The Ceylon Law Weekly

containing Cases decided by the Court of Criminal Appeal, the Supreme Court of Ceylon, and His Majesty the King in the Privy Council on appeal from the Supreme Court of Ceylon

VOLUME XXIV

WITH A DIGEST

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In a decree for sale certain premises depicted in a plan marked D1 and bearing assessment numbers were ordered to be sold in blocks. Two of the premises adjoining each other bore the assessment Nos. 212 and 216. D1 showed that a portion of the 1st floor of No. 212 projected over the ground floor of 216.

For the purpose of the sale a new plan P3 was made. It referred to the assessment numbers but did not show the said projection. At the sale separate blocks were sold as partitioned in P3 and plaintiff became purchaser of lot 216 and defendant the purchaser of lot 212.

In the conveyance to the plaintiff the block is described as the allotment of land presently bearing assessment No. 216 ; western boundary as premises bearing assessment No. 212 and extent as 2.12 perches, according to plan P3. In the conveyance to defendant, the block is described as premises bearing assessment No. 212 ; eastern boundary as lot 216 ; area as 3.46 perches according to plan P3.

Held : (i) That the plan P3 was an essential part of the description of the land purchased.

(ii) That plaintiff became the owner of everything above the portion of the ground floor depicted as No. 216 in plan P3 including the portion of the building projecting on it ; and the defendant is restricted to that only which is above the portion depicted as No. 212 in the same plan.

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The petitioner in his petition prayed that an election to the Ceylon State Council be declared null and void. It contained charges of :

(*a*) undue influence.
(*b*) treating.
(*c*) impersonation.
(*d*) general intimidation, impersonation on a large scale and general treating.

A sum of Rs. 5,000/– was deposited as security for costs of the respondent.

Held : (i) That the amount of security deposited was not in compliance with rule 12 (2) of the Ceylon State Council (Elections) Order-in-Council 1931, and that the petition was liable to be dismissed.

(ii) That rules 19-21 of the Election (State Council) Petition rules 1931 have no application in cases where the petitioner has not furnished security to the right amount.

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Civil Procedure Code sections 344 and 349

Independently of whether the terms of a bargain between a judgment-creditor and a judgment-debtor amount to an adjustment within the meaning of section 349 the terms of the bargain should be considered by the executing court under section 344 as to whether the plaintiff's right to execution was controlled, and if so, to what extent and in what manner, by such bargain.

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(ii) A confession prompted by a suggestion by a Police Officer, that some advantage would be gained by the accused if he spoke the truth, is rendered inadmissible by section 24 of the Evidence Ordinance.

Court of Criminal Appeal

Court of Criminal Appeal—Conviction for rape— —Nature of corroborative evidence required.

The accused was convicted of committing rape on a girl. Apart from the evidence of the girl there was independent evidence of a witness to the effect —

(i) that he saw the girl enter the house of the accused at about the time the offence was committed ;

(ii) that the accused was the sole occupant of the house at the time of the offence.

Further, there was evidence of the presence of blood on the sarong which the accused admittedly wore on that day. The accused falsely denied that the house was his and made a false statement that he was away from the village at the time of the alleged offence.

Held : That the evidence corroborates the girl's story by tending to show that the accused was the person who assaulted her.

Per SOERTSZ, J. : " As observed by Howard, C.J., Lord Reading said that the rule does not mean 'that there must be confirmation of all the circumstances of the crime. It is sufficient if there is corroboration as to *a material circumstance* of the crime and of the identity of the accused in relation thereto.' "

Court of Criminal Appeal—Burden of proving that prisoner comes within any of the general exceptions in the Penal Code—Evidence Ordinance section 105.

Held : That the burden which rests on a prisoner of proving that he comes within any of the general exceptions in the Penal Code is not so heavy as that which lies on the prosecution of proving its case beyond all reasonable doubt.

Court of Criminal Appeal—Evidence of bad character of accused—When relevant—Evidence of good character—What amounts to—Evidence Ordinance (Chapter 11) *section* 54*—Scope of re-examination.*

The prosecution led evidence of several incidents tending to show that there was ill-feeling between the deceased and the accused such as might provide the latter with a motive for intentionally harming the deceased. The deceased's father in cross-examination said that apart from the feeling of jealousy between the two he had "nothing to say against the accused." On being questioned further as to whether the accused was a well-behaved man the witness replied that he was a quarrelsome man who loses his temper in no time for trivial things.

Held : (i) That the 1st statement did not amount to evidence of good character as contemplated by section 54 of the Evidence Ordinance, as it was elicited in answer to a question directed to show the absence of motive and was therefore limited to that aspect of the case.

(ii) That the second statement was irrelevant and might well have had the effect of inclining the jury to the belief that the appellant was of a violent disposition and therefore not unlikely to have intentionally shot at the deceased.

(iii) That a re-examination by the prosecution was not proper merely because it was directed to matters referred to in cross-examination, unless such reference required explanation from the point of view of the case for the prosecution.

Court of Criminal Appeal—Criminal Procedure Code sections 134 *and* 233.

Held : (i) That a statement made by an accused voluntarily after the commencement of the non-summary inquiry and recorded in the manner prescribed by section 134 of the Criminal Procedure Code cannot be put in evidence at the trial by the prosecution.

(ii) That the statements contemplated by section 233 of the Criminal Procedure Code are the statements made under section 160 and 165 of that Code.

(iii) That in regard to an accused's statements which do not come under section 160 or 165 of the Criminal Procedure Code it is open to the prosecution or to the accused to decide whether to make use of them or not, provided they are relevant and admissible.

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(ii) That the verdict should be quashed and a retrial ordered as the jury do not appear to have understood the judge's charge.

Court of Criminal Appeal—Plea of autre fois acquit*—Criminal Procedure Code sections* 190, 191 *and* 330.

Held : (i) That the wording of section 190 of the Criminal Procedure Code means that a magistrate is precluded from making an order of acquittal under that section till the end of the case for the prosecution.

(ii) That a discharge under section 191 of the Criminal Procedure Code, even though the judge calls it an acquittal, cannot support a plea of *autre fois acquit.*

Court of Criminal Appeal—Section 120 *of the Evidence Ordinance.*

Held : That a woman's evidence is not excluded by section 120 (2) of the Evidence Ordinance unless there is proof that she is the wife of the

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(ii) That the case of *Rex vs Chandrasekere* does not lay down that if two possible views may be taken of a set of proved circumstances the jury is precluded from adopting either of those views.

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Held : (i) That a proctor convicted of the offence of sending by post indecent and grossly offensive postcards was unfit to remain on the roll of proctors.

(ii) That it is the duty of the court to regard the fitness of a person to continue in the profession from the same angle as it should regard it if he was a candidate for enrolment.

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Held : (i) That the Regulation penalizes the publication of a rumour even though it is expressly stated to be a rumour.

(ii) That the article in question was likely to cause alarm or despondency.

(iii) *Mens rea* is not an ingredient of the offence created by Regulation 20A.

(iv) In a charge under Regulation 20A once the Crown proves—

(*a*) the publishing by the accused of the report or statement ;

(*b*) that the report or statement related to matters connected with the war ; and

(*c*) that the report or statement was likely to cause alarm or despondency, the accused must prove the matters mentioned in the proviso in order to escape conviction.

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Electricity Ordinance

Electricity Ordinance section 6—Telegraphs Ordinance section 10—Penal Code section 183.

Held : (i) That a power conferred under section 6 of the Electricity Ordinance in the following terms,

> " It is hereby notified for general information that the Governor has been pleased, in pursuance of the powers vested in him under section 6 of the Electricity Ordinance, and with the advice of the Executive Council, to confer upon the Director of Electrical Undertakings and upon all officers of the Electrical Department duly empowered by the Director in that behalf the powers which the Telegraph authority possesses with respect to the placing of the telegraph lines and posts for the purpose of a telegraph established or maintained by the Government or to be established or maintained,"

carries with it a power to maintain the appliances and apparatus placed in pursuance of the power.

(ii) That refusal to unlock a gate to permit a public officer who has a right to enter the premises for the execution of his duty amounts to obstruction by the person who can, but refuses to unlock the gate with full knowledge that the person seeking admission is a public servant, and that he is seeking admission to execute his duty.

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Plaintiff brought this action against the defendant claiming to be entitled to a land purchased by the defendant at a sale in execution of a writ against one Pabilis Appuhamy. The defendant pleaded that the plaintiff was estopped by his conduct from denying the vendor's title. It was proved that the plaintiff was present at the Fiscal's sale which took place on the land itself and that he bid twice at the sale.

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To exclude a woman's evidence under section 120 (2) there must be proof that she is the wife of the accused. There must be proof of a legal marriage and mere evidence that there was a marriage ceremony and celebrations of some sort and that the two lived as man and wife is insufficient.

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Held : That independently of whether the terms of a bargain between a judgment-creditor and a judgment-debtor amounts to an adjustment within the meaning of section 349 of the Civil Procedure Code, the terms of the bargain should be considered by the executing court under section 344 of the Civil Procedure Code as to whether the plaintiff's right to execution was controlled, and if so, to what extent and in what manner by such bargain.

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The plaintiff-respondent discharged a promissory note whereon he and the two defendants were jointly and severally liable. Thereafter the respondent, who had signed the note merely as an accommodating party, sued the two defendants for the sum paid on their behalf. The second defendant-appellant maintained that the respondent could only recover from each defendant one half of the amount paid in discharge of the promissory note.

Held : (i) That once a promissory note is discharged by payment the English law ceases to apply. Any debt due by reason of such payment is governed by the Roman-Dutch law.

(ii) That each of several co-obligors is only liable for his share of the contract (except in the case of co-partners) and not for the whole contract *in solidum*, unless the contrary has been stipulated.

(iii) That a surety who has discharged the whole debt may only enforce his own rights against the principal debtors unless he has procured a subrogation to the rights of the creditor.

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Held : (i) That under the Kandyan law a *deega* widower succeeds to the acquired property of his deceased wife dying issueless as against her brothers and sisters.

(ii) That the fact that the property is acquired *before* marriage is immaterial. As regards immovable property there is no distinction between property acquired before and after marriage known to the Kandyan law.

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Premises No. 528/8 out of a row of rooms numbered 528/5, 528/6, 528/11 and 528/8 was acquired under the Land Acquisition Ordinance. It was proved that the rooms were in a continuous line, with a verandah running the full length in front. The portion of the verandah in front of 528/11 has in some way become 528/7. Each of the five rooms is occupied by a different tenant. The common roof rests on a ridge plate, or beam, which runs the entire length of the building. That beam consists of several parts joined together without any relation to the partitions. The partitions had except in one case no intercommunication. Even in that case the door was not in use. It appeared from the evidence of some of the witnesses that not only was the rear portion originally one building but was also connected with the front portion and that the whole formed one residence.

Held : (i) That the five rooms were five separate houses and that the owner cannot under section 44 of the Land Acquisition Ordinance require that all the five rooms be acquired.

(ii) That in valuing the compensation to be paid for buildings lying within street lines defined under section 19 (4) of the Housing and Town Improvement Ordinance account must be taken of the restrictions on the use of the land resulting from the definition of such street lines.

Mens Rea

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Held : (i) That where the plaint in a mortgage action has been registered the registration of the decree is unnecessary, and the purchaser at a subsequent partition sale can claim no priority by virtue of the registration of his certificate of sale.

(ii) That section 12 of the Partition Ordinance continues to protect the rights of a mortgagee even after decree is entered.

Partition Ordinance

Section 12 of the Partition Ordinance continues to protect the rights of a mortgagee even after decree is entered.

A purchaser of an undivided share of a land in execution of a mortgage decree is upon partition of the land subsequent to his purchase entitled to have his conveyance rectified by the inclusion of the lots allotted to his mortgagor in the partition decree.

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(ii) That payments made by or at the instance of the pensioner to a creditor after the insolvency of the pensioner vest in the assignee who is entitled to compel the creditor to pay the money so received by him to the credit of the assignee in the insolvency proceedings.

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(ii) That a payment on account merely extends the period of prescription and cannot be regarded as creating a new cause of action.

(iii) That in a case where at the time when the cause of action arose the party entitled to sue is a minor, the existence of an administrator would not affect the right of the minor to take advantage of the provisions of section 13 of the Prescription Ordinance except where prescription had already begun to run.

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Prescription Ordinance (Chapter 55) section 3 proviso—Gift of property subject to life interest in donor's favour—When does prescription begin to run against the donee.

The owner of a certain property gifted it, in 1928 to the plaintiffs' predecessor in title, reserving to himself a life interest. He died in 1932. The defendants claimed prescriptive title to a house on this property and the soil on which it stands on the ground that they built it in 1923 with the permission of the owner and continued to possess up to date.

Held : That prescription did not begin to run against the donee until the donor's death in 1932.

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Sale of maldive fish at a price above the maximum price—Meaning of sale for purpose of the offence—Sale of Goods Ordinance, No. 11 of 1896 (Chapter 70) sections 2, 4 and 18.

Accused was charged with having sold a bag of maldive fish at Rs. 95/65, a price nearly Rs. 25/- above the controlled maximum price. The sum actually tendered was Rs. 94/- and the Police entered the boutique before the balance 1/65 could be tendered.

Held : That it is not necessary for the purpose of a prosecution of this nature to prove a contract of sale within the meaning of section 4 of the Sale of Goods Ordinance.

MERRY (A.S.P.) VS PAKIAMPILLAI 78

Principal and Agent

Principal and Agent—Purchase and sale of rubber coupons by broker—Rights and liabilities of broker acting for undisclosed principal—When may local usage be regarded as affecting the general law.

Held : (i) That where by reason of a custom the brokers are liable to be sued by the sellers, they are not relieved of their liability because it is inconsistent with their position as mere agents under the general law.

(ii) That a right of action which lies according to local usage will not be lost because it is inconsistent with the plaintiff's position under the general law.

(iii) That the right of indemnity covers not merely the losses actually sustained by the agent but also the full amount of the liabilities incurred by him even though they may in fact never be enforced.

MARIKAR VS DE MEL LTD. 103

When cannot attorney exercise statutory functions for principal.

See Defence Regulations 3

Proctor

Disenrolment of for conviction of offence.

See Courts Ordinance 7

Professional Misconduct

See Courts Ordinance 7

Promissory Note

Once a promissory note is discharged by payment the English law ceases to apply to the rights of parties thereafter.

The Roman-Dutch law governs the rights of parties.

See Joint and Several Obligations 35

Quia Timet Action

Quia timet *action—Rights previously transferred to plaintiff purchased by defendant at Fiscal's Sale—Plaintiff in possession—Fiscal's conveyance not obtained when action instituted—Action for declaration of title by plaintiff—Is it maintainable.*

On 5th January, 1937 plaintiff became entitled to an undivided one-fourth acre of a certain land from one Siriwardene and entered into possession thereof. On 3rd July, 1937 defendant became the purchaser of the said interests at a Fiscal's sale. Plaintiff instituted this action for declaration of title to the interests he acquired as against the defendant who had not at the time obtained the Fiscal's transfer nor asserted title to the land. The learned District Judge entered judgment for plaintiff.

Held : That a *quia timet* action was not maintainable under the circumstances.

GUNASEKERE VS KANNANGARA 84

Rectification of Deed

Rectification—Undivided shares—Sale in execution of mortgage decree—Conveyance by Commissioner—Application by purchaser for rectification of conveyance by substituting divided lots allotted to mortgagor under final decree (subsequent to date of sale) in lieu of undivided shares—Endorsement on conveyance—Writ of delivery of possession—Should application be allowed.

At a sale in execution of a mortgage decree the appellant purchased on 14th October, 1939 an undivided 2/5th share of a certain land mortgaged by the respondents and obtained a Commissioner's conveyance dated 25th November, 1940. A decree partitioning the land in question was entered on the 29th August, 1940, whereby in lieu of the undivided 2/5 share lots 4 and 5 were allotted (subject to the mortgage) to the respondent. On 4th September, 1941 the appellant moved the District Court to endorse the Commissioner's conveyance by substituting the words "lots 4 and 5 according to final plan in case No. 11072 of the District Court of Jaffna" in place of "an undivided 2/5 share of the land" and for a writ to the Fiscal to deliver possession of the said lots 4 and 5.

This application was opposed by the respondents and was refused.

Held: That the appellant is entitled to the relief he claims inasmuch as he purchased the undivided shares prior to the partition decree and the parties who oppose are the execution-debtors themselves.

AIYADURAI vs THURASINGHAM & ANOTHER 27

Registration of Documents Ordinance

Section 8 (proviso 1) and section 11 (proviso)—Where the plaint in a mortgage action has been registered the registration of the decree is unnecessary and the purchaser at a subsequent partition sale can claim no priority by virtue of the registration of his certificate of sale.

See Mortgage 11

Revision

Powers of the Supreme Court.

See Criminal Procedure Code 135

Suicide

A nominee of a member of a Benevolent Association who commits suicide cannot claim a contribution payable on the death of the member.

See Benevolent Association 71

Surety and Suretyship

A surety who has discharged the whole debt may only enforce his own rights against the principal debtors unless he has procured a subrogation to the rights of the creditor.

See Joint and Several Obligations 35

Telegraphs Ordinance

Section 10 of the Telegraphs Ordinance.

See Electricity Ordinance 74

Trusts and Trustees

Charitable trust—Hindu temple—Scheme of management framed by court—Provision that meeting to elect trustees be held at the temple premises—Obstruction to holding such meeting at temple premises—Election of trustees at meeting held outside—Is such election void.

When trustees to a Hindu Temple were elected at a meeting held at a place other than the place named in the scheme of management framed by the court as a charitable trust because the congregation was prevented from doing so at the appointed place by the opposing party,

Held: That the election was good.

VELUPILLAI & OTHERS vs SABAPATHIPILLAI .. 17

Charitable trust—Claim for recovery of property comprised in—Does claim for declaration that a person is trustee convert such action into one for an office or status—Section 111 (1) (c) Trusts Ordinance (Chapter 72)—Prescription—Claim for a vesting order—Procedure "where it is uncertain in whom title to any trust property is vested"—Section 112 (1) (1)—Does procedure laid down in section 102 (1) (b) apply—Is a vesting order necessary.

Held: (i) That the fact that the plaintiff in an action for the recovery of property comprised in a charitable trust claimed a declaration that he is the trustee does not convert the action into one for an office or status. In substance the claim is *rei vindicatio*, and falls within the provisions of section 3 (1) (c) of the Trusts Ordinance.

(ii) That the claim for a vesting order is not a claim to an office or status and, if granted has only the effect of transferring legal title to the person named in the order. No question of prescription or limitation arises in connection with such a claim, but delay may be an element to be considered in connection with the granting thereof.

(iii) The procedure laid down in section 102 of the Trusts Ordinance does not apply to a claim for a vesting order where it is uncertain in whom the title to any trust property is vested. Such a claim may be asserted by a regular action.

(iv) A person who can establish that he is the trustee need not clothe himself with a vesting order before suing for the recovery of the trust property from a trespasser.

THAMBIAH vs SATHASIVAM & ANOTHER .. 55

Usage

See Custom and Usage among Brokers .. 103

Waste Lands Ordinance No. 1 of 1897

There is no appeal to the Privy Council as of right from a decision under section 20.

See Appeals 14

Words and Phrases

"On the death of a member;" "death" does not include suicide.

See Benevolent Association 71

Writ of Certiorari

An application for a writ of *certiorari* is a civil action for the purposes of section 3 of the Appeals (Privy Council) Ordinance.

See Appeals 14

Present: HEARNE, J.

JEELIN SILVA vs P. DE S. KULARATNE

In the Matter of the Election Petition No. 1 of 1942 (Balapitiya Electorate.)
Application by the respondent for the dismissal of the Petition inasmuch as the security tendered by the petitioner is not in accordance with Rule 12 (3).
Argued on 20th August, 1942.
Decided on 25th August, 1942.

The Ceylon State Council (Elections) Order-in-Council 1931—Petition to declare election void—Charges of undue influence, treating, impersonation, and general intimidation, impersonation, general treating—Articles 74 (a) and (c)—Deposit of security in Rs. 5,000/- —Non-compliance with Rule 12 (2) —Effect—Applicability of Rules 19-21 of the Election (State Council) Petition Rules 1931.

The petitioner in his petition prayed that an election to the Ceylon State Council be declared null and void. It contained charges of:

(*a*) undue influence.
(*b*) treating.
(*c*) impersonation.
(*d*) general intimidation, impersonation on a large scale and general treating.

A sum of Rs. 5,000/- was deposited as security for costs of the respondent.

Held : (i) That the amount of security deposited was not in compliance with rule 12 (2) of the Ceylon State Council (Elections) Order-in-Council 1931, and that the petition was liable to be dismissed.

(ii) That rules 19–21 of the Election (State Council) Petition rules 1931 have no application in cases where the petitioner has not furnished security to the right amount.

H. V. Perera, K.C., with *G. P. J. Kurukulasuriya*, and *G. P. A. Silva*, in support.

A. P. de Zoysa, for the respondent (petitioner)

HEARNE, J.

The petition filed by the petitioner contained the charges of undue influence, treating and impersonation which, it was alleged, had been committed "by the respondent or with his knowledge or consent or by his agents" and it was prayed that the election of the respondent be declared void by virtue of article 74 (*c*) of the Ceylon State Council (Elections) Order in Council, 1931. It was also prayed that the election be declared void "by reason of general intimidation and impersonation on a large scale and of general treating" Article 74 (*a*).

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Rule 12 (2) provides a minimum security of Rs. 5,000/– and Rs. 2,000/– for each charge in excess of three. The security is required to be given "at the time of the presentation of the petition or within three days afterwards," and if not so given Rule 12 (3) provides that "no further proceedings shall be had on the petition."

The Respondent has moved for the dismissal of the petition under Rule 12 (3) on the ground that, as more than three charges were laid and as a sum of Rs. 5,000/– only was tendered as security, the petitioner failed to comply with the requirements of Rule 12 (2).

It was argued on behalf of the petitioner that it was not his intention to make a charge of general intimidation, general treating and impersonation on a large scale; that what he intended was to suggest that the *general character* of the intimidation, treating and impersonation might and probably would be inferred from the widespread activities of the respondent and his agents of which proof would be offered; and, finally, that while the respondent's ingenuity, has brought four charges to light one of them can only be said to be "latent in the petition."

The intentions and mental reservations of the petitioner are beside the point now in issue. The notion of a "latent charge" is without any legal sanction. The only question is how many charges did the petition contain? The answer, as a matter of simple calculation, is four. There were three of corrupt practices alleged to have been committed by the respondent or his agents and one of general intimidation, general treating, etc. which, if proved, would have had the effect of unseating the successful candidate, even if connivance on his part or agency could not be established. It must, therefore, be held that the security tendered by the petitioner was insufficient.

It was further argued that even if the security was insufficient the petition would not be dismissed on this ground alone by reason of the provisions of Rules 19 to 21. It has been held by this court that these rules have no application in cases where the petitioner has not furnished security to the right amount.

The motion is allowed with costs to the respondent.

Motion allowed.
Petition dismissed.

Proctors :

S. R. Amaresekere, for the respondent.
M. P. P. Samarasinghe, for the petitioner.

Present: HEARNE, J.

IN RE MRS. VIVIENNE GOONEWARDENE

S. C. No. 449—*M. C. Colombo No.* 40959 *with Application No.* 235.

Argued on 22nd July, 1942.

Decided on 30th July, 1942.

Defence (Miscellaneous) Regulations—Criminal Procedure Code sections 59 and 60—Order by Governor for arrest of person—Inability to execute warrant as person wanted is absconding or concealing—Application to magistrate for proclamation and attachment of property—Can Attorney of proclaimed person move to rescind magistrate's order.

Held : That the attorney of a person proclaimed under section 59 of the Criminal Procedure Code is not competent to move to set aside the order of attachment made under section 60 of that Code.

Cases referred to : (1942–29 A.I.R. 289)
(13 Cr. L.J. 796)

H. V. Perera, K.C., with *N. Nadarajah, K. C., V. Mendis*, and *H. W. Jayawardena*, for the appellant.

E. H. T. Gunasekera, Crown Counsel, for the respondent.

HEARNE, J.

An Officer of the Criminal Investigation Department reported to the magistrate of Colombo that " His Excellency the Governor had made an order against Mrs. V. Goonewardene in pursuance of powers vested in him by the Defence (Miscellaneous No. 3) Regulations, that the order was deemed to be a warrant for the arrest of Mrs. Goonewardene (Regulation 1 (9)) * and that she had absconded or was concealing herself so that the warrant could not be executed." He asked the magistrate to publish a proclamation requiring her to appear at a specified place and time and also asked, in terms of section 60 (1) of the Criminal Procedure Code, for an order of attachment of any property belonging to her. Both the applications were allowed.

Mr. C. E. Jayawardene, a proctor, then filed an affidavit in the magistrate's Court to the effect that Mrs. Goonewardene had appointed him her attorney by deed, that she had told him in November 1941 (five months prior to the Governor's order) she was leaving Ceylon " immediately " and that he had not seen or heard from her since that date. " He verily believed that she had carried out her intention of leaving the Island " and moved the court to cancel the order of attachment of the property of Mrs. Goonewardene. This was refused. It was conceded that there was no right of

* For the purposes of the application of the provisions of the Penal Code, the Criminal Procedure Code and other written law, an order made by the Governor under the preceding provisions of this regulation directing that any person be detained shall be deemed to be a warrant for the arrest of that person issued by the Magistrate's Court of Colombo.

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appeal from the order of refusal and this court has been asked to exercise its revisional jurisdiction in respect of the said order by setting it aside and releasing Mrs. Goonewardene's property from attachment.

It is necessary to decide, in the first place, whether the petitioner had any status at all to move the magistrate to rescind his order. I agree with Crown Counsel that *prima facie* he had no status. A proclamation having been issued requiring Mrs. Goonewardene to appear she must, till she does so, be *deemed* to be in contempt. It may be she is not for the reason that she has had no notice of the proclamation. If, later on, she comes forward and offers an explanation it will be the duty of the magistrate to determine judicially whether her explanation is satisfactory. If it is held that it is, she may, if so advised, apply for a suspension of the attachment order. But till she comes forward in response to the proclamation she must be regarded as in contempt, and no court will ordinarily entertain an application on behalf of a person who is in contempt of its authority.

Counsel for the petitioner appreciated this and, in the argument before me, submitted that his client would be accorded a hearing, at least as *amicus curiae*, when he could show, as he claimed to be able to show, that there was in fact no legal foundation for the attachment order ; in other words that the magistrate had acted without jurisdiction.

In this connection he cited two cases. In one of them reported in 13 Cr. L. J. 796, a magistrate issued a warrant for the arrest of a person in his district when the only information he had was that he had left the district. Upon the intervention of a third party the matter was referred to the High Court which declared the warrant as well as the proclamation and attachment which followed to be illegal. In the other reported in 1942–29 A.I.R. 289, an affidavit was filed on behalf of the petitioner that the accused had left India for the Federated Malay States before the warrant for his arrest had been issued and the complainant did not contradict the statement. It was held that the proclamation and attachment were bad.

The facts in this case are very different. The petitioner, so far from being able to show affirmatively that Mrs. Goonewardene has left Ceylon, does not really know where she is. What she is alleged to have told him, if she did, may not be the truth. There is no proof, as the magistrate pointed out, that she obtained a passport, booked a passage or was seen off at a railway station. The sum total of reliable information placed before him by the petitioner was that she was in the Island in November, 1941.

Even if I accept the Indian cases as a guide (they do not bind this court) and hold that a stranger may, in certain proved circumstances, invite a court to revise an order it has made, those circumstances have certainly not been shown by the petitioner to exist.

I uphold Crown Counsel's objection that the petitioner had no status and the application in revision is dismissed.

Application dismissed.

Present: MOSELEY, J.

UDUMANACHY & OTHERS vs MEERALEVVE

S. C. No. 114—*C. R. Kalmunai No.* 950.
Argued on 30th September, 1941.
Decided on 9th October, 1941.

Prescription Ordinance (*Chapter* 55) *section* 13—*Appointment of administrator over estate of deceased creditor after prescription has begun to run—Does it arrest progress of prescription against minor heirs—Does a payment on account create a fresh cause of action.*

Held : (i) That where prescription has begun to run, its progress cannot be arrested merely by the subsequent incapacity *e.g.* minority of the person entitled to sue.

(ii) That a payment on account merely extends the period of prescription and cannot be regarded as creating a new cause of action.

(iii) That in a case where at the time when the cause of action arose the party entitled to sue is a minor, the existence of an administrator would not affect the right of the minor to take advantage of the provisions of section 13 of the Prescription Ordinance except where prescription had already begun to run.

Cases referred to : *Sinnatamby vs Vairavy* (1 S.C.C. 14)
Sinnatamby vs Meera Levvai (6 N.L.R. 50)
Tillainathan vs Nagalingam (39 N.L.R. 118)
Manuel Pillai vs Saverimuttu (Ramanathan's Reports 1863–68 p. 335)
Arunasalem vs Ramasamy (17 N.L.R. 156)
Tanner vs Smart (1827–6 B. & C. 603)
Spencer vs Hemmerde (1922–2 A.C. 507)

M. Tiruchelvam, for the plaintiffs-appellants.

M. M. I. Kariapper with *A. H. C. de Silva*, for the defendant-respondent.

MOSELEY, J.

The defendant-respondent borrowed a quantity of paddy on a mortgage bond dated 21st November, 1912, from one Seeny Mohamadu. The latter died on 27th June, 1916, leaving the plaintiffs-appellants, who were then minors, as his heirs. An administrator was appointed but appears to have taken no steps to recover the money due under the Bond. A payment on account was made to the administrator in 1917. Within the last ten years all the appellants have attained their majority, and on 29th November, 1940, brought an action for the value of the paddy still outstanding and interest. The respondent pleaded prescription and the parties went to trial on that issue alone. The appellants relied upon section 13 of the Prescription Ordinance (Chapter 55), a section which has on many occasions come up for judicial interpretation in similar circumstances. In the present case

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prescription began to run against Seeny Mohamadu in 1912. It seems to have been settled beyond doubt that, where prescription has begun to run, its progress cannot be arrested merely by the subsequent incapacity, *e.g.* minority, of the person entitled to sue. This principle was clearly laid down by a court of three judges in *Sinnatamby vs Vairavy* (1 S.C.C. 14) and was followed by Moncrieff, A.C.J. in *Sinnatamby vs Meera Levvai* (6 N.L.R. 50). Soertsz, J. in *Tillainathan vs Nagalingam* (39 N.L.R. 118) after considering the abovementioned authorities, was of the same opinion.

Counsel for the appellants, however, contends that the position in this case is altered by the fact of the appointment of an administrator. It seems to me that in a case where, at the time when a cause of action arose, the party entitled to sue is a minor, the existence of an administrator would not affect the right of the minor to take advantage of the provisions of section 13. But in the present case time has already begun to run, and it does not seem to me that the position of the minors, while in any way weakened by the appointment of an administrator, is in any way bettered. See *Manuel Pillai vs Saverimuttu* (Ramanathan's Reports 1863-68 p. 335).

The further point is raised on behalf of the appellants that the payment on account in 1917 does not merely extend the period of prescription, but creates a new obligation, that is to say, a new cause of action. Counsel relied on *Arunasalem vs Ramasamy* (17 N.L.R. 156) where De Sampayo, A.J. said : " A payment on account is necessarily an acknowledgment of the debt, and the law, in the absence of anything to the contrary, implies from the acknowledgment of the debt a promise to pay the balance. This implied promise creates a new obligation and takes the debt out of the operation of the statute, and this is so even though at the date of payment the debt may have been already statute-barred."

The learned Commissioner, to whom the abovementioned authority was cited, found, with some justification, the point to be very interesting. He found the argument based on that authority, *viz.* that a new cause of action was created, to be " interesting and ingenious." He was, however, unable to agree with it.

The case of *Tanner vs Smart* (1827–6 B. & C. 603), was assumed to have set at rest a doubt which had apparently existed since the passing of the Limitation Act, 1623. Until 1827 opinions seem to have varied whether, in order to take a claim out of the operation of the statute a mere admission of the claim was sufficient, or whether the acknowledgment must amount to a promise to pay. Then, in *Tanner vs Smart* (*supra*), Lord Tenterden, C.J., in the course of his judgment in which he held that an acknowledgment of a claim on a simple contract will only keep it alive if the acknowledgment amounts to a fresh promise to pay, said : " The only principle upon which it (*i.e.* the acknowledgment) can be held to be an answer to the statute is this, that an acknowledgment is evidence of a new promise, and as such, constituted a new cause of action . . . . . "

The authorities on this point were exhaustively reviewed by Lord Sumner in *Spencer vs Hemmerde* (1922–2 A.C. 507). He found (at page 524) "that the great preponderance of the cases is against regarding the new promise as a new cause of action, and it seems to me that reason also is against it. Surely the real view is, that the promise which is inferred from the acknowledgment.....is one which corresponds with and is not at variance from or in contradiction of that promise."

It seems, therefore, that, in the present case, the payment on account cannot be regarded as creating a new cause of action; it merely extended the period of prescription. The plaintiffs' action is, therefore, clearly prescribed.

The appeal is dismissed with costs.

Appeal dismissed.

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

IN RE A. T. G. BRITO, PROCTOR

In the Matter of A. T. G. Brito, a Proctor of the Supreme Court, and In the Matter of section 17 of the Courts Ordinance (Chapter 6).

Argued on 16th September, 1942.

Decided on 1st October, 1942.

Courts Ordinance section 17—Proctor convicted of offences against sections 19 and 71 (1) of the Post Office Ordinance—Disenrolment of—Considerations that guide the Supreme Court in determining whether a proctor convicted of an offence should be disenrolled.

Held: (i) That a proctor convicted of the offence of sending by post indecent and grossly offensive postcards was unfit to remain on the roll of proctors.

(ii) That it is the duty of the court to regard the fitness of a person to continue in the profession from the same angle as it should regard it if he was a candidate for enrolment.

(iii) That for any gross misconduct whether in the course of his professional practice or otherwise the court will expunge the name of a proctor from the roll.

Cases referred to: *In re a Solicitor: Ex Parte The Incorporated Law Society* (61 L.T. 842)
In re a Proctor (40 N.L.R. 367)
In re Weare, a Solicitor: In re The Solicitors Act 1888, (1893–2 Q.B.D. 439)
In re Hill (L.R. 3 Q.B. 543; 18 L.T. 564)
Attorney-General vs Ellawala (29 N.L.R. 13)
In re Isaac Romey Abeydeera, a Proctor of the Supreme Court (1 C.L.W. 359)
Emperor vs Rajani Kanta Bose et al (49 Cal. at p. 804)

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In the Matter of A. T. G. Brito, Proctor

J. Mervyn Fonseka, Solicitor-General, with *H. H. Basnayake, Crown Counsel,* in support of the rule.

C. S. Barr-Kumarakulasingham, for the respondent.

HOWARD, C.J.

The respondent, a proctor of this court, has been called upon to show cause why his name should not be removed from the Roll of Proctors entitled to practise before this court.

On the 6th November, 1941, the respondent was convicted in D. C. Colombo No. N. 338/22541 on three counts punishable under section 71 (1) of the Post Office Ordinance (Chapter 146) in that on the 2nd September, 1940, the 11th October 1940, and the 15th October, 1940, respectively he did send by post a post card addressed to Mrs. Babsy Phyllis Ludowyk having thereon words of an indecent or grossly offensive character. Upon these convictions the respondent was sentenced to six months' rigorous imprisonment on each count, the sentences running concurrently. On an application by way of revision to have the said convictions and sentences set aside, this court on 6th March, 1942 refused the said application and affirmed the said convictions and sentences.

In urging the court to take a lenient view of the conduct of the respondent and not to proceed to the extreme step of removing the respondent's name from the Roll of Proctors, his counsel has stressed the fact that the offences of which the respondent were convicted were not committed by him *qua* Proctor and have no connection with his conduct as a Solicitor. And, therefore, so far as these offences are concerned, he must be treated like an ordinary individual. Mr. Barr-Kumarakulasingham in contending, on behalf of the respondent, that this is a case in which, having regard to extenuating circumstances, the court should exercise its discretion in his favour, has relied on the case of *In re A Solicitor: Ex Parte The Incorporated Law Society* (61 L.T. 842). I agree with the *dictum* of Baron Pollock in this case when he states that "the mere conviction is not binding upon the court in a case of this kind, and that the court can, and may, and ought, to enter upon and weigh all the facts of the case, including any extenuating circumstances that exist in favour of the Solicitor, then I think our duty is to look and see upon what facts the judgment of the court was based etc." In the same case Manisty, J. stated that "it was not *qua* Solicitor that he committed the offence of which he has been convicted and that was pointed out (*In re Hill* (18 L.T. 564)) as a very strong fact to be considered. So far as the offence was concerned he was like an ordinary individual." Mr. Barr-Kumarakulasingham also relied on the judgment of Hearne, J. (*In re a Proctor* (40 N.L.R. 367))* in which case the court thought that suspension from practising as a proctor for twelve months a sufficient penalty for a proctor convicted of committing criminal breach of trust. In this case also the offence was not committed by the respondent *qua*

* 13 C.L.W. 80 (Edd.)

proctor. The court in coming to a conclusion seems to have been guided solely by the two cases to which I have referred. Other cases in which reference was made to other matters which the court should take into consideration when the offence was not committed *qua* solicitor were not cited. We have had the advantage of considering these cases. In the case of *In re Weare, a Solicitor: In re The Solicitors Act* 1888 (1893–2 Q.B.D. 439) a solicitor was convicted of allowing houses, of which he was the landlord, to be used by the tenants as brothels. In an application by the Incorporated Law Society to strike the name of the solicitor off the roll, it was held that a solicitor may be struck off the roll for an offence which has no relation to his character as a Solicitor, the question being whether it is such an offence as makes a person guilty of it unfit to remain a member of the profession. Conviction for a criminal offence *prima facie* makes a solicitor unfit to continue on the roll; but the court has a discretion and will inquire into the nature of the crime, and will not as a mere matter of course strike him off because he has been convicted. Both the other English cases I have cited were referred to in the judgment of Lord Esher in this case. In the course of his judgment Lord Esher, M.R. states as follows :

> " All these cases seem to me to show that it is not necessary that the offence, at all events if it be a criminal offence, should be committed by the offending party in his character as an attorney : the question is whether it is such an offence as makes it unfit that he should remain a member of this strictly honourable profession. Where a man has been convicted of a criminal offence, that *prima facie* at all events does make him a person unfit to be a member of the honourable profession. That must not be carried to the length of saying that wherever a solicitor has been convicted of a criminal offence the court is bound to strike him off the roll. That was argued on behalf of the Incorporated Law Society in the case of *In re a Solicitor ex parte Incorporated Law Society* (61 L.T. 842). It was there contended that where a Solicitor had been convicted of a crime it followed as a matter of course that he must be struck off; but Baron Pollock and Manisty, J. held that although his being convicted of a crime *prima facie* made him liable to be struck off the roll, the court had a discretion and must inquire into what kind of a crime it is of which he has been convicted and the court may punish him to a less extent than if he had not been punished in the criminal proceeding. As to striking off the roll, I have no doubt that the court might in some cases say, ' under these circumstance we shall do no more than admonish him ' ; or the court might say, ' We shall do no more than admonish him and make him to pay the costs of the application ' ; or the court might suspend him, or the court might strike him off the roll. The discretion of the court in each particular case is absolute. I think the law as to the power of the court is quite clear."

In his judgment in this case Lopes, L.J. cited with approval the following passage from the judgment of Blackburn, J. *In re Hill* (L.R. 3 Q.B. 543; 18 L.T. 564) :

> " We are to see that the officers of the court are proper persons to be trusted by the court with regard to the interests of suitors and we are to look to the character and position of the persons, and judge of the acts committed by them upon the same principle as if we were considering whether or not a person is fit to become an attorney. If he has previously misconducted himself we should see whether the circumstances were such as to prevent his being admitted or

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whether he had condoned his offence by his subsequent good conduct. the principle on which the court acts being to see that the suitors are not exposed to improper officers of the court."

The principles formulated *In re Weare* (*supra*) have been followed in various cases in Ceylon. In *Attorney-General vs Ellawala* (29 N.L.R. 13) the following passage from Lush's Practice, p. 218 was cited with approval :

> " For any gross misconduct whether in the course of his professional practice or otherwise the court will expunge the name of the Attorney from the roll."

Again *In re Isaac Romey Abeydeera, a Proctor of the Supreme Court* (1 C.L.W. 359) Macdonell, C.J. cited with approval the following passage from the judgment of Mukerjee, J. in *Emperor vs Rajani Kanta Bose et al* (49 Cal. p. 804.) :

> " The practice of the law is not a business open to all who wish to engage in it; it is a personal right, or privilege limited to selected persons of good character with special qualifications duly ascertained and certified : it is in the nature of a franchise from the State conferred only on merit and may be revoked whenever misconduct renders the person holding the license unfit to be entrusted with the powers and duties of his office. Generally speaking the test to be applied is whether the misconduct is of such a description as shows him to be an unfit and unsafe person to enjoy the privileges and to manage the business of others as a Proctor, in other words, unfit to discharge the duties of his office and unsafe because unworthy of confidence."

The Chief Justice then applied this test and stated as follows :

> " We are compelled by the facts proved and admitted in this matter to say that the respondent is not a person who should be allowed to manage the business of others as a Proctor because he has abused the confidence of those who entrusted their business and money to him as such proctor."

We have applied the principles laid down in the various cases I have cited to the facts of the present case. The respondent was convicted of sending to Mrs. Ludowyk post cards of a particularly obscene, disgusting and abusive character. In doing so he has committed what can only be described as a personally disgraceful offence. It is said that he acted as he did because he was labouring under a deep sense of personal grievance. The fact that he could react in such a manner shows his unfitness for membership of an honourable profession. Ought any respectable proctor be called upon to enter into that intimate intercourse with him which is necessary between two proctors even though they are acting for opposite parties ? In my opinion no other proctor ought to be called upon to enter into such relations with a person who has so conducted himself. The conviction is *prima facie* a reason why the court should act. Section 16 of the Courts Ordinance is worded as follows :

> " Subject to the rules hereinafter set out in the second schedule the Supreme Court is authorized and empowered to admit and enrol as advocates or proctors in the said court and as proctors in any of the District Courts of the Island, persons of good repute and of competent knowledge and ability."

How can it be said that the respondent is a " person of good repute " ? Our duty is to regard the fitness of the respondent to continue in the profession from the same angle as we should regard it if he was a candidate for enrolment. In my opinion, the disgracefulness of the offence leaves us with

no option but to strike the respondent off the roll. If he continues a career of honourable life for so long a time as to convince the court that there has been a complete repentance and a determination to persevere in honourable conduct, the court will have the right and the power to reinstate him in his profession. For the time being the order is that he be struck off the roll.

SOERTSZ, J.

I agree.

DE KRETSER, J.

I agree.

Struck off the roll.

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

GUNARATNE vs PERERA & ANOTHER

S. C. No. 244—*D. C. Kalutara No.* 21746.

Argued on 8th July, 1941.

Decided on 14th July, 1941.

Lis pendens—Mortgage decree unregistered—Subsequent sale of mortgaged property in execution of a partition decree—Does registration of plaint in mortgage action protect mortgagee's rights as against the purchaser at the partition sale—Section 8 (*proviso* 1) *and section* 11 (*proviso*) *Registration of Documents Ordinance* (*Chapter* 101)—*Section* 12 *Partition Ordinance* (*Chapter* 56.)

Held : (i) That where the plaint in a mortgage action has been registered the registration of the decree is unnecessary, and the purchaser at a subsequent partition sale can claim no priority by virtue of the registration of his certificate of sale.

(ii) That section 12 of the Partition Ordinance continues to protect the rights of a mortgagee even after decree is entered.

Cases referred to : *De Silva vs Rosinahamy* (41 N.L.R. 56)
Saravanamuttu vs Sollamuttu (26 N.L.R. 385)

H. V. Perera, K.C., with *D. W. Fernando*, for the plaintiff-appellant.

N. Nadarajah with *A. C. Z. Wijeyratne*, for the defendants-respondents.

SOERTSZ, J.

A brief statement of the facts in this case is necessary in order to clarify the matter in controversy on this appeal. One Daniel Pieris mortgaged on mortgage bond P4 of 1920, 493/504 shares of land called Kongahawatta *alias* Kosgahawatte and certain planter's shares and buildings. The mort-

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gagee was one Adeline Wijeygoonewardene. Eleven years later, by deed P5, he conveyed these same interests to one Dona Madalena, subject to the mortgage.

Adeline Wijeygoonewardene put her bond in suit in D. C. Kalutara case No. 19538 on the 8th of March, 1934, and obtained a hypothecary decree dated the 11th of June 1935 against the mortgagor Daniel Pieris, and the subsequent purchaser Dona Madalena. Nearly six months after this decree had been entered, one Don Abraham Appuhamy instituted an action for the partition of this land. Dona Madalena was the first defendant in that case. Decree for sale was entered on the 2nd of August 1937, and Dona Madalena was allotted 157/192 shares of the soil, and the same proportion of the buildings and plantations therein. (See P2). While the partition suit was pending there was a sale in execution of the hypothecary decree, at which the present plaintiff became the purchaser, and obtained Fiscal's transfer P6, dated the 26th of April, 1939.

Between the date of the sale on the hypothecary decree and the issue of the Fiscal's Transfer, the sale in pursuance of the decree in the partition suit took place, and one P. P. Don Pieris bought the entire land with everything thereon, and obtained a certificate of sale dated the 19th of November, 1937 (D1). He sold all the interests he had acquired on D1, to the 1st defendant on D2 of 1938. The 2nd defendant is the 1st defendant's lessee by virtue of D3 of 1939.

The plaintiff brought the present action against both landlord and tenant, praying that he be declared entitled as against them, to the entirety of the mortgaged interests that he had purchased on P6, and asking for damages and ejectment. The defendants filed answer denying that any title passed to the plaintiff on P6, and praying for a dismissal of the action.

The case went to trial on a number of issues which it is not necessary to recapitulate. The trial judge dismissed the plaintiff's action with costs, on the ground that the mortgage decree of the 11th of June 1935 not having been registered, the title conveyed to the 1st defendant by the registered certificate of sale gained priority over the title based on the mortgage decree.

The plaint in the mortgage action bears on the face of it an endorsement that it has been registered in a certain folio by the Registrar of Lands. If this endorsement is sufficient proof that this *lis* was registered, then by virtue of section 8 proviso 1 of the Registration of Documents Ordinance, the registration of the decree of the 11th June 1935 was unnecessary, and the defendant can claim no priority by virtue of the registration of their certificate of sale.

Their title would be subject to the mortgage by operation of section 12 of the Partition Ordinance which enacts that " nothing in this Ordinance contained shall affect the right of any mortgagee of the land which is the subject of the partition sale." The meaning and implication of the section have been considered with reference to all the earlier authorities in the case of *De Silva vs Rosinahamy* (41 N.L.R. 56).

Counsel for the respondent, however contended :—

(*a*) that there is no legal proof that the plaint in the mortgage action was registered, and that therefore, his title gained priority by registration.

(*b*) that assuming that the *lis* was registered, the mortgage was swallowed up by the decree and that section 12 of the Partition Ordinance conferred no benefit on the plaintiff inasmuch as the partition or sale was made subject to the mortgage alone, and not to the decree or consequent sale.

In regard to (*a*), the concluding part of the trial judge's judgment makes it quite clear that this question of priority by registration was raised at the eleventh hour by the defendants, and even then raised only by way of questioning the registration of the decree, and not of the *lis*. It is clear that in raising the issue of registration in that way, the respondent's counsel in the court below was relying upon the *dictum* of Bertram, C.J. that "the result is that, though the principle of *lis pendens* operates up to final execution, its registration only protects the mortgagee up to decree. After decree, he must further protect himself by registering the decree." *Saravanamuttu vs Sollamuttu* (26 N.L.R. at 385). But that *dictum* was applicable to the law of registration as it stood at the date of that decision, 1924, when decrees were registrable documents regardless of whether the *lis* had been registered or not. The position is different now in view of the proviso of section 11 of the present Registration of Documents Ordinance (Chapter 101) which has been in force since 1st of January, 1928. The defendant's counsel in the court below did not question the registration of the *lis*, and it is too late now to raise the matter on appeal. Besides, regulation 13 of the regulations for the Registration of Documents Ordinance (Chapter 101 Vol. 1 Subsidiary Legislation) provides for the registration of a *lis* to be in the form of the endorsement adopted in P3, and a presumption arises under section 114(*d*) that the endorsement is regular.

In regard to point (*b*) taken by the respondent's counsel, I am afraid it cannot be sustained at all. "Subject to the right of any mortgagee," can only mean subject to his rights till he had made them effective according to law.

For these reasons, I am of opinion that the appeal must be allowed, and judgment entered for the plaintiff for 157/192 of the soil and of the plantations and of the buildings. Those were the interests allotted to Dona Madalena the successor in title of the mortgagor, and the rights of the successor in title to the mortgagee must be limited to that extent.

The plaintiff is entitled to the damages agreed upon, that is to say, to Rs. 7/50 a month from the 14th of September 1929, till he is placed in possession of the shares to which he has been declared entitled ; he is also entitled to a decree directing that he be placed in possession of those interests, and to an order for costs here and below.

Appeal allowed.

Present: HOWARD, C.J. & DE KRETSER, J.

VANDERPOORTEN vs THE SETTLEMENT OFFICER

Application for Conditional Leave to Appeal to Privy Council.
S. C. No. 120/1941 (*Inty.*)—*D. C. Ratnapura No.* 6940.
Argued on 7th July, 1942.
Decided on 22nd July, 1942.

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

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

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

Cases referred to : *Palaniappa Chettiar & Two Others vs Mercantile Bank of India & Others* (23 C.L.W. 13)
Salaman vs Warner (1891–1 Q.B. 734)
Ramchand Manjimal & Others vs Goverdhandas Vishandas Ratanchand & Others (A.I.R. 1920–P.C. 86)
Bozson vs Altrincham Urban District Council (1903–1 K.B. 547)
Shubrook vs Tufnell (1882–9 Q.B.D. 621)
Abdul Rahman vs Cassim & Sons (A.I.R. 1933–P.C. 58)
Soertsz vs Colombo Municipal Council (32 N.L.R. 62)
R. M. A. R. A. R. R. M. vs The Commissioner of Income Tax (37 N.L.R. 447)

H. V. Perera, K.C., with *E. G. Wickremenayake*, for the petitioner.

H. H. Basnayake, Crown Counsel, for the Settlement Officer, respondent.

HOWARD, C.J.

This is an application for conditional leave to appeal to the Privy Council under Rule 1 (*a*) contained in the schedule to the Appeals (Privy Council) Ordinance (Chapter 85). The application is opposed by counsel for the respondent on the following grounds :

(*a*) The order from which leave to appeal is prayed is not a final judgment of the Court,

(*b*) The order from which leave to appeal is prayed was not made in a civil suit or action in the Supreme Court within the meaning of these words in section 3 of Chapter 85.

(*c*) As the Supreme Court held that there was no appeal from the order of the District Judge, there was no suit or action in the Supreme Court and hence there could be no appeal to the Privy Council.

With regard to (*a*), various cases have been cited by counsel for the applicant including *Palaniappa Chettiar & Two Others vs Mercantile Bank of India & Others* (23 C.L.W. 13). In my judgment in that case I cited the following passage from the judgment of Fry, L.J. in *Salaman vs Warner* (1891–1 Q.B. 734) :

> " I think the true definition is this : I conceive that an order is ' final ' only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is ' interlocutory ' where it cannot be affirmed that in either event the action will be determined."

In citing this definition I was misled by the following passage from the judgment of Viscount Cave in *Ramchand Manjimal & Others vs Goverdhandas Vishandas Ratanchand & Others* (A.I.R. 1920–P.C. 86.)

> " The question as to what is a final order was considered by the Court of Appeal in the case of *Salaman vs Warner* and that decision was followed by the same court in the case of *Bozson vs Altrincham Urban District Council.*"

Reference to the case of *Bozson vs Altrincham Urban District Council* (1903– 1 K.B. 547) shows that *Salaman vs Warner* was not followed, but an earlier case *Shubrook vs Tufnell* (1882–9 Q.B.D. 621) which was in conflict with the decision in *Salaman vs Warner*. The principle laid down in *Shubrook vs Tufnell* was that, if the judgment entered put an end to the action, the order was final.

The test of finality was further considered by the Privy Council in the later case of *Abdul Rahman vs Cassim & Sons* (A.I.R. 1933–P.C. 58) where the earlier case was cited. It was held that the test of finality is whether the order " finally disposes of the rights of the parties." Where the order does not finally dispose of those rights, but leaves them " to be determined by the courts in the ordinary way" the order is not final. Having regard to the decisions in *Bozson vs Altrincham Urban District Council* and *Abdul Rahman vs Cassim & Sons* the passage cited by me in *Palaniappa Chettiar vs Mercantile Bank of India* from the judgment of Fry, L.J. in *Salaman vs Warner* cannot be regarded as the law. The test of finality is that formulated in *Shubrook vs Tufnell.* The rights of the parties in the present case were in my opinion finally disposed of by the order made by the Supreme Court. Hence it was a final order.

The question as to whether the order was made in a " civil suit or action in the Supreme Court " does not lend itself to such easy solution. It has been contended by Mr. Basnayake for the respondent that the District Court in this case was not exercising the jurisdiction conferred on it by the Courts Ordinance, but was sitting as a special tribunal. The Courts Ordinance provides for an appeal to the Supreme Court only in cases where the District Court is exercising the jurisdiction conferred on it by the Courts

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Ordinance. No appeal to the Supreme Court was provided by the Waste Lands Ordinance or the Land Settlement Ordinance. In these circumstances there was no "civil action or suit in the Supreme Court." In support of this contention Mr. Basnayake cited various decisions of this court. In *Soertsz vs Colombo Municipal Council* (32 N.L.R. 62) it was held that there is no right of appeal to the Privy Council from a judgment of the Supreme Court on a case stated under section 92 of the Housing and Town Improvement Ordinance, No. 19 of 1915. In coming to this decision a Bench constituted by Fisher, C.J. and Drieberg, J. held that in dealing with the matter under consideration the Supreme Court was not acting in the exercise of the appellate jurisdiction vested in it by the Courts Ordinance nor was the District Court acting in the exercise of any jurisdiction vested in it by that Ordinance. The Supreme Court had authority to deal with the matter under section 92 of the Housing and Town Improvement Ordinance. This Ordinance however, was silent with regard to applications for leave to appeal from decisions under that section and hence finality was imposed on them. A right of appeal, if not expressly given, could not be inferred. Moreover, so far as appeals from District Courts to the Supreme Court are concerned, the appellate jurisdiction of the Supreme Court and the powers of the Court of Appeal relate solely to the exercise by District Courts of the jurisdiction conferred upon them by the Courts Ordinance. This case was followed in *R. M. A. R. A. R. R. M. vs The Commissioner of Income Tax* (37 N.L.R. 447) where it was held that there is no right of appeal to the Privy Council from a judgment of the Supreme Court on a case stated under section 74 of The Income Tax Ordinance.

The applicability of these two cases involves a consideration of the jurisdiction that was being exercised in this matter both by the Supreme Court and the District Court. Proceedings in respect of the premises were originally commenced under the Waste Lands Ordinance, No. 1 of 1897, by settlement notices being published in the Government Gazette on the 21st September, 1928. During the course of the proceedings the Waste Lands Ordinance was repealed by the Land Settlement Ordinance 1931 (new chapter 319). The proceedings were continued under the Waste Lands Ordinance and final order dated the 29th March, 1940 was made under that Ordinance as amplified by sections 3 (3) and 32 of the Land Settlement Ordinance. No claim in pursuance of the notice of the 21st September, 1928 had been made by the applicant or by A. J. Vander Poorten within the time prescribed. Thereafter the applicants, purporting to act under section 24 of the Land Settlement Ordinance, presented a petition to the District Judge claiming the premises. This petition was dismissed with costs. The applicants subsequently appealed to the Supreme Court against the decision of the District Judge and on the respondent taking a preliminary objection that no appeal lay, the objection was upheld and the appeal dismissed. The applicants now desire to appeal to the Judicial Committee of the Privy Council against the dismissal of their appeal by the Supreme Court.

In the Supreme Court, counsel for the applicants conceded that no appeal lay under section 24 of the Land Settlement Ordinance, but contended that the petition constituted a good and sufficient claim under section 20 of the Waste Lands Ordinance. The court held, however, that section 20 did not confer a right of appeal from an order made thereunder and the preliminary objection must prevail. In view of the circumstances in which the claim of the applicants had arisen, can it be said that the latter were parties to a civil suit or action in the Supreme Court ? Inasmuch as the District Court was not exercising any jurisdiction conferred by the Courts Ordinance the appeal to the Supreme Court was not made in pursuance of any right of appeal given by the Courts Ordinance. It was however contended that there was an appeal under section 20 of the Waste Lands Ordinance. This contention was rejected. If the contention however, had been upheld and the Supreme Court had proceeded to hear the appeal on its merits and dismissed it there would, having regard to the decision in *Soertsz vs Colombo Municipal Council* (*supra*), have been no right of appeal to the Privy Council in view of the fact that no specific right of appeal to such authority is given by the Waste Lands Ordinance. In my opinion the applicants are not in any better position by reason of the fact that the appeal was dismissed by reason of a preliminary objection which was upheld with regard to the jurisdiction of the Supreme Court. For the reasons I have given the application fails and must be dismissed with costs.

De Kretser, J.

I agree.

Application dismissed.

Present: Moseley, J. & Jayatileke, J.

VELUPILLAI & OTHERS vs SABAPATHIPILLAI

S. C. No. 205 (*F*)—*D. C. Jaffna No.* 8708

Argued on 26th & 27th August, 1942.

Decided on 10th September, 1942.

Charitable Trust—Hindu Temple—Scheme of management framed by court—Provision that meeting to elect trustees be held at the temple premises—Obstruction to holding such meeting at temple premises—Election of trustees at meeting held outside—Is such election valid.

When trustees to a Hindu Temple were elected at a meeting held at a place other than the place named in the scheme of management framed by the court as a charitable trust because the congregation was prevented from doing so at the appointed place by the opposing party,

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Held: That the election was good.

Cases referred to : (40 N. L. R. 109)

Veeraragavachariar vs Advocate General (1927 A. I. R. Madras 1073)

Sevak Jeranchad Bhogilal vs Dakora Temple Committee (1925 A. I. R. Privy Council 155)

Islington Division Case (5 O'Mailey and Hardcastle, Elect. Pet. 120.)

H. V. Perera, K. C., with *N. Nadarajah*, K. C., and *H. W. Thambiah*, and *V. K. Kandasamy*, for the 2nd defendant-appellant.

N. E. Weerasooriya, K. C., with *T. K. Curtis*, for the 1st to 4th substituted-plaintiffs-respondents.

JAYATILEKE, J.

In action No. 23628 of the District Court of Jaffna it was decreed that the Nochikadu Pillaiyar Kovil and its temporalities be declared a public charitable trust within the meaning of the Trusts Ordinance (Chapter 72) and that their management should be under the control of a board of trustees on which the 5th plaintiff in the present action and his successors should have a hereditary seat and the other four should be appointed by election by the congregation.

Thereafter a scheme of management was framed by the court which provided, *inter alia*, that the four trustees should be elected at a general meeting of the members of the congregation held at the temple premises and that the trustees so elected should hold office for a period of three years.

On December 1st 1932, the 1st, 2nd, 3rd and 4th plaintiffs were elected trustees and on August 2nd, 1933 the court made an order vesting all the immovable property belonging to the temple in them and the 5th plaintiff.

The defendants prevented the plaintiffs from taking possession of the temple and its temporalities and the plaintiffs thereupon instituted this action against them for ejectment and for the recovery of certain movables and damages.

The 1st defendant did not file an answer but the 2nd and 3rd defendants filed a joint answer in which they alleged, *inter alia*, that the plaintiffs could not continue the action as the term of office of the 1st, 2nd and 3rd and 4th plaintiffs had expired on December 1st 1935.

At the trial the contesting defendants invited the court to try that question as a preliminary issue. The District Judge held that they could continue the action but on appeal his order was reversed. In the concluding part of his judgment Maartensz, J. * said :—

> " This order, however does not, subject to the law with regard to abatement of suits, preclude those persons who claim to have succeeded the plaintiffs as trustees of the temple from applying to the court for leave to continue the suit against the defendant. "

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* 40 N. L. R. 109.

Thereafter the members of the congregation wanted to hold a meeting at the temple premises to elect new trustees but they were prevented from doing so by the 2nd defendant. They thereupon moved the District Court in action No. 23628 for permission to hold the meeting outside the temple premises at some place convenient to them.

The District Judge noticed the 2nd defendant to show cause why he should not permit the members of the congregation to hold the general meeting at the temple premises. He appeared and objected on the ground that the holding of the meeting in the temple premises would be an invasion of his rights in this action.

The District Judge thereupon discharged the notice and granted the permission, asked for. The meeting was held at a temple about half a mile away and four new trustees were elected. They were substituted in place of the 1st, 2nd, 3rd and 4th plaintiffs.

Prior to the next date of trial the 3rd defendant died but no one was substituted in her place as her claim was limited to a life interest.

At the trial a large number of issues were framed all of which were answered against the 2nd defendant.

The District Judge entered judgment in plaintiffs' favour and the 2nd defendant has appealed.

The only point that was seriously pressed before us by counsel for the appellant was that the election of the 1st, 2nd, 3rd and 4th substituted-plaintiffs was void as the general meeting at which they were elected was not held at the temple premises. He contended that the order of the District Judge granting permission to hold the general meeting outside the temple premises was a variation of the scheme that was framed and that it was made without jurisdiction.

He based his argument on the second point very largely upon the judgment of the full Bench in *Veeraragavachariar vs Advocate General* * and upon the judgment of the Privy Council in *Sevak Jeranchad Bhogilal vs Dakora Temple Committee.* †

On the first point he laid great stress upon clause 4 of the scheme which provided that the general meeting of the members of the congregation *shall* be held at the Nochikadu Pillaiyar Kovil and contended that the election ought to be held void as the conveners of the meeting had violated the provisions of that clause.

It must be noted that the scheme that was framed by the court does not contain a clause that the election of trustees would be void if it is not conducted in accordance with its provisions. If there had been such a clause there would have been great force in the argument that was addressed to us.

Though the election took place more than three years ago no application has so far been made by any member of the congregation to have it declared void on the ground that the general meeting was not held at the temple premises as required by the scheme.

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* 1927 A. I. R. Madras 1073. † 1925 A. I. R. Privy Council 155.

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At the trial the 2nd defendant failed to place any evidence before the court that the holding of the general meeting outside the temple premises did or could affect the result of the election.

In these circumstances it seems to me, quite apart from the order of the District Judge granting the members of the congregation permission to hold the general meeting outside the temple premises, that the election of the substituted-plaintiffs as trustees was good.

In the *Islington Division Case* * an application was made by the unsuccessful candidate to have the election declared void on account of breaches of the law relating to Parliamentary elections committed by the presiding officers and their assistants at certain polling stations. It was alleged that voters had been allowed to vote after 8 p. m. on the day of the election in contravention of the Elections (Hours of Poll) Act 1885 (48 vic. c10. s I.) The court held that in the absence of proof that the infraction of the law in the supply of ballot papers did and could affect the result of the election, it would not be justified in declaring the election void.

In the joint judgment of Kennedy, J. and Darling, J. the following passage appears at page 125 :

> " It appears to us to be convenient at this point, to state our view of the law in regard to this matter. Our opinion is that an election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election where the court is satisfied that the election was notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, *i. e.*, the success of the one candidate over the other, was not, and could not have been affected by those transgressions. If, on the other hand, the transgressions of the law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether these transgressions *may* not have affected the result and it is uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void. It appears to us that this is the view of the law which has generally been recognized and acted upon, by the tribunals which have dealt with election matters."

This case is clear authority which covers the present case. I have only to add that it is unnecessary for me to deal with the other question argued as to whether the court acted without jurisdiction in granting permission to the members of the congregation to hold the meeting outside the temple premises.

The appeal is dismissed with costs.

MOSELEY, J.

I agree.

Appeal dismissed.

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* 5 O'Mailey and Hardcastle Elect. Pet. 120.

IN THE COURT OF CRIMINAL APPEAL

Present: SOERTSZ, J. (President), KEUNEMAN, J. & DE KRETSER, J.

REX vs MARATHELIS

S. C. No. 4—*M. C. Chilaw No.* 17565—*3rd Western Circuit* 1942
Appeal No. 22 *of* 1942.
Argued on 29th September, 1942.
Decided on 14th October, 1942.

Court of Criminal Appeal—Conviction for rape—Nature of corroborative evidence required.

The accused was convicted of committing rape on a girl. Apart from the evidence of the girl there was independent evidence of a witness to the effect—

(i) that he saw the girl enter the house of the accused at about the time the offence was committed;

(ii) that the accused was the sole occupant of the house at the time of the offence.

Further, there was evidence of the presence of blood on the sarong which the accused admittedly wore on that day. The accused falsely denied that the house was his and made a false statement that he was away from the village at the time of the alleged offence.

Held : That the evidence corroborates the girl's story by tending to show that the accused was the person who assaulted her.

Per SOERTSZ, J. : " As observed by Howard, C.J., Lord Reading said that the rule does not mean ' that there must be confirmation of all the circumstances of the crime. It is sufficient if there is corroboration as to *a material circumstance* of the crime and of the identity of the accused in relation thereto.' "

Cases referred to : *Rex vs Baskerville* (1916 – 2 K.B.D. 658)
Benjamin Myro Smith (14 Cr. App. R. 74)
Crocker (17 Cr. App. R. 46)
Henry Hedges (3 Cr. App. R. 262)
John Graham (4 Cr. App. R. 218)
Richard Manser (25 Cr. App. R. 18)
John Edward Freebody (Ibid 69)
The King vs Ana Sheriff (42 N.L.R. 169)
Rex vs Burke (22 C.L.W. 7)

C. Renganathan, for the accused-appellant.
E. H. T. Gunasekera, Crown Counsel, for the Crown.

SOERTSZ, J. (President)

This was a case of rape, and the victim being a girl under twelve years of age, the two questions that arose for the jury were whether this girl had been subjected to sexual intercourse at or about the time alleged, and whether the appellant was the culprit.

The evidence of the Medical Officer put the first point beyond the possibility of doubt.

In regard to the second question, the Crown relied on the testimony of the girl herself definitely implicating the appellant and also on the evidence

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Soertsz, J.
(President)

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of the witness Mohideen who said he saw the girl enter the house of the appellant at about 3 or 3.30 p.m. on this day. That would be, approximately, the time at which the offence was committed, according to the girl herself, if her evidence and the evidence of Asilin Nona, her foster mother, are read together. Other circumstances relied on by the Crown were, (*a*) that the Government Analyst found blood on three of the garments the girl wore on that day, as well as on the sarong the appellant had on at the time he was arrested. The appellant admitted that that was the sarong he was dressed in on the day on which the girl said he raped her; (*b*) the defence set up by the appellant. He gave evidence and affirmed that he was absent from the village on that day from 7.30 a.m. till about 2.30 p.m. and that he had nothing to do with this girl on that day or at any time at all. He also stated that the house pointed out by the girl as the place of the offence was not his house and that he lived in the adjoining house. He could not account for the blood on his sarong.

That was, substantially, all the evidence bearing on the question whether the appellant was the girl's ravisher or not. The learned judge of Assize summed-up all this evidence very fully to the jury, and in directing them on the law, pointed out to them that it was a rule of practice for judges to warn juries that, in these cases, it is dangerous to convict unless the evidence of the prosecutrix "is corroborated in some material particular," and he went on to say: "Corroboration means this—independent evidence implicating the accused in some material particular." He also told them: "But the law also says that the jury may, nevertheless, convict without corroboration, because they may be so impressed by the evidence of the woman or girl that they feel they do not need any corroborative evidence to convict the accused." Assuming for the purpose of this case, that we are governed by what the later decisions of the Court of Criminal Appeal in England have laid down in regard to the proper direction to be given to juries in these cases, the charge of the Assize Judge in this case is unexceptionable.

But, the objection is taken that he at a later stage of his charge, misdirected the jury when he told them that if they should look for corroboration, they would find it in Mohideen's evidence. It is contended that, in fact, Mohideen's evidence did not afford such corroboration as is required in law inasmuch as that evidence does not implicate the accused in any material way.

In *Rex vs Baskerville* (1916–2 K. B. D. 658) the Court of Criminal Appeal dealt with the question of the corroboration of an accomplice and enunciated the rule that the corroboration required in such a case, is corroboration "which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused." The reason why the practice of courts has been to test the evidence of accomplices in this way is that as pointed out by Best at page 161 of the 12th edition of his treatise on the "Law of Evidence," "the objection to the evidence of accomplices

arises from the obvious interest which they have to save themselves from punishment by the conviction of the accused against whom they appear." That consideration does *not* apply in the case of a prosecutrix complaining of a sexual offence. In such a case corroboration is sought, for quite another reason, namely that without it, it would be a case of oath against oath. In that view of the matter, it seems reasonable to say that any evidence that helps to tip the balance of the scales in favour of the oath of the prosecutrix in a significant manner, is sufficient corroboration of her evidence. Be that as it may, the rule in *Rex vs Baskerville* was not assumed for a long time to be applicable to cases of sexual offences. In 1919, the question arose in the case of *Benjamin Myro Smith* (14 Cr. App. R. 74) and curiously enough, it arose before Lord Reading, L. C. J. who had delivered the judgment in *Rex vs Baskerville* and with him there were, on this occasion, Avory, J. and Bray, J. who had sat with him to decide *Rex vs Baskerville*. Reading, L. C. J. then made the following order :

> " This appeal involves the important question whether it is essential that, where a person is accused of rape, the prosecutrix's evidence should be corroborated in a material particular implicating the accused. We think it is advisable that that point should be argued before a Full Court."

Accordingly it went before a Full Court, the additional judges being Lawrence, J. and Sankey, J. but, after a full argument, if I may respectfully say so, it produced this anticlimax :

> " It is sufficient to say that we are of opinion that the verdict should not be allowed to stand as it is unreasonable having regard to the evidence. It, therefore, becomes unnecessary to decide the questions of law which have been argued before us." (Lord Reading at p. 81 of 14 Cr. App. Rep.).

The question still remains unconsidered by a Full Court. But in 1922, in the case of *Crocker* (17 Cr. App. Rep. 46) Hewart, L. C. J. after referring to the rule in *Rex vs Baskerville* said this :

> " Now that is the law regarding the evidence of accomplices, but this *court cannot accept* the contention that the evidence of a girl, the victim of the offence, is on the same plane with that of the evidence of an accomplice. The objection in such cases as this is *not on the grounds of complicity*, but because the case is one of oath against oath."

In two earlier cases, *exempli gratia*, *Henry Hedges* (3 Cr. App. Rep. 262) and *John Graham* (4 Cr. App. Rep. 218) corroboration not according to the standard of the rule in *Rex vs Baskerville*, was considered sufficient. On the other hand in two later cases, *Richard Manser* (25 Cr. App. Rep. 18) and *John Edward Freebody* (Ibid 69) we have instances in which that rule was adopted. An examination of a large number of these cases drives one to the conclusion that there is not a consistent rule, but only a wilderness of single instances.

Our Court of Criminal Appeal considered this question in the case of *The King vs Ana Sheriff* (42 N.L.R. 169)* and the majority of the judges adopted the rule in *Rex vs Baskerville*. They held that, on the facts of that case, the conditions laid down by that rule were not satisfied by the independent evidence there relied on. Whether that was a correct view or not

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we can no longer inquire and we shall be bound to apply the whole of that decision, when a case similar on the facts to that case arises. But in regard to this class of cases generally, we are bound by the principle there laid down, that is to say, the principle adopted in *Rex vs Baskerville*, that is that the corroborative evidence should "*show or tend to show* that the story that the accused committed the crime is true, not merely that the crime was committed, but that it was committed by the accused."

Applying that principle to this case, we are of opinion that there is independent evidence here which although, it may not positively show, yet *tends* to show that the appellant committed the crime. The evidence of Mohideen that he saw the girl enter the house of the accused of which during this period he was the sole occupant, about the time this offence was committed, that is to say, at about 3.30 p.m. taken with the unexplained fact that there was blood on the sarong the accused, admittedly, wore on this day and with, what, according to the view of the jury was a false denial by him that the house was his house, and a false statement by him that he was away fron the village at the time alleged, corroborates the girl's story by *tending to* show that he must have been the culprit.

As observed by Howard, C. J., Lord Reading said that the rule does not mean "that there must be confirmation of all the circumstances of the crime. It is sufficient if there is corroboration as to *a material circumstance* of the crime and of the indentity of the accused in relation thereto."

Such was the corroboration that the Court of Criminal Appeal here, accepted as sufficient in *Rex vs Burke* (22 C. L. W. 7). In that case the only corroborative circumstance put to the jury by the presiding judge was the fact that the accused was found to be suffering from chronic gonorrhoea, and that seven days after the date of the alleged offence the girl in the case was herself found to be suffering from that disease. Counsel for the appellant contended, with much force, that the medical evidence in the case disclosed a high incidence of this disease in the city of Colombo and that "there were many ways whereby the girl may have been infected other than by contact with the accused." Counsel impeached the evidence regarding the diseased condition of the accused in that case as irrelevant. But Moseley, S. P. J. in delivering the judgment of the court said: "It (that is the evidence that the appellant was suffering from gonorrhoea) seems to us to be relevant, if for no other reason, by virtue of section 11 (*b*) of the Evidence Ordinance since the fact of the appellant's infection enhances the probability of the girl's allegation that it is he who assaulted her."

In the same way, in the present case, Mohideen's evidence and the other facts already referred to, enhance the probability of the girl's allegation that the appellant it was who assaulted her. In other words, they sufficiently *tend* to show that he was the culprit.

For these reasons, we dismiss the appeal.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL

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

REX vs HARAMANISA *alias* THIMISA

Application No. 41 *of* 1942—*S. C. No.* 25—*M. C. Kegalle No.* 303.

Application for leave to appeal against conviction.

Argued & Decided on 27th May, 1942.

Court of Criminal Appeal—Burden of proving that prisoner comes within any of the general exceptions in the Penal Code—Evidence Ordinance section 105.

Held : That the burden which rests on a prisoner of proving that he comes within any of the general exceptions in the Penal Code is not so heavy as that which lies on the prosecution of proving its case beyond all reasonable doubt.

Cases referred to: *Woolmington vs Director of Public Prosecutions* (1935 A.C.462).

O. L. de Kretser (*Jnr.*) with *E. L. W. de Zoysa*, for the applicant.

G. E. Chitty, Crown Counsel, for the Crown.

HOWARD, C. J. (President)

Mr. de Kretser on behalf of the applicant has argued this case with considerable force and ability. He says that the learned judge's direction on the law with regard to the burden cast on the applicant in pleading grave and sudden provocation amounts to a misdirection. In support of this argument he has invited our attention to certain passages in the learned judge's charge to the jury. On page 4 we find this passage: "Now, once the Crown has established its case beyond reasonable doubt, if the prisoner relies upon any general or special exception created by the Penal Code, the law says that the burden of establishing or proving the circumstances by virtue of which he claims the benefit of any general or special exception is upon the prisoner, and the law requires you, as judges of the facts in the case, to start with the presumption that there were no such circumstances and casts upon the prisoner the burden of satisfying you that there were such circumstances." Then further on on that page the learned judge says: "Therefore by our law, the burden of proving those circumstances by virtue of which the mitigation is claimed is cast upon the prisoner. Therefore, in order to prove that and in order to obtain the benefit of the exception which says that culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave that provocation, the burden is cast by the law upon the prisoner to satisfy you that at the time he delivered the attack he had lost his power of self-control. Not only that, he must also satisfy you that he had lost his power of self-control by reason of the grave and sudden provocation which he had received at the hands of the

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person whose death he caused." Then again on page 5 we find the following passage: " In order to claim the benefit of mitigation on either ground submitted to you by his counsel, the prisoner must prove that this happened in a sudden fight, upon a sudden quarrel, in the heat of passion and without the assailant taking undue advantage of the victim and without his acting in a cruel or unusual manner." Now, these passages merely indicate to the jury that the burden of satisfying them that these circumstances existed rests on the prisoner. There is no indication as to how that burden is to be discharged. On the other hand we have the following passages on page 7: "Are you satisfied, beyond reasonable doubt, that the deceased man did actually slap the accused before the accused retorted or retaliated with his knife?" Now, that passage deals with the discharge of the burden of proof which has been placed on the prisoner and indicates that the prisoner must satisfy the jury beyond all reasonable doubt. Now, if that was the only indication to the jury of what the requirements of the law were we agree that it is not a correct statement of the law. But the learned judge, later on in his charge, has in our opinion wiped out the effect of that passage. On page 12 he says: "In regard to that the law in this country is that the burden is upon the prisoner to establish the fact that he was slapped, but again upon that position I would even ask you, when you are considering that question as to whether the prisoner was slapped by the deceased or not, if you have any reasonable doubt on that point, to give the benefit of the doubt to the prisoner and go on the footing that the prisoner was slapped, unless, of course, you are clearly convinced that no such thing happened, having regard to the evidence of the witnesses for the prosecution." That passage was unduly favourable to the applicant and invited the jury, if any reasonable doubt existed in their minds, to give the benefit of that doubt to the prisoner. Again, on page 13 the learned judge says: " I do not mean to suggest that if you have a reasonable doubt in regard to the matter you should not give the benefit of it to the prisoner." That again is unduly favourable to the applicant. Further on, in the last lines of the charge, he says "but let me repeat again that when I say that I do not mean to suggest that if you have an honest and conscientious doubt—you should not be merely guided by your heart, apart from your reason—but if you have an honest and conscientious doubt, you must give the benefit of the doubt to the prisoner, but if you have no such doubt, then your duty is quite clear." It is quite obvious that these passages, coming at the very end of the charge, must in the minds of the jury have removed the effect of the earlier passage where the learned judge said that the burden was on the prisoner to prove beyond all reasonable doubt that he came within one of the exceptions. We think, therefore, in spite of Mr. de Kretser's able argument, that there are no grounds for granting this application, which is dismissed.

In view of our decision on this point, we think there is not need for us to go into the question as to whether the decision in the case of

Woolmington vs Director of Public Prosecutions (1935 A. C. p. 462) is part of our law. Speaking for myself, I have always thought that it was. No doubt the occasion may arise when the court will have to consider as to what is the exact effect of that decision.

Appeal dismissed.

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

AIYADURAI vs THURASINGHAM & ANOTHER

S. C. No. 24/42—*D. C. Jaffna No.* 22284
Argued on 9th June, 1942.
Decided on 29th June, 1942.

Rectification—Undivided shares—Sale in execution of mortgage decree —Conveyance by Commissioner—Application by purchaser for rectification of conveyance by substituting divided lots allotted to mortgagor under final decree (subsequent to date of sale) in lieu of undivided shares—Endorsement on conveyance—Writ of delivery of possession—Should application be allowed.

At a sale in execution of a mortgage decree the appellant purchased on 14th October, 1939 an undivided 2/5 share of a certain land mortgaged by the respondents and obtained a Commissioner's conveyance dated 25th November, 1940. A decree partitioning the land in question was entered on the 29th August, 1940, whereby in lieu of the undivided 2/5 share lots 4 and 5 were allotted (subject to the mortgage) to the respondent. On 4th September, 1941 the appellant moved the District Court to endorse the Commissioner's conveyance by substituting the words "lots 4 and 5 according to final plan in case No. 11072 of the District Court of Jaffna" in place of "an undivided 2/5 share of the land" and for a writ to the Fiscal to deliver possession of the said lots 4 and 5.

This application was opposed by the respondents and was refused.

Held : That the appellant is entitled to the relief he claims inasmuch as he purchased the undivided shares prior to the partition decree and the parties who oppose are the execution-debtors themselves.

Cases referred to : *Mudalihamy vs Appuhamy* (36 N.L.R. 33)
Markar vs Siman (1 Matara Cases 9)

H. V. Perera, K.C., with *S. Saravanamuttu*, for the purchaser-appellant.
No appearance for the respondents.

HOWARD, C.J.

This is an appeal from an order of the Additional District Judge of Jaffna dismissing an application by the appellant, the purchaser under a mortgage decree entered in the case, to have his conveyance rectified by the substitution of divided lots in lieu of undivided lots of the land sold. A certain P. Sinnatamby Aiyathurai, the assignee and substituted-plaintiff in the case, was entitled to all rights and title and interest in a mortgage decree obtained by the original plaintiff in respect of an undivided 2/5th share of certain land belonging to the respondents. On the 14th October, 1939, on a commission issued by the District Court of Jaffna in execution of the said decree, the said 2/5th share belonging to the respondents was sold by the

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Commissioner to the appellant. On application made to the District Court to have the sale confirmed an objection taken to such confirmation was raised by the respondents and the sale was set aside. On appeal to the Supreme Court the order of the lower court was set aside and the sale confirmed on the 30th October, 1940. A Commissioner's conveyance dated the 25th November, 1940, was executed in favour of the appellant. Whilst the mortgage action was pending, case No. 11072 of the District Court of Jaffna was filed to partition the said land amongst the various co-owners. In that action the first and second defendants were the respondents in this appeal. The final partition decree was entered on the 29th August, 1940, about a year after the sale of the 2/5th share in the land to the appellant. By the said partition decree lots 4 and 5 were allotted to the respondents subject to the mortgage decree in favour of the said P. Sinnatamby Aiyathurai the mortgage decree holder, in lieu of their undivided 2/5th share. On the 6th Februrary 1941, the appellant moved the District Court to issue writ to the Fiscal to deliver possession of lots 4 and 5 to the appellant. The respondents objected to the delivery of possession of the entirety of lots 4 and 5 and contended that possession could be given of only 2/5th share of the said lots. On the 4th September, 1941, the appellant moved the District Court that an endorsement might be made on the said conveyance substituting the words " Lots 4 and 5 according to final partition plan in Case No. 11072 of the District Court of Jaffna" in place of "an undivided 2/5th share of the land." The appellant further moved that after the said endorsement the writ should be re-issued to the Fiscal to deliver possession of the said lots 4 and 5 to the appellant.

In refusing the application of the appellant the learned judge seems to have arrived at the conclusion he did on the ground (*a*) that inasmuch as the Supreme Court had not confirmed the sale of divided lots, it was not competent for the District Court to make the amendments desired and (*b*) that the matter in issue was set at rest by the case of *Mudalihamy vs Appuhamy* (36 N.L.R. 33). In that case the plaintiff took on mortgage an undivided 2/3rd share of two contiguous fields in October, 1927. In January, 1930, the defendant brought a partition action treating the two fields as one *corpus*. Final decree was entered in the action declaraing the plaintiff's mortgagor entitled to half share only of the fields and lot A was allotted to her. In January, 1931, the plaintiff put his bond in suit and purchased the undivided shares mortgaged to him at the sale in execution of his decree, obtaining a Fiscal's transfer dated January, 25th 1932. Prior to that date the defendant took out writ against the plaintiff's mortgagor for *pro rata* costs due to him and became the purchaser of lot A, obtaining Fiscal's transfer dated April 17th 1931, in his favour. It was held by Dalton, J. and Maartensz, A.J. that (in an action brought by the plaintiff for declaration of title to lot A) he was entitled to 2/3rd share of the lot. The plaintiff in this case, before he obtained the decree in the mortgage action, was fully aware that the land had been partitioned and that his mortgagor's interest at the time when he put the bond in suit was not an undivided 2/3rd share but only

an undivided half share in the lands. This fact to my mind is in itself sufficient to distinguish the case of *Mudalihamy vs Appuhamy* from the present case where the appellant purchased the undivided share of the respondent on the 14th October, 1939, at a time when their interests were undivided shares and about a year before decree was entered in the partition action. Moreover another distinction in the facts of the two cases arises from the fact that in the present case it is the mortgagors in the mortgage action who are disputing the right of the appellant, the purchaser at the sale, to take the interest allocated to them by the partition action, whereas in *Mudalihamy vs Appuhamy* it was a third party, namely, the plaintiff in the partition action, who was claiming the property in order to recover from the mortgagor her *pro rata* share of the costs in that action. For the reasons I have given I have come to the conclusion that *Mudalihamy vs Appuhamy* has no application and was wrongly applied by the learned judge to the facts of the present case.

The appellant both in this court and in the District Court has relied on the case of *Markar vs Siman* (1 Matara Cases 9). The facts in this case were as follows: A certain Don Siman was a party to the partition suit in respect of land on 3/4th of which a mortgage had been created in favour of the plaintiff. On the 8th June, 1888, it was adjudged that Don Siman was entitled to an undivided half of the said land and no more. In July, 1888, the plaintiff obtained a decree against Don Siman and under the writ in execution of the said decree purchased in September, 1888, an undivided 1/2 share of the land in question. Subsequent to this judicial sale the land was partitioned and on the 17th May, 1889, the court by its decree confirmed the apportionment of the western half of the said land as the said Don Siman's share. On the 11th July, 1892, the plaintiff obtained a Fiscal's transfer which purported to convey to him an undivided half share of the land in question, such being the nature of the share to which the judgment-debtor was at the time of the said action, entitled. In the course of the partition proceedings the defendant had recovered costs against the said Don Siman and in execution of the order for costs he took out writ and seized the half of the land which had been apportioned to his debtor, Don Siman. The plaintiff brought an action under section 247 of the Civil Procedure Code to establish his right to the western half of the land which the defendant had seized under his writ. The court constituted by Lawrie, A.C.J. and Withers, J. held that, by virtue of section 12 of the Partition Ordinance, the right of a mortgagee is conserved to him with the necessary qualifications attendant on the conversion of an undivided into a separate share. It is deemed to be incorporated with the bond and the owner of the allotted share is to warrant and make good to the mortgagee the said several parts after such partition as he was bound to do before. The plaintiff was, therefore, declared to be entitled, by virtue of the sale under his mortgage decree and the provision of section 12 of the Partition Ordinance and nothing having occurred to affect the rights of third parties, to the western half of the land

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in question. By way of further relief the court directed that the decree should be endorsed on the Fiscal's transfer. The learned District Judge distinguished the facts of this case from those in the Matara case on the following grounds :

(1) The Matara case deals with a Fiscal's sale and Fiscal's transfer.

(2) The question did not arise in that case as to whether a fraction of the entirety of the lands should be proceeded against.

(3) That case did not decide the particular point raised in this case.

(4) Whilst mortgagees are protected by section 12 of the Partition Ordinance, such protection does not extend to purchasers at sales.

In the present case the District Judge on the 9th November, 1938, issued a commission to one N. Kandiah to sell the 2/5th share of the land in question. A Commissioner's conveyance of the 2/5th share was executed in favour of the appellant on the 25th November, 1940. By virtue of section 289 of the Civil Procedure Code a Fiscal's sale subsequently confirmed vests the property in the purchaser from the time of sale and in this respect such a sale differs from a sale by commission. This difference, however, does not in my opinion affect the question at issue in the present case. The other reasons given by the learned judge for holding that *Markar vs Siman* (*supra*) had no bearing on the present case depend on the meaning to be given to section 12 of the Partition Ordinance. The position of a person who purchases in execution the undivided interests of a party pending partition proceedings, but obtains his Fiscal's conveyance after final decree is considered in Jayawardena on "The Law of Partition in Ceylon" on pp. 299-300. The learned author is of opinion that the purchaser is entitled to the share allotted to the judgment-debtor, but expresses doubt as to how the Fiscal's purchaser is to claim the divided lot on his conveyance for an undivided share. He also considers that, unless the Fiscal's conveyance can be altered to a conveyance for the divided block, the purchaser is in danger of losing his rights to an alienee from the execution-debtor. In the present case there is no question of an intervention by a third party claiming rights as an alienee of the execution-debtor. It is the execution-debtor who is setting up his own rights against those of the purchaser. Can the purchaser at a sale in execution occupy a worse position than a mortgagee ? In this connection it must be borne in mind that the mortgagee in *Markar vs Siman* (*supra*) was claiming rights as purchaser at the Fiscal's sale. In my opinion the facts in this case cannot be distinguished from those in *Markar vs Siman*. I am, therefore, of opinion that the appellant is entitled to the relief which he claims. The order of the Additional District Judge dated the 10th December, 1941, is set aside. It is further ordered that an endorsement be made on the Commissioner's conveyance dated the 25th November, 1940, substituting "Lots 4 and 5" in place of the words "an undivided 2/5th share of the land." The District Court is directed to deliver possession of the said lots to the appellant who is awarded costs in this court and the District Court.

SOERTSZ, J.

I agree.

Appeal allowed.

Present: SOERTSZ, J. & KEUNEMAN, J.

SELLAPPA CHETTIAR vs ARUMUGAM CHETTIAR

S. C. No. 60—*D. C. Colombo No.* 6188.
Argued on 9th & 10th September, 1942.
Decided on 7th October, 1942.

Civil Procedure Code—Sections 350, 352—*Money deposited in court—Concurrence—Can a judgment-creditor who has no writ in the hands of the Fiscal at the time of realization of assets claim concurrence—Amount in excess of the writ in hands of Fiscal—Who is entitled to.*

Held : (i) That a writ in the hands of the Fiscal at the instance of a particular judgment-creditor is a condition precedent to a claim by him for concurrence.

(ii) A competing creditor who has no claim to concurrence inasmuch as his writ was not in the hands of the Fiscal at the time of the realization of assets, is entitled to the sum in excess of the amount due on the writ in the hands of the Fiscal out of the sum deposited in court.

Cases referred to : *Konamalai vs Sivakulanthu & Sabapathipillai, claimant* (9 S.C.C. 203)
Mirando vs Kidura Mohamadu (7 N.L.R. 280)
Mendis vs Pieris (18 N.L.R. 310)
Raheem vs Yusoof Lebbe (6 N.L.R. 169)
Muttiah vs Abudalla (1 C.W.R. 180)
Letchiman vs Arunasalam Chetty (2 C.W.R. 130)
Sadayappa Chetty vs Siedle (2 Br. 3)
Meyappa Chetty vs Weerasooriya (19 N.L.R. 79)

N. Nadarajah, K. C., with *V. K. Kandaswamy*, for the 2nd respondent.

H. V. Perera, K. C., with *F. A. Tisseverasinghe*, for the substituted-plaintiff-applicant.

SOERTSZ, J.

In this appeal, we have to deal with a matter of some difficulty which raises once again the question of the correct interpretation of section 352 of the Civil Procedure Code. The material facts are as follows : The original plaintiff in this case sued the 1st defendant on the 20th of November, 1936. He obtained judgment on the 14th February, 1938. An appeal was taken on the 15th February, 1938. Early in October, 1938, the present petitioner-respondent sued the 1st defendant in this case and his brother Mona Mohamed as partners doing business as Buhari Bros. On the 7th of October, 1938 he obtained a mandate of sequestration. On the 21st of October, 1938 the 2nd defendant in that case No. 9165, that is to say Mona Mohamed who alone had signed the proxy given to the proctor purporting to act for Buhari Bros. consented to decree being entered against himself and Habub Mohamed who is 1st defendant in that case as well as in this, jointly and severally for a sum of Rs. 3095/- and interest and costs, and he also consented to the plaintiff in case No. 9165 "being declared entitled to the sum of Rs. 2233/– more or less lying to the credit of defendants with Messrs. Narottam &

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Pereira." On the 26th October, 1938 the plaintiff in case No. 9165 applied for writ. That application was allowed, but no writ was actually taken out.

In the meantime, the plaintiff in this case applied for execution of his writ on the 20th October, 1938. This application was allowed only in respect of the amount due on the claim and interest. Writ was issued on the 21st October, 1938, and the Fiscal made his report on the 24th October, 1938 to the effect that he had taken action under section 229 of the Civil Procedure Code. On being served with this notice, Messrs. Narottam & Pereira paid into the District Court a sum of Rs. 3688/15 on the 26th October, 1938, and a further sum of Rs. 91/42 on the 22nd November, 1938. In bringing these sums into court they said they represented amounts due by them to Buhari Bros.

The plaintiff-respondent claims that he is entitled to draw the entire amount decreed to him in case No. 9165 out of this sum under section 350 of the Civil Procedure Code or alternatively, that he is entitled to concurrence with the substituted-appellant under section 352. The substituted-appellant contests both these claims.

In these circumstances, two questions have been submitted to us for consideration and determination, namely—

(*a*) What are the rights of the two parties under section 352 of the Civil Procedure Code.

(*b*) If the plaintiff in D. C. 9165, that is the petitioner-respondent on this appeal, has no right to any part of this money under section 352 of the Civil Procedure Code, has he a preferent claim or any claim at all to the money under section 350 of the Civil Procedure Code ?

In regard to the first question we are fettered by the authority of a Collective Court. In the case of *Konamalai vs Sivakulanthu & Sabapathi-pillai, claimant* (9 S. C. C. 203) Burnside, C. J., Clarence, J and Dias, J. held on facts almost exactly the same as the material facts in this case, that no judgment-creditor who had no writ in the hands of the Fiscal at the time of the realization of the assets, is entitled to claim concurrence. It is difficult to follow the *ratio decidendi* in that case. Not one of the judges stated in express terms that a writ in the hands of the Fiscal at the instance of a particular judgment-creditor is a condition precedent to a claim by him for concurrence. But that was the effect of their judgments.

Section 352 appears to be susceptible of an interpretation more favourable to the respondent in this case as would appear from the judgments delivered by De Sampayo, J. in *Mirando vs Kidura Mohamadu* (7 N. L. R. 280) and in *Mendis vs Pieris* (18 N. L. R. 310). But the Collective Court judgment already referred to is binding upon us. It has been followed, as was pointed out by Layard, C. J. in his judgment in *Raheem vs Yusoof Lebbe* (6 N. L. R. 169) "for so many years." That was in 1902. It has been followed since then too, as pointed out by Shaw, A. C. J. in "numerous other cases", for instance in *Muttiah vs Abudalla* (1 C. W. R. 180); *Letchiman vs Arunasalam Chetty* (2 C. W. R. 130); *Sadayappa Chetty vs Siedle* (2 Br. 3) and as already observed by me, it was followed in *Mendis vs Pieris* and in

Meyappa Chetty vs Weerasooriya. In the case of *Mendis vs Pieris* (*supra*) Wood Renton, C. J. and Shaw, J., De Sampayo, J. taking a different view, followed *Konamalai vs Sivakulanthu* (*supra*) and allowed the appellant in the case they were considering the right to concurrence in regard to two writs of his, on the ground that, at the time of the realization of the assets, the Fiscal had in his hands those two writs, as well as the writ of the other party in that case. They refused to allow him concurrence in regard to a third writ he held on the ground that that writ was not in the hands of the Fiscal at that time. De Sampayo, J. was of opinion that the appellant in that case was entitled to concurrence in respect of all three writs. Again in the case of *Meyappa Chetty vs Weerasooriya* (19 N. L. R. 79) Shaw, A. C. J. and Ennis, J. followed *Konamalai vs Sivakulanthu* (*supra*). Shaw, A. C. J. observed as follows: "In *Mendis vs Peiris* following the decision in *Konamalai vs Sivakulanthu*, it was held that a creditor who had applied for execution after the proceeds of the execution had been paid into the Kachcheri is not entitled to share in the proceeds, and the reason given by the judges who constituted the majority of the court was that *such creditor had no writ in the hands of the Fiscal at the date of the sale.*" Ennis, J. in a separate judgment took the same view and both Shaw, A. C. J. and Ennis, J. were of opinion that "the object of the enactment contained in section 352 of the Code was clearly that stated in the judgment in *Konamalai vs Sivakulanthu* namely, to give the creditors who had been to the trouble of realizing the assets of the debtor an advantage over more dilatory creditors." (per Shaw, A. C. J. at p. 82). "The whole object of the section seems to me to be to give a creditor who has been vigilant a preference over other creditors who have been less vigilant" (per Ennis, J. at p. 86). De Sampayo, J. who was associated with Shaw, A. C. J. and Ennis J. in the case took a different view on the point raised in that case and in the course of his judgment referred to the Full Court case as follows : " The sheet anchor of the counsel for the respondent for this argument is *Konamalai vs Sivakulanthu* to which all the other cases cited are referable. That case is very difficult to understand.....My impression is that the learned judges who decided that case did not mean to construe section 352 of the Code when they made the observations now depended on. Indeed, there is hardly any reference to its terms, and certainly there is none to the numerous difficulties which surround that section and with which this court has since had from time to time to grapple." There can be no doubt as to the difficulties created by section 352. Shaw, J. has drawn attention to them in his judgments in both *Mendis vs Pieris* and *Meyappa Chetty vs Weerasooriya* and has pointed out the urgent need for amendment. That was over twenty-five years ago. But nothing has been done and there is no alternative open to us but to continue to grapple with section 352 in the way in which it has been grappled with ever since the judgments in *Konamalai vs Sivakulanthu* were delivered.

I would, therefore, hold that the respondent was not entitled to concurrence under section 352.

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The next question is in regard to the position of the petitioner-respondent under section 350 of the Civil Procedure Code. This is a much wider section than section 352 and deals with "money in court, whether realized in execution of a decree or not", and it appears to me that the petitioner-respondent is entitled to have his claim investigated under this section. That he did make a claim that he was entitled to the money in court to the exclusion of the present appellant appears from the proceedings of the 23rd November, 1938. He has also filed cross-objections on this appeal, in which he makes the same claim.

For the purpose of considering this claim the following facts are material. On the 14th February, 1938 decree was entered in favour of the present appellant for Rs. 2240/- with interest thereon at 9% per annum from the date of decree and for costs of suit. When the appellant asked for writ on the 20th October, his application was allowed *to the extent of the claim and interest only*. That amounted to Rs. 2240/- plus interest Rs. 128/60.

Although Messrs. Narottam & Pereira on the notice issued to them brought into court the sum of Rs. 3688/15 and Rs. 91/42, that is to say Rs. 3779/57 the only assets realized in virtue of the appellant's writ, must be taken to be Rs. 2368/60 for the recovery of which writ had been allowed. It seems to me that the appellant is entitled to the whole of that amount inasmuch as Messrs. Narottam & Pereira did not dispute the debt alleged to be due by them to the 1st defendant as they were entitled to do under section 230 of the Civil Procedure Code. The fact that in bringing the money into court they referred to the two sums as money due to Messrs. Buhari Bros. does not in my opinion, amount to showing cause within the meaning of section 230. The position, therefore, is, I think, what it would have been if Messrs. Narottam & Pereira had paid this sum of Rs. 2368/60 into the hands of the appellant himself.

In that view of the matter, the investigation under section 350 of the Code must be limited to the sum of Rs. 1410/97 which is the amount over and above the amount for which the appellant's application for writ was allowed.

In regard to that amount it represents less than half the amount due by Narottam & Pereira to Buhari Bros. The trial judge has found that Mona Mohamed was a partner of that firm. I see no reason for differing from that view. It follows that that sum is now in court as the amount left over after the appellant's writ had been satisfied to the extent to which it was limited by the orders of the judge and may fairly be regarded as Mona Mohamed's share of the money to which the plaintiff-respondent is entitled on the consent decree in case No. 9165.

I set aside the order of the District Judge and make order as stated above. Each party will bear his costs of appeal.

KEUNEMAN, J.

I agree.

Order set aside.

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

GUNASEKERE vs GUNASEKERE

S. C. No. 340—40 (*F*)—*Circuit D. C. Balapitiya No. B* 158

Argued on 11th November, 1941.

Decided on 26th November, 1941.

Joint and several obligations—Liability of co-obligors—Is each liable in solidum for the whole debt—Position of surety who has paid the whole debt—Subrogation—Promissory notes—Are they governed by English or Roman-Dutch law.

The plaintiff-respondent discharged a promissory note whereon he and the two defendants were jointly and severally liable. Thereafter the respondent, who had signed the note merely as an accommodating party, sued the two defendants for the sum paid on their behalf. The second defendant-appellant maintained that the respondent could only recover from each defendant one half of the amount paid in discharge of the promissory note.

Held : (i) That once a promissory note is discharged by payment the English Law ceases to apply. Any debt due by reason of such payment is governed by the Roman-Dutch Law.

(ii) That each of several co-obligors is only liable for his share of the contract (except in the case of co-partners) and not for the whole contract *in solidum*, unless the contrary has been stipulated.

(iii) That a surety who has discharged the whole debt may only enforce his own rights against the principal debtors unless he has procured a subrogation to the rights of the creditor.

Cases referred to : *Ramalingam vs Jones* (14 C.L.W. 89)
Panis Appuhamy vs Selenchi Appu (7 N.L.R. 16)

L. A. Rajapakse with *J. M. Jayamanne*, for the 2nd defendant-appellant.

M. T. de S. Amerasekere, K. C., with *R. N. Ilangakoon* for the plaintiff-respondent.

HOWARD, C. J.

This is an appeal by the 2nd defendant from a judgment of the Additional District Judge of Galle giving judgment for the plaintiff as claimed with costs. The action arose out of a promissory note dated the 16th December, 1937, whereby the two defendants and the respondent jointly and severally promised to pay to Messrs. R. M. P. L. P. R. Planiappa Chettiar a sum of Rs. 500/- and interest thereon at eighteen per centum per annum. On the 3rd November, 1939, the respondent paid an amount of Rs. 657/50 owing on the note which was discharged. In this action he claimed from the defendants the said sum of Rs. 657/50 which he maintained he had paid on their behalf. The claim of the respondent which was not contested by the 1st defendant, was based on the contention that he signed the promissory note for Rs. 500/– at the request of the defendants as an

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accommodating party without receiving any consideration. Moreover, he alleged that the Chettiar was not prepared to lend the money unless he also signed the note as a debtor. The 2nd defendant-appellant filed answer denying that the respondent was merely an accommodating party and signed the note without receiving consideration. On this point, which was a question of fact, the finding of the learned District Judge was in favour of the respondent. This finding has not been contested by counsel for the appellant in this court. The latter, however, maintains that the respondent could only recover from each defendant one half of the amount he had paid in discharge of the promissory note.

The first point that arises for consideration is whether the position as between the respondent and the defendants was governed by English or by Roman-Dutch law. Mr.Rajapakse contends that Roman-Dutch law applies, a contention not seriously challenged by Mr. Amerasekere. In my opinion the principle laid down by Soertsz, J. in *Ramalingam vs Jones* (14 C. L. W. 89) is applicable. The promissory note while it existed was governed by English law. When it was discharged by payment, it was swallowed up by such payment and lost its identity. Any debt due to the respondent by reason of his payment of the amount due on the promissory note is a new debt and is governed by the common or Roman-Dutch law. Both counsel have referred us to the law as stated in Walter Pereira's "Laws of Ceylon." At page 586 the following passage occurs:

> "In general, when any one enters into an obligation for one and the same thing to different persons, or, on the contrary, when different persons are jointly bound to another, each is only liable or entitled *pro rata* as debtor or creditor of the thing. However, an obligation may be entered into by which each party may be bound or entitled *in solidum*, when this is the object of the several parties, provided however that payment made to or by one of the parties frees all the others. This is entitled an obligation *in solidum*; and, according to the general rule, has no place, but when expressly stipulated, except in some few cases, as when the partners of any firm enter into any contract on account of their trade, or when several persons are charged with one and the same guardianship, or when several persons have conspired together, and are equally principals in the commission of some crime, and are thus equally liable in damages, or have contracted together a debt *in solidum*, and are each liable for the whole with respect to the creditor, though among themselves the debt is divisible."

Again on page 588 it is stated as follows :

> "Solidity must be stipulated in all contracts of whatever kind. As already observed, strictly speaking, it ought to be expressed. If it is not, when several persons have contracted an obligation in favour of another each is presumed to have contracted as to his own part."

A similar view of the law is also expressed in Maasdorp's "Institutes of Cape Law" Vol. III, p. 86 where the following passage occurs :

> "Whereas there are several co-obligors or co-obligees, the general rule of our law is that, unless otherwise expressly agreed upon, the liability of the co-obligors is joint merely, and not joint and several, whilst the rights of the co-obligees are held in common. In other words, each of several co-obligors (except in the case of co-partners) is only liable for his share of the contract, and not for the whole contract *in solidum*."

A similar statement of the law is also to be found in Evan's translation of Pothier on "Obligations," Vol. I, p. 147, where it is stated as follows :

> "Solidity may be stipulated in all contracts of whatever kind. But regularly, it ought to be expressed ; if it is not, when several persons have contracted an obligation in favour of another, each is presumed to have contracted as to his own part. And this is confirmed by Justinian in the Novel 99. The reason is that the interpretation of obligations is made in cases of doubt in favour of debtors, as has been shewn elsewhere. According to this principle, where an estate belonged to four proprietors, and three of them sold it *in solido*, and promised to procure a ratification by the fourth proprietor, it was adjudged that the fourth, by ratifying the sale, was not to be considered as having sold *in solido* with the others : for although the three had promised that he should accede to the contract of sale, it was not expressed that he should accede *in solido*.
>
> Nevertheless, there are certain cases in which solidity between several debtors of the same thing takes place, although it is not expressly stipulated.
>
> The first case is when partners in commerce contract some obligation, in respect of their joint concern."

The law as formulated by the authorities to which I have referred was considered by Layard, C. J. in *Panis Appuhamy vs Selenchi Appu* (7 N. L. R. 16), in which it was held that where two or more persons have joined in stipulating for the payment of a certain sum of money each is ordinarily liable to pay a quota of that money. It is only when the intention of the parties is clearly expressed, that each person shall severally pay the whole, that each person becomes bound *in solidum*. When two lessees covenant to pay a certain sum of money as rent and there are no words in the lease clearly showing that each lessee bound himself *in solidum* it was held that each lessee is not severally liable for the payment of the whole rent. From the concluding words of his judgment in *Ramalingam vs Jones* (*supra*) it is clear that Soertsz, J. took the same view of the law as expressed by Layard, C. J. in *Panis Appuhamy vs Selenchi Appu* (*supra*).

The question for consideration is, therefore, whether there is anything in the contractual relationship between the respondent on the one hand and the defendants on the other hand to take this case out of the ordinary rule creating a joint obligation, and by reason of such relationship creating an obligation *in solidum*. The respondent became liable on the promissory note without receiving consideration and was, so far as the defendants are concerned, in the position of a surety. The position of sureties with regard to recourse against the principal debtor after they have paid is formulated in Pothier, Vol. I, p. 277, as follows:

> "After the surety has paid, if he has procured a subrogation to the rights and actions of the creditor, he may exercise them against the debtor, as the creditor himself might have done : if he has neglected to acquire this subrogation, he has still in his own right an action against the principal debtor, to reimburse him what he has paid."

And again on p. 282 it is stated as follows :

> "The surety who demands from one of the principal debtors, for whom he has become surety, the whole of the debt which he has discharged, ought to cede to this debtor, not only his actions in his own right against the other debtors,

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but also the actions of the creditor to whom he may have procured a subrogation ; if the surety in paying the creditor has neglected to acquire this subrogation, and has thereby incapacitated himself from assigning it to the principal debtor from whom he demands the whole of the debt, this debtor may, on offering to reimburse him for his own part, obtain a liberation from the demand of the surety for the parts of the other principal debtors."

In this case the respondent in paying the Chettiar did not acquire subrogation of the latter's rights. In these circumstances he is only in a position to enforce his own rights against the defendants. There remains for consideration the question of the respondent's own rights. The nature of the obligation must be ascertained by reference to the circumstances in which he became a party to the bond. According to the evidence the defendants were jointly engaged in a 'bus business and the money was raised for the benefit of that business. In these circumstances I am of opinion that the implied obligation to repay the respondent the sum of money he had paid the Chettiar in discharge of the promissory note was on account of the defendants' trade. Moreover, apart from the fact that the defendants approached the respondent and requested him to become a party to the bond as partners in a business, he undertook at their request and without consideration the liability of each of them to pay the whole debt. In these circumstances a joint and several liability must be implied. Hence for the reasons I have given the defendants were liable for the whole obligation *in solidum* and on this ground the respondent is entitled to succeed in this action.

For the reasons I have given I have come to the conclusion that the judgment of the learned District Judge is right and the appeal must be dismissed with costs.

HEARNE, J.

I agree.

Appeal dismissed.

Present: SOERTSZ, J. & KEUNEMAN, J.

MURUTHAPPAH vs ZOWHAR

S. C. No. 10 (*F*)—*D. C. Colombo No.* 1418 *L.*

Argued on 8th September, 1942.

Decided on 16th September, 1942.

Building—Adjoining premises—Portion of 1st floor of one projecting over the ground floor of other—Sale in blocks as depicted in plan—Omission in plan to show projection—Blocks sold described with reference to plan—Ownership of such projection.

In a decree for sale certain premises depicted in a plan marked D1 and bearing assessment numbers were ordered to be sold in blocks. Two of the premises adjoining each other bore the assessment Nos. 212 & 216. D1 showed that a portion of the 1st floor of No. 212 projected over the ground floor of 216.

For the purpose of the sale a new plan P3 was made. It referred to the assessment numbers but did not show the said projection. At the sale separate blocks were sold as partitioned in P3 and plaintiff became purchaser of lot 216 and defendant the purchaser of lot 212.

In the conveyance to the plaintiff the block is described as the allotment of land presently bearing assessment No. 216 ; western boundary as premises bearing assessment No. 212 and extent as 2.21 perches, according to plan P3. In the conveyance to defendant, the block is described as premises bearing assessment No. 212 ; eastern boundary as lot 216 ; area as 3.46 perches according to plan P3.

Held : (i) That the plan P3 was an essential part of the description of the land purchased.

(ii) That plaintiff became the owner of everything above the portion of the ground floor depicted as No. 216 in plan P3 including the portion of the building projecting on it ; and the defendant is restricted to that only which is above the portion depicted as No. 212 in the same plan.

Cases referred to : *Mitchell vs Moseley* (1914–1 Ch. D. 438)
Laybourn vs Gridley (1892–2 Ch. D. 53 at 58)

H. V. Perera, K.C., with *N. K. Choksy* and *D. W. Fernando*, for the plaintiff-appellant.

N. E. Weerasooriya, K.C., with *A. E. R. Corea*, for the defendant-respondent.

KEUNEMAN, J.

In a decree for sale entered in D.C. Colombo No. 233 under Ordinance 10 of 1863 premises bearing numbers 212, 216, 220, 222 and 224 situated along Keyzer Street and 3rd Cross Street in the Pettah, Colombo, were ordered to be sold in blocks. The whole area was depicted in plan D1 No. 33, by H. C. Stotesbury, Licensed Surveyor. This plan showed both the ground floor and the first floor, and it is clear from the plan that a portion of the first floor of No. 212, projected over the ground floor of No. 216. In these proceedings this projection has been described as a room, used as a kitchen in connection with No. 212 and this is the portion now in dispute.

For the purposes of the sale, a new plan No. 1437 was made by P. B. Weerasinghe, Licensed Surveyor. This is the plan P3, and consists only of the ground floor plan. There is reference in this plan to the assessment numbers. In it the projection in dispute in the first floor of No. 212 is not depicted. According to the conditions of sale (*vide* P5 relating to No. 212 and P6 relating to No. 216), the separate blocks were sold as partitioned in P3, but the whole premises are referred to as depicted in D1.

At the sale plaintiff became the purchaser of Lot 216 and the defendant the purchaser of Lot 212 and the question in dispute is as regards the projection referred to.

In the conveyance to the plaintiff, marked P2, (certificate of title No. 38 of March 2nd 1937) the block is described as the allotment of land presently bearing assessment No. 216, the western boundary is given as premises bearing assessment No. 212 and the extent is 2.21 perches, according to the Partition Plan No. 1437 (P3 made by P.B. Weerasinghe). Certain

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other blocks purchased by the plaintiff are then described, and it is added that all these blocks are part of the whole premises of 9.80 perches described in the plan No. 33 (D1 made by H. C. Stotesbury).

In the conveyance to the defendant, the block is described as the premises bearing assessment No. 212, the eastern boundary is given as No. 216 and the area as 3.46 perches according to plan P3 and it is added that this block is part of the whole premises depicted in D1.

On examination of these deeds it is clear that defined areas depicted on plan P3 were conveyed. There is no question that the projection in question is immediately above the portion depicted as No. 216 in P3. " The grant of the land includes the surface and all that is *supra* — houses, trees, and the like — *cujus est solum ejus est usque ad caelum* — and all that is *infra*, *i.e.* mines, earth, clay, etc." (per Cozens-Harvey, M.R. in *Mitchell vs Moseley* (1914– 1 Ch. D. 438 at 450). No doubt, as the learned judge added, this only applies when you can find nothing to the contrary in the conveyance.

Can it be said that there is anything to the contrary in the conveyances in this case ? Counsel for the respondent argues that the reference to the premises as bearing assessment numbers 212 and 216 respectively, taken in conjunction with the description of the whole premises as being in accordance with plan D1 must be so regarded. But I think it is a very strong point in favour of the plaintiff that the actual conveyances of the particular blocks in question were made in accordance with plan P3, and in that plan the reference to the first floor is (I think, deliberately) omitted. The reference to the precise area further helps to confirm this opinion.

I think the plan P3 was " an essential part of the description, shewing the dimensions exactly, and indicating the area of the buildings on the ground floor ; there is nothing in any way to indicate what is above ; therefore, it is clear that what was above was intended to pass to the grantee of the land." (per North, J. in *Laybourn vs Gridley* (1892–2 Ch. D. 53 at 58).

This rule will operate in two directions. The purchaser of Lot 216 becomes the owner of everything above the portion of the ground floor depicted in P3 as No. 216 including the portion in dispute, and the purchaser of Lot No. 212 is restricted to that only which is above the portion depicted in P3 as No. 212.

There is a very strong similarity between the facts of the present case, and the facts in *Laybourn vs Gridley* (*supra*). That case was followed in *Mitchell vs Moseley* (*supra.*)

I think the dismissal of the plaintiff's action was wrong. I set aside the judgment of the District Judge and enter judgment for the plaintiff as prayed for, except as regards damages, which will be assessed at Rs. 5/– a month from the date of action until plaintiff is restored to possession. The plaintiff is entitled to costs in both courts.

SOERTSZ, J.

I agree.

Appeal allowed.

Present: MOSELEY, J. & JAYETILEKE, J.

THENUWARA vs THE COLOMBO MUNICIPAL COUNCIL

S. C. No. 44-*S*—*D. C.* (*Inty*) *Colombo No.* 3062.
Argued on 24th & 25th August, 1942.
Decided on 4th September, 1942.

Land Acquisition Ordinance section 44—*Acquisition of one room of a row of self contained rooms under one connected roof—Can the owner avail himself of the provisions of section* 44—*Effect of definition of street lines under section* 19 (4) *of the Housing and Town Improvement Ordinance so as to include land on which there are buildings at the time of such definition on the market value in the event of compulsory acquisition under the Land Acquisition Ordinance.*

Premises No. 528/8 out of a row of rooms numbered 528/5, 528/6, 528/11 and 528/8 was acquired under the Land Acquisition Ordinance. It was proved that the rooms were in a continuous line, with a verandah running the full length in front. The portion of the verandah in front of 528/11 has in some way become 528/7. Each of the five rooms is occupied by a different tenant. The common roof rests on a ridge plate, or beam, which runs the entire length of the building. That beam consists of several parts joined together without any relation to the partitions. The partitions had except in one case no inter-communication. Even in that case the door was not in use. It appeared from the evidence of some of the witnesses that not only was the rear portion originally one building but was also connected with the front portion and that the whole formed one residence.

Held : (i) That the five rooms were five separate houses and that the owner cannot under section 44 of the Land Acquisition Ordinance require that all the five rooms be acquired.

(ii) That in valuing the compensation to be paid for buildings lying within street lines defined under section 19 (4) of the Housing and Town Improvement Ordinance account must be taken of the restrictions on the use of the land resulting from the definition of such street lines.

Cases referred to : *Richards vs Swansea Improvement & Tramways Company* (1878–9 Ch. 425)
Harvie vs The South Devon Railway Company (32 L.T.R. 1)
Goodchild vs Romford Borough Council (56 T.L.R. 548)
Greswolde-Williams vs Newcastle-upon-Tyne Corporation (1927 W.N. 325)
Lord Robert Grosvenor vs The Hampstead Junction Railway Company (1 De Gex & Jones 466)
Regent's Canal & Dock Company vs London County Council (1912–1 Ch. 583)
Genders vs London County Council (1915–1 Ch. 1)
Newnham vs Gomis (35 N.L.R. 119)
Chairman, Municipal Council, Colombo vs Fonseka et al (38 N.L.R. 145)

H. V. Perera, K.C., with *N.K. Choksy, S. J. Kadirgamar* and *B. G. S. David*, for the plaintiff-appellant.

J. E. M. Obeyesekera, with *G. Thomas*, for the defendant-respondent.

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Moseley, J.

Thenuwara
vs
The Colombo
Municipal Council

MOSELEY, J.

This is an appeal by the Municipal Council of Colombo from an award of the District Court of Colombo determining the amount of compensation payable to the claimant-respondent in respect of certain land acquired by the appellant under the provisions of the Land Acquisition Ordinance (Chapter 203 of the Legislative Enactments).

The respondent was the owner of what is known as Lot 6 on Preliminary Plan No. A. 942. The eastern boundary of Lot 6 is Maradana Road ; the western is the "street line" which had been laid down in connection with the widening of Maradana Road. The respondent's property comprises premises bearing assessment Nos. 528, 528/1, 528/2, 528/3, 528/4, 530, 532, 534, all of which lay within the street line, 528/8, which the street line bisects, 528/7, 528/6, 528/5 and 528/11, all of which lie to the west of the street line. The premises which the Council sought to acquire comprised all those which lay within the street line and No. 528/8 which the line bisects. For those premises the Council offered by way of compensation the sum of Rs. 16,550/–. This sum includes the 10% on the market value, provision for the payment of which is made by section 38 of the Ordinance. The claimant, however, assessed the value of the premises within the street line at Rs. 19,422/– and in regard to lot 528/8 he alleged that it was part of a larger building, and invoked the aid of section 44 of the Ordinance which is as follows :

> 44. "The provisions of this Ordinance shall not be put in force for the purpose of acquiring a part only of any house, manufactory, or other building, if the owner desires that the whole of such house, manufactory, or building shall be so acquired."

He desired that the whole of that building be acquired, and assessed its value at Rs. 4,320/–. That is to say, for the entire property he claimed Rs. 23,742/–, and in addition the 10% above-mentioned.

The learned District Judge held that No. 528/8 together with the other premises lying without the street line must necessarily be regarded as one house (which I shall hereinafter refer to as "the rear portion") and awarded Rs. 17,943/75 (including 10% for compulsory acquisition) in respect of the portion already acquired, and assessed the value of the other buildings at Rs. 2,812/50. Since however the claimant was "willing to pay for and take back the land on which those buildings stand" the District Judge assessed its value at Rs. 1,031/25, and awarded in respect of the buildings Rs. 1,781/–. He held that the 10% for compulsory acquisition could not be claimed in respect of this sum. The total sum, therefore, awarded to the claimant was Rs. 19,724/75. Each party was ordered to pay its own costs.

The first question that arises in appeal is in regard to the applicability of section 44 of the Ordinance. Do the premises No. 528/8 constitute one house, or are they only a part of a house, *i.e.* of the rear portion ? This portion was described by the learned District Judge as a "set of outhouses lying under one common roof." This may well be an apt description. It

will be noted that the premises are five in number. Those numbered 528/5, 528/6, 528/11, and 528/8 would appear to have consisted each of one room, the rooms being in a continuous line, with a verandah running the full length in front. That portion of the verandah in front of 528/11 has in some way become 528/7. Each of the five is occupied by a different tenant. The common roof rests on a ridge plate, or beam, which runs the entire length of the building. That beam consists of several parts joined together without any relation to the partitions. There is evidence that in one of the partitions there is a door which is not, however, in use. Counsel for the respondent has stressed the opinion of witnesses that not only was the rear portion originally one building but was even connected with the front portion and that the whole formed one residence. That may have been so, but is that a matter which need be considered ? In *Richards vs Swansea Improvement & Tramways Company* (1878–9 Ch. 425) Brett, L.J., at page 434, said:

> " I cannot help feeling that the period of time to which alone you must look is the moment before the notice to treat is given ; and what you have to consider in all these cases is the state or nature of the premises to be dealt with at that moment, and that it does not signify when or how that state of the premises was brought about."

That was an action brought under the provisions of the Lands Clauses Consolidation Act (8 and 9 Vic. Chapter 18) section 92 of which corresponds closely with section 44 of our Chapter 203. Assuming that the date of the " notice to treat " corresponds with the date of acquisition here, it is clear to me that we need not consider the premises in the light of their original structural character or user. What is relevant is whether, from the point of view of structure and user they constitute one house or a number of houses. " You must have," continued Brett, .J., at page 435, " the premises so structurally made or placed that they may be one house,.....and secondly, you must have them enjoyed as one house, or held as one house."

Counsel for the appellant relied largely upon the case of *Harvie vs The South Devon Railway Company* (32 L.T.R. 1) in which the plaintiff was the lessee of two semi-detached villas under one continuous roof. The party wall between them was only carried up to the ceilings, so that there was a continuous space between the ceilings and the roof. There was no internal communication between the villas. The party wall was so ineffective that if one of the villas were to be pulled down, the other would become uninhabitable. The question was whether the two villas were one house within the meaning of section 92 of the Lands Clauses Consolidation Act (*supra*). The two villas were in fact held under separate leases, but that was a fact which Cairns, L.C. put altogether out of the case. " They were," he said, " separately occupied by separate families, they have separate hall doors, and they have no internal communication in the ordinary sense of the term, that is to say, no internal communication by which it is intended, or by which it is the practice that the inmates of one villa should pass into the other villa ; in point of fact, as regards all the parts of the villas which are occupied, namely, the ground and the first floors, there is no communication

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of any kind whatever between the two.....For all practical and real purposes the two villas appear to be .....two separate houses." The fact that the two houses could not be safely separated was held to be immaterial, and the defendant company, who had given notice to treat for a strip of the garden of one, were not compelled to take the two villas as constituting one house. With all respect to the learned District Judge, to whom the above-mentioned case was cited and who did not regard it as analogous, it seems to me that this decision, to put it no higher, provides a useful formula. In *Goodchild vs Romford Borough Council* (56 T.L.R. 548) the question for decision was whether an arcade consisting of thirty shops constituted a commercial building within the meaning of the Civil Defence Act, 1939. It was held that the arcade was not one building, but a number of buildings.

The Indian Act corresponding to our Land Acquisition Ordinance contains upon this point a provision that the court shall have regard to the question whether the land proposed to be taken is reasonably required for the full and unimpaired use of the house, manufactory or building. There is no such provision in the local Ordinance, but it seems to me that the Indian legislature had done no more than codify what is obviously a piece of sound common-sense.

Counsel for the claimant-respondent relied upon *Greswolde-Williams vs Newcastle-upon-Tyne Corporation* (1927 W.N. 325) in which the plaintiff was the owner of "Princes Buildings" which structure, from the architectural aspect of its exterior, appeared to form one whole. It was divided into thirteen or fourteen divisions or houses (using the term "houses" not in the sense of section 92 of the Lands Clauses Consolidation Act), by walls of the character properly and usually built as party walls to divide the properties of adjoining owners. In some cases a house had its own staircase, in other cases a common staircase gave access to the upper floors of more than one house. The defendant-corporation had given notice to treat for the acquisition of a piece of land numbered 130, and on this land stood the two western-most houses. In the case of these two houses access to the upper floors of No. 1 was only gained by means of the staircase in house No. 2. The plaintiff owned the whole building and was in possession of all the staircases and lavatories and rooms for purposes of management and for accommodation of porters. There was one system of water-supply for the whole building. There was inter-communication between all the ten eastern-most houses, but between those and the four western-most there was none. It was held that the corporation was bound to take the whole building. I need only say that the facts appear to me to be so different from those in the present case that the decision is of no avail to the respondent. The judgment, however, affirms the proposition that the factors to be taken into consideration are the structure and user. Again, the case of *Lord Robert Grosvenor vs The Hampstead Junction Railway Company* (1 De Gex & Jones 466) in which it was held that the land, which would ultimately be part of the garden

in front of one of a number of intended almshouses, formed part of a house, was decided upon the footing that the conveyance of "the house" would pass the open space in front, and that, in the words of Turner, L.J. "it was in vain to argue that these (*i.e.* the individual almshouses) can be considered as separate tenements." That this was so is clear when it is realized that there was a common centre part, which was to be a hall with proper offices attached, and the abstraction of one or more of the almshouses piecemeal might render the centre part out of all proportion to requirements. The case of *Regent's Canal & Dock Company vs London County Council* (1912–1 Ch. 583) was, if I understood counsel's argument aright, cited merely because it followed *Richards vs Swansea Improvement & Tramways Company* (*supra*) and affirmed the opinion of Brett, L.J. that a manufactory might be a house, or a building or might be more than one house or more than one building. This case does not seem to me to be of any more assistance to the case for the respondent than is *Genders vs London County Council* (1915–1 Ch. 1) where there was a special provision in the Act under consideration that where the Council took part of a property it was not entitled to interfere with the main structure of any house, building or manufactory.

Having considered all these authorities it seems to me that having regard to the structure and user of the premises in this case, and to the fact that without structural alterations the user as one house would be, to say the least, highly inconvenient, I find it difficult to avoid the conclusion that the rear portion consists of five separate houses. In these circumstances the appellant cannot be required to acquire any part of the rear portion other than No. 528/8.

The question then arises whether, in assessing the amount of compensation to which the claimant is entitled there should be taken into consideration the restrictions imposed by section 19 of the Housing and Town Improvement Ordinance (Chapter 199) in regard to erection and re-erection of buildings beyond any defined street line. The learned District Judge after consideration of the evidence of the Municipal Assessor that, owing to the fact that the property acquired was situated within the street lines, the rentals of those premises would have a tendency to decline, held that the court was concerned to value the premises at the date of acquisition and that there was no satisfactory ground upon which the actual rent received should not be regarded as the basis upon which the value should be capitalized. It was, I think, admitted that the actual rents received in respect of the whole of the premises acquired was Rs. 145/–. Three months rental was allowed, the parties acquiescing, on account of rates, taxes and repairs. The nett annual rent was thus found to be Rs. 1,305/– which, capitalized on the basis of 12½ years' purchase gave the capital value as Rs. 16,312/50. The Municipal Assessor, taking into consideration the existence of the street lines, assessed the rental which might be expected at Rs. 135/– which, making the allowance in respect of rates, taxes and repairs, gives a nett annual rental of Rs. 1,215/–. This figure, on the same basis, gives a capital value of Rs. 15,187/50.

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In *Newnham vs Gomis* (35 N.L.R. 119) it was held that in awarding compensation for land acquired in similar circumstances the depreciation in value caused by the laying down of the street lines might be taken into consideration. The land in question was not built upon, as was the case in *The Chairman, Municipal Council, Colombo vs Fonseka et al* (38 N.L.R. 145) which affirmed the principle. At the trial it was argued on behalf of the claimant that these authorities only concerned land which was not built upon, and the learned District Judge does not, in his judgment, refer to them. It is clear that the value of vacant land must necessarily depreciate when the area is curtailed by the definition of a street line which imposes a restriction upon building. I am quite unable to see that the same principle does not apply in the case of land upon which is erected a building which must, sooner or later, require repairs of a nature which would be prohibited by the section of the Housing and Town Improvement Ordinance to which I have referred. The extent to which the value of such land and buildings would be affected would vary according to the substantial nature and state of repair of such buildings. I think that the evidence of Mr. Orr, the Municipal Assessor, may safely be accepted on this point. In his opinion they were very old boutiques in very poor condition, at least fifty years old. No doubt he had this in mind when he gave his estimate of a fair rental as Rs. 135/- per month. In my view his estimate should be accepted. It follows that, in my opinion, the capital value of the buildings acquired is Rs. 15,187/50. That seems to me to be the market value mentioned in section 21 of the Ordinance. To this must be added the ten per centum of the market value mentioned in section 38, which brings the amount of compensation which I would award to Rs. 16,706/25. It will be noted that the sum offered by the appellant was Rs. 16,500/-. This sum was arrived at by deducting from the total the sum of Rs. 250/- in respect of about one perch of the land which forms part of No. 528/8 and which falls without the street line, since it was thought that the claimant might wish to retain it. The result of my findings is that the appeal is allowed with costs here and in the court below. The award of the District Court is set aside and the claimant is awarded Rs. 16,706/25, or, in the alternative, if he wishes to retain that part of No. 528/8 which lies without the street line, Rs. 16,431/25.

JAYETILEKE, J.

I entirely agree.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: MOSELEY, J. (President), KEUNEMAN, J. & DE KRETSER, J.

REX vs KOTALAWALA

S. C. No. 18—*M. C. Kurunegala No.* 69660—*3rd Midland Circuit* 1940
Application No. 30 *of* 1941.
Argued on 24th March, 1941.
Decided on 2nd April, 1941.

Court of Criminal Appeal—Evidence of bad character of accused—When relevant—Evidence of good character—What amounts to—Evidence Ordinance (Chapter 11) section 54—Scope of re-examination.

The prosecution led evidence of several incidents tending to show that there was ill-feeling between the deceased and the accused such as might provide the latter with a motive for intentionally harming the deceased. The deceased's father in cross-examination said that apart from the feeling of jealousy between the two he had " nothing to say against the accused." On being questioned further as to whether the accused was a well-behaved man the witness replied that he was a quarrelsome man who loses his temper in no time for trivial things.

Held : (i) That the 1st statement did not amount to evidence of good character as contemplated by section 54 of the Evidence Ordinance, as it was elicited in answer to a question directed to show the absence of motive and was therefore limited to that aspect of the case.

(ii) That the second statement was irrelevant and might well have had the effect of inclining the jury to the belief that the appellant was of a violent disposition and therefore not unlikely to have intentionally shot at the deceased.

(iii) That a re-examination by the prosecution was not proper merely because it was directed to matters referred to in cross-examination, unless such reference required explanation from the point of view of the case for the prosecution.

Cases referred to : *Arthur Thomas Ellis* (5 Cr. App. R. 41)
Rex vs Norton (1910–2 K.B. p. 500)
Ramesh Chandra Das vs Emperor (46 Cal. p. 895)
Harry Firth (26 Cr. App. R. 148)
Maxwell vs Director of Public Prosecutions (103 L.J. (K.B.) p. 502)

S. Mahadeva, for the accused-applicant.
E. H. T. Gunasekera, Crown Counsel, for the Crown.

MOSELEY, J. (President)

This matter came before the court by way of an application for leave to appeal on the facts. In our opinion it cannot be said that the verdict of the jury on the evidence before it was unreasonable. Nor is there any substance in the submission that there had been misdirection on a matter of

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fact. The appellant was, however, allowed to raise a point of law which had not been made a ground of appeal.

The appellant was convicted at the Kurunegala Assizes on 24th February, of the murder of the son of his employer. The latter was the manager of a boutique and both the deceased and the appellant were employed in the boutique, the deceased as a salesman, accused as a clerk. In the absence of the manager the accused was accustomed to take charge. There is evidence that accused and deceased were jealous of each other. Otherwise they appear to have been on friendly terms. In a box on the premises there was a shotgun. On the day of the incident, according to the evidence of the accused, he took the gun out of the box and asked the cook to load it. Shortly afterwards a report was heard and the deceased who was sitting at a table in the next room, separated from the accused by a screen of gunny bag, was shot. It is common ground that the gun was in the hands of the accused. The defence was that the gun went off by accident. The prosecution led evidence of several incidents tending to show that there was ill-feeling between deceased and appellant such as might provide the latter with a motive for intentionally harming the deceased. The latter's father, in cross-examination, said that, apart from the feeling of jealousy between the two he had nothing to say against the accused. This statement, which appears to us to be limited to the question of motive, apparently encouraged counsel for the defence to put a question as follows :

> Q. " Accused was a very well behaved man, doing his work well in the boutique ? "
>
> The answer was " He is a quarrelsome man who loses his temper in no time for very trivial things."

The examination of the witness continued as follows :

> " If anybody finds fault with him in any work he does he gets angry. I have seen it very often and I have warned him. There are two very important incidents which I know apart from the deceased. (Re-examined) This accused went to get some medicine from the dispenser at Dodangaslanda and when the dispenser asked him to wait for some time to give him the medicine the accused quarrelled with the dispenser and came away without taking the medicine."
>
> Counsel for accused : " I object to this as it is hearsay." Crown Counsel : " How did you come to know about it ?" Witness : " The accused told me about it. The accused came away merely because the dispenser asked him to wait till he got the medicine ready. The second incident happened in my presence. When a man from an estate came to buy some dry fish he found fault with the accused for overcharging. Accused abused the customer and after he left the boutique the accused said that if that man came to the boutique again he would hit him with a ruler. "

It is in regard to the admission of this evidence that objection is now taken on the ground, as provided by section 54 of the Evidence Ordinance (Cap. 11), that the fact that the accused has a bad character is irrelevant, unless evidence has been given that he has a good character. The explanation to section 55 makes it clear that the word "character" includes both reputation and disposition, and that, except as provided in section 54, "evidence may be given only of general reputation and general disposition,

and not of particular acts by which reputation or disposition were shown." The reason underlying this limitation is that whereas some inference may be drawn in favour of an accused person from a general reputation of good character, no presumption can be based on proof of isolated facts.

Counsel for the Crown submitted that evidence of good character had been led by the defence and relied upon the statement of the deceased's father that apart from the feeling of jealousy he had "nothing to say against the accused." As we have already observed it seems to us that the question which elicited that answer was directed to show the absence of motive in the appellant and that the answer obtained is limited to that aspect of the case. It is not clear how the evidence of the witness which immediately followed, and which is quoted above, was elicited. The reference to "two very important incidents" would seem to be in reply to a query as to the ability of the witness to furnish instances reflecting the quarrelsome nature of the appellant. Assuming that to be so counsel for the Crown argued that the re-examination which followed was proper since it was, he said, directed to matters referred to in cross-examination. This argument does not appeal to us. The reference by the witness to "two very important incidents" did not require explanation from the point of view of the case for the prosecution. The result of the re-examination was to crystallize in the minds of the jury a matter which counsel for the defence had wisely left in a shadowy form.

The position then seems to be that since evidence that the appellant had a good character had not been given, the evidence indicating that he had a bad character was not relevant. It matters not who was responsible for its introduction. In *Arthur Thomas Ellis* (5 Cr. App. R. 41) the court expressed the opinion that it is the duty of the judge not to wait for any objection from the prisoner's counsel, but to stop such questions himself, and if by mischance the question be put, it is equally the clear duty of the judge to direct the jury to disregard it and not let it influence their minds. The present case is in this respect not free from difficulty since in the first place, it could have been reasonably anticipated that the question put by counsel for the defence would receive an answer favourable to the appellant, and secondly the answer reached the jury in the language of the witness before it was interpreted to the judge. Even then the purport of the evidence appears to have escaped attention. Indeed it is only in this court and at the last minute that the point has been raised. Objection was raised at the trial, but only on the ground that the evidence as to one of the incidents was hearsay and the objection, being ill-founded, was not pressed.

There can be little doubt but that this evidence, particularly that in regard to the second incident, might well have the effect of inclining the jury to the belief that the appellant was of a violent disposition and therefore not unlikely to have intentionally shot at the deceased. The presiding judge might have told the jury to put the evidence out of their minds entirely. But as was observed in *Rex vs Norton* (1910–2 K.B. p. 500) and quoted

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in *Ramesh Chandra Das vs Emperor* (46 Cal. p. 895) "whatever directions be given to the jury, it is almost impossible for them to dismiss such evidence entirely from their minds."

No doubt, if the position had been realized and if counsel for the defence had applied for a fresh trial before another jury, it would have been the duty of the court to begin the trial again. This was laid down in so many words in *Harry Firth* (26 Cr. App. R. 148). In that case a statement prejudicial to the accused had been inadvertently made by a witness. Application for a fresh trial was refused and the accused was convicted, notwithstanding a strong warning from the judge that the objectionable evidence should be disregarded. It seemed to the Appeal Court " in a high degree dangerous to permit the trial to continue to its end where such an irregularity has occurred as that which there was inadvertently permitted. It is impossible to say at what conclusion the jury might have arrived if the irregularity had not occurred.....The question is not whether the risk involved in refusing another jury should have been accepted. The risk seems to us too great to have been taken..." In the case before us there was no application for, nor refusal to grant, a fresh trial. Nevertheless there is in our view a clear indication of the remedy which this court should apply in such a case.

In *Maxwell vs Director of Public Prosecutions* (103–L.J. (K.B.) p. 502) an accused person who had put his character in issue was asked whether he had been previously charged with a certain offence, a question which counsel for the prosecution was entitled, under the Criminal Evidence Act, 1898, to put to him, "subject to the consideration that the question asked him must be one which was relevant and admissible to the case of an ordinary witness." As was observed in the judgment of the House of Lords which proceeds as follows :

> " The effect of such a statement on the minds of a jury might be overwhelming, and it is impossible to say in this case that the reception of this evidence was not the deciding factor which made the jury give their verdict. It might well be that the fact....might have been the last ounce which turned the scale against him."

In the present case the jury had before them on the one hand a case of shooting which the prosecution asked them to say was intentional. On the other hand the defence put forward a case of accident. Evidence that the accused had a tendency towards violence might be the deciding factor in favour of the case of the prosecution.

The appeal must be allowed and the conviction quashed. In exercise of the powers conferred upon us by the proviso to section 5 (2) of the Court of Criminal Appeal Ordinance (No. 23 of 1938) we order a new trial.

New trial ordered.

Present: WIJEYEWARDENE, J.

PODIMAHATHMAYA & OTHERS vs HENDRICK APPUHAMY & OTHERS

S. C. No. 159—*C. R. Teldeniya No.* 10069

Argued on 28th October, 1942.

Decided on 13th November, 1942.

Prescription Ordinance (*chapter* 55) *section* 3 *proviso—Gift of property subject to life interest in donor's favour—When does prescription begin to run against the donee.*

The owner of a certain property gifted it, in 1928 to the plaintiffs' predecessor in title, reserving to himself a life interest. He died in 1932. The defendants claimed prescriptive title to a house on this property and the soil on which it stands on the ground that they built it in 1923 with the permission of the owner and continued to possess up to date.

Held : That prescription did not begin to run against the donee until the donor's death in 1932.

Cases referred to : *Geddes vs Vairavy* (1906–9 N. L. R. 126)
Kiri Menika vs Mirapettia (1842–Morgan's Digest 328) (1845–Austin's Reports 88)
Unga vs Tikiri Duraya (1858–3 Lorenz 101)
Stackpoole vs Stackpoole (1843–4 Drury & Warren 320)
Doe vs Moore (115 English Reports (King's Bench) 1387)

J. E. M. Obeyesekere, with *I. Misso*, for the plaintiffs-appellants.
L. A. Rajapakse, for the defendants-respondents.

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The plaintiffs filed this action against one Francina in February 1940 as an action for rent and ejectment. Later the plaintiffs filed an amended plaint in July, 1941 asking for a declaration of title to the house A on lot 2 shown in plan P1 and the plot of ground on which the house stood. Francina having died in the meantime, her husband Hendrick and children were substituted as defendants. They filed answer setting up prescriptive title.

One Philippu de Silva was admittedly the original owner of lot 1 and 2 in plan P1. He conveyed lot 1 by deed D2 of 1909 to his daughter Francina. He gifted lot 2 by deed P2 of 1928 to two other children Juwan and Carlina subject to a life interest in his favour. Philippu died in 1932. The plaintiffs are the heirs of Juwan who died in 1939. The Commissioner of Requests held that Hendrick and Francina and their children have been in possession of the house for 10 years after 1923 and have acquired prescriptive title.

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The evidence in support of the prescriptive title of the defendants is that of Hendrick the 1st substituted-defendant and his witness Karunaratne. Hendrick stated that as lot 1 was not suitable for erecting a building, his father-in-law, Philippu asked him to put up the thatched house A on lot 2. He said he got the permit D3 from the Government Agent in October 1923 and then built the house A and that he and his family have lived there up to date. He admitted however in cross-examination that up to the time of Philippu's death in 1932 he lived in that house " with Philippu's permission " and added that after Philippu's death he " possessed the thatched house " without any dispute up to Juwan's death in 1939 when Juwan's widow began to dispute his possession. He admitted further that there was no fence separating his compound from the rest of lot 2 where admittedly Juwan's family have lived for a long period in a tiled house. In re-examination he said " Philippu gave me the ground on which to build the house." No attempt was made in re-examination to explain his previous statement as to his occupation with Philippu's permission. The witness Karunaratne stated that Hendrick paid him for building but admitted that he built the house at the request of Hendrick, Juwan and Philippu and that Juwan himself used to bring materials for the house in the absence of Hendrick.

The plaintiff denied that Hendrick got the house built and led evidence to prove that Juwan put up the house A for his parents, who lived there at first before Francina and her husband were permitted to occupy it.

On this evidence the Commissioner of Requests has held in favour of the defendant on the ground that there was evidence of " possession for over 10 years by defendants unaccompanied by payments of rent or any acknowledgment of any others' rights. " It is difficult to ascertain from the judgment whether the Commissioner addressed his mind to the question whether Hendrick commenced his possession adversely to Philippu or with his permission and if such possession was permissive at the start, whether there was any evidence that Hendrick and his family made known to Philippu or Juwan that they were changing the character of their possession at any time ten years before the filing of the action.

The learned judge has not referred in his judgment to the admission of Hendrick that he lived in the house up to 1932 with Philippu's permission. In the absence of any explanation it is difficult to see how the defendants could be held to have acquired prescriptive title, as the action was filed within the ten years. The Commissioner himself seems to have been aware of the meagre nature of the evidence of possession but he misdirected himself when he said that " the evidence of both parties cannot be considered satisfactory, " and then proceeded to adjudicate on the question of prescriptive title. The question he had to decide was whether the defendants have led satisfactory evidence to prove prescriptive title. If that evidence is unsatisfactory the defendant must fail and it does not matter whether the evidence of the plaintiffs' possession is unsatisfactory, as the plaintiffs have documentary title to the property.

There is another difficulty in the way of the defendants setting up prescriptive title against the appellants. Even assuming that the defendants commenced their adverse possession from October, 1923, they had only five years' possession in 1928 when Philippu executed deed P2 reserving a life interest in his favour. Could they rely on that possession or on the adverse possession from 1928 till Philippu's death in 1932, in support of their prescriptive title? Juwan the predecessor in title of the plaintiffs "acquired a right of possession" only in 1932 and as the defendants had not acquired a prescriptive title before 1928, do they not require 10 years' adverse possession from 1932 in order to defeat the claim of the plaintiffs? The answers to these questions will depend on the construction of the proviso to section 3 of Ordinance No. 22 of 1871 which reads :

> "Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute."

This court considered the effect of that proviso in *Geddes vs Vairavy* (1906-9 N. L. R. 126). The facts of that case were briefly as follows : Ramalingam the admitted owner of the property mortgaged it with Geddes in 1875. The executors of the last will of Geddes purchased the property in 1884 in satisfaction of the mortgage decree. In terms of the last will of Geddes the property thereupon vested in his widow subject to a *fidei commissum* in favour of her children. The widow died in 1901. The defendant pleaded prescriptive title to the property against the children of Geddes on the ground of adverse possession from 1875. Wendt, J. and Wood Renton, J. rejected that plea and held that where a property was burdened with a *fidei commissum* a third party could not acquire title by prescription to such property against the *fidei commissarii* during the life time of the *fiduciarius* as prescription did not begin to run against the *fidei commissarii* until after the death of the *fiduciarius*. In the course of his judgment Wendt, J. said :

> "Appellants questioned the right of an owner against whom a person has held adversely for (say) nine years to render that adverse possession nugatory by creating *fidei commissum*, but we fail to see any injustice in upholding that right. *Ex hypothesi* the owner is full *dominus* until the completion of ten years. He may at once himself vindicate the land, or sell it outright and enable the purchaser to do so. Why then may he not alienate it by way of *fidei commissum*. And on what ground can the wrongful possessor complain that his attempt to steal the land has been frustrated ?"

There are some earlier decisions where this court considered the effect of the corresponding provision in Ordinance No. 8 of 1834 *vide Kiri Menika vs Mirapettia* (1842- Morgan's Digest 328); 1845 Austin's Reports 88 ; *Unga vs Tikiri Duraya* (1858–3 Lorenz 101). In all these cases it was held that prescription did not run against an heir pending the life interest of a Kandyan widow. In some at least of these cases however, the adverse possession appears to have commenced to run after the accrual of the life interest of the widow.

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After I reserved judgment my attention was drawn by counsel for the defendants to the following passage in Lightwood's "Time Limit on Actions":

> "An owner entitled to possession against whom the statute is already running, cannot, by settling the land, postpone the operation of the statute as to persons taking future interests under the settlement."

That statement of the law appears at first sight to be against the view taken in *Geddes vs Vairavy* (*supra*). The authorities on which that statement is based are *Stackpoole vs Stackpoole* (1843–4 Drury & Warren 320) and *Doe vs Moore* (115 English Reports (King's Bench) 1387). The decision in *Stackpoole vs Stackpoole* is not available to me. The latter case was a decision given with special reference to section 15 of the Real Property Limitation Act, 1833. That Act had the effect of abolishing the old doctrines of adverse possession and it laid down special rules for ascertaining in various cases the date of accrual of the right of action. Section 15 was enacted in order to give some relief in these cases where by the operation of these rules a possession which was not adverse before 1833 would have become adverse on the passing of the Act and that would have immediately deprived the owner of his right to the property. Section 15 provided for the suspension of the Act in such cases for a period of five years. I do not think that a decision construing such an enactment is of much assistance in interpreting our Ordinance.

According to the decision in *Geddes vs Vairavy* the defendants could not in any event acquire title by prescriptive possession as Philippu's title was not lost by the adverse possession of Francina and Hendrick when he executed the deed P2 in 1928 and as the defendants have not had 10 years possession after the death of Philippu in 1932.

At the hearing of the appeal before me the defendants' counsel urged that he would be entitled to claim compensation for improvements in respect of the house. According to the surveyor's report this house is a wattle and daub building with a thatched roof. I think it will be in the interests of the parties not to send the case back for the determination of this question but to take this claim into consideration and make an appropriate order as to costs.

I set aside the decree appealed against and direct that decree be entered—

(a) declaring the plaintiffs entitled to "the house and premises" referred to in clause (*a*) of the prayer in the amended plaint:

(b) restoring the plaintiffs to the possession of "the house and premises" referred to and the ejectment of the defendants therefrom:

(c) granting plaintiff half costs of appeal.

Neither the appellants nor the respondents will be entitled to costs so far incurred in the lower court.

Appeal allowed.

Present: MOSELEY, J. & KEUNEMAN, J.

THAMBIAH vs SATHASIVAM & ANOTHER

S. C. No. 26—*D. C.* (*F*) *Jaffna No.* 13897
Argued on 18th & 25th September, 1941.
Decided on 2nd October, 1941.

Charitable trust—Claim for recovery of property comprised in—Does claim for declaration that a person is trustee convert such action into one for an office or status—Section 111 (1) (*c*) *Trusts Ordinance* (*Chapter* 72)—*Prescription—Claim for a vesting order—Procedure "where it is uncertain in whom title to any trust property is vested"—section* 112 (1) (1)—*Does procedure laid down in section* 102 (1) (*b*) *apply—Is a vesting order necessary.*

Held : (i) That the fact that the plaintiff in an action for the recovery of property comprised in a charitable trust claimed a declaration that he is the trustee does not convert the action into one for an office or status. In substance the claim is *rei vindicatio*, and falls within the provisions of section 3 (i) (*c*) of the Trusts Ordinance.

(ii) That the claim for a vesting order is not a claim to an office or status and, if granted has only the effect of transferring legal title to the person named in the order. No question of prescription or limitation arises in connection with such a claim, but delay may be an element to be considered in connection with the granting thereof.

(iii) The procedure laid down in section 102 of the Trusts Ordinance does not apply to a claim for a vesting order where it is uncertain in whom the title to any trust property is vested. Such a claim may be asserted by a regular action.

(iv) A person who can establish that he is the trustee need not clothe himself with a vesting order before suing for the recovery of the trust property from a trespasser.

Cases referred to : *Sangto vs Paras Ram* (A. I. R. (1919) 203)
Muthu Kumaru vs Vaithy (12 C. L. W. 9)

H. V. Perera, K. C. with *N. Nadarajah*, and *C. J. Ranatunga* for the plaintiff-appellant.

N. E. Weerasooriya, K. C. with *H. W. Thambiah*, and *S. Kandasamy*, for the defendant-respondent.

KEUNEMAN, J.

This action was in respect of the temple known as Santhirasekera Vairavanather Sivan Kovil. The plaintiff alleged that the original founder was Poolagasingha Mudaliyar, who in the year 1830 erected further buildings and enlarged the temple fabric. The plaintiff further set out a pedigree, whereby he claimed that he was an heir of the said founder, and stated that he was the lawful hereditary trustee and manager of the temple and its temporalities. He stated that a cause of action had arisen for a declaration that he was the lawful trustee and manager, for protection of the temple and its temporalities, for an accounting from the defendant, for the ejectment of the defendant and for damages. As ancillary relief, the plaintiff claimed

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for himself a vesting order in regard to the temple and its temporalities, on the ground that it was not possible to ascertain the successors in title of the various properties which constituted the temporalities of the trust, and it was uncertain in whom the legal title thereto was vested. The plaintiff also claimed an injunction. The prayer of the plaint contained claims to relief in respect of the various matters I have mentioned.

At the trial certain preliminary issues were framed. The most important of which are as follows :

1. Is the cause of action prescribed.
2. Is an action available to plaintiff except under the provisions of section 102 of the Trusts Ordinance.
3. Can the plaintiff maintain this action without obtaining a vesting order.

I do not mention the other issues, which principally related to pleas of *res judicata* and estoppel. These have been correctly answered by the learned District Judge, and no comment is necessary.

As regards issue (1) the District Judge held that the plaintiff's action was in substance a claim to an office or a status, and that the further reliefs claimed were subservient to the claim for declaration of trusteeship, and that the fact that these reliefs were claimed did not convert the action to one to be quieted in possession of immovable property. The period of prescription, was three years, and as plaintiff's title to the office had been disputed from more than three years, the District Judge held that the claim was prescribed. He further held that section 111 of the Trusts Ordinance had no application to the present case.

In support of this contention, counsel for the respondent argued that in the present case, the defendant himself acknowledged the existence of the religious trust, and merely disputed the claim of the plaintiff to be declared trustee, setting up his own claim to the trusteeship as against this. I do not think that this fact alters the nature of the action, which is in substance a claim by a person alleging that he holds the legal title to property, as against one, who it is alleged, has neither a legal nor equitable title to the same. I do not think that the fact that the plaintiff claims a declaration that he is the trustee, converts this action into one for an office or status. It is common in a *rei vindicatio* action for the plaintiff to add a prayer that he be declared the owner, but in substance the claim is in vindication of the property.

On a careful examination of the plaint, I agree with the contention of the appellant's counsel, that two distinct elements are revealed. One relates to the temple and the temple premises, the other relates to the temporalities. As regards the temple and the temple premises, the plaintiff alleged that the title to these resided in the original founder who by his dedication of these to the temple, became a trustee. The plaintiff alleged that the legal title descended to him. The burden of proof rested on the plaintiff to establish these facts, but if he did establish them, I do not think that any plea of prescription could avail against him.

I think the language of the Trusts Ordinance is clear. Section 111 (1) (*c*) says that " in the case of any claim in the interests of any charitable trust, for the recovery of any property comprised in the trust, or for the assertion of title to such property, the claim shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance. "

There can be no question that the present action is " in the interests of a charitable trust, " and it must certainly be regarded as one for " the recovery of property comprised in the trust " or " for the assertion of title to such property, " or as containing both these elements.

I hold in this connection that the plea of prescription is not available to the defendant in respect of any property the legal title of which is proved to have resided in the alleged original founder, and to have subsequently descended to the plaintiff.

As regards the temporalities, the plaintiff has claimed a vesting order, on the ground that there is a doubt as to the person in whom the legal title is vested. This will apply to all those temporalities for which the original founder had no legal title. I do not think this claim can be based on any declaration that the plaintiff is a trustee of those temporalities. In fact the very claim for a vesting order negatives this. The matter will have to be decided upon evidence placed before the court, and I think the court will have a discretion either to grant or to refuse a vesting order. At the same time, if the plaintiff succeeds in proving that he is the trustee of the temple and the temple premises that will be one element which the District Judge may take into account.

Can a claim to a vesting order be prescribed ? It should be borne in mind that such a claim is not based on the assertion that the claimant is a trustee in that respect. Under section 112 (2) of the Trusts Ordinance a vesting order will have the same effect " as if the trustee or other person in whom the trust property was vested had executed a transfer to the effect intended by the order. " The claim for a vesting order is not then a claim to an office or status. The order only has the effect of transferring the legal title from any one in whom it may reside, to the person named in the order. I do not think that any question of prescription or limitation arises in connection with the claim to a vesting order, but delay may be an element to be considered, in connection with the granting of the vesting order.

As regards issue 2, it was argued for the respondent that section 112 of the Trusts Ordinance, while it gives the court the power to make a vesting order, does not provide any procedure for the purpose. It was further contended that, as section 102 provides a procedure for obtaining a vesting order in connection with a religious trust (*vide* section 102 (1) (*b*)), it was necessary that the procedure there laid down should be followed. Now it is true that section 102 gives the right to any five persons interested in the religious trust, provided the conditions of sub-section 3 have been complied with, to institute an action to obtain a decree " vesting any property in the trustees. " But this appears to presume that the trustees have already been

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ascertained, and I think it does not apply to the case " where it is uncertain in whom the title to any trust property is vested " (section 112 (1) (*a*)). Further section 112 applies to all classes of trusts, and not only to religious trusts. It is contained in a chapter headed " Miscellaneous. " I have not been able to find, nor has counsel been able to show me, any section, which lays down a procedure relating to vesting orders in connection with the ordinary trust as distinct from a religious trust. I do not think, where a power has been expressly given in the Ordinance we can deny to the parties requiring the exercise of that power some appropriate procedure. In this case, in earlier proceedings, it was held that a mere application to court was not the proper procedure, but that a regular action was needed. As there was no appeal from that order, for the purposes of this case, that particular point may be regarded as settled. I hold that the claim to a vesting order may be asserted by an action and that the present action is in order, so far as it relates to the claim for a vesting order.

This touches mainly the temporalities. The claim to the temple and the temple premises is based on the allegation that the plaintiff is the trustee, and the defendant a trespasser. I think it is clear that a person who is able to prove that he is the trustee, is entitled to bring an action *rei vindicatio* or for declaration of title in respect of the trust property against a trespasser. He is not required to resort to section 102, and in fact that section has no application to an action of that nature.

Counsel for the respondent referred us to the case of *Sangto vs Paras Ram* (A. I. R. (1919) 203). But that case has no application to the facts of the present case. In *Muthu Kumaru vs Vaithy* (12 C. L. W. 9) Moseley, J. refers to the point I have discussed but refrains from deciding it.

As regards issue 3, the short answer is that a person who can establish the fact that he is trustee, can sue for the recovery of trust property from a trespasser, and it is not a necessary requisite that he should have clothed himself with a vesting order before action was brought. Further a person who brings an action to obtain a vesting order, obviously cannot already have obtained that order before action.

For the reasons I have given, I am of opinion that issues 1, 2 and 3 must be decided in favour of the plaintiff. The appeal is allowed and the order dismissing the plaintiff's action is set aside, and the case is remitted to the District Court for due proceedings on such further issues as the District Judge may frame. The appellant is entitled to the costs of the appeal, and of the trial dates, on which the present proceedings were taken. All other costs are in the discretion of the District Judge.

MOSELEY, J.

I agree.

Appeal allowed.

Present: DE KRETSER, J.

MIRIHANA POLICE vs MARIKAR

S. C. No. 401—*M. C. Colombo No.* 37685.

Argued on 18th June, 1942.

Decided on 23rd June, 1942.

Defence (Coin and Currency Notes) Regulations—Regulations 3 (*c*)* *and* 6—*Penal Code section* 72.

Held : That where a trader acts honestly in refusing to accept currency notes because he considers them not good money, section 72 of the Penal Code applies and he commits no offence.

R. G. C. Pereira, for the appellant.

H. W. R. Weerasooriya, Crown Counsel, for the respondent.

DE KRETSER, J.

The magistrate accepted the case for the prosecution and, despite some difficulty in following his reasons for rejecting the defence, I think he was right in accepting the facts given by the prosecution. Those facts are that the accused is a very small trader ; that he was quite willing to sell two tins of cigarettes for Rs. 1/87 ; that he always accepts currency notes and displays no tendency to hoard silver coins ; that he might have refused to sell at all since cigarettes are not "controlled" ; that he was given as part of the payment three notes of 25 cents each and refused to accept two of them as they were damaged ; that no immediate protest was made nor was he requested to sell only one tin ; that the sale was one for cash and so was not complete.

He was fined Rs. 100/-, the magistrate indulging in some general remarks, quite proper and creditable in themselves but having no application to the facts of the present case.

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* Regulation 3.

No person shall —

(*a*) buy or sell or offer to buy or sell, for an amount other than its face value, any coin or note ; or

(*b*) accept or offer to accept, in payment of a debt or otherwise, any coin or note for an amount other than its face value ; or

(*c*) refuse to accept in payment of a debt or otherwise any coin or note ; or

(*d*) hold, keep, or retain in his possession or under his control coin to an amount in excess of his personal or business requirements for the time being.

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It is common knowledge that not only traders but ordinary folk fight shy of damaged notes ; there is an idea that they are no longer legal tender. The Magistrate refers to some clerk in the Kachcheri who refused to accept such notes when remitted by the court.

The regulation penalises a person who refuses to accept a note in payment of a debt or otherwise. The first question is whether there was a debt. There was none as the sale was not on credit. What would be the case if the customer tendered counterfeit coins or notes ? Clearly the seller could refuse to sell. What if he refused to accept any notes and insisted being paid in coin ? That would be the kind of thing the regulation was aimed at. Here he would not be refusing to sell but refusing to sell except for coin. " Otherwise " would cover such a case. If then damaged notes were in fact legal tender, it would cover the present case. But if the trader acted honestly in refusing to accept the notes because he considered them not good money, as this trader clearly did, then section 72 of the Penal Code applies and he has committed no offence.

In my opinion the accused is entitled to be acquitted on this ground alone.

I quite realize how dishonest traders might exploit this finding but each case must depend on its own facts and the legislature is always available.

Accused acquitted.

Present: MOSELEY, S.P.J. & DE KRETSER, J.

DUNUWEERA vs MUTTUWA & TWO OTHERS

S. C. No. 41 S/1942 (*Inty.*)—*D. C. Kandy No.* 5299 (*Testy.*)
Argued on 21st August, 1942.
Decided on 19th September, 1942.

Kandyan Law—Acquired property—Wife dying issueless leaving brothers and sisters—Deega *widower's rights.*

Held : (i) That under the Kandyan law a *deega* married widower succeeds to the acquired property of his deceased wife dying issueless as against her brothers and sisters.

(ii) That the fact that the property is acquired *before* marriage is immaterial. As regards immovable property there is no distinction between property acquired before and after marriage known to the Kandyan law.

Cases referred to : *Lebbe vs Banda* (31 N.L.R. 28)
Naideappu vs Palingarala (2 S.C.C. 176)
Kalu vs Lami (11 N.L.R. 222)
Tikiri Banda vs Appuhamy (18 N.L.R. 105)
Saduwa vs Siri (3 Bal. 18)
Dingirihamy vs Menika (2 C.L.R. 76)
Distinguished : *Seneviratne vs Halangoda* (24 N.L.R. 257)

N. E. Weerasooriya, K.C., with *S. R. Wijayatilake*, for the petitioner-appellant.

H. V. Perera, K.C., and M. T. de S. Ameresekera, K.C., with *R. N. Ilangakoon*, for the 3rd defendant-respondent.

DE KRETSER, J.

The deceased Kuda Ridee died in 1935 issueless, and her estate is being administered in this case by her husband, the petitioner. She also left two brothers and a sister, one of them being the 3rd defendant-respondent. When Kuda Ridee was five years old her father had gifted to her the lands numbered 1 to 5 in the inventory. He died in 1912 and she was married in 1922. The case was argued on the footing that the lands gifted to her were her acquired property. This is the correct position, in view of a number of decisions of this court, the latest of which is *Lebbe vs Banda* (31 N.L.R. 28). In that case it was sought to impress on the property gifted the quality it had before the gift of being *paraveni* property. Drieberg, J. said: " ....our courts have in questions of inheritance always regarded *paraveni* property as meaning ancestral property which has descended by inheritance, property derived by any other source of title or by any other means being regarded as acquired property."

Mr. Perera for the respondent limited the question in this case to one point, namely, whether the husband, where the marriage was in *deega* and where the wife died issueless, had any rights in property acquired by his

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wife before coverture, and he relied on the judgment of this court in *Seneviratne vs Halangoda* (24 N.L.R. 257).

The authority of Sawers has always stood high and there is repeated testimony to this fact in our law reports. I do not think, however, that it has been sufficiently realized that Sawers' *Memoranda* were not merely the work of a diligent scholar but were compiled under the express instructions of the Government. Anybody examining the archives will find that shortly after the British occupation, Sir Alexander Johnstone, Chief Justice, either undertook or was commissioned by the Council to collect the customary laws of the Island. Instructions were accordingly sent out to Government officials and it was in this way that the compilation known as the *Thesavalami* was discovered and the *Mohammedan Code of* 1806 compiled. Similar instructions had been sent out regarding the Kandyan law, and as a result D'Oyly made some notes, reference to which will be found in the "*Decisions of the Supreme Court*" collected by Pereira. Turnour, the Government Agent of Sabaragamuwa also collected some information which will be found in Modder's copy of Sawers' *Digest* published in 1921.

In Hayley's "*Sinhalese Laws & Customs*" will be found Sawers' official letter to the Chief Secretary, dated the 30th December, 1826. Armour, Secretary to the Judicial Commissioners' Court, attempted to carry on what Sawers began. Sawers was the Judicial Commissioner and took voluminous evidence before he compiled his *Memoranda*. His work bears evidence not only of his diligence and knowledge of the country but also of the methodical manner in which he approached his subject. His arrangement of subjects has not been recognized frequently.

At the argument section 31 was relied on by counsel for the appellant. In that section Sawers says that "the husband is heir to his wife's landed property, which at his demise go to his heirs." This is an unqualified statement and I see no reason why it should be qualified. It clearly applies only to property acquired during a marriage in *deega*, for in section 3 Sawers had already stated that a daughter married in *deega* loses her rights in the landed property of her parents, and in subsequent sections he had dealt with the daughter married in *binna*. Since the *deega* married daughter lost her rights to the *paraveni* lands, Sawers' statement must apply only to landed property which she had otherwise acquired. It is now too late to consider the question whether Sawers would not have said that ancestral property given by way of dowry or apportioned by a parent at a division of his property still retained the quality of *paraveni* land. Nowhere has either Sawers or Armour dealt with that specific question.

The statement in section 31 that the property will at the husband's demise go to his heirs need not necessarily mean that he had only an estate for life. Sawers was dealing with the question of inheritance and there would be nothing to inherit if the husband dealt with the property. Probably he is here indicating what happens to the property at the husband's death,

making it clear that the property goes to the husband's heirs and not to the heirs of the wife. There is however, one instance in which the voice of the dead wife speaks and that is where the husband contracts a second marriage. We are not, however, concerned with the case where issue was left.

In section 31 Sawers makes no distinction between property acquired before coverture and property acquired during coverture. It was rather assumed during the argument that he had no such distinction before his mind at any time. I doubt if this is correct, for when he comes to deal with *Succession to Movable Property* (in the next chapter) he clearly makes the distinction in section 7 movable property received by the wife from her parents reverts to her family when she dies without issue, " but the husband inherits all the property acquired during the coverture, but that only." Seeing that Sawers makes that distinction so emphatically, it seems hardly likely that he would not have made a similar distinction regarding immovable property, if such a distinction existed. In this section (7) he assumes that before marriage a woman would acquire property only from her parents. He uses the words " all the property," and unless one bears in mind that the chapter deals with movables one might be inclined to apply it to immovables also.

Section 31 of chapter 1 came up for consideration so far back as 1879 in the case of *Naideappu vs Palingarala* (2 S.C.C. 176). There the property in question was property acquired after the marriage, but there is nothing in the judgments of the court to indicate that it was limiting its judgment to that class of property only. The passage in Sawers is referred to and Armour is invoked in a passage where he speaks of " goods."

A decision in *Austin's Reports* was also considered. The court did not note that Sawers was dealing separately with movable and immovable property. Dias, J. arrived at the conclusion that on a careful review of all the authorities a *deega* husband was heir to the acquired property of his deceased wife. Cayley, C.J. was doubtful as to what Armour meant by the word " goods " but in view of the fact that Armour had left untouched the question of the devolution of land he was inclined to think that the word " goods " included property of all kinds.

Another possible explanation, of course is that Armour did not sort out his notes as carefully as Sawers had done. But in fact Armour did deal with the devolution of land. In Sinhalese there would be no confusion between the words for movable and for immovable property. In the copy of *Armour's Grammar* which is in the Judges' Library, Armour himself gives the words. It is also difficult to believe that a person having a knowledge of the English language, as Armour doubtless had, would use the word " goods " to describe immovable property.

In the case reported in *Austin's Reports* (–.66) the District Judge had relied on the passage in Sawers at page 16 (*i.e.* section 7 of chapter 3 of *Modder's Edition*) and quite clearly had failed to realize that that passage

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applied to movable property. Cayley, C.J. saw no reason why there should be a different principle governing the two types of acquired property.

In the edition I referred to, Armour quotes within inverted commas (at p. 26) Sawers' statement that " a wife dying intestate leaving a husband and children, her peculiar property of all descriptions goes to her children and not to her husband." As I have already stated, this passage applied only to movable property. Sawers' use of the word " peculiar " is striking. Lower down on the same page Armour refers to landed property. Dealing with " goods " received from her parents as dowry he states that this " will remain to her husband, and her brother will have no right to the said goods." The brother would have no right also to the goods acquired during her *deega* coverture on the ground of a bequest from his sister. But if the deceased wife's mother survived, she would be entitled to all the property that belonged by right of inheritance and as dowry to the deceased daughter, the husband being limited to the property acquired during the coverture. Even, therefore, if we accept the authority of Armour, we must accept the interpretation either that " goods " included landed property or that it did not. If it did, he expressly states that the goods received from her parents will remain to the husband to the exclusion of her brother. In this case, therefore, where no parent survives, the husband would be entitled to the property. If the expression " goods " did not include landed property, then the statement in Sawers remains uncontradicted.

In the case of the widow surviving, it has been held that she is entitled to a life interest in her husband's property. In *Kalu vs Lami* (11 N.L.R. 222) decided in 1905, it was sought to limit her right to property acquired during coverture. This contention was repelled and has not been raised since. In *Tikiri Banda vs Appuhamy* (18 N.L.R. 105) where the *deega* married wife died leaving her husband and children, the husband claimed a life interest. A Bench of three judges held that he was entitled to what he claimed, this conclusion being arrived at on different grounds. In that case the property had been acquired during coverture : Pereira, J. mentions the fact. He referred to *Naideappu vs Palingarala* (*supra*) and confined that ruling to the case of a wife dying without issue, quoting without disapproval *Modder's Art.* 204 to the effect that a *deega* married widower succeeds to all the acquired property of his wife dying intestate and without issue in preference to her brothers and sisters. He followed a recent decision *Saduma vs Siri* (3 Bal. 18) giving the husband a life interest where there was issue. He drew no distinction between property acquired before and after coverture. Shaw, J. thought that some operation should be given to the paragraph in Sawers cited before them and that the recent decision was equitable. De Sampayo, A.J. did not think the reasoning in *Naideappu vs Palingarala* was restricted to the case of a wife dying without issue nor that it was an authority for the proposition that the husband was not entitled even to a life interest. He thought it possible that Sawers (at p. 8) meant to give the husband a life interest where there were children of the marriage,

for the had stated that on the death of the husband the property would go to his son by his deceased wife. *Naideappu vs Palingarala* still retained its authority in the case of a wife dying without issue.

In 1922 came the case of *Seneviratne vs Halangoda* (24 N.L.R. 257) in which Garvin, A.J. wrote the judgment. The case had come up before this court previously (*vide* 22 N.L.R. 472). It appeared that the wife, notwithstanding her *deega* marriage, had maintained such a connection with her *mulgedera* as to have preserved or regained her *binna* rights. The court held that nevertheless the husband did not cease to be a *deega* married husband. De Sampayo, A.J. said that if he were so it must be conceded that he would inherit from his wife, but in view of the ruling in *Tikiri Banda vs Appuhamy* (*supra*) it was thought desirable to send the case back for further proceedings. When the case came before this court the second time, the question for determination was stated by Garvin, A.J. to be whether the husband was the heir at law to his wife's landed property acquired before marriage when she died without issue, having been married in *deega*. That is the question now before us, and we would naturally wish to follow the decision in *Seneviratne vs Halangoda* if possible. But in that case the property had been given by way of dowry about six weeks before marriage and the fact that it was dowry was the deciding factor evidently. On the first appeal the case was sent back apparently to ascertain to what extent, if any, the husband's right was limited. If the court thought he would have no right since the property had been acquired before marriage then it was unnecessary to send the case back. It emerges, therefore, that the distinction between property acquired before and after marriage was either not urged at all before the court or, if it was, it was not recognized.

The reasoning of Garvin, A.J. is not easy to follow in parts. In particular, he often appears to treat the wife's *paraveni* lands and her acquired lands on the same footing. He does not seem to have recognized any arrangement of subjects by Sawers. He quotes Sawers' two paragraphs further on (section 33) and draws the conclusion that the wife's heir to her landed property is her son. But Sawers had just previously stated that the the husband was the heir to her landed property, clearly meaning — as I have shown earlier — her *acquired property*. It is hardly likely that he would contradict himself so soon after. He was dealing with specific cases on which he had taken evidence, just as Armour was later. Having dealt with rights of husband and wife to inherit from each other, he next turns to the question of inheritance by parents from children.

Sawers then goes on to deal with the case of a mother inheriting from her children (section 32). He first takes the case of the husband's *paraveni* property and says that the mother inherits such property from her children stating what would happen if she died intestate. Presumably the mother inherits such property from her children if they died without issue. He had previously stated that inherited or *paraveni* property would go to a deceased person's children, and one cannot suppose that in the case

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of married sons and daughters who had children those children would be excluded by the brothers and sisters of a deceased son or daughter. Having then dealt with the case of a surviving mother, he goes on to deal with the case of a surviving father, starting with the premise that the son had already inherited his mother's property and died without issue. Such property would be the mother's *paraveni* property, her " peculiar property " to use Sawers' own words as regards movable property. In such a case, says Sawers, the father would have only a life interest.

There is, therefore, no conflict between sections 31 and 33, and when in section 33 Sawers gives only a life interest, using that very expression, he must be understood to mean in section 31 that the husband had absolute title to his wife's landed property. The expression " heir to " clearly had a definite meaning for him, as is evident from section 32 where the mother is giving absolute title to her children's property inherited from their father.

I do not think the next conclusion reached by Garvin, A.J. from a passage in Sawers dealing with the case of a person dying childless leaving parents and brothers is sound. In that case no surviving wife or husband is mentioned. The rule merely lays down what would happen should a person leave neither spouse nor children but only parents and brothers. Garvin, A.J. then turns to Armour (p. 29 which would be p. 26 in the copy I am using) and quotes two instances given by Armour, neither of which has any application to the case now before us. Armour takes for his premise that the married woman left no near relatives and in such a case gives the husband a right or reversion to her estate, adding that that would include even her *paraveni* or ancestral lands. Garvin, A.J. thought there was no question that Armour was dealing with the landed estate of the married woman but in my humble opinion there does exist a very real question and it seems to me clear that Armour was dealing only with movable property.

According to Modder, in his *Introduction to his work on Kandyan law*, Armour's contributions were published in 1842 in a paper called the *Ceylon Miscellany*. It was therefore put into print, and it will be noted that there is a line drawn across the top of the page (26) indicating presumably that Armour was now passing on to a different subject. He begins the new chapter (if I may so call it) with the quotation from Sawers relating to movable property. That movable property, if it is her " peculiar property " goes first to her children, and it is only when there are no other near relatives of hers that it goes to her husband. It appears to have struck Armour at this point that the same rule applied to her *paraveni* lands.

Earlier at page 18 Armour had dealt with the case of the man dying intestate and had said that his widow and children were his immediate heirs, adding within brackets " to the movable property." He then dealt in a separate section with the man's landed property. Passing now (at page 26) to the case of the woman dying intestate he again starts with the movable property.

Turning next to a consideration of the case law Garvin, A.J. seems to have experienced needless difficulty regarding the case of *Dingirihamy vs Menika* (2 C.L.R. 76). Whether the marriage was in *binna* or *deega* the husband would not have any rights in the *paraveni* lands of his deceased wife. I do not propose to examine his remarks with regard to other cases.

The conclusion reached by Garvin, A.J. was that the landed property in the case he was dealing with was in the nature of dowry that it was not property acquired during coverture and did not fall within the class of property which, according to Armour, a husband takes. He has taken Armour's statement at page 26 that the surviving mother was entitled to such property as her daughter had obtained as dowry. In *Seneviratne vs Halangoda* it was the mother who contested the husband's claim. Interpreting as he did the passage in Armour to refer to landed property he had authority for the conclusion he arrived at.

But the facts of the present case are different. There is no surviving mother and the property is not in the nature of dowry. Without disturbing, therefore, the authority of *Seneviratne vs Halangoda* one is free to arrive at an independent conclusion in this case. I see no reason for drawing any distinction between property acquired before and property acquired after coverture. No such distinction is allowed with regard to a wife and I cannot see why it should be allowed with regard to a husband.

As regards landed property the only distinction known to Kandyan law was between *paraveni* and acquired property. Decisions of this court have grouped under the head of acquired property even ancestral property which came by way of gift. As regards movable property the Kandyan law recognized a distinction between property acquired before and after coverture but even then the husband inherited where there was no issue. I see no reason why a different principle should apply to landed property and find no difficulty in holding that where there is no issue the surviving husband is entitled to his wife's acquired property.

The judgment of the lower court is set aside and the case will go back for the District Judge to proceed on the conclusion just stated. The appellant is entitled to his costs in both courts.

MOSELEY, S.P.J.

I agree.

Appeal allowed.

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

SETHA vs MUTTUWA & OTHERS

On an Application for Conditional Leave to Appeal to His Majesty in Council

S. C. No. 41—*D. C. Kandy No.* 5299

Argued on 23rd October, 1942.

Decided on 2nd November, 1942.

Privy Council—Application for leave to appeal—Rule 1 *of the rules in the schedule to the Appeals (Privy Council) Ordinance.*

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

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

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

Cases referred to : *Seneviratne vs Halangoda* (24 N.L.R. 257)
Appuhamy vs Corea (1900–1 Br. p. 165)
De Alwis vs Appuhamy (30 N.L.R. 421)
Allan vs Pratt (13 A.C. 780)
Bandara vs Bandara (Cur. L.R. p. 51)

H. V. Perera, K.C. with *N. Nadarajah, K.C.* and *E. B. Wickramanayake,* for the applicant.

N. K. Choksy with *S. R. Wijayatilake,* for the respondent.

SOERTSZ, J.

This is an application for conditional leave to appeal to His Majesty in Council, from a judgment of two judges of this court. The application purports, in the first instance, to be made as of right under rule 1 (*a*) of the Privy Council Appeal Ordinance on the footing that "the matter in dispute on the appeal" is over Rs. 5,000/– in value ; or alternatively, under rule 1 (*b*) "at the discretion of the court," on the ground that "the matter involved in the appeal is of great general importance for the reasons stated in paragraphs 4 (*a*), (*b*) and (*c*) of the petition to which I shall presently refer.

This application is made by the 3rd respondent in D.C. Kandy No. 5299 (Testamentary). The 1st and 2nd respondents to those proceedings are his brother and sister respectively. The petitioner in those proceedings is their brother-in-law the husband of one Kuda Ridee, sister of the three respondents, who died intestate leaving an estate valued in the inventory at Rs. 4,245/–.

There was a contest in the court below which raised the question whether Kuda Ridee's heirs were her two brothers and her sister or whether her *deega* married husband was her sole heir. The trial judge found in favour of the brothers and the sister, relying on the authority of the judgment in the case of *Seneviratne vs Halangoda* (24 N.L.R. 257). On appeal, the judgment of the trial judge was reversed, and the husband was declared to be heir. It is from this order that conditional leave to appeal is sought.

The application is resisted by the husband on two grounds — Firstly, on the ground that there is no *right* of appeal inasmuch as the property involved in the case is not worth Rs. 5,000/- or, alternatively, inasmuch as the applicant's share of the property, if he is entitled to a share, is not worth Rs. 5,000/-. Secondly, on the ground that, so far as we are asked to exercise our *discretion*, under rule 1 (*b*), that the matter in dispute is not of great general importance, nor of public importance, nor otherwise a matter calling for the exercise of that discretion.

In regard to the first objection, the value put upon the estate in the inventory is as already pointed out, Rs. 4,245/-. Counsel relies on the old case of *Appuhamy vs Corea* (1900–1 Br. p. 165) in which the plaintiff was held to the value he had put upon the property in his plaint and was refused leave to appeal to the Privy Council because that value was under Rs. 5,000/-. A request for a revaluation was refused largely for the reason that on the plaintiff's own showing, he had deliberately undervalued the property and had so avoided payment of the proper stamp duty. But as pointed out by Lyall-Grant, J. in the case of *De Alwis vs Appuhamy* (30 N.L.R. 421), " the established principle appears to be that where there has been no fraud on the part of the appellant and where he has not consented to a lower valuation for the purpose of obtaining some advantage, he should be allowed to prove the value of his claim, and that where the value has appreciated since the date when action was first taken, he should be allowed to prove the value at the time of appeal."

The present case falls clearly within that principle. There is no indication whatever of a fraudulent undervaluation. It was a valuation put upon the estate not by the applicant, but by his brother-in-law who now opposes this application and the applicant's case is that the properties have appreciated in value since that date. We are satisfied upon the material before us that the whole estate is presently worth Rs. 10,000/- a fact not seriously disputed.

But, the question still remains whether for the purpose of determining the applicant's right of appeal the total value of the estate or the value of the share the applicant would be entitled to, is the relevant value. In regard to this question the applicant's brother and sister do not associate themselves with the applicant in this application. Indeed, it was conceded that they are content with the order made on appeal, and it is difficult to see how the applicant can claim that the value of their shares too should be taken into account in valuing the matter in dispute on the appeal. What would the

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position have been, for instance, if from the outset the applicant's brother and sister had supported the case of their brother-in-law that he was the lawful heir ? Would the applicant have been able, in that event too, to ask that the value of their shares be reckoned ? It seems to me that the principle enunciated by Lord Selbourne in *Allan vs Pratt* (13 A.C. 780), governs the question ; that principle is " that the judgment is to be looked at as it affects the interests of the *party who is prejudiced by it and who seeks to relieve himself of it by appeal.*" That was the principle by which this court guided itself in *Bandara vs Bandara* (Cur. L.R. p. 51), to cite one case. Looked at in this way, I do not think it can be said that the matter in dispute, on the proposed appeal, is any more than one-third of ten thousand rupees.

The applicant, therefore, has no *right* of appeal.

The next question is whether this is a case which is properly within rule 1 (*b*) and as such one in which we ought to exercise our discretion and grant the applicant leave.

The ground upon which we are asked to exercise our discretion are stated in paragraphs 4 (*a*), (*b*) and (*c*) of the petition. The gist of those averments is that the judgment given in this case rules that a *deega* married widower is the sole heir of his childless wife so far as immovable property acquired before coverture is concerned ; and that he excludes the wife's next of kin, whereas a different view was taken in the case of *Seneviratne vs Halangoda* (24 N.L.R. 257). It is also said that a committee appointed in recent times to report on Kandyan Law and Custom adopted the rule in this latter decision as having correctly laid down the law on the point. The result of the conflict, it is urged would be to leave the law on this question in an unsettled and unsatisfactory state.

But there are, in our reports, conflicting decisions on several other questions and if that were sufficient reason for granting leave our reports would afford precedents. But I can find none. Leave could be properly sought and would properly be given only if the matter in dispute is of great general importance, or of public importance, or is otherwise of an equally substantial character.

I do not think it can be said that the question in this case falls within the condition of great general importance or of public importance. The most that can be said in regard to it is that it concerns a question of intestate succession arising in Kandyan law in certain circumstances that are more of uncommon than common occurrence. Nor, is it otherwise, a matter of such a substantial character as would justify us to give leave. We ought to be careful not to attempt too lightly to add to the onerous duties of the Judicial Committee, or similarly interfere with the ordinary right of a successful litigant in a case of this value, not to be vexed any further.

It seems to me that the latter part of the opinion of Lord Selbourne in *Allan vs Pratt* (*supra*) applies to this branch of the question. He said : " Of course their Lordships will not at present go into the merits of the case at all and they will assume that there may be such a question and that it may be

important; but the present question is whether this appeal being incompeten they ought to give under the circumstances of the case, an opportunity of asking for special leave to appeal. No doubt there may be cases in which the importance of the *general* question of law involved may induce their Lordships to give leave to appeal, though the value of the matter in dispute is not sufficient; but their Lordships must be governed in the exercise of that discretion by a consideration of all the circumstances of each particular case." Their Lordships then went on to point out that in the case before them the respondent did not appear to be a man who could comfortably bear the expense of such a proceeding, even if he contrived to be represented at the hearing. The same can, I think, be fairly said of the respondent to this application. If however, he decided not to incur the necessary expenditure and failed to be represented at the hearing, their Lordships would not have the fullest assistance in a matter that, after all, arises under a foreign or, at least, an unfamiliar law, and as observed by Lord Selbourne, such assistance their Lordships "must necessarily desire." Moreover, if as the applicant's counsel stated at the Bar, cases have already been instituted in view of the ruling given in this case, a proper opportunity is likely to arise for this question to be reagitated and if necessary, decided by a Full or Divisional Bench or, may be, even by the Privy Council.

I would for these reasons, refuse the application with costs.

HOWARD, C.J.

I agree.

Application refused.

Present: MOSELEY, J. & SOERTSZ, J.

PAGAVATHIAMMA vs THE CEYLON LAWYERS' BENEVOLENT ASSOCIATION

S. C. No. 301/*M*—*D. C. Colombo No.* 12534

Argued on 13th November, 1942.

Decided on 25th November, 1942.

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

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

Cases referred to: *Beresford vs Royal Insurance Co.* (1938–A.C. 586 p. 594)

N. Nadarajah, K.C. with *H. W. Thambiah* and *C. Renganathan*, for the plaintiff-appellant.

H. V. Perera, K.C. with *N. K. Choksy*, for the defendants-respondents.

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Pagavathiamma *vs* The Ceylon Lawyers' Benevolent Association

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P. Balasubramaniam, a Proctor of this court was a member of an Association called and known as The Ceylon Lawyers' Benevolent Association. This Association of some five hundred members was formed as stated in the plaint, for promoting thrift and giving relief to members in times of sickness and distress, aiding them when they were in pecuniary difficulties and making provision for their widows and orphans. There were rules governing this Association.

Rule 21 provided *inter alia* that :

> " On the death of a member the amount available at his credit less any sum in which he is indebted to the Association shall be paid to his nominee or nominees upon application. In addition to this payment, if the deceased had been a member for twelve months or more immediately preceding his death the committee shall pay to the nominee a contributory call calculated as follows....."

P. Balasubramaniam died by his own hand on the 26th of July, 1938. The evidence shows and it is not seriously disputed that he was sane at the time of his suicide. The amount that would have been payable at the time of his death if it was due to be paid is said to be Rs. 4,334/50. It is to recover this amount that the plaintiff who is his mother and nominee instituted this action.

The defendants who are the Honorary Secretary and the Honorary Treasurer of this Association were appointed to represent it for the purpose of this case in terms of section 16 of the Civil Procedure Code. They filed answer denying liability to pay the amount claimed inasmuch as Balasubramaniam had died by his hand. They however, expressed their willingness to pay the sum of Rs. 24/50 which was the amount to the credit of his account with the Association. We are not concerned with that on this appeal.

The two questions submitted to us are :

> (1) Is the amount claimed by the plaintiff due on the contract between him and the Association ?
>
> (2) If it is, is the plaintiff's claim defeated by considerations of public policy ?

As observed by Lord Atkin in his speech in the case of *Beresford vs Royal Insurance Co.* (1938 A.C. 586 p. 594) these questions are apt to be confused, but must be considered apart.

In that case, it was a clear term of the contract that the amount due on the Policy of Insurance would be paid on death, even if the assured had caused his own death, provided it was so caused after a lapse of one year from the date of the Policy. The question that created difficulties and that was fully considered in that case was the second question, namely whether although that was a term of the contract, the contract was enforceable.

But, here, we are dealing with a different kind of case for there is no term in this contract, concerned with the contingency of suicide. The agreement is that a certain sum would be payable on death. In such a case

their Lordships who made speeches in the case of *Beresford vs Royal Insurance Co.* declared that there was no difficulty at all because, in the words of Lord Atkin,

> "On ordinary principles of insurance law an assured cannot by his own deliberate act cause the event upon which the insurance money is payable. The insurers have not agreed to pay on that happening. The fire assured cannot recover if he burns down his house nor the marine assured if he scuttles his ship, nor the life assured if he deliberately ends his own life."

Or as Lord Macmillan put it,

> "If the policies had contained no reference at all to suicide, I should have been of opinion that they did not cover the contingency of the assured committing suicide while sane, or in other words that the event of the assured's death did not mean or include the event of his self caused death while sane."

Counsel for the appellant sought to escape from this conclusion by contending that this Association was a purely Benevolent Association and not a "business concern" to use his words, like an Insurance Company and that for that reason different principles applied. He further submitted that the Association had on previous occasions, paid the full amount due in cases of suicide. I do not think that either of these facts makes any material difference. The principle enunciated in the House of Lords holds good whether we are dealing with an agreement with an Insurance Company, or an agreement among members of a Benevolent, Provident or Family Benefit Association or just an agreement among a group of persons banded together for the purpose of providing for payments to be made by the survivors to persons named or indicated by those dying. In each of these cases the event contemplated is that of natural death. In regard to the point taken that payments such as that claimed here were made on previous occasions, I understand it to mean that that fact might have induced some of the members of the Association to join it in the view that payment would be made to the widows, orphans or nominees in the event of death however brought about, and that, therefore, it should be taken into account. But I fail to see how it could bear on the matter by way of creating a right or giving rise to an obligation.

On this answer to the first question there is no occasion to consider the second question in order to ascertain whether in regard to it, we are governed by Roman-Dutch Law and if we are, whether the resulting position is different under that law.

In my opinion, the appeal fails and it must be dismissed.

MOSELEY, J.

I agree.

Appeal dismissed.

Present: SOERTSZ, J.

INSPECTOR OF POLICE vs KALUARATCHI

S. C. No. 668—*M. C. Colombo No.* 36178.
Argued on 6th October, 1942.
Decided on 19th October, 1942.

Electricity Ordinance section 6—*Telegraphs Ordinance section* 10—*Penal Code section* 183.

Held : (i) That a power conferred under section 6 of the Electricity Ordinance in the following terms,

> "It is hereby notified for general information that the Governor has been pleased, in pursuance of the powers vested in him under section 6 of the Electricity Ordinance, and with the advice of the Executive Council, to confer upon the Director of Electrical Undertakings and upon all officers of the Electrical Department duly empowered by the Director in that behalf the powers which the Telegraph authority possesses with respect to the placing of the telegraph lines and posts for the purpose of a telegraph established or maintained by the Government or to be established or maintained,"

carries with it a power to maintain the appliances and apparatus placed in pursuance of the power.

(ii) That refusal to unlock a gate to permit a public officer who has a right to enter the premises for the execution of his duty amounts to obstruction by the person who can, but refuses to unlock the gate with full knowledge that the person seeking admission is a public servant, and that he is seeking admission to execute his duty.

Cases referred to : *Curtis vs Stovin* (22 Q.B.D. at p. 517)
Scheibler vs Furiss (1893–A.C. at p. 20)
Police Sergeant, Hambantota vs Simon Silva (40 N.L.R. p. 534.)

H. V. Perera, K.C. with *S. de Soysa* and *E. A. G. de Silva*, for the accused-appellant.

H. A. Wijeymanne, Crown Counsel, for the complainant-respondent.

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The accused-appellant in this case was charged for that he did "voluntarily obstruct a public servant to wit, Mr. Muthubalasuriya, Assistant Engineer, Government Electrical Department, in the execution of his duty by refusing him admission into premises 164, Thimbirigasyaya Road, for the purpose of effecting repairs to a feeder pillar situated in the premises, and having thereby committed an offence punishable under section 183 of the Penal Code."

In order to sustain this charge it was necessary to prove (*a*) that the Public Officer referred to was entitled to enter upon this land for the purpose aforesaid ; (*b*) that what the accused-appellant did or said amounted to voluntary obstruction. In regard to the former of these elements, the evidence of the Chief Engineer and Manager of the Government Electrical Undertakings Department taken with his letters P1 and P2 sent to the

appellant on the 15th of July and on the 7th of August 1941 respectively, shows that the case for the prosecution is that the Public Officer concerned in this case had the right to enter upon this land under section 6 of the Electricity Ordinance (Chapter 158) read with the notification published under section 6 of the Government Gazette No. 7622 on the 23rd December, 1927, and with section 10 of the Telegraphs Ordinance (Chapter 147).

It is necessary to quote these sections and the notification for the purpose of examining the case for the prosecution as well as the case for the defence.

Section 10 of the Telegraphs Ordinance, so far as it is material, enacts as follows :

> "The telegraph authority may from time to time maintain a telegraph line under, over, along or across posts in or upon, any immovable property ; and for that purpose it shall be lawful for any officer in the employ of the Government in the Telegraph Department and for the servants, workmen and labourers employed by or under such officer, at all times on reasonable notice and with all necessary carriages and animals and other means to enter upon all or any lands and to put up thereon any posts which may be required for the support of any telegraph line ; and to fasten or attach to any tree growing on such land or to any building or thing thereon any bracket or other support for such line ; and to cut down any tree or branch which may in any way injure, or which is likely to injure, impede or interfere with any telegraph line ; and also severally to do and perform all other acts matters and things necessary for the purpose of establishing, constructing, repairing, improving, examining, altering or removing any telegraph or in any way connected therewith, or for performing any act, matter, or thing under the provision of this Ordinance."

Section 6 of the Electricity Ordinance enacts as follows :

> "The Governor may, for the placing of appliances and apparatus for the supply of energy for any purpose of the Government, confer upon any public officer any of the powers which the telegraph authority possesses with respect to the placing of telegraph lines and posts for the purpose of a telegraph established or maintained by the Government or to be so established or maintained."

The notification under this section notifies as follows :

> "It is hereby notified for general information that the Governor has been pleased, in pursuance of the powers vested in him under section 6 of the Electricity Ordinance, and with the advice of the Executive Council, to confer upon the Director of Electrical Undertakings and upon all officers of the Electrical Department duly empowered by the Director in that behalf the powers which the Telegraph authority possesses with respect to the placing of the telegraph lines and posts for the purpose of a telegraph established or maintained by the Government or to be established or maintained."

Now, counsel for the appellant contends that this officer was not entitled to enter this land *for the purpose he had in view* when he sought admission, *namely to effect certain repairs* to what has been described as a feeder pillar erected on this land. Counsel's argument was that section 6 of the Electricity Ordinance authorizes the Governor to confer powers only with respect to the *placing* of appliances and apparatus and not with respect to the *maintaining* of such appliances and apparatus, by effecting repairs or otherwise. In other words, counsel submits that, while the Telegraphs Ordinance by section 10 expressly provides for both *placing and maintaining* telegraph

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lines and posts, and the powers conferred by that section are powers necessary for both these purposes, the effect of the operation of section 6 and the notification made thereunder is to separate from the total area of those powers such powers only as are necessary for the *placing* of appliances and apparatus and to confer them — and no more — on the persons nominated by the Governor.

At first sight, there appears to be considerable force in this argument inasmuch as the word " maintain " in section 10 of the Telegraphs Ordinance is absent from section 6 of the Electricity Ordinance. But it can hardly be said that this was a deliberate omission intended to restrict the powers of officers under the Electricity Ordinance within narrower limits, and to deprive them of so essential a power as that of maintaining the appliances and apparatus, once they have been placed, in a state of working efficiency. This omission seems, rather, the result of somewhat inept draftsmanship that was content to direct itself by the " heading " above section 10, without a close scrutiny of the words of the section itself.

I do not think that the language of the two sections in question and of the notification published under section 6 of the Electricity Ordinance properly interpreted drives us to the conclusion that whatever the intention of the legislature may have been, it has only succeeded in conferring powers necessary for the placing of appliances and apparatus as distinguished from powers necessary for maintaining them. It is a canon of the interpretation of statutes " that if it is possible the words of a statute must be construed so as to give a sensible meaning to them. The words ought to be construed *ut res magis valeat quam pereat* " *Curtis vs Stovin* (22 Q.B.D. at p. 517). One is not only entitled to, but one must get an exact conception of the sum and scope of a statute in order to interpret it (see *Scheibler vs Furiss* 1893 A.C. at p. 20).

Looked at in this way, it seems clear that section 6 of the Electricity Ordinance aims at " the supply of energy." It says that " the Governor may, for the placing of appliances and apparatus for *the supply of energy* .....confer upon any public officer any of the powers which the Telegraph authority possesses with respect to the placing of telegraph lines and posts for the purpose of a telegraph *established or maintained* by the Government....."

By the Gazette notification already referred to the Governor has conferred upon the officers of the Electrical Department mentioned in it " the powers which the Telegraph authority possesses with respect to the placing of telegraph lines or posts for the purpose of a telegraph established or maintained by the Government."

Now one of the powers expressly given by section 10 of the Telegraphs Ordinance is " to do and perform all other acts, matters and things necessary for the purpose of establishing constructing *repairing* improving and examining altering " etc. Conceding that " repairing " is a function appropriate not to the " placing " but to the " maintaining " expressly provided for

by section 10 of the Telegraphs Ordinance, it may, reasonably, be said that "repairing" is a function necessary under the Electricity Ordinance to ensure that appliances and apparatus placed under section 6 of the Electricity Ordinance continue in a condition in which they can be described as "appliances and apparatus for the *supply of energy*," and that, therefore, the power to enter the land for the purpose of repairing has been given by necessary implication. The view contended for by the appellant would result in the breakdown, irreparably, of the system or the supply of energy. It would mean that whenever an appliance or apparatus ceases to function owing to some defect, great or small, the empowered authorities may enter the land and place new appliances and apparatus, but may not, for instance, use a screw driver to set the machinery going again, and that would be a *reductio ad absurdum*.

I would, therefore, hold that the Assistant Electrical Engineer was entitled to enter upon this land to effect repairs to the feeder pillar.

The next question for consideration arises on the submission made by counsel that what the appellant did or said on this occasion did not constitute obstruction within the meaning of that word as used in section 183 of the Penal Code, but was, only passive resistance.

The learned magistrate who tried the case found that when the Engineer went on the 20th August, 1941 to effect the necessary repairs after notice had been given to the appellant by letter P2 of the 7th August acquainting him with the proposed visit, he found the gate giving access to the appellant's premises "closed and padlocked." The engineer requested him to open the gate but he "asked him to clear out and refused to open the gate....." When the Engineer "tried the padlock of the gate, accused threatened him and said he would assault his men. He feared a breach of the peace and left." This seems to me to establish an activity too intense to be described as passive resistance or sullen non-co-operation.

The appellant's own version is that the Assistant Engineer came up to his gate that morning ; he went to the verandah ; he saw a Police Sergeant and some people near the gate ; the Engineer asked him to open the gate that was locked, telling him that he was in the Electrical Department ; he refused to open the gate ; the Engineer asked him twice ; he refused twice ; he told the Engineer that he could climb over or creep under the gate ; after some time the Engineer left.

The Magistrate preferred to accept the version given by the Engineer. It was, substantially, supported by the Police Sergeant who accompanied the working party. According to that version a clear case of obstruction was made out.

But assuming that the appellant's version is the true one still, on what he admittedly said and did, it is clear that he transgressed the limits of passive resistance or non-co-operation and was clearly in the realm of obstruction. His case is within the ruling in the case of *Police Sergeant, Hambantota vs Simon Silva* (40 N.L.R. p. 534).

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I dismiss the appeal and I would add that, having regard to the status of the appellant it seems to me that he owes more to himself than he appears to be ready to give. He may not be as fortunate in the matter of sentence if he persists in this course of action.

Appeal dismissed.

Present: WIJEYEWARDENE, J.

MERRY (A. S. P.) vs PAKIAMPILLAI

S. C. No. 797—M. C. Colombo No. 48633

Argued on 5th November, 1942.

Decided on 10th November, 1942.

Sale of maldive fish at a price above the maximum price—Meaning of sale for purpose of the offence—Sale of Goods Ordinance, No. 11 of 1896 (chapter 70) sections 2, 4 and 18.

Accused was charged with having sold a bag of maldive fish at Rs. 95/65, a price nearly Rs. 25/– above the controlled maximum price. The sum actually tendered was Rs. 94/– and the Police entered the boutique before the balance 1/65 could be tendered.

Held : That it is not necessary for the purpose of a prosecution of this nature to prove a contract of sale within the meaning of section 4 of the Sale of Goods Ordinance.

Cases referred to : *The King vs Townbrow* (English Reports 109 K.B. 860)
Miles vs Melias Ltd. (Bell's "Sale of Food & Drugs" (6 Ed.) p. 99)

N. Nadarajah, K. C. with *H. W. Thambiah* for the accused-appellant.
G. E. Chitty, Crown Counsel, for the Crown-respondent.

WIJEYEWARDENE, J.

The accused-appellant was convicted on a charge of having sold maldive fish (mixed Kundira and Male) on August 31, 1942, at a price above the maximum price fixed by the Controller of Prices and sentenced to six months' rigorous imprisonment.

Acting under the powers vested in him by section 3 of the Control of Prices Ordinance No. 39 of 1939, the Controller of Prices made and signed an order on July 31, 1942 fixing Rs. 57/50 as the maximum "wholesale" price of this particular kind of maldive fish. The word "wholesale" as used in the order is so defined in the order itself as to make a sale of any quantity of maldive fish, for the purpose of resale, a sale by wholesale. That order is published in the Government Gazette No. 8979 of July 31, 1942 and the prosecution produced at the trial a copy of that Gazette.

The learned magistrate has recorded his findings of fact after a very careful analysis of the evidence and I accept those findings, though, no

doubt, there are certain passages in the evidence as pointed out by the counsel for the appellant which appear to be in conflict with the evidence accepted by the magistrate. I may add also that no evidence was given on behalf of the accused.

The facts as found by the magistrate may be summarized as follows : On August 31st a trader called Herat reported to the Assistant Superintendent of Police, Colombo, that he found it difficult to buy maldive fish. The Assistant Superintendent gave Herat a list of boutiques dealing in maldive fish and sent him with police constable Rasiah in plain clothes. Herat returned shortly afterwards and informed the Assistant Superintendent that he bought at one of the boutiques a bag of 1 cwt. and 20 lbs. for Rs. 92/50. Then the Assistant Superintendent noted down the number of 50 two-rupee notes belonging to Herat and handed back to him 47 of them in one bundle and the remaining three notes separately and asked him to return to the same boutique and buy another bag. A bundle of 47 notes was made separately as it was thought that the second bag would contain the same quantity as the first bag and would cost only Rs. 92/50. Herat went this time with police constable Wijesinghe in plain clothes while police constable Rasiah was sent to report to the Assistant Superintendent when the transaction was completed. Herat went to the boutique and waited until the door was opened. Herat was then admitted by the accused. Wijesinghe went in, a few minutes later, and said he wanted to buy onions. Wijesinghe was asked to go out and wait outside the boutique as it was said " only one person at a time could be served inside. " Herat opened the bag examined some pieces of maldive fish in it and was satisfied with the quality. The accused thereupon got the bag restitched and weighed and found it to contain 1 cwt. and 25 lbs. He then kept the bag apart and began to calculate on a piece of paper P3 the price of the maldive fish at Rs. 78/- per cwt. and got the result as Rs. 95/65. He gave the paper P3 to Herat showing the price that had to be paid and Herat then held out to the accused the bundle of notes amounting to Rs. 94/- before paying the balance Rs. 1/65 out of the notes which he kept separately. Just as the accused stretched out his hand and held the bundle Wijesinghe and the Assistant Superintendent who had been summoned by Rasiah entered the boutique after ordering one of the men at the door to open the door without giving a warning to those inside. On seeing the Police entering the boutique the accused pulled the paper P3 out of the hands of Herat and tore it up. He also released his hold on the bundle of notes which then dropped on the ground. Herat picked up the notes and the Assistant Superintendent collected the torn bits of P3.

The accused is charged with regard to the second transaction. The value of 1 cwt. and 25 lbs. contained in the bag would be a little less then Rs. 71/- as the sale to Herat would be a sale by wholesale according to the order. Herat has therefore, been charged nearly Rs. 25/- over the controlled value.

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It was argued in appeal that there was no sale of the maldive fish to Herat according to law as only a bundle was held out to the accused in payment of the prices and the accused had no opportunity of ascertaining whether the bundle contained currency notes. It was also argued that even according to the evidence of Herat the money actually tendered was only Rs. 94/- while the value of the goods was Rs. 95/65. It should be noted in this connection that Herat intended to tender the balance Rs. 1/65 after giving the notes when the Police arrived. This contention is urged on the footing that the sale to be considered in this case should be a sale governed by the Sale of Goods Ordinance. Even on that assumption I am of opinion that there has been a sale. A contract of sale is defined in section 2 of that Ordinance as a contract whereby the seller transfers the property in goods to the buyer for a money consideration. Under section 18(3) where there is a contract for the sale of specific goods in a deliverable state and the seller has weighed the goods for the purpose of ascertaining the price and the buyer had notice of it the property would pass to the buyer in the absence of any special circumstances. Of course the right to property in goods must be distinguished from the right to their present possession. Where there is a sale of specific goods for cash the property passes by the contract but the seller may (unless otherwise agreed) retain the goods till the price is paid. Here Herat tested the goods in the bag. The bag was stitched and then weighed and kept apart in Herat's presence. The value was then worked out and shown to Herat. On these facts alone there would be a contract of sale within the meaning of the Ordinance. These facts along with the tender of Rs. 94/- preparatory to the handing over of the balance Rs. 1/65 would even make it a contract of sale " enforceable by an action " within the meaning of section 4 of the Ordinance. I do not think that it is necessary for the purpose of a prosecution of this nature to prove a contract of sale "enforceable by action" within the meaning of section 4 of the Sale of Goods Ordinance. (*vide The King vs Townbrow* (English Reports 109 King's Bench 860); *Miles vs Melias Ltd.* referred to in Bell's "Sale of Food and Drugs" (9th edition) p 99.

The counsel for the appellant has also pleaded for reduction of the sentence. The sentence passed in this case is undoubtedly a severe one. The learned magistrate has however addressed his mind very carefully to this question before he sentenced the accused to six months' rigorous imprisonment. The evidence discloses as pointed out by the magistrate, a bold and systematic evasion of the law. It cannot be said that the magistrate has exercised his discretion on a wrong principle or that there are any circumstances in this case which make it desirable for this court to interfere with the sentence.

I dismiss the appeal.

Appeal dismissed.

Present: MOSELEY, J. & SOERTSZ, J.

A. E. GOONESINGHE — APPLICANT

Application for Conditional Leave to Appeal to the Privy Council from the judgment of the Supreme Court in Application No. 125 for a Writ of Certiorari (219.)

Argued on 13th November, 1942.

Decided on 19th November, 1942.

Appeals (Privy Council) Ordinance—Section 3 and Rule 1(b) of the schedule—Application for a Writ of Certiorari on the judge of an election court—Order refusing to issue a writ—Is an application for a Writ of Certiorari a civil suit or action for the purposes of section 3.

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

Cases referred to : *Settlement Officer vs Vander Poorten et al* (43 N.L.R. 436)
Eshugbayi Eleko vs Officer Administering the Government of Nigeria & Another (1928–A.C. 459)
Edward Hutchinson Pollard, one of Her Majesty's Counsel at the Colony of Hongkong vs The Chief Justice of the Supreme Court of Hongkong (2 P.C. Appeal Cases 106)
Chang Hang Kiu & Others vs Sir Francis T. Piggott & Another (1909–A.C. 312)
Subramaniam Chetty vs Soysa (25 N.L.R. 344)

R. L. Pereira, K.C. with *A. R. H. Canakaratna, K.C., C. V. Ranawake, V. F. Gunaratne* and *S. R. Wijayatilake*, for the petitioner-appellant.

H. H. Basnayake, Crown Counsel, on notice as *amicus-curiae*.

MOSELEY, J.

This application for leave to appeal to the Privy Council is a sequel to circumstances arising in connection with the hearing of an election petition by a judge of this court. At the conclusion of the hearing the Election Judge reserved his order and subsequently declared the election to be null and void and in accordance with the provisions of Article 78 of the Ceylon State Council (Elections) Order-in-Council, 1931 certified his determination to the Governor. On the same date the present petitioner, who had given evidence at the hearing of the election petition, was served with a notice issued out of this court calling upon him to show cause why he should not be reported to the Governor in accordance with the provisions of Article 79 of the Order-in-Council. The matter came up for enquiry before the Election Judge at which the petitioner was refused an opportunity of calling evidence. On 18th March, 1942 the learned judge delivered an order stating that the offences alleged against the petitioner had been made out and that a report would be sent to the Governor. The petitioner then applied to the Supreme Court for a Writ of Certiorari to quash the order made by the Election Judge on 18th March, 1942. For reasons set out in his judgment (43 N.L.R. 337)

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the learned Chief Justice held that the Supreme Court has no power to issue such a writ against a judge of the court who has been nominated under the provisions of Article 75 (1) of the Order-in-Council to try an election petition. It is against this judgment, dated 1st June, 1942, that the petitioner now prays for leave to appeal.

It is not contended that an appeal lies as of right. The petitioner, however, asks us to grant leave to appeal, using the discretion which is vested in us, on the ground that the question involved is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council, for decision. It cannot be controverted that, to quote from the judgment of the learned Chief Justice (43 N.L.R. at 347)* "the action taken against the petitioner under Article 79 of the Order-in-Council has involved him in grave consequences in regard to his political career." Nor does it seem to me that the matter is lacking in general and public importance. There is certainly an important question of procedure for decision. It has, however, to be considered whether or not the matter comes within the ambit of section 3 of the Appeals (Privy Council) Ordinance. That section deals with the regulation of "the right of parties to civil suits or actions in the Supreme Court to appeal to His Majesty in Council against the judgments and orders of such court....."

Mr. Basnayake, who appeared as *amicus curiae*, contended that the Appeals (Privy Council) Ordinance (Chapter 85) and the rules made thereunder apply only to litigation *between parties*. It does not seem to me that the mere use of the plural as it appears from the extract from section 3 which I have quoted above effectively rules out the possibility that the word "action" may embrace the proceedings in connection with the various mandates, of which a Writ of Certiorari is one, which may be issued by this court. Counsel further drew our attention to the use of the words "matter in dispute" which appear in rule 1 (*a*) of the rules made under the Ordinance and contended that in the present case there is no matter in dispute. But those words do not appear in rule 1 (*b*) under which this application is made, although they might well have been employed had that been the intention of the legislature, whereas in their place appear the words "question involved in the appeal." The mere fact that there is a change of phraseology would seem to support the view that rule 1 (*b*) contemplates a class of case wider than a dispute between parties. It does not seem to me that the authority cited by Mr. Basnayake *viz. Settlement Officer vs Vander Poorten et al* (43 N.L.R. 436) has any bearing on the present case. There the application was made under rule 1 (*a*) and the authorities there considered seem to me equally inapplicable. Similarly I do not see that the authorities cited by counsel for the petitioner are particularly helpful.

In *Eshugbayi Eleko vs Officer Administering the Government of Nigeria & Another* (1928–A.C. 459) the point as to whether an appeal lay does not appear to have been considered. Moreover, the appeal was against a judgment of a Full Court affirming the refusal of a judge of the Supreme Court

* 25 C.L.W. at p. 49

to entertain an application for a writ of *Habeas Corpus*, a writ which seems to be in a class apart from the other prerogative writs. There is, further, no indication in the report as to the manner in which the appeal reached the Privy Council, whether by leave of the Supreme Court of Nigeria or by special leave of the Privy Council. In the case of *in re Edward Hutchinson Pollard, one of Her Majesty's Counsel at the Colony of Hongkong vs The Chief Justice of the Supreme Court of Hongkong* (2 P.C. Appeal Cases 106) the appellant had been summarily punished for contempt. It was therefore a criminal matter and the case seems to have no application. The same observation applies to the case of *Chang Hang Kiu & Others vs Sir Francis T. Piggott & Another* (1909–A.C. 312) in which the appellant had been summarily committed to prison for perjury.

It may be argued that the word "suit" implies the existence of two parties. Can the same be said of "action"? The word is not defined in Chapter 85, but as Bertram, C.J. observed in *Subramaniam Chetty vs Soysa* (25 N.L.R. 344) it would be highly inconvenient if the word "action" in this Ordinance were given a different meaning from that which is given to it in our Code of Civil Procedure. "But," the learned Chief Justice went on to say, "there is a further reason. The principal sections of this Ordinance replaced and re-enacted certain repealed sections of our Code of Civil Procedure and there is a very strong inference that the words used in an enactment so passed should have the same meaning as they bore in the sections which the enactment replaced."

So in section 5 of the Civil Procedure Code (Chapter 186) we find "action" defined as "a proceeding for the prevention or redress of a wrong." Learned Crown Counsel's observation in regard to this aspect of the matter was that the judgment of the learned Election Judge could not be considered as a "wrong." It seems to me unnecessary to pursue that argument in view of the further definition which occurs in section 6 of the Civil Procedure Code *viz.* "Every application to a court for relief or remedy obtainable through the exercise of the court's power or authority or otherwise to invite its interference, constitutes an action." Crown Counsel's argument was that section 6 is qualified by section 7 which provides that "the procedure of an action may be either regular or summary" and contended that the procedure upon an application for a Writ of Certiorari is neither regular nor summary. A somewhat similar argument had been advanced in *Subramaniam Chetty vs Soysa* (*supra*) in which the question for decision was whether proceedings to set aside a sale constituted an action. That view was rejected by Bertram, C.J. who conceived, for the purpose of the case before him the possibility of "an action within an action." That of course is not the case here, but, at all events Bertram, C.J. does not appear to have considered that the classification of actions in section 7 as regular or summary is exhaustive. With that view I would, with respect associate myself. Sharing that view I have little difficulty in arriving at the conclusion that an application for a Writ of Certiorari being an application for

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relief or remedy obtainable through the court's power or authority constitutes an action, and therefore comes within the compass of section 3 of Chapter 85.

In view of the opinion which I have already expressed as to the importance, general, public and otherwise, of the matter, I would grant leave to appeal on the usual conditions.

SOERTSZ, J.

I agree.

Leave granted.

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

GUNASEKERE vs KANNANGARA

S. C. No. 49/41—*D. C. Galle No.* 37216.

Argued on 23rd January, 1942.

Decided on 28th January, 1942.

Quia timet action—Rights previously transferred to plaintiff purchased by defendant at Fiscal's Sale—Plaintiff in possession—Fiscal's conveyance not obtained when action instituted—Action for declaration of title by plaintiff —Is it maintainable.

On 5th January, 1937 plaintiff became entitled to an undivided one-fourth acre of a certain land from one Siriwardene and entered into possession thereof. On 3rd July, 1937 defendant became the purchaser of the said interests at a Fiscal's sale. Plaintiff instituted this action for declaration of title to the interests he acquired as against the defendant who had not at the time obtained the Fiscal's transfer nor asserted title to the land. The learned District Judge entered judgment for plaintiff.

Held : That a *quia timet* action was not maintainable under the circumstances.

Cases referred to : *The Ceylon Land & Produce Company Limited vs Malcolmson* (12 N.L.R. 16)
De Silva vs Dheerananda Thero (28 N.L.R. 257)
Fernando vs Silva (1 S.C.C. 27)
Fernando vs Fernando (21 N.L.R. 158)
Baki vs Cassie Lebbe (14 N.L.R. 441)

H. V. Perera, K.C., with *E. B. Wickramanayake, U. A. Jayasundera* and *A. C. Alles*, for the appellant.

C. V. Ranawaka with *H. A. Koattegoda*, for the respondent.

HOWARD, C.J.

This is an appeal by the defendant from a judgment of the District Judge of Galle in favour of the plaintiff with costs. The only point that arises for our consideration is whether the learned judge was right in coming to the conclusion that the action which was *quia timet* was maintainable. The plaintiff in his plaint asked to be declared entitled to an undivided extent of one-fourth acre of the land described in the schedule, a plantation made by him and a tiled house. The plaintiff derived title to this property from one Charles Perera Siriwardene. The defendant at a Fiscal's sale on

the 3rd July, 1937, became the purchaser of the interests previously transferred to the plaintiff on the 5th January, 1937. The plaintiff was in possession and the defendant had not at the time when the action was instituted by the plaintiff obtained a Fiscal's transfer. In the court below it was contended that the defendant would obtain a Fiscal's transfer and try to eject the plaintiff from the land and the house. In coming to the conclusion that a *quia timet* action would lie the learned judge relied on the cases of *The Ceylon Land & Produce Company Limited vs Malcolmson* (12 N.L.R. 16) and *De Silva vs Dheerananda Thero* (28 N.L.R. 257). In considering whether the defendant has committed an actionable wrong reference must be made to the definition of "cause of action" in section 5 of the Civil Procedure Code.

This definition is worded as follows :

> "Cause of action is the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury."

In *Ceylon Land & Produce Co., Ltd. vs Malcolmson* the defendant took and registered a mortgage of a land belonging to another from a third party, put the mortgage in suit and obtained a decree thereon. It was held that the true owner had a sufficient cause of action against such person to maintain an action *quia timet.* In his judgment Wood Renton, C.J. stated that the defendant by registering his mortgage and obtaining a decree for its sale on the footing that he was the owner placed on the plaintiffs' registered title a real blot which would gravely and immediately prejudice their power of dealing with the land. The act of the defendant was both a "denial" of the plaintiffs' rights and the "infliction of an affirmative injury" upon them.

In *De Silva vs Dheerananda Thero* it was held that the trustee of a Buddhist temple may maintain an action *quia timet* to set aside a deed by which a priest, claiming by virtue of pupillary succession, transferred land belonging to the temple, even though the trustee's enjoyment of the land has not been interfered with. Lyall Grant, J. in his judgment stated that the plaintiff had ample reason to fear that the deed of transfer might be used to his prejudice. The priest had a residence on the land, by the execution of the deed he made a definite claim that that residence was independent of the plaintiff and if the plaintiff did not assert his rights, he might be taken in future as having acquiesced in the possession.

It appears to me that there is a wide divergence between the facts in the present case and those in the two cases I have cited and on which the District Judge relied. In *Ceylon Land & Produce Co., Ltd. vs Malcolmson* there was by the registration of a competing document a definite blot on the plaintiffs' title. This was one of the deciding factors in that case. In *De Silva vs Dheerananda Thero* the defendant asserted a claim independently of the plaintiff. In the present case the defendant has merely bought at a Fiscal's sale the right and title of the judgment-debtor. He has not obtained a Fiscal's conveyance. He has not asserted title to the plaintiffs' land. An

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attempt was made to contend that the visit of the surveyor to the land was an assertion of the defendant's rights. I do not consider that such a contention is sound. The survey was made by the Fiscal acting under the provisions of section 286 of the Civil Procedure Code. He must be regarded as the agent of the Fiscal and not of the defendant. I do not think the act of the defendant in buying at the Fiscal's sale amounted either to a "denial" of the plaintiff's rights or the "infliction of an affirmative injury" on them.

Apart from the facts in the two cases cited by me being distinguishable from those in the present case I am fortified in the decision at which I have arrived by the perusal of other authorities. In *Fernando vs Silva* (4 S.C.C. 27) Phear, C.J. in his judgment stated that suits *quia timet* ought always to be scrutinized most closely, because, although there are no doubt many cases where it is right that a court of equity should enable a suitor, notwithstanding he has at the time no substantial ground of suit to obtain a present declaration of title in anticipation of some cause of action occurring in future in the shape of an invasion of property or infringement of title, on some occasion when he may have difficulty in establishing his right, yet suits of this class are certainly not to be encouraged. In that case A, the mortgagee, not in possession of certain property, obtained a decree against B, his mortgagor, for realization of the security, and in execution of this decree caused the mortgaged property to be sold to a third person. C, claiming to be in possession as owner of the portion of the property so sold, brought a suit against A and B for declaration of title and asking to be quieted in possession, but failed to show that she had been in any degree molested in the enjoyment of her property. It was held that she had no cause of action. If the purchaser of the plaintiff's property from the defendant ever attempted on the footing of that purchase to disturb her in the enjoyment of it, she would be able on that future occasion, as she was then to establish her title to the property whatever it may be.

In *Fernando vs Fernando* (21 N.L.R. 158) the second defendant who owned a two-third share of a land, mortgaged his first share to the first defendant who obtained a decree for sale. It was held that the action of the plaintiff, who owned the remaining one-third share, in bringing an action to have it declared that he had a right to compensation was premature.

In the case of *Baki vs Cassie Lebbe* (14 N.L.R. 441) Wood Renton, C.J. stated that it was not possible or desirable to attempt to lay down any general rules as to the classes of cases in which *quia timet* actions are maintainable. Each case must be decided on its own merits and special facts.

I am satisfied that in the circumstances of this case there is no occasion to allow a *quia timet* action. The appeal is therefore allowed and the action dismissed with costs in this court and the court below.

HEARNE, J.

I agree.

Appeal allowed.

Present: WIJEYEWARDENE, J.

SIEBEL (Inspector of Police) vs SILVA

S. C. No. 623—M. C. Matara No. 44125.

Argued on 5th November, 1942.

Decided on 10th November, 1942.

Defence (Wholesale Dealers in Food) Regulations 1942—*Regulation* 2* —*Goods usually stored at two places—Removal from one store to another—No offence.*

Held : That, where a trader usually stored his goods both in his boutique and in an annexe of his house, it was not an offence under regulation 2 of the Defence (Wholesale Dealers in Food) Regulations 1942 to remove without a permit any article of food from his boutique to his house.

N. Nadarajah, K.C., with *S. Saravanamuttu*, for the accused-appellant.

G. E. Chitty, Crown Counsel, for the respondent.

WIJEYEWARDENE, J.

The charge against the accused-appellant was in the following terms :

" You did.... remove or permit to be removed 21 bags of sugar from your business premises where the sugar is usually stored or kept in the course of your business as such dealer to your residence at Pallimulle without authority from the Deputy Food Controller Matara in breach of regulation 2 (*a*) of Defence (Wholesale Dealers in Food) Regulations 1942 published in Government Gazette No. 8915 of 17.4.42 and thereby committed an offence punishable under Defence Regulation 52."

The magistrate convicted the accused on this charge and sentenced him to undergo 3 months' simple imprisonment and to pay a fine of Rs. 500/- and in default undergo simple imprisonment for a further period of 3 months. Later, the magistrate reduced the period of imprisonment passed in default of payment of the fine from 3 months to three weeks, when his attention was drawn to the provisions of section 312 (*c*) of the Criminal Procedure Code.

The charge in this case is defective. Regulation 2 mentioned in the charge refers only to a permit issued by the " proper authority " and " proper authority " as defined in regulation 5 of the Defence (Wholesale

* No wholesale dealer in any article of food shall remove or cause or permit to be removed any quantity of such article from —

(*a*) the place where such article is usually kept or stored in the course of his business as such dealer, or

(*b*) the place where such article is kept or found on the date on which these regulations are published in the Gazette,

except under the authority of a permit in writing issued by the proper authority or otherwise than in accordance with such conditions as that authority may in his discretion attach to such permit.

This regulation has been repealed by reg. 4 (*a*) of the Defence (Control of Prices) (Supplementary Provisions) Regulations (No. 10) 1942 as from 10.10.42.

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Dealers in Food) Regulations 1942 does not include a Deputy Food Controller. The charge should have, therefore, referred to a "proper authority" and not to a "Deputy Food Controller." Moreover the reference to the penal section as "Defence Regulation 52" is misleading. There is no regulation 52 in the set of regulations mentioned earlier in the charge. The magistrate intended most probably to refer to regulation 52 of the Defence (Miscellaneous) Regulations. These defects however, have not occasioned a failure of justice.

The accused is charged with removing the bags of sugar from his boutique to his residence on May 16th 1942. The accused did not deny the removal, but put forward the defence that both the boutique and the house were places where his goods were usually kept or stored in the course of his business as a wholesale dealer. This defence was clearly foreshadowed in the early stages of the case when the witnesses for the prosecution were cross-examined. One of these witnesses, Raoof, stated that he carried 20 bags of sugar in addition to other goods from Colombo to Matara on May 14th 1942 and unloaded them at accused's boutique at about 8 p.m. In cross-examination he said that he "stocked the goods inside the boutique and on the steps of the boutique." He stated that the accused asked him to take the bags of sugar to the accused's house and he refused to do so as he was pressed for time. He admitted that he had on previous occasions "transported goods to accused's home" and added that on May 14th 1942 "the accused's boutique was full of goods." The accused himself gave evidence and said :

> "A portion (of the boutique) is occupied for the display of currystuffs and other sundries. There are 2 large doors to the boutique. I have also a very large balance....I keep my excess articles in an annexe of my house. I have often had to remove goods from my boutique to my house when there is a surplus and get it back. I have done this for the past 3 years."

The Magistrate has not commented in his judgment on the evidence that the accused's house was also a place where the accused usually kept or stored his goods. He says, no doubt, that he "cannot agree with the *argument* that the accused stocks his goods at his home" but he adds immediately afterwards that "the stocking contemplated under section 2 (*a*) of the regulations is in premises in the course of his business as such dealer where sales take place and price lists are exhibited." The Magistrate was, therefore, giving his construction of regulation 2 and not his opinion on the evidence when he expressed his inability to "agree with the argument that the accused stocks his goods at his home" as is shown clearly also by his reference to an "argument"

In the absence of any expression of opinion by the magistrate, I do not see any reason for rejecting the evidence of the accused that he used to store his goods not only in the boutique but also in the house, especially as that evidence is corroborated to an appreciable extent by the evidence of Raoof who was called by the prosecution. In view of that evidence it cannot be said that the accused has removed his goods from "the place where

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such article is usually kept or stored in the course of his business as such dealer." All that the accused has done is to remove it from one portion of the "place" to another portion of the "place," the "place" in this case being the home and the boutique where the goods were usually kept or stored. I am unable to accept the construction put on the regulation by the magistrate that goods could be "kept or stored" only at the place where sales take place. There is nothing in the regulation itself to support such a construction, while the use of the two distinct words "kept" and "stored" suggest to my mind that the legislature had in view not only the place where the goods are "kept" for sale but also the place where the goods are "stored."

I set aside the conviction and acquit the accused.

Conviction set aside.

Present: KEUNEMAN, J.

THE ATTORNEY-GENERAL vs GUNARATNE & ANOTHER

S. C. No. 760—*M. C. Colombo No.* 41625 (*Defence Regulations.*)

Argued on 16th October, 1942.

Decided on 23rd October, 1942.

Defence (*Miscellaneous*) *Regulations—Defence Regulation* 20*A*—*Publication in a newspaper of an article likely to cause alarm and despondency.*

The following passage occurred in an article published in a newspaper called the "Sinhala Bauddhaya":

> "A rumour has spread throughout the Anuradhapura District that our Ceylon Government has fixed dynamite at the sluices of Nachchaduwa, Tissawewa, Nuwarawewa, Kalawewa and other tanks which contain water sufficient for the production of adequate foodstuffs for the whole of the North Central Province. There is a feeling among the people that, in the event of there being any danger from the enemy, the dynamite would be caused to explode and that the water would be made to flow out. Then, the water in all these tanks would like a sea flowing over the land, carry the whole Anuradhapura District with the people into the ocean. At a time when the people have to face dreadful famine like this, their being overtaken by a trouble of this nature would be a fatal blow to their cultivation work etc."

Held: (i) That the Regulation penalizes the publication of a rumour even though it is expressly stated to be a rumour.

(ii) That the article in question was likely to cause alarm or despondency.

(iii) *Mens rea* is not an ingredient of the offence created by Regulation 20A.

(iv) In a charge under Regulation 20A once the Crown proves —

(*a*) the publishing by the accused of the report or statement;

(*b*) that the report or statement related to matters connected with the war; and

(*c*) that the report or statement was likely to cause alarm or despondency,

the accused must prove the matters mentioned in the proviso in order to escape conviction.

Cases referred to: *Betts vs Armstead* (L.R. 1888-20 Q.B.D. 771)

Weerakoon vs Ranhamy (29 N.L.R. 33)

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The Attorney-General *vs* Gunaratne & Another

Mervyn Fonseka, Solicitor-General, with *R. R. Crossette-Thambiah, Crown Counsel,* for the appellant.

N. E. Weerasooriya, K.C. with *H. W. Jayawardene,* for the respondents.

KEUNEMAN, J.

This is an appeal by the Attorney-General against an acquittal. The 1st accused was charged with publishing in contravention of regulation 20A of the Defence (Miscellaneous) Regulations an article entitled "The fatal blow that 'Raja-Rata' would receive" in the issue of the Sinhalese Newspaper "Sinhala Bauddhaya" dated 7th March 1942, which article, relating to matters connected with the war, was likely to cause alarm or despondency. The 2nd accused was charged with abetment. The offences were punishable under regulation 20(A) (1) of the said regulations.

The article in question after dealing with the food question in the North-Central Province contained the following paragraph which forms the basis of the prosecution:

> "A rumour has spread throughout the Anuradhapura District that our Ceylon Government has fixed dynamite at the sluices of Nachchaduwa, Tissawewa, Nuwarawewa, Kalawewa and other tanks which contain water sufficient for the production of adequate foodstuffs for the whole of the North Central Province. There is a feeling among the people that, in the event of there being any danger from the enemy, the dynamite would be caused to explode and that the water would be made to flow out. Then, the water in all these tanks would like a sea flowing over the land, carry the whole Anuradhapura District with the people into the ocean. At a time when the people have to face dreadful famine like this, their being overtaken by a trouble of this nature would be a fatal blow to their cultivation work etc."

I may add that as regards the phrase "in the event of there being any danger from the enemy" may also be translated as "in the event of danger from a harmful source" or "from a hostile source."

It has been proved and admitted that the 1st accused is the printer and publisher of the paper "Sinhala Bauddhaya." The 1st accused is also the Secretary of the Mahabodi Society and manager of its printing press. In accordance with the practice of this Society, the letter in question was sent first to and opened by the 1st accused, registered in his register, and addressed to the editor. The letter bears an endorsement to the editor in the handwriting of the 1st accused. The 1st accused, however, states in evidence that he did not read this letter and was unaware of its contents till long after publication in the newspaper. He stated that he had no time to read all the letters received, and only read those letters signed by persons who were known to him.

As regards the 1st accused the learned magistrate held that the prosecution had failed to establish that he knowlingly (or intentionally) published the article in question and further that the article was not likely to cause alarm or despondency. As regards the latter point, the magistrate mentions that with regard to the placing of dynamite at the sluices of the tanks mentioned in the letter all that is said refers to a rumour. But the

particularity with which four at least of the tanks are mentioned and I think the general tone of the letter suggests to the reader that there is truth in the rumour. Further I think it is no defence to publish a rumour. The word " report " in regulation 20A may properly include a rumour. I think it has been a general experience, as expressed in another issue of this very newspaper, that " rumours are more dangerous than bombs ", and there can be no question but that publication of a rumour in a newspaper will give it a currency which it would not otherwise have. I am of opinion that the regulation penalizes the publication of a rumour even though it is expressly stated to be a rumour.

The pith of the article lies in the publication of the rumour that certain specified tanks and other tanks have had their sluices dynamited. Two distinct dangers are indicated. First the danger of explosions, as a result of, or in anticipation of, action of an inimical nature. Next the danger from flooding. This danger has been described in picturesque and exaggerated language, but though it is probable as the magistrate says, that the very exaggeration would rouse derision in the better informed classes, it would tend to create the greater alarm among more ignorant persons.

I think the time at which this letter was published must be taken into account. It is a matter of general knowledge that it was a period of tense expectancy and anticipation of enemy attack. This and similar rumours called for emphatic denial by the authorities (see D5).

I hold that the article in question was likely to cause alarm or despondency, more particularly among those who resided in the neighbourhood of the tanks indicated, and also in the district of Anuradhapura. There is evidence that the " Sinhala Bauddhaya " has a circulation in this District. The spread of a state of alarm or despondency was a probable, and not merely a possible, result of the publication. I think the magistrate is wrong in thinking that language of this kind " would rather raise a smile than cause alarm." Nor can I regard the article as a general discussion of the "scorched earth policy." This is the publication of facts, said to be based on rumour, with regard to the placing of dynamite at the sluices of certain tanks, and the dangers arising from the possible explosion of the dynamite and the consequent flooding that would ensue. There is a world of difference between this and the general discussion of the " scorched earth policy."

I shall now turn to the other matter on which the order of acquittal rests. I may say that even if knowledge was a necessary ingredient of the offence, it may be difficult to say on the facts proved in the case that the publication was without the knowledge of the 1st accused. There can be no question but that the 1st accused was aware of the existence of the letter and had passed it on to the editor in the ordinary course. Would the fact that the 1st accused did not make himself acquainted with the contents of the letter be a defence to the charge of publication with knowledge ? I do not propose to answer this question, for I do not think the magistrate

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was entitled to read in the word "knowingly" into the regulation. The word does not occur in the regulation itself which runs as follows :

> "20. (A) (1) Subject as hereinafter provided, any person publishing any report or statement relating to matters connected with the war which is likely to cause alarm or despondency shall be liable.....to imprisonment.....or to a fine.....or to both....
>
> Provided that a person shall not be convicted of an offence against this regulation if he proves :
>
> (*a*) that he had reasonable cause to believe that the report or statement was true ; and
>
> (*b*) that the publication thereof was not malicious and ought fairly to be excused."

It is significant that in the case of previous regulations various mental states are clearly indicated as essential to the constitution of the offences created. To give a few instances, under regulation 10 interference with telegraphic communications is made an offence if done "knowingly". So under regulation 13 knowledge is specifically made the basis of the offence in relation to means of secret communication. In the case of other offences, absence of permission by a competent authority, is one of the ingredients of the offence. Under regulation 17 (*b*) a certain "intent" is necessary and so in regulations 19 (*b*) and 20 (1) (*b*). In the regulation with which we are concerned *viz.* 20 (A) no mental state is made an ingredient of the offence, but instead we find a proviso which exempts the accused person from conviction, *if he proves* two things, contained in proviso (*a*) and (*b*). I think it is not possible to resist the conclusion that the words "knowingly" or "intentionally" were deliberately omitted, and the burden definitely placed on the accused to prove the matters mentioned in the proviso in order to escape conviction. The burden of the Crown was to prove three things :

> (*a*) the publishing by the accused of the report or statement ;
>
> (*b*) that the report or statement related to matters connected with the war ; and
>
> (*c*) that the report or statement was likely to cause alarm or despondency.

See in this connection *Betts vs Armstead* (L.R. 1888–20 Q.B.D. 771) per Cave, J :

> "That word is not to be found in the section and it is clear from the words of other sections of the Act that the word 'knowingly' was intentionally omitted from section 6. It is provided by section 5 that want of knowledge shall be a defence in the case of the offences specified in sections 3 and 4 and it is therefore obvious that the legislature when it desired to make ignorance a good answer, has expressed that intention in the clearest terms."

The whole question of *mens rea* has been discussed in the Divisional Bench case of *Weerakoon vs Ranhamy* (23 N.L.R 33). In this case it was held by the majority of the court that the doctrine of the English Criminal Law, known as the doctrine of *mens rea*, only exists in Ceylon in so far as it is embodied in the express terms of sections 69 and 72 of the Penal Code :

> "Our Code is intended to be an exhaustive Code.....We cannot, therefore, import into this chapter any principle of English law, except in so far as it is expressed or implied in these words. In other words, the formula can neither

be extended nor limited by reference to the principles of the English law. It must be taken as complete in itself." (per Bertram, C.J. p. 44)

In the case of regulation 20A there is evidence that the draftsman had in mind a principle in the English law, which Bertram, C.J. refers to as follows (p. 43.):

> " When the definition or statement of the offence contains the word 'knowingly' or some corresponding expression, it is for the prosecution to establish the guilty knowledge. Where it does not, it is for the accused to prove the absence of *mens rea*. As it is often put, the absence of the word ' knowingly ' merely shifts the onus."

But it is clear that the draftsman of the regulation has not put into his draft the full implications of that principle. On the contrary, the draftsman has specifically mentioned only two matters which *if proved by the accused*, would provide a ground of defence. I think the defence must be restricted to these two matters.

It has been further contended in this case that the accused can justify his action under the terms of section 72 of the Penal Code. There can be no doubt the accused can avail himself of section 72, but does the section apply ? Is the accused a person " who by reason of a mistake of fact and not by reason of a mistake of law, believes himself to be justified in doing it." Has there been any mistake of fact made by the 1st accused ? I agree with the *dictum* of Bertram, C.J. in *Weerakoon vs Ranhamy* (23 N.L.R. at 45), that " ignorance is not the same as mistake. Mistake, to my mind, implies a positive and conscious conception which is, in fact, a misconception." There is no evidence of any such misconception in this case, nor is there evidence that as a result of the misconception the accused " believed himself to be justified in doing it."

On these grounds I hold that the acquittal of the 1st accused was wrong. I set aside that order find the 1st accused guilty and enter a conviction of the 1st accused for the offence with which he was charged.

As regards the 2nd accused, the magistrate held he had reasonable cause to believe that the report was true, and that the publication was not malicious and ought fairly to be excused. The 2nd accused who is a student priest of the age of 17 stated in evidence that some man from Trincomalee came to the temple and asked him to copy out what he had written down and that the article in question was what he copied at the man's bidding and sent to the " Sinhala Bauddhaya."

The magistrate described this evidence as " childish " and holds it to be untrue. The name of the visitor was not given by the 2nd accused. But the magistrate thought, more particularly owing to the youth of the 2nd accused, it would not be straining the law in his favour to accept the view that when he heard the talk of his elders he had reasonable cause to believe that what they said was true. The magistrate thought he was entitled " to use some common sense, and not to base his decision strictly upon the actual evidence given before him." I am not myself aware of any justification for making " common sense " a substitute for evidence. This

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is not a case where the magistrate was considering the question of reasonable doubt as to the commission of the offence, but a case, where the accused had to *prove* that he came within the proviso. Though the 2nd accused mentions hearing of the rumour, he nowhere says, that the rumour was conveyed to him by any of his "elders" or by any members of the priesthood having authority over him. There is no evidence whatever to show that the 2nd accused had any material upon which he could come to the reasonable conclusion that dynamite had been placed at the sluices of any tank. In fact, the 2nd accused in cross-examination stated "I don't know whether it is true or not that dynamite had been fixed in tanks."

It is clear therefore that the 2nd accused has failed to prove that he had reasonable cause to believe that the report or statement was true. The defence of the 2nd accused therefore fails, for it was incumbent upon him to *prove* both the elements of defence in provisos (*a*) and (*b*).

I hold that the evidence establishes that the 2nd accused was guilty of the offence of abetment with which he was charged. I set aside the order for his acquittal and enter a conviction of the 2nd accused for the offence with which he was charged.

There remains to be considered the question of sentence in the case of each of these accused. The 2nd accused, the writer of the letter, is only 17 years of age. I think it is clear that his action was not malicious, but was intended mainly as a help to the food-production scheme, and to draw the attention of the authorities to certain dangers. He ends his letter as follows :

> "Let us bring this matter to the notice of the noble English Government in order to save the people of Ceylon from this dreadful trouble."

There were, however, mis-statements and considerable exaggeration in the letter. As regards the 1st accused, the magistrate had held that he was not aware of the contents of the letter, which he undoubtedly published. This finding was not disputed. I also think it is clear that he was not actuated by malice, but there was at the least carelessness, either by him or by those to whom he delegated his authority of passing letters.

In all the circumstances, I impose on the 1st accused a fine of Rs. 100/- in default 3 weeks' simple imprisonment and on the 2nd accused a fine of Rs. 20/- in default one week's simple imprisonment.

Appeal allowed.

Present: MOSELEY, J.

KING vs PUNCHI BANDA

S. C. No. 45—*1st Midland Circuit* 1942—*M. C. Dandegamuwa* 9536A.
Argued on 8th July, 1942.
Decided on 14th July, 1942.

Statement in the nature of a confession by witness—Subsequent charge against witness—Admissibility of statement—Confession prompted by hope of advantage at suggestion of Police—Admissibility—Evidence Ordinance sections 21 *and* 24.

Held : (i) That a statement in the nature of a confession made by an accused person in the capacity of a witness before he was charged, in the course of proceedings against other parties in respect of the same incident, is admissible under section 21 of the Evidence Ordinance, unless otherwise tainted.

(ii) A confession prompted by a suggestion by a Police Officer, that some advantage would be gained by the accused if he spoke the truth, is rendered inadmissible by section 24 of the Evidence Ordinance.

Cases referred to : *The King vs Ranhamy & Others* (2 C.L.J. 104)
The King vs Francisco Appuhamy (6 C.L.J. 146).

Nihal Gunasekera, Crown Counsel.
Sextus Coorey, Proctor, for the accused (assigned).

MOSELEY, J.

The accused was charged with murder. At the outset the jury having been asked to retire, counsel for the defence objected to the admission of two statements made by the accused each of which is in the nature of a confession. The first (P15) was made by him in the capacity of a witness in the course of proceedings against other parties in respect of the same incident ; the second (P39), when he was subsequently charged with the offence. On the latter occasion the magistrate who had recorded the evidence of the accused in the previous proceedings had entered the witness-box, with a view to testifying to the first statement of the accused, and had been affirmed, when the accused stated that he was " willing to make the same statement." Certain " preliminary precautions " were taken, and upon the accused " persisting that he is anxious to make the statement " the acting magistrate expressed himself as " inclined to believe " that the statement about to be made was to be made voluntarily. The statement was then recorded and a memorandum made in the form prescribed by section 134 (3) of the Criminal Procedure Code.

In regard to the first statement counsel for the accused argued that it is not the statement of an accused recorded in the course of an enquiry and does not therefore come within the scope of section 233 of the Criminal

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Procedure Code, but he was unable, on the facts then before me, to advance any further objection against its admission. His contention is sound in regard to the inapplicability of section 233, but it seems to me that, unless the statement is otherwise tainted, it is clearly admissible under section 21 of the Evidence Ordinance as an admission by the accused.

The point was then taken that the second statement, P39, had been made in circumstances which offend the provisions of section 24 of the Evidence Ordinance which makes irrelevant any confession which has been caused by any inducement, threat, or promise proceeding from a person in authority.

My attention was drawn to a passage towards the end of the statement which is as follows :— " At the Police Station.....when I was questioned I denied any knowledge about this matter. Then the sergeant told me to tell the truth if I knew anything about this *and to get out of it.* Then I came out with the truth.....Then the sergeant asked me to tell the truth before the magistrate and to beg for pardon. Therefore I spoke the truth before the magistrate." These words definitely imply that the confession was prompted by a suggestion by the sergeant that some advantage would be gained by the accused if he told the truth. In the face of them however the learned acting magistrate expressed himself as believing that the statement was voluntarily made. Unfortunately he was unaware of the rules issued by the Legal Secretary for the guidance of magistrates in recording statements and confessions under section 134 of the Criminal Procedure Code. Had he been aware of the instructions, and as Abraham C. J. said in *The King vs Mudiyanselagey Ranhamy & Others* (2 C.L.J. 104) " probed with the greatest care into the motives which led the accused to make this statement," it is highly improbable that the statement would have been made. Moreover the statement was recorded in the magistrate's chambers, and not in open court as advised in the Rules, and the accused was not given any time to reflect upon his position as is considered desirable and advisable. I do not suggest that the Rules have any legislative sanction. They are, as described in anticipation by Abraham, C.J. " Rules of prudence." But it seems to me that they set out the precautions which, where practicable should be regarded as a minimum. I may mention that in the recent case of *The King vs W. K. Franciscu Appuhamy* (6 C.L.J. 146) Wijeyewardene, J. thought that the " magistrate should have allowed a much longer interval than 45 minutes to elapse before he recorded the confession." In the present case no time at all was allowed. It appears to me, to express myself no more strongly, that the confession P39 was caused by an inducement proceeding from a person in authority and is irrelevant and therefore inadmissible.

Having arrived at that conclusion at the close of the argument it became necessary for me to consider whether the first statement P15 was tainted in similar manner. Counsel for the accused put the latter into the witness-box. He said that he was arrested on 5th September and kept in custody until the 11th, the date upon which he appeared as a witness and

made the statement incriminating himself. He alleged that he was assaulted by Sergeant Lewis Appuhamy and promised an acquittal if he would say what he was told to say.

A witness, Dingiri Banda, called in support, also alleged that he himself was knocked about by Sergeant N. X. Perera " from 4.30 p.m. to 4 a.m." in order to induce him to tell the truth. The accused also alleged that he spent the night before making the statement P39 (i.e. 13th October) at Kuliyapitiya Police Station and was there coached by Inspector Sivasampu and Sergeant Lewis Appuhamy as to the statement which they wished him to make. (It is noteworthy that on 29th September Inspector Sivasampu had informed the court that the 6th suspect (i.e. accused) wished to make a statement).

The latter informed the court that he was not willing to make a statement.

All these allegations were denied by the Police Officers concerned, and I should be very reluctant to believe that they were guilty of the conduct imputed to them. In regard to the alleged incident on the night of 13th October the Fiscal's Marshal swore that the accused was brought from Negombo remand goal to the M. C. Dandagamuwa direct on the morning of 14th October. In that case the accused could not have been at Kuliyapitiya Police Station as alleged by him. Moreover, Sergeant Lewis Appuhamy denied that accused was in custody until September when he appeared as a witness. Be that as it may, it is conceded by the sergeant that he questioned the accused twice, *viz.* on 5th and 7th September and that at that time the Police were at a complete loss in regard to evidence against any of the persons then suspected, including the accused. The sergeant says that accused then came to him on the 9th and said that he wished to tell the whole truth and that he thereupon made a statement which, it can be assumed was on the lines of his subsequent evidence. It should be noted that when he began to incriminate himself in the witness-box he was questioned by the magistrate and warned that he was equally liable with the other suspects for the offence He said that he was giving evidence, voluntarily and realized the implications. Even so it is difficult to imagine why a person in the position of the accused who must have known that there was no evidence against him should deliberately provide that evidence unless some inducement were offered to him. Seeing that his first public appearance in the proceedings was in the character of a witness it is not difficult to believe that he had been told that that would be the part he would play throughout the proceedings and that no harm would befall him. This supposition is confirmed by the passage from P39 which I have quoted above. I hold therefore, that P15 like P39 and for the same reasons is inadmissible.

Statements excluded.

Present: HOWARD, C.J.

TISSAHAMY KAPURALA vs PERERA

S. C. No. 188/41—*C. R. Badulla No.* 10307.

Argued on 22nd May, 1942.

Decided on 1st June, 1942.

Estoppel—Evidence Ordinance section 115—*Can person who bid at the sale of a land deny the title of the vendor.*

Plaintiff brought this action against the defendant claiming to be entitled to a land purchased by the defendant at a sale in execution of a writ against one Pabilis Appuhamy. The defendant pleaded that the plaintiff was estopped by his conduct from denying the vendor's title. It was proved that the plaintiff was present at the Fiscal's sale which took place on the land itself and that he bid twice at the sale.

Held : That the plaintiff was by his conduct estopped from denying the defendant's vendor's title.

Cases referred to : *Ukku Banda vs Karupai* (25 N.L.R. 204)
Rodrigo vs Karunaratne (21 N.L.R. 360)
Carr vs The London & North Western Railway Co. (1875—10 C.P. 307)
Caruppen Chetty vs Wijesinghe (14 N.L.R. 152)
Fernando vs Fernando (14 N.L.R. 155)

N. K. Choksy with *Ivor Misso*, for the plaintiff-appellant.
Cyril E. S. Perera, for the defendant-respondent (substituted)

HOWARD, C.J.

This is an appeal by the plaintiff from a judgment of the Commissioner of Requests, Badulla, dismissing his action with costs. The learned Commissioner has decided in the plaintiff's favour an issue as to whether the latter had prescribed to the land in dispute. He has also held that the plaintiff is estopped from denying the title of the defendant who bought the land in question at a Fiscal's sale. The only question for decision is whether the Commissioner was right in coming to the conclusion that the plaintiff was estopped from denying the title of the defendant.

It is conceded by the plaintiff that he was present when the land was sold by the Fiscal. The sale took place on the land itself. The plaintiff, though present, made no claim to any portion of the land. In fact he offered two bids. In spite of this conduct on the part of the plaintiff his counsel contends that he is not estopped from denying the title of the defendant who purchased the property at the auction. He bases this contention on certain statements made by the defendant when he gave evidence. In cross-examination the substituted-defendant stated as follows :

> " On a writ against the brother-in-law the land was sold and my wife bought. The plaintiff bid twice. His bidding did not influence my conduct. I knew the land when it belonged to father-in-law and that it was bequeathed to brother-in-law. Whether plaintiff bid or not we would have purchased unless the price went very high."

Counsel for the plaintiff maintains that the inference to be drawn from this evidence is that the defendant's purchase at the sale was independent of the conduct of the plaintiff in bidding. The defendant was not therefore induced to purchase by the conduct of the plaintiff. The latter in these circumstances is not estopped from denying the title of the defendant.

A number of authorities have been cited. In *Ukku Banda vs Karupai* (25 N.L.R. 204) it was held that in order to establish an estoppel by conduct by silence, the person who is sought to be estopped by reason of his silence must be proved to have intended to create a false impression on the person who sets up the estoppel and that he caused him thereby to do a particular act. The facts in this case were that a puisne incumbrancer who was not bound by a mortgage decree was present at the execution sale and was silent. De Sampayo, A.C.J. gave the judgment of the court and held that in the circumstances of the case the defendant was not estopped from asserting his title. In the course of his judgment the learned judge in referring to the conduct of the defendant says :

> " Even assuming that she was among the circle of people who were attracted to the spot by the sale, it is quite certain that she was not there as a bidder, nor did she say or do anything to indicate to any person that she had no objection to the sale. She was in fact only silent, and it is contended on behalf of the plaintiff that she should have made her claim to the land publicly. Now, this class of estoppel by conduct is generally very difficult to apply. From all the decisions on the subject, two clear propositions emerge. (1) that the person who is sought to be estopped by silence must be proved to have intended to create a false impression on the person who sets up the estoppel, and (2) that he caused him thereby to do a particular act."

In the present case the plaintiff was not only silent but bid twice thereby indicating that he had no objection to the sale. In *Rodrigo vs Karunaratna* (21 N.L.R. 360) it was held that to establish an estoppel. it must be proved that the action taken by the party seeking to establish the estoppel was directly connected with the false impression caused by the representation or conduct of the party sought to be estopped. The representation or the conduct producing the impression must be, in effect, an invitation to the person effected by it to do a particular act. But it need not be proved that the party sought to be estopped knew the truth about the facts which he by his statement or his conduct misrepresented. In the course of his judgment in this case Bertram, C.J. cited with approval the following passage from the judgment of Brett, J. in *Carr vs The London & North Western Railway Co.* (1875–10 C.P. 307) :

> " Another proposition is that, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the

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latter was intended to act upon it in a particular way, and he, with such belief, does act in that way to his damage, the first is estopped from denying that the facts were as so represented."

The case of *Caruppen Chetty vs Wijesinghe* (14 N.L.R. 152) is also very much in point. In this case the defendant was present at the Fiscal's sale but deliberately refrained from notifying his title to the purchaser. The Commissioner of Requests, however, held on the evidence that the defendant's silence on the occasion of the sale to the plaintiff was due to a deliberate intention on his part to deceive the plaintiff for his own emolument. Wood Renton, J. was not prepared to say that the finding was wrong. It was argued for the defendant that there was nothing to show that the defendant's silence was the proximate cause of the plaintiff's purchase. Wood Renton, J. dealt with this argument in the following words :

> " One has merely, I think, to ask the question whether if the respondent had disclosed his interest in the land, the appellant would have purchased it as if it were an unencumbered property, in order to see the untenable character of this argument."

Wood Renton, J. in these circumstances held that the defendant was estopped from setting up his title against the plaintiff. In *Fernando vs Fernando* (14 N.L.R. 155) it was held that it was essential, in order to create an estoppel by acquiescence, to show that the plaintiffs, knowing that a violation of their rights was in progress, stood by and so misled the first and second defendant. In this case there was no evidence of any silence or inaction on the part of the plaintiffs on any occasion when it was their duty to assert their rights.

Applying to the present case the principles formulated by the various authorities I have cited, the evidence proved that there was more than mere silence on the part of the plaintiff. He actually made two bids for the property. Any reasonable person would take such conduct to mean that the plaintiff had no interest in the property. Was the defendant intended to act upon it in a particular way, that is to say, by a purchase of the property ? The answer to this question is supplied by the passage I have cited from the judgment of Wood Renton, J. Would the defendant have purchased if the plaintiff had disclosed his interest in the land. The substituted-defendant also stated in re-examination that if plaintiff claimed the land or part of it the Fiscal would not have sold it and that by his bidding, he, the defendant, thought plaintiff admitted title of Pabilis Appuhamy.

For the reasons I have given, I have come to the conclusion that the Commissioner came to a right decision. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

Present: WIJEYEWARDENE, J. & JAYETILEKE, J.

PUBLIC SERVICE MUTUAL PROVIDENT ASSOCIATION vs ABRAHAMS (ASSIGNEE)

S. C. No. 90 (*Inty.*)—*D. C. Colombo No.* 5588/*Ins.*

Argued on 22nd January, 1943.

Decided on 2nd February, 1943.

Pension of a servant of the Crown—Does it vest in the assignee on the insolvency of the pensioner—Can an order impounding a pension of a servant of the Crown be made—Do payments made to a creditor out of pension after the insolvency of the pensioner vest in the assignee—Government Minutes on Pensions.

Held : (i) That a prospective order cannot be made impounding the pension of a person who had retired from the service of the Crown in Ceylon.

(ii) That payments made by or at the instance of the pensioner to a creditor after the insolvency of the pensioner vest in the assignee who is entitled to compel the creditor to pay the money so received by him to the credit of the assignee in the insolvency proceedings.

Cases referred to : *Baker vs Vairamuttu Chetty* (26 N.L.R. 360)
Wells vs Foster (8 Meeson & Welsby 149)
Ashby, ex parte Wreford (1892–1 Q.B. 872)
Crowe vs Price (22 Q.B.D. 429)
Jones & Co. vs Coventry (1909 – 2 K.B. 1029)
In re Roberts (1900–1 Q.B. 122)

E. B. Wickramanayake, for the appellant.

G. P. J. Kurukulasuriya, for the assignee-respondent.

WIJEYEWARDENE, J.

The insolvent, G. W. Perera, was a Government Servant and retired from service on a pension. He mortgaged a property of his with the Public Service Mutual Provident Association for Rs. 7,500/–. That bond was put in suit in July, 1941, and a decree was entered in October, 1941. Prior to his adjudication, the insolvent arranged that the Treasury should pay out of his pension a sum of Rs. 69/50 monthly to the Provident Association in reduction of the claim on the bond. The assignee applied to court for an order on the Provident Association to bring to the credit of the insolvency case the sum of Rs. 451/33 so received by the Association after the insolvent filed his declaration of insolvency and was adjudged an insolvent. The District Judge allowed the application and the Association has preferred the present appeal against that order.

It was urged on behalf of the appellant :

i. That the appellant was entitled under section 99 of the Insolvency Ordinance to set off the sum of Rs. 451/33 against the debt due to him.

ii. That a pension did not vest in the assignee as the right to a pension was not a right which could be enforced at law.

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The first argument is clearly untenable as section 99 does not apply to credit given or debts contracted by an insolvent after his adjudication.

With regard to the second argument, it is necessary to consider the effect of certain rules of the Pension Minute and the provisions of the Insolvency Ordinance. Section 70 of the Insolvency Ordinance enacts that, " when any person shall have been adjudged an insolvent, all his personal estate and effects, present and future.....and all property which he may purchase, or which may revert, descend.....or come to him and all debts due or to be due to him.....shall become..... vested in the assignee....." Our Ordinance as well as the English Bankruptcy Act of 1849 on which our Ordinance is based do not contain a definition of " property " ; but it was held in *Baker vs Vairamuttu Chetty* (26 N.L.R. 360) that the words of the section were wide enough to include the " salary " or " income " of a mercantile assistant. How does a " pension " of a public servant, differ from such " salary " or " income " ? Generally speaking, in the absence of any statutory enactment a pension awarded for past services could be attached in satisfaction of the debts of the pensioner just as much as any other income of his, at least to the extent that it is not needed for the maintenance of the insolvent and his family. It is true that Rule 1 of the Pension Minute provides that " public servants have no absolute right to any pension.....and the Governor retains the power to dismiss a public servant without compensation." It may even be possible to argue that even after the Governor decides to award a pension it is payable only during the pleasure of the Crown. These considerations do not deprive a pension of its character of property capable of assignment. (*Vide* judgment of Parke, B in *Wells vs Foster* (8 Meeson & Welsby 149)). But we have, however, Rule 41 which lays down that ".....no pension, granted under these Rules shall be assignable or transferable " and Rule 43 which provides that " if any person to whom a pension has been granted under these Rules becomes a bankrupt the pension shall forthwith cease " subject to the qualification that the Governor may make such allowance as he thinks fit for the maintenance of the public servant or his family either during the remainder of the pensioner's life of for a shorter period. I think, therefore, a prospective order cannot be made impounding the pension of a retired public servant though the pension has been granted for past services (See *re Ashby, ex parte Wreford* (1892 – 1 Q.B. 872). But, is it possible to say that the same considerations should apply to the sum of money paid to the appellant Association ? No doubt, this sum of money can be identified as a part of the pension but it ceased to be impressed with the character of " pension " the moment it was paid to the appellant Association at the request of the public servant concerned. I think the position is the same as if the insolvent received the pension from the Treasury and then paid instalments of Rs. 69/50 a month to the appellant Association. This view of the law is supported by the *dicta* of the judges in *Crowe vs Price* (22 Q.B.D. 429) which were approved and adopted in *Jones & Co. vs Coventry* (1909 – 2 K.B.

1029). In *Crowe vs Price* a sum of £ 109/– stood in the Bankruptcy Estate Account at the Bank of England to the credit of the judgment-debtor, a retired Deputy Commissary in the army, on the annulment of his bankruptcy. The sum represented the balance payments made to the trustee in bankruptcy out of the defendant's retired pay by the Paymaster-General under an order in the bankruptcy proceedings. The judgment-debtor was liable to be recalled to active service and section 141 of the Army Act 1881 made an assignment of, or any change on, such pay void. The plaintiff as judgment-creditor applied for the appointment of a receiver in respect of that sum. In holding against that application Lord Esher, M.R. said :

> " It is money which came from the Crown as pension and which was on its way to the defendant to be received by him as pension ; but the Court of Bankruptcy intercepted it on its way to the Officer ; it was not paid to him nor to any agent of his nor with his consent to anybody."

It has, of course, been established by a long series of decisions that an insolvent should not be deprived of so much of the income as is necessary for his maintenance. (*In re Roberts* 1900 – 1 Q.B. 122). But in this case the arrangement made by the insolvent himself for the payment of Rs. 69/50 monthly to the appellant Association shows that no part of that amount was necessary for his maintenance.

I would, therefore, uphold the order of the District Judge directing the appellant Association to bring Rs. 451/33 to the credit of the insolvency proceedings and vesting that amount in the assignee.

The appellant will pay the respondent the costs of this appeal.

JAYETILEKE, J.

I agree.

Appeal dismissed.

Present: SOERTSZ, J. & HEARNE, J.

MARIKAR vs DE MEL, LTD.

S. C. No. 40—*D. C. Colombo No.* 12458 *with*
S. C. No. 129—*D. C. Colombo No.* 12458.
Argued on 14th, 15th, 16th and 17th December, 1942.
Decided on 15th January, 1943.

Principal and Agent—Purchase and sale of rubber coupons by broker—Rights and liabilities of broker acting for undisclosed principal—When may local usage be regarded as affecting the general law.

Held : (i) That where by reason of a custom the brokers are liable to be sued by the sellers, they are not relieved of their liability because it is inconsistent with their position as mere agents under the general law.

(ii) That a right of action which lies according to local usage will not be lost because it is inconsistent with the plaintiff's position under the general law.

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(iii) That the right of indemnity covers not merely the losses actually sustained by the agent but also the full amount of the liabilities incurred by him even though they may in fact never be enforced.

Cases referred to : *Sharman vs Brandt* (1871 – L.R. 6 Q.B. 720)
Fleet vs Murton (1871-72 – L.R. 7 Q.B. 126)
Humfrey vs Dall (27 L.J. (Q.B.) 390)
Couturier vs Hastie (8 Exch. 40)
Lacey vs Hill (Crowley's Claim 1874 – L.R. 18 Eq. 182)
British Union & National Insurance Co. vs Rawson (1916 – 2 Ch. 476, C.A.).

N. E. Weerasooriya, K.C., with *A. R. H. Canakaratne*, K. C., *L. A. Rajapakse*, and *J. M. Jayamanne*, for the plaintiff-appellant in S. C. No. 40 and the plaintiff-respondent in S. C. No. 129.

H. V. Perera, K.C., with *E. F. N. Gratiaen*, and *D. W. Fernando*, for the defendants-respondents in S. C. No. 40 and the defendants-appellants in S. C. No. 129.

HEARNE, J.

The plaintiff, who is the respondent to this appeal, No. 129, alleged that he had requested the appellants to buy as well as to sell rubber coupons for him, that in pursuance of his requests the appellants had " put through " various purchases and sales, details of which appear in the plaint, and that, on a balance of these transactions, 310,000 lbs. coupons of rubber " were deliverable by him " to the appellants which they " wrongfully and unlawfully " refused to accept. In their answer the appellants accepted liability as the *brokers* employed by the respondent but pleaded that the latter's statement of their dealings was incomplete. It was alleged that on the 15th May 1940 the respondent instructed them to purchase 1,000,000 lbs. coupons, and that, in consequence, so far from there being any liability on their part to take delivery of 310,000 lbs. coupons from the respondent, the respondent was liable to take delivery of 690,000 lbs. coupons from them. The respondent denied that he had given instructions for the purchase of 1,000,000 lbs. coupons as alleged by the appellants.

The appellants are a private company (Austin de Mel, Ltd). It is admitted that, when approached by buyers, they had on some occasions issued " bought notes " in which reference was made to undisclosed principals whose existence was entirely mythical. Indeed, in regard to the sales to the respondent which are set out in the plaint the sellers were, admittedly, in every case, the appellants themselves. It is, however, not necessary to consider whether, on the authority of *Sharman vs Brandt* (1871 – L.R. 6 Q.B. 720), the respondent would have been entitled to repudiate these sales for the respondent in his plaint gave them credit for them and in the course of the trial a clear cut agreement was reached. It was agreed that, if the appellants failed in regard to the 1,000,000 lbs. coupons contract, they would be liable in the sum of Rs. 56,185/18 and that, if they succeeded, they would be entitled to judgment for Rs. 107,055/81.

By reason of this agreement it appeared that the decision of the case depended upon the determination of one question of fact. But this was far from being so. Sixteen issues had originally been framed and after Mrs. de Mel, the alleged seller of the 1,000,000 lbs. coupons had been cross-examined at length, further issues were raised. One of the issues suggested that the 1,000,000 lbs. coupons contract was unenforceable as it was a wagering contract, and others suggested that the use of Mrs. de Mel's name was a mere cloak to hide the real transaction, namely a sale, not by Mrs. de Mel, the " undisclosed principal," but by the appellants themselves.

The position that obtained from this stage onwards was not free of complications. Apart from the evidence in the case, the agreed course of dealing between the parties negatived the idea that the contracts made by the respondent were wagering contracts. He himself professed to know what these contracts are. He had had experience of them and had carried two or three cases involving the defence of wagering as far as the Privy Council, and yet, while he was maintaining in evidence that his contracts were not wagering contracts and that he did not enter into the 1,000,000 lbs. contract at all, his counsel was arguing that the contract which was denied by his client was, *if made*, a wagering contract. Alternative defences are, of course, possible in law but arguments in support of them in circumstances such as these must of necessity lose much of their force. Again while the respondent's contention was that he was not a party to the 1,000,000 lbs. contract his counsel was, in effect, arguing that he was, and that the other party to the contract was, not Mrs. de Mel, but the appellants themselves.

An examination of documents in the case, *e.g.* D50 and P39 indicates that before and after the 15th May, 1940. Mrs. de Mel had bought and sold coupons through Austin de Mel, Ltd. The judge said that " he had no hesitation in accepting the story of the defence that the plaintiff did put through the contract of 15th May, 1940, and in rejecting the plaintiff's denial." He held that " the seller on the 1,000,000 lbs. coupons contract was not the defendant company but Mrs. de Mel " and that it was not a wagering contract. Nothing has been said on appeal that, in my opinion, could have the effect of disturbing these findings. No argument was based on the fact that Mrs. de Mel is the holder of one share in Austin de Mel, Ltd.

Notwithstanding the judge's strong findings of fact in favour of the appellants he held against them as a result of the view he took of the law in England which governs the rights and liabilities of principal and agent in Ceylon.

It had been agreed at the trial that " the brokers' bought note or sold note never discloses the name of the other party to the contract : that the broker is, as far as the seller is concerned, liable to accept delivery of all coupons tendered, and to pay the full contract price of the amount tendered by the seller whether the buyer accepts delivery or not : that, as far as the buyer is concerned, the broker is liable to tender and deliver the coupons irrespective of whether the seller has tendered or not."

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The judge held that " there was nothing in the local usage by which the defendant company (the appellants) who acted merely as agents for an undisclosed principal, can claim to act as principal and sue on the contract of the undisclosed principal."

I agree that in accordance with the general law of agency the appellants could not sue on the contract of the undisclosed principal (Mrs. de Mel). But, before it can be said that the local usage did not affect the general law, it is necessary to consider the legal implication of the local usage subject to which the contract was made.

It will be noted at once that the appellants undertook, as far as the seller is concerned, to accept delivery of all coupons and to pay the full contract price, whether the buyer accepts delivery or not. If, in the event of the buyer refusing to accept delivery, as in this case he did, the seller is entitled to sue the appellants, then the general law of agency *is* affected by the local usage : for under the general law, the brokers would not be liable to be sued by the seller.

Now, there is authority for saying that, where by reason of a custom the brokers are liable to be sued by the sellers, they are not relieved of their liability because it is inconsistent with their position as mere agents under the general law.

In *Fleet vs Murton* (1871-72 – L.R. 7 Q.B. 126), the defendants, M. & W., fruit brokers in London, being employed by the plaintiffs, merchants in London, to sell for them, gave them the following contract note addressed to the plaintiffs : " We have this day sold for your account to our principal " so many tons of raisins. (Signed) M. & W. brokers." The defendants' principal having accepted part of the raisins, and not having accepted the rest, the plaintiffs brought an action against the defendants, and they sought to make them personally liable by giving evidence that in the London fruit trade, if the brokers did not give the names of their principals in the contract, they were held personally liable although they contracted as brokers for a principal. The brokers were held to be liable.

Cockburn, C.J. said : " If the custom attaches, the non-liability which would under ordinary circumstances *prima facie* exist in a contract made by a person purporting to contract as broker, ceases, and the contract assumes a different form and character and carries with it different legal consequences, by reason of the custom of the trade....."

In his judgment Blackburn, J. said : " If the matter were *res integra* I should have felt great difficulty indeed, as some of the judges in the Exchequer Chamber did in *Humfrey vs Dale*, in making out how the custom could make the broker, who is, in fact, not contracting as purchaser, liable in the terms of the count in that case which charged the defendant as purchaser," But, after considering in this connection the case of *Couturier*

vs Hastie, he said : " It seems to me, therefore, as Mr. Cohen said, that this custom must be taken as merely regulating the terms of the employment " of the brokers.

It will be seen that, in the case cited, the custom, either because of the legal consequences which flowed from it, or because it was held to attach, not to the contract of sale, but to the term of employment, was enforced although it conflicted with the general law of agency. Similarly, in the present case, if, by reason of the local usage, an action by the appellants (or rather a claim in reconvention) is maintainable by them against the respondent, they would not lose their right of action because it is inconsistent with their position under the general law. This, I think, disposes of the difficulty which the learned judge felt.

The next question is what rights, if any, have the appellants against the respondent ? They became liable to tender and deliver to the respondent the coupons contracted for irrespective of whether the seller tendered or not, and also to take delivery from the seller of all coupons tendered and to pay the full contract price for them whether the respondent was prepared to take delivery or not : and, upon the default of the respondent, they are entitled to be indemnified against the liabilities they have incurred. " The right of indemnity covers not merely the losses actually sustained by the agent but also the full amount of the liabilities incurred by him, even though they may in fact never be enforced." Halsbury (Hailsham edition) volume I, article 437. The authority of this proposition is *Lacey vs Hill* (Crowley's Claim 1874 – L.R. 18 Eq. 182). See also *British Union & National Insurance Co. vs Rawson* (1916 – 2 Ch. 476 C.A.).

In this state of the law, and having regard to the terms of the agreement to which I have referred, the appeal of the appellants must be allowed with costs and judgment must be entered in their favour for Rs. 107,055/81 with interest as claimed and costs.

A preliminary objection had been taken that the notice of tender of security was not given " forthwith." It is, however, clear from the record that notice was given on the very day that the petition of appeal was received by the court. The objection fails.

It was agreed that if this appeal was allowed, the appeal by the plaintiff in S. C. No. 40 would not arise for consideration. It must be put aside. I make no other order.

SOERTSZ, J.

I agree.

Appeal in S.C. No. 129 allowed.

IN THE COURT OF CRIMINAL APPEAL

SOERTSZ, J., (President), HEARNE, J. & DE KRETSER, J.

REX vs PUNCHIMAHATMAYA

Appeal No. 33 *of* 1942 *with Application No.* 122 *of* 1942
S. C. No. 33—*M. C. Balangoda No.* 33768.
Argued on 23rd and 24th November, 1942.
Decided on 8th December, 1942.

Court of Criminal Appeal—Criminal Procedure Code sections 134 *and* 233.

Held : (i) That a statement made by an accused voluntarily after the commencement of the non-summary inquiry and recorded in the manner prescribed by section 134 of the Criminal Procedure Code cannot be put in evidence at the trial by the prosecution.

(ii) That the statements contemplated by section 233 of the Criminal Procedure Code are the statements made under sections 160 and 165 of that Code.

(iii) That in regard to an accused's statements which do not come under section 160 or 165 of the Criminal Procedure Code it is open to the prosecution or to the accused to decide whether to make use of them or not, provided they are relevant and admissible.

Cases referred to : *The King vs Weerasamy* (42 N.L.R. 152 & 207)
The King vs Wellayan Sittambaram (20 N.L.R. 257)

O. L. de Kretser, (*Jnr.*), for the appellant.
H. W. R. Weerasooriya, *Crown Counsel*, for the Crown.

SOERTSZ, J. (President)

The appeal from the conviction entered in this case was based on several grounds set forth in the original notice of appeal and on several others advanced in a supplementary statement tendered on a much later date.

Mr. de Kretser, who appeared for the appellant, confined his argument to only a few of the questions raised. After examination of all the matters submitted to us, we reserved our judgment in order to consider the objection taken in ground (1) of the original notice, for that appeared to us to be the one substantial question for our decision.

That question was whether it was incumbent on the Crown to put in evidence the statement made by the appellant to the magistrate on the 19th of May, 1942, and whether if the Crown was bound to do that, its failure in that respect was material in the circumstances of this case.

The statement in question was a statement that came to be recorded in this way : On the 19th of May, the magistrate, on receiving information from the Ratnapura Police that a case of suspected murder had been reported to them, went to the scene of the alleged offence. After the magistrate had made his inspection, the Police Sergeant informed him that the accused,

who was present in custody at the scene, desired to make a statement. The magistrate, thereupon, questioned the accused, and he admitted that he desired to make a statement. The magistrate told him that he is not bound to make a statement, and that if he did make one, it might be read in evidence against him, and that he need not make it if he had been induced to make it. The magistrate went to tell him that " if he was prepared to make his statement later, after he had time to consider about the matter," he would record it.

The magistrate then placed the accused in the charge of the Interpreter Mudaliyar and proceeded to record the " available evidence." After he had taken the evidence of three witnesses, including the Sub-Inspector of Police, he gave the accused information of the charge as required by section 156 of the Criminal Procedure Code, and recalled the two witnesses, other than the Inspector whose evidence had been taken, and read over that evidence to the accused, and gave him an opportunity to cross-examine those witnesses. At this stage the accused again said that he desired to make a statement. The magistrate then questioned the accused and satisfied himself that the accused was going to make " a purely voluntary statement," and recorded it on the appropriate form as a statement made under the provisions of section 134 of the Criminal Procedure Code. If the statement so recorded is, unequivocally, one made under section 134 of the Code, it is clear that it is not within section 233 of the Code and the Crown was under no obligation to put it in evidence. But Mr. de Kretser submits that although this statement, P17, purports to have been recorded under section 134, it is not, strictly, such a statement as is contemplated by that section for the reason that it cannot properly be regarded as a statement recorded *before* the commencement of the inquiry in view of the rulings given in the case of *The King vs Weerasamy* (42 N.L.R. 152 and *ibid* 207) to the effect that an inquiry commences when the charge is read to the accused under section 156 of the Criminal Procedure Code. That had been done in this case before the statement in question was recorded. The statement cannot, therefore, be regarded as one properly taken under section 134 of the Code. In our opinion, the Judge of Assize rightly ruled that it was not competent to the Crown to put it in evidence as such a statement.

But Mr. de Kretser contends that this statement was a statement of the accused recorded " in the course of the inquiry " in the Magistrate's Court, and relying upon section 233 of the Criminal Procedure Code, he said that the Crown was bound to put it in and read it in evidence before the close of the case for the prosecution.

Section 233 enacts that :

> " 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 question, then, is what are the statements contemplated in that section. Chapter 16 of the Criminal Procedure Code contains the provisions regulating an inquiry into a case such as this. So far as those provisions go,

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Soertsz, J. (President)

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the only sections that refer to statements by an accused in relation to their being recorded or not are sections 156, 160 and 165. Section 156 refers to such a statement, only to direct the magistrate *not* to record it and to provide that any reply made by the accused shall be inadmissible against him. Section 160 deals with that stage of the case at which the examination of the witnesses called on behalf of the prosecution has been completed and it directs the magistrate to read the charge and to explain it to the accused and to ask him whether he wishes to say anything in answer to it, and after cautioning him in the manner indicated in the section, to record it in the manner provided by section 302. Section 165 directs the magistrate when he commits the accused for trial to the Supreme Court to require him to state orally the names of persons whom he wishes to be required to give evidence at his trial and to prepare a list in the manner indicated.

From these facts it emerges clearly that there are two occasions on which the accused must be given an opportunity to make a statement, and one occasion on which he is in effect forbidden to make one. The opportunity contemplated in section 160 may, however, recur more than once in the course of an inquiry, for a charge may be altered under section 172 (3) of the Code at any stage of the inquiry.

The next question is whether, apart from the occasions referred to in sections 160 and 165, an accused may not make a statement and ask the magistrate to record it. As I have already observed, there is one occasion on which he is not entitled to do that, and that is the occasion referred to in section 156 of the Code. But for that, there is certainly no express prohibition, that, and there does not appear to be any good reason why, an accused may not make a statement at some other stage of the inquiry and ask the magistrate to record it.

For instance, he may desire to withdraw a statement made by him under section 160 or 165 and to make a different statement or to name other witnesses and he should be allowed to do that. That was the view taken in the case of the *The King vs Weerasamy* (*supra*) and the Divisional Bench ruling in the case of *The King vs Wellayan Sittambaram* (20 N.L.R. 257), in regard to unsworn statements made by accused persons, seems to support that view.

In regard to the point that the word "statements" in the plural in section 233 suggests that statements other than that made by an accused under section 160 "shall be put in and read in evidence" by the Crown, that does not seem to follow necessarily. The word "statements" in the plural was necessary in section 233 for, in addition to the statement under section 160, there is the statement under section 165, and what is more, there may be several statements made under each of these sections.

The sole question that remains is whether it was incumbent on the prosecution to put it in and to read it in evidence as a part of its case. We do not think it was. The statements contemplated by section 233 are statements made under sections 160 and 165. Indeed, in regard to statements

under section 160, the accused is given the assurance that they shall be taken down and shall be given in evidence at the trial.

In regard to other statements made in the course of the inquiry it is open to the prosecution or to the accused to decide whether to make use of them or not if, of course, they are relevant and admissible.

In this case the proceedings show that the accused was offered every facility for putting the statement in question in evidence if he desired to do so, but his counsel decided not to avail himself of that opportunity.

For these reasons we are of opinion that the appeal fails. It is dismissed.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present: SOERTSZ, J., (President), KEUNEMAN, J. & JAYETILEKE, J.

REX vs MUDIYANSELAGE MUDIYANSE

S. C. No. 10—*M. C. Kurunegala No.* 6053—*2nd Midland Circuit* 1942.
Appeal No. 28 *of* 1942. *Application No.* 101 *of* 1942.
Argued on 14th October, 1942.
Decided on 26th October, 1942.

Charge of murder—Plea of self-defence—Evidence Ordinance section 105—Court of Criminal Appeal—Directions of judge—Questions put to the judge by the foreman with a view to clear their understanding of certain points in the summing-up—Indication from the questions that the jury did not follow the charge of the judge—Retrial.

In this case the accused who was indicted for murder pleaded self-defence. Counsel for the accused had suggested that the offence was culpable homicide not amounting to murder either on the ground that. at the time he caused the death of the deceased, he had been deprived of his power of self-control by grave and sudden provocation or on the ground that the death of the deceased occurred in circumstances that brought the case within the plea of a sudden fight.

The trial judge in the course of his summing-up said :-

> " Now, that burden is not so heavy as is imposed on the Crown to prove its case beyond all reasonable doubt. All that the accused has to do is to show by a preponderance or balance of evidence that the circumstances are such as to bring him within this provision of law."

The jury after deliberating for forty-five minutes returned for further directions and through their foreman put certain questions to the trial judge which indicated that they did not follow the charge.

Held : (i) That an accused person who puts forward the plea that he acted in self-defence must prove that he was exercising that right. Section 105 of the Evidence Ordinance imposes that burden on him,

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Soertsz, J. (President)

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(ii) That the verdict should be quashed and a retrial ordered as the jury do not appear to have understood the judge's charge.

J. E. M. Obeyesekere, with *V. F. Gunaratna*, for the accused-appellant who is also the applicant in the application.

E. H. T. Gunasekera, Crown Counsel, for the Crown.

SOERTSZ, J. (President)

This is an appeal from a sentence of death passed on the appellant by the presiding judge, when the jury empanelled to try the case returned a verdict of six to one, finding the appellant guilty of the offence of murder with which he was charged.

The case for the Crown was that the appellant had taken the deceased man at a disadvantage, and stabbed him while he was reeling to a fall under two blows dealt him by the appellant's brother.

The Medical Officer who performed the autopsy found an injury that, if it was not necessarily fatal, was, undoubtedly, sufficient to cause death in the ordinary course of nature.

The case for the defence was that the appellant stabbed the deceased man when he was about to attack the appellant's brother with a knife and that, in the circumstances of the case, it was justifiable homicide. On this plea there also arose the question whether the appellant's offence was not that of culpable homicide not amounting to murder if in the view of the jury, he had exceeded the right the law gave him.

Counsel for the appellant appears also to have submitted to the jury for their consideration, as alternative defences, the questions whether the appellant's offence was not that of culpable homicide not amounting to murder either on the ground that, at the time he caused the death of the deceased, he had been deprived of his power of self-control by grave and sudden provocation ; or on the ground that the death of the deceased occurred in circumstances that brought the case within the plea of a sudden fight.

The learned judge charged the jury as fully and as clearly as was possible. He explained to them the meaning of the word " murder " and repeatedly drew their attention to the fact that for the constitution of that offence, it was necessary that there should be, on the part of the assailant, an intention either to cause death or to cause bodily injury sufficient, in the ordinary course of nature, to cause death. He then told them that if they could not find such an intention, or were in reasonable doubt as to the existence of such an intention, they should not find him guilty of murder, but should go on to consider whether they could find that he had the knowledge that his act was likely to cause death. If they so found, the offence would be that of culpable homicide not amounting to murder. If they did not find even this requisite knowledge, or had a reasonable doubt in regard to it, they would then go on to consider whether he intended to cause the grievous injury that had resulted,

The learned judge next dealt with the defence that the appellant was exercising the right of private defence and explained the law on that point, again fully and clearly. He summed-up the evidence on this question and called their attention to such contradictions and discrepancies as existed in the evidence. Finally, he dealt with the alternative defences of provocation and sudden fight, and he asked the jury to consider their verdict.

Counsel for the appellant confined himself to two of the several grounds on which this appeal was taken. He contended, firstly, that there was misdirection in that the learned judge in charging the jury in regard to the plea of private defence said to them :

> " In that connection I must say that by law the burden is placed on an accused person to prove to you that he was exercising that right." (namely, the right of private defence.)

That is the only part of the charge dealing with this question that has been quoted in the notice of appeal but that is an incorrect and misleading statement of what the judge said on this point, for he added immediately :

> " Now, that burden is not so heavy as is imposed on the Crown to prove its case beyond all reasonable doubt. All that the accused has to do is to show by a preponderance or balance of evidence that the circumstances are such as to bring him within this provision of law."

In our view this direction, if it erred at all, erred in favour of the prisoner. The direction as quoted in the grounds of appeal was in itself a correct direction. It states, substantially, what section 105 of the Evidence Act lays down.

Secondly, counsel contended that the proceedings show that the jury were thoroughly confused in their minds and that, for that reason, their verdict should not be allowed to stand.

The summary I have given of the charge shows that the jury were given all the assistance a judge could possibly give them. But they, or at least, some of them, as will presently appear, seem to have stood in need of much more than assistance. After a deliberation of forty-five minutes' duration, they came before the judge and asked for further direction. It is necessary to quote the full note of the proceedings that took place then :

Foreman :

> " I have been requested to ask Your Lordship to give us a little further instruction on the law relating to murder, and this is the question particularly asked : If a man uses a lethal weapon on another, but without the intention of causing death, but unfortunately kills his victim, is he still guilty of murder ? "

Court :

> " Not unless he has the intention of causing death or such bodily injury as in the ordinary course of nature is sufficient to cause death. Does that clear the point ? He must intend to cause death or such bodily injury as is sufficient in the ordinary course of nature to cause death. Is that the only point ? "

Foreman :

> " Yes, that is the only point."

Court :

> " I may say in that connection, Mr. Foreman, that a person by law is presumed to intend the ordinary consequences or normal consequences of his acts.

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An ordinary, normal person is presumed to intend the ordinary consequences of his acts. What I mean to say is, if somebody in this court got up and pointed a gun at you from this distance and fired it, he is presumed to intend the death of the person he fired at."

Foreman :

"Even though he can say afterwards that he did not intend ?"

Court :

"Yes. That is all ?"

Foreman :

"Yes. That is all."

Here again, it is perfectly clear that the learned judge directed the jury correctly that they could not find the prisoner guilty of murder "unless he had the intention of causing death or such bodily injury as in the ordinary course of nature is sufficient to cause death." But our difficulty is that we cannot be certain as to the purpose of the question the foreman asked. Was he seeking to ascertain whether intention to cause death etc. was essential ; or whether the prisoner would be guilty of murder, even if he had no such intention, because he used a lethal weapon ; or whether when the foreman used the phrase " but *unfortunately* kills his victim," he was asking for guidance in regard to what the position would be in law, if the prisoner used a lethal weapon not with *intention* in the sense of *malice aforethought*, but in an attempt to exercise the right of private defence. It seems impossible to say what exactly the foreman intended to ask. The word *unfortunately* is extremely puzzling in the context. The question becomes even more difficult when we find that the foreman was asking this question at the request of one or more fellow jurors. Had he himself quite understood the difficulty of the juror or jurors for whom he put the question ? Then there is the final question put by the foreman after the learned Judge had adduced an instance to illustrate the rule that " a person by law is presumed to intend the ordinary consequences or normal consequences of his acts." That question was " Even though he can afterwards say that he did not intend ? "

It is impossible to say what the real difficulty was that existed in the minds of the juror or jurors at whose instance the foreman put that question, and we are unable to free ourselves from a strong impression that, although the jury had been fully and properly charged, they or some of them, appear to have been in an extremely confused state of mind.

We have, therefore, come to the conclusion that it is desirable that we should quash the conviction and order a re-trial.

Conviction quashed and re-trial ordered.

IN THE COURT OF CRIMINAL APPEAL

Present: SOERTSZ, J., (President), HEARNE, J. & DE KRETSER, J.

REX vs WILLIAM *alias* RATU WILLIAM

Appeal No. 42 *of* 1942 *with Application No.* 132 *of* 1942
S. C. No. 1—*M. C. Avisawella No.* 24331.
Argued on 7th December, 1942.
Decided on 18th December, 1942.

Court of Criminal Appeal—Plea of autre fois acquit—*Criminal Procedure Code sections* 190, 191 *and* 330.

Held : (i) That the wording of section 190 of the Criminal Procedure Code means that a magistrate is precluded from making an order of acquittal under that section till the end of the case for the prosecution.

(ii) That a discharge under section 191 of the Criminal Procedure Code, even though the judge calls it an acquittal, cannot support a plea of *autre fois acquit.*

Cases referred to : *Senaratna vs Lenohamy* (1917 – 20 N.L.R. 44)
Weerasinghe vs Wijeyesinghe (1927 – 29 N.L.R. 208)
Gabriel vs Soysa (1930 – 31 N.L.R. 314)
Sumangala Thero vs Piyatissa Thero (39 N.L.R. 265)
Sidamparapillai vs Veeran & Others (20 C.L.W. 77)

A. Seyed Ahamed, for the accused-appellant.
E. H. T. Gunasekera, Crown Counsel, for the Crown.

HEARNE, J.

The appellant was found guilty by the unanimous verdict of the jury of the offences of robbery and of causing grievous hurt at the time of committing the offence of robbery.

The only point of law that was argued was that the presiding judge was wrong in ruling that the plea of *autre fois acquit* which was raised at the trial failed.

The facts relative to the former trial were these : The appellant had been tried by the Magistrate of Avisawella, who had assumed jurisdiction as District Judge. After the evidence of four witnesses had been recorded but before the prosecution had called all the witnesses whose evidence was available, an order of acquittal was entered. Following this order non-summary proceedings were taken against the appellant in consequence of which he was committed for trial before the Supreme Court.

The relevant law is set out in section 330 (1) of the Criminal Procedure Code, and the question for our decision is whether the appellant had been previously tried and acquitted within the meaning of that section. It reads thus : " a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the

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same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 181 or for which he might have been convicted under section 182."

In English law an acquittal means an acquittal on the merits but this is not necessarily so under our Code. Under section 194, for instance, if the complainant does not appear on the day fixed for trial the magistrate shall acquit the accused, unless he thinks proper to adjourn the hearing of the case. If he acquits, then, subject to the proviso in the section, the accused is entitled to the benefit of section 330. He is deemed to have been tried and acquitted, although no trial in any sense of the word has taken place.

On this view of the section the decision of the majority of the court in the case of *Senaratna vs Lenohamy* (1917–20 N.L.R. 44) was wrong. An order had been made by the magistrate under section 194 and the accused, it would appear was entitled to an acquittal and not to an inconclusive discharge. So strictly has the section been construed in India that even where the accused, against whom process had been issued, was also absent, an order of acquittal was held to entitle him to raise the plea of *autre fois acquit* (34 Mad. 253).

Again, under section 195, notwithstanding the fact that no trial takes place, the accused is in law deemed to have been tried and acquitted within the meaning and for the purposes of section 330. An attempt, however, is made to preserve the idea of an acquittal on the merits by the use of the words " if a complainant.....satisfies the magistrate....." An order of acquittal under section 195 which follows the withdrawal of the complaint implies that the magistrate had addressed himself to the merits of the case and has satisfied himself that the complainant should be permitted to withdraw for the reasons that the accused cannot be proved to be guilty.

On the other hand in section 190 the word " acquittal " has no artificial meaning. It means an acquittal on the merits.

Section 191 is an unfortunate section. Under the Indian Code when an accused is tried summarily, if a magistrate does not find him guilty he must record an order of acquittal (I am not now dealing with the compounding of offences). No order of discharge can be made. But section 191 gives a magistrate in Ceylon the power to discharge the accused at any stage. Even if he is unaware of the nature of the evidence of the remaining prosecution witnesses, he may stop the trial and discharge the accused. That such a power may have mischievous results is illustrated by this case. The accused was " acquitted " when all the prosecution evidence had not been led and yet, when all the available evidence was placed before a jury, they unanimously found him guilty.

The point in this appeal is whether the order of the magistrate — it is called an acquittal — was made under section 190 or section 191. It if was made under the latter it was no more than an order of discharge which does not bar the institution of fresh proceedings.

It was argued on behalf of the appellant that, although the case for the prosecution had not been closed, the order that was made was one under

section 190. This view is supported by the *obiter dicta* in *Weerasinghe vs Wijeyesinghe* (1927 – 29 N.L.R. 208), and it is also supported by the decision in *Gabriel vs Soysa* (1930 – 31 N.L.R. 314). The latter however was not followed in the recent cases reported in 39 N.L.R. at page 265 and 20 C.L.W. at page 77. We take the view that the wording of section 190 means that a magistrate is precluded from making an order of acquittal under that section till the end of the case for the prosecution.

In follows that although the magistrate of Avisawella purported to make an order under section 190, in reality he made an order under section 191, mistakenly calling it an acquittal, instead of a discharge. Such an order cannot support a plea of *autre fois acquit*.

The appeal is dismissed. The application to appeal on the facts is without merit and is refused.

Appeal dismissed.

Present: MOSELEY, A.C.J.

GNANAPRAKASAM vs SUBRAMANIAM

S. C. No. 796—*M. C. Jaffna No.* 20006.
Argued on 16th December, 1942.
Decided on 13th January, 1943.

Civil Procedure Code section 839—*Has the District Court power to order the Secretary of the Court to proceed to the house where the movable property of a deceased person may be found and to prepare an inventory pending the grant of probate or letters of administration to the person entitled to them*—*Penal Code section* 183.

Held : That a District Court has no power under section 839 of the Civil Procedure Code to order the Secretary of the Court to proceed to the house where the movable property of a deceased person may be found and to prepare an inventory thereof pending the grant of probate or letters of administration to the person entitled thereto.

Cases referred to : *Selvadurai vs Raja et al* (41 N.L.R. 423)

S. Nadesan, for the 1st accused-appellant.
A. C. Alles, Crown Counsel, for the Crown-respondent.

MOSELEY, J.

The appellant was convicted of an offence punishable under section 183 of the Penal Code in that he voluntarily obstructed a public servant or a person acting under the lawful orders of such public servant in the discharge of his public functions. He was sentenced to pay a fine of Rs. 75/–. The charge arose out of circumstances following the death of one Suppiah who

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appears to have been in trade at Jaffna. He died possessed of no inconsiderable an amount of movable property. At the time of his death one Thuraiappah had a decree against the deceased for the sum of Rs. 30,733/95. The deceased had appealed against that judgment and the appeal had been argued but the deceased died pending delivery of the judgment. The judgment-creditor alleging that he had reason to believe that the estate of the deceased had been or was likely to be tampered with, applied for letters of administration. He cited as respondents in the matter the widow and two infant children of the deceased. He did not, however, disclose that the children were in fact infants nor that the deceased had left a will by which he appointed his widow executrix. The learned District Judge held the view that a grant of letters *ad colligenda* did not apply to the circumstances of the case but it seemed to him that it was necessary to make some order for the preservation of the estate pending the grant of letters to such person who should be thereto entitled. He therefore ordered the Secretary of the court to proceed to the house of the widow and to the shops which had been carried on by the deceased and take an inventory of all the stock-in-trade and movable property and further to *bring into court any cash exceeding a sum of Rs.* 100/– which was to be left with the widow for her expenses. The order does not set out the authority under which the learned District Judge purported to act. It can only be assumed that he had in mind section 839 of the Civil Procedure Code which is as follows :

> " Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

The Secretary of the Court, armed with the order, proceeds to carry out the instructions therein contained and for that purpose went to the house of the widow where he proceeded apparently with the acquiescence of the widow, to make an inventory. In fact, the widow would appear to have given the Secretary every assistance in order to enable him to carry out what he believed to be his duty. The appellant, however, whose interest in the matter is quite unapparent but who appears to have been somewhat shocked by the intrusion of the Secretary into the house of the deceased upon a day of wailing, questioned the rights of the Secretary to take an inventory and ordered him out of the house. The Secretary thereupon left the house without completing the task upon which he had entered.

It seems to me that the only point for decision is whether the order made by the learned District Judge was a lawful order within the meaning of section 183 of the Penal Code. There is clearly no express provision in the Civil Procedure Code for the making of such an order, and as I have already said it can only be presumed that the aid of section 839 was invoked. This section at first glance would appear to invest the court with very wide powers to make such orders as may be necessary for the ends of justice. A wealth of authority was cited by counsel for the appellant whereby he sought to indicate the limits which have been imposed by judicial authority upon

the exercise by the courts of the power given by the section. I have considered all the authorities but do not feel that it is necessary to refer expressly to any one of them beyond observing that they appear to support the view of Wijeyewardene, J. in *Selvadurai vs Raja et al* (41 N.L.R. 423) to the effect that a court " must be careful to see that its decision is in harmony with sound general legal principles and it is not inconsistent with the intentions of the legislature." I do not propose to express any view as to the legality or otherwise of the order of the learned judge in regard to the taking of the inventory, but it seems to me that the order directing the Secretary to bring into court any cash exceeding a sum of Rs. 100/– cannot be said to be consistent with sound general principles of law. The order in this respect on the face of it embraces all money which might be found in the house irrespective of the person or persons to whom it belonged. This part of the order, therefore, seems to me, notwithstanding the argument of Crown Counsel that it must be presumed to be legal, manifestly illegal.

However one may view the conduct of the appellant, it seems to me clear that he committed no offence for which he is punishable by law. I allow the appeal and set aside the conviction and sentence.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: HEARNE, J. (President), DE KRETSER, J. & WIJEYEWARDENE, J.

REX vs VELOO

Appeal No. 45 *of* 1942—*S. C. No.* 23—*M. C. Gampaha No.* 12429.

Argued on 20th January, 1943.

Decided on 1st February, 1943.

Court of Criminal Appeal—Section 120 *of the Evidence Ordinance.*

Held : That a woman's evidence is not excluded by section 120 (2) of the Evidence Ordinance unless there is proof that she is the wife of the accused. The mere fact that there was a marriage ceremony and celebrations of some sort and that the two lived as man and wife is not sufficient.

V. T. Thamothram, for the accused-appellant.

H. W. R. Weerasooriya, Crown Counsel, for the Crown.

HEARNE, J. (President)

This appeal proceeded on the ground of law that the presiding judge was wrong in admitting the evidence of Walliamma against the appellant as she was his wife.

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It was argued that the appellant and Walliamma were members of an Indian community whose parents had come to Ceylon, that they contracted a marriage according to certain customs peculiar to Hindus of the " Wadduwa " caste and that they are, therefore, in the eyes of our law man and wife.

It appears from decided cases that, in the absence of any repugnancy to express provisions of the law of Ceylon, for instance on the subject of incapacity of parties to marry, (as to this *locus regit actum* would of course apply) a marriage that would be valid amongst Hindus in India on the performance of certain customary rites, would also be valid in Ceylon on performance of the same rites. In the case of *The King vs Perumal* (14 N.L.R. 496), for instance, there was " abundant evidence that a marriage according to Hindu rites was celebrated " in Ceylon and on the " marriage " of the accused to another woman, it was held that he was guilty of bigamy. It was also decided that a polygamous marriage between persons who are not Mohammedans is void in Ceylon, even though it is valid by the law of the country in which the husband has his domicile.

Coming to the facts : Walliamma described herself in the Magistrate's Court as the mistress of the accused. At the trial she similarly described herself. Counsel for the appellant who was also counsel at the trial, frankly stated that she used a word, referring to the accused, which would correspond with " her man " and not " her husband. " On being questioned, she said she had been removed from her house by the accused one night with the knowledge of her parents whose discussion of accused's intentions she had overheard. She also said that the accused paid her father Rs. 20/– and that later " there was some sort of a function," during which betel was served. Cross-examined she admitted that she and the accused were free to leave each other at will.

Walliamma's uncle also gave evidence. He said that the accused paid Rs. 40/– to the girl's father and Rs. 2/– to provide tea and toddy for the tribe, and that that " was the sole ceremony and Walliamma was considered to be the wife of the accused." Under cross-examination he said that while the union was intended to be permanent it could be renounced by either party, apparently at any time.

On the scanty evidence before the judge, he was, in our opinion, right in ruling that Walliamma was a competent witness for the prosecution.

The appeal is dismissed.

Appeal dismissed.

Present: SOERTSZ, J., HEARNE, J. & WIJEYEWARDENE, J.

SUPPAMMAL vs GOVINDAN CHETTY

S. C. Nos. 109 (*I*) & 3 (*I*)—*D. C. Colombo No.* 7457.
Argued on 5th February, 1943.
Decided on 19th February, 1943.

Civil Procedure Code—Sections 718 *and* 736—*Scope of—When can an amendment of an inventory in a testamentary case be made.*

Held : That an amendment of an inventory in a testamentary case may be ordered either under section 718 or under section 736 of the Civil Procedure Code, and it would be in the discretion of the court to direct amendment under section 718 or to refer a party to the procedure of section 736 according to the nature and scope of the particular application and the stage at which it is made.

Per SOERTSZ, J. : " The language of section 736 does not, in my opinion, justify the interpretation put upon it by Bertram, C.J. The words ' where a contest arises..... respecting any property alleged to belong to the estate, but to which the accounting party lays claim ' appear to me to contemplate just such a case as has arisen here. A property which the administrator, the accounting party claims, is alleged by the widow, another party to the testamentary suit, to belong to the estate, and thus there has arisen a contest which, in the words of the section, ' *must be tried and determined* ' in the course of the judicial settlement."

Dissented from : *de Zoysa vs de Zoysa* (26 N.L.R. 472)
Pavistina vs Veyachchey (5 Bal. N.C. 22)
Cases referred to : *Silva vs Coorey* (4 Tamb. 38)

H. V. Perera, K.C., with *S. J. V. Chelvanayagam* and *N. Kumarasingham*, for the petitioner-appellant in No. 109 and the petitioner-respondent in No. 3.

N. Nadarajah, K.C., with *T. K. Curtis*, for the respondent in No. 109 and the appellant in No. 3.

SOERTSZ, J.

The difficulty that arises on these two appeals is due to conflicting views that have been taken of the meaning and scope of sections 718 and 736 of the Civil Procedure Code. But, before proceeding to consider those views, and to attempt an interpretation of the sections in question, a brief statement of the facts that led to these appeals is necessary.

The first appeal is from an order dated the 5th of June, 1942, refusing an application made by the widow, one of the two heirs of the deceased whose estate is being administered, for a direction to the administrator to amend the inventory by including in it certain assets which, she maintains, form part of the deceased's estate, but which the administrator says, belong to him, in part, having come to him from the deceased ; and in regard to the other part, that it never belonged to the deceased,

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This application was made after the Final Account had been filed by the administrator, and when that account was about to come up for judicial settlement.

On her application being refused, the widow preferred an appeal, and almost simultaneously moved the court to permit her to raise the question whether the assets she claimed belonged to the estate or not, in the course of the judicial settlement.

Objection was taken, on behalf of the administrator, to this application as well, on the ground that a judicial settlement should be limited to the accounts in respect of the assets already in the inventory, and that a claim that property included in it belongs to the estate should be submitted for decision in a separate action.

The judge in the court below rejected this contention and made order dated the 20th of November, 1942, that the judicial settlement should proceed in the manner desired by the widow. The second appeal is from that order.

If the administrator's contentions are entitled to prevail the result would be that an heir cannot obtain such relief as the widow in this case seeks either under section 718 or under 736, but must have recourse to a separate action. Such a view appears to be inconsistent with the words of both section 718 and section 736.

To deal first with section 736, it provides that :

> " Where a contest arises between the other parties respecting any property alleged to belong to the estate, but to which the accounting party lays claim, or respecting a debt alleged to be due by the accounting party to the testator or interests, or by the testator or interests to the accounting party, the contest must be tried and determined in the said special proceeding and in the same manner as any issue arising on a civil trial."

These words are clear and peremptory. They require that, if at the stage of a judicial settlement, a question such as arose here, arises between an accounting party, that is to say, between an executor or administrator, and any of the other parties, that is to say, other parties to the testamentary suit, such as the widow in this case, that question *must* be determined " in the same special proceeding," that is to say in the proceeding for the judicial settlement.

But, it is contended that this view is opposed to that taken by Bertram, C.J. in the case of *de Zoysa vs de Zoysa* (26 N.L.R. 472). In that case that learned Chief Justice made this observation (p 477) :

> " Another claim made by the appellant which cannot, in my opinion, be entertained, is the claim that certain properties of the testator have not been included in the inventory. *If the correctness of the inventory is to be challenged, it should be challenged under section* 718. A judicial settlement is a proceeding of a limited nature. Its scope is indicated by the provisions of section 739. A judicial settlement proceeds upon the footing that the inventory is a full and true inventory of the estate."

If the words I have underlined, correctly state the law, each of the orders now under appeal is wrong. The first order is wrong inasmuch as

it holds that an inventory cannot be amended under section 718 where there is a "serious contest," whereas Bertram, C.J. holds that in such an event, section 718 is the appropriate section. And the second order is wrong inasmuch as it permits such a contest to be investigated under section 736 contrary to the view taken by Bertram, C.J.

It must have been in this dilemma that the widow, with wise precaution, appealed from the first order, and at the same time sought the aid of section 736. Her counsel now contends that she is justified by both section 718 and section 736.

The language of section 736 does not, in my opinion, justify the interpretation put upon it by Bertram, C.J. The words "where a contest arises.....respecting any property alleged to belong to the estate, but to which the accounting party lays claim," appear to me to contemplate just such a case as has arisen here. A property which the administrator, the accounting party claims, is alleged by the widow, another party to the testamentary suit, to belong to the estate, and thus there has arisen a contest which, in the words of the section "*must be tried and determined*" in the course of the judicial settlement.

With great respect, I would, therefore, say that *de Zoysa vs de Zoysa* (*supra*) was wrongly decided on this point, and that the second order of the District Judge was correct.

In regard to the appeal from the first order on which too the parties desire a decision, the contention on behalf of the appellant is that the judgment in the case of *Pavistina vs Veyachchey* (5 Bal. N.C. 22) upon which that order was based, does not correctly interpret section 718. In that case, Lascelles, C.J. and Wood Renton, J. were of opinion that,

> "the language of section 718 is not appropriate to a case where there is any serious contention between the executor on the one hand and any other party on the other,"

the words "any other party" meaning, in the context "any other person who is a party to the testamentary suit;" For this view the reasons given were: (*a*) that in an earlier case *Silva vs Coorey* (4 Tamb. 38) Wendt, J. and de Sampayo, J. expressed a similar opinion; (*b*) that there is no provision in the section for the holding of an inquiry or for the fixing of issues as would be expected in the scope of the section extended to cases where there is a serious dispute as to the ownership of the property;" (*c*) that the procedure to be adopted is a very summary one and applies to cases "where the executor has wilfully and intentionally kept out of the inventory goods which he ought to have included," and not to cases where there is a serious dispute as to the ownership of the property.

In regard to (*a*) the case of *Silva vs Coorey* is distinguishable, for, as pointed out by de Sampayo, J., that was a case in which an heir required the administrator "to amend the inventory by adding to it the boutique goods and timber which the administrator claimed as his own: the value of certain jewellery and precious stones which the administrator said were never found

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in the estate ; and the value of the stock-in-trade of a boutique which was alleged to have been sold by him, but which he said had been sold by the deceased in his lifetime ; by rendering an account of certain plumbago which is said to be in the hands of a third party from whom, according to the administrator, nothing is due ; and by reducing the amount of a debt in the inventory as due to a chetty by the estate." de Sampayo, J. went on to say :

> "There were other matters also gone into which I need not detail here. I have stated these particulars in order to indicate the nature of the inquiry that took place.....but it seems to me that this section (718) does not justify the court entering at this stage upon an inquiry into *such contentious matters as above* ...../... In my view, the proper procedure for this purpose is by way of judicial settlement of the administrator's account under the provisions of chapter 55." (Section 736 occurs in that chapter).

The application in that case involved parties other than those who were parties to the testamentary proceedings.

I would respectfully associate myself with that view and say that having regard to the large and varied scope of the heir's application in that case, and involving, as it did, third parties, section 736 was the more appropriate section under which to proceed so far at least as the administrator and the other parties to the testamentary proceedings were concerned, and so far as third parties were involved, separate actions would have been the proper course, unless section 712 served the purpose.

The observations made by de Sampayo, J. and Wendt, J. regarding section 718 must be understood as made on the facts of that case. But here, we are dealing with a very different matter, a straightforward application by an heir to have the inventory amended by including therein six sums of money which she alleges form part of the deceased's estate but which the administrator says, in respect of three sums, that they are his because the intestate had endorsed the promissory notes relating to them to him, and in respect of the three others that they never formed part of the estate. I cannot interprete the judgments in *Cooray vs Silva* as laying down that, in a case like the present one too, section 736 is the appropriate section. Such a case as this appears to me to be within the scope of section 718 more appropriately than it would be under section 736.

In short, the amendment of an inventory may be ordered either under section 718 or under section 736, and it would be in the discretion of the court to direct amendment under section 718 or to refer a party to the procedure of section 736 according to the nature and scope of the particular application and the stage at which it is made. I am therefore unable to agree with the view taken in *Pavistina vs Veyachchey* that section 718 is not applicable to a case in which the administrator "seriously" claims the property as his own or "seriously" says that the property does not belong to the estate. Indeed, I do not quite understand what exactly the words "serious dispute" were intended to mean. They appear to have been used by way of contrast with what was said earlier, namely, that section 718 applies to "cases where the

executor has wilfully and intentionally kept out of the inventory goods which he ought to have included." I should have thought that it is such a wilful and intentional omission that would occasion a serious dispute. It seems to me that the application by the widow, in this case was well within section 718.

Another reason given for the ruling in *Pavistina vs Veyachchey* was that there is "no provision in section 718 for the holding of an inquiry or the fixing of issues." It is true that there is not as explicit a direction as to an inquiry in the case of section 718 as there is in that of section 736, but a sufficient inquiry is indicated in section 718 (2) and 718 (3).

For these reasons I am of opinion that *Pavistina vs Veyachchey* does not correctly interpret section 718 in so far as it says that that section does not apply to a case in which an administrator or executor seriously claims as his own, property which a creditor or any person interested in the estate alleges is property of the estate.

In the circumstances of this case, I would direct that an inquiry be held under section 736 in the manner proposed by the District Judge. I would allow the widow one set of costs against the administrator.

HEARNE J.

I agree.

WIJEYEWARDENE J.

I agree.

Appeal allowed.

Present : WIJEYEWARDENE, J.

KING vs GOONEWARDENA

Argued & Decided on 23rd February, 1943.

S. C. No. 78—*M. C. Colombo No.* 44694—(*First Western Circuit*)

Evidence Ordinance section 24—*Confession made by employee of Bank to person in authority.*

Held : That the mere fact that leading questions are asked by a person in authority does not make the answers inadmissible when they contain confession by the accused.

R. L. Pereira, K.C., with *W. S. de Saram, C. Suntheralingam* and *S. N. Rajaratnam*, for the accused.

D. Jansze, Crown Counsel, for the Crown.

WIJEYEWARDENE, J.

In this case the question arises as to the admissibility of a confession alleged to have been made by the accused to Mr. Aiyangar, Agent of the Indian Bank on April 7th, 1942.

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The accused was a ledger keeper employed in the Indian Bank. He is charged under section 467 of the Ceylon Penal Code with having falsified three books P1, P6 and P5 by making certain false credit entries and debit entries. According to the Crown the irregularities were discovered on April 6th, 1942.

Mr. Aiyangar instructed the Accountant on April 7th 1942 to send the accused to his room on his arrival at the Bank. Accordingly, the accused was directed by the Accountant to meet Mr. Aiyangar that morning. When the accused entered the room of Mr. Aiyangar, the latter said "What! You have made false debits of Rs. 30,000/- and Rs. 4,000/- in Madavan's account!" The accused bowed his head and then Mr. Aiyangar put the question "What are the other false debits you have made?" The accused is then said to have stated that he made a false debit entry in the account of the estate of Natchiappa Chettiar. Mr. Aiyangar then put the further question, "How have you withdrawn the money Rs. 30,000/- and Rs. 4,000/-?" The accused replied to this, "Through K. D. Peter."

The evidence given by Mr. Aiyangar regarding the alleged confession was recorded in the absence of the jury. Mr. Suntheralingam cross-examined the witness at length. A good part of the cross-examination appeared to have been intended to show that no fact was discovered in consequence of the information received from the accused. As Mr. Suntheralingam stated that it was necessary for the purposes of his argument to cross-examine Mr. Aiyangar on those lines, I permitted him to do so.

No evidence was called to contradict the evidence of Mr. Aiyangar.

The question I have to decide is whether the confession is irrelevant under section 24 of the Evidence Ordinance. No doubt that section has to be read subject to section 27. I do not think, however, that section 27 would permit the confession to be admitted even if the bank discovered some fact in consequence of the information given by the accused. When the accused made the alleged confession he was not in the custody of a police officer and therefore section 27 would not apply.

I have to ascertain whether the confession should be ruled out under section 24 of the Ordinance. There is no evidence whatever before me to show that any inducement, threat or promise having reference to the charge was made to the accused so as to give him any grounds to suppose that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the charge against him. Nor am I able even to infer from the evidence that such inducement, threat or promise was made. No doubt questions put by Mr. Aiyangar are of the nature of leading questions and were based on the assumption that the accused had made false entries. This, however, is no ground for holding the confession irrelevant. In this connexion I would cite the following passage from "The Law of Evidence" by Ameer Ali (9th edition page 303) to which my attention was drawn by Mr. Jansze :

"Much less will a confession be rejected merely because it has been elicited by questions put to the prisoner whoever (subject to the provisions of the twenty fifth and twenty-sixth sections) may be the interrogator, and the form of the question is immaterial ; it may be in a leading form or even assume the prisoner's guilt."

I hold that the confession is admissible. It is for the jury to decide as to the probative value of this confession.

Present: WIJEYEWARDENE, J.

KING vs GOONEWARDENA

Argued on 8th and 9th February, 1943.

Decided on 9th February, 1943.

S. C. No. 78—M. C. Colombo No. 44694—(First Western Circuit)

Criminal Procedure Code sections 178 and 179—Joinder of charges—Three charges under section 467 of the Penal Code joined in the same indictment—Particulars of an offence under section 467—Does each particular constitute a separate offence.

Held : (i) That each of the particulars of the offence in a charge under section 467 of the Penal Code does not constitute a separate offence for the purposes of section 179 of the Criminal Procedure Code.

(ii) That an indictment in the following form did not constitute a misjoinder of charges :

(1) That on or about 30th September, 1941, at Colombo, he being employed in the capacity of Ledger Clerk under the Indian Bank, Ltd., Colombo, did, wilfully and with intent to defraud, falsify a book belonging to his employer, to wit, the Current Account Ledger No. 3, marked P1, by making the following false entry at page 799 in the account of K. D. Peter & Bros :

"September 30 Chq.1. 500/–" on the credit side,

meaning thereby that a sum of Rs. 500/– had been deposited by cheque to the credit of K. D. Peter & Bros. in the said bank, on the 30th September, 1941, whereas in fact no such sum had been deposited by cheque to the credit of K. D. Peter & Bros. on the said date ; and that he has thereby committed an offence punishable under section 467 of the Penal Code.

(2) That on or about 26th February, 1942, at the place aforesaid he being employed as aforesaid, did, wilfully and with intent to defraud, falsify a book belonging to his employer, to wit, the Sectional Day Book, marked P6, by making the following false entries at pages 228 and 229 respectively :

"141 K. R. Mathavan 485 1542/03" on the debit side, and

"804 K. D. Peter & Bros. D 1029/45" on the credit side,

meaning thereby that a sum of Rs. 1,542/03 had been withdrawn by K. R. Mathavan from his account in the Indian Bank on cheque No. 446485 and that a sum of Rs. 1,029/45 had been deposited by cheque to the credit of K. D. Peter & Bros. in the said bank on the 26th February, 1942, whereas in fact a sum of Rs. 542/03 had been withdrawn by the said K. R. Mathavan from his account in the said bank on the said cheque and a sum of Rs. 29/45 had been deposited by cheque

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to the credit of the said K. D. Peter & Bros. in the said bank on the said date ; and that he has thereby committed an offence punishable under section 467 of the Penal Code.

(3) That on or about 1st April, 1942, at the place aforesaid, he being employed as aforesaid, did, wilfully and with intent to defraud, falsify a book belonging to his employer, to wit, the Current Account Ledger No. 3, marked P5, by making the following false entries at pages 142 and 143 respectively in the account of K. R. Mathavan :

" April 1. 950 Cash 30,000/–" on the debit side

" April 1. 434941 D. P. S. Weerasekere 4000" on the debit side,

and at page 599 in the account of Valliyamma Achchi, executrix of the estate of K. M. N. S. P. Natchiappa Chettiar :

" April 1. 035 Self 5,000/– " on the debit side,

meaning thereby that the sum of Rs. 30,000/– and 4,000/– had been withdrawn by the said K. R. Mathavan from his account in the Indian Bank on cheques Nos. 434950 and 434941 in favour of cash and D. P. S. Weerasekere respectively and that the sum of Rs. 5,000/– had been withdrawn by the Attorney of Valliyamma Achchi from her account in the said bank as executrix of the said estate on cheque No. 428035 in favour of self, whereas in fact no such sums had been withdrawn by the said K. R. Mathavan and the said Attorney on the said cheques on the said date ; and that he has thereby committed an offence punishable under section 467 of the Penal Code.

D. Jansze, Crown Counsel, for the Crown.

R. L. Pereira, K.C., with *W. S. de Saram, C. Suntheralingam* and *S. N. Rajaratnam* instructed by *N. A. B. Stave*, for the accused.

WIJEYEWARDENE, J.

The accused stood charged on the following counts in the indictment:

(1) That on or about 30th September, 1941, at Colombo, he being employed in the capacity of Ledger Clerk under the Indian Bank, Ltd., Colombo, did, wilfully and with intent to defraud, falsify a book belonging to his employer, to wit, the Current Account Ledger No. 3, marked P1, by making the following false entry at page 799 in the account of K. D. Peter & Bros :

" September 30, Chq.1. 500/–" on the credit side,

meaning thereby that a sum of Rs. 500/– had been deposited by cheque to the credit of K. D. Peter & Bros. in the said bank, on the 30th September, 1941, whereas in fact no such sum had been deposited by cheque to the credit of K. D. Peter & Bros. on the said date ; and that he has thereby committed an offence punishable under section 467 of the Penal Code.

(2) That on or about 26th February, 1942, at the place aforesaid he being employed as aforesaid, did, wilfully and with intent to defraud, falsify a book belonging to his employer, to wit, the Sectional Day Book, marked P6, by making the following false entries at pages 228 and 229 respectively :

" 141 K. R. Mathavan 485 1542/03" on the debit side, and

" 804 K. D. Peter & Bros. D 1029/45" on the credit side,

meaning thereby that a sum of Rs. 1,542/03 had been withdrawn by K. R. Mathavan from his account in the Indian Bank on cheque No. 446485 and that a sum of Rs. 1,029/45 had been deposited by cheque to the credit of K. D. Peter & Bros. in the said bank on the 26th February, 1942, whereas in fact a sum of Rs. 542/03 had been withdrawn by the said K. R. Mathavan from his account in the said bank on the said cheque and a sum of Rs. 29/45 had been deposited by cheque

to the credit of the said K. D. Peter & Bros. in said bank on the said date ; and that he has thereby committed an offence punishable under section 467 of the Penal Code.

(3) That on or about 1st April, 1942, at the place aforesaid, he being employed as aforesaid, did, wilfully and with intent to defraud, falsify a book belonging to his employer, to wit, the Current Account Ledger No. 3, marked P5, by making the following false entries at pages 142 and 143 respectively in the account of K. R. Mathavan :

"April 1. 950 Cash 30,000/–" on the debit side

"April 1. 434941 D. P. S. Weerasekere 4000" on the debit side,

and at page 599 in the account of Valliyamma Achchi, executrix of the estate of K. M. N. S. P. Natchiappa Chettiar :

"April 1. 035 Self 5,000/– " on the debit side,

meaning thereby that the sum of Rs. 30,000/– and 4,000/– had been withdrawn by the said K. R. Mathavan from his account in the Indian Bank on cheques Nos. 434950 and 434941 in favour of cash and D. P. S. Weerasekere respectively and that the sum of Rs. 5,000/– had been withdrawn by the Attorney of Valliyamma Achchi from her account in the said bank as executrix of the said estate on cheque No. 428035 in favour of self, whereas in fact no such sums had been withdrawn by the said K. R. Mathavan and the said Attorney on the said cheques on the said date ; and that he has thereby committed an offence punishable under section 467 of the Penal Code.

Counsel for the accused objected to the indictment before it was read out to the accused. He stated that he would argue the matter after the jury was empanelled. The jury was accordingly empanelled and asked to retire during the argument.

Counsel for the accused objected to the inclusion of the 3rd count in the indictment. His reasons may be summarized as follows :

(1) The 3rd count sets out three debit entries on April 1st 1942, which, it is said, the Crown alleges to have been made falsely by the accused in order to balance the books as against the false credit entries specified in the first two counts and some earlier entries made in 1940 and 1941. The inclusion of count 3—

(*a*) would make it necessary for the accused to meet again the charges made on counts 1 and 2 when answering the charge on count 3,

(*b*) would bring into consideration entries made before April 1st, 1941, and this contravenes the provisions of section 179 of the Criminal Procedure Code.

(2) That the three counts mention altogether six entries which constitute six different offences and the indictment is therefore bad as only three offences falling under section 179 could be included in an indictment.

I find it difficult to appreciate the reason 1 (*a*) given by counsel for the accused. If the Crown fails to prove the first two counts it would not be necessary for the accused in answering count 3 to disprove any allegation of the Crown that the entries referred to in the earlier counts were false entries made wilfully and with intent to defraud.

In support of his ground 1 (*b*) the accused's counsel referred me to *Raman Buhary Das vs The Emperor* (A.I.R. 1915 Calcutta 296). In that case the accused was convicted of three offences under section 477 (*a*) of the Indian Penal Code (corresponding to section 467 of the Ceylon Penal Code) and three offences under section 409 of the Indian Penal Code

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(corresponding to section 392 of the Ceylon Penal Code). An attempt was made to justify the indictment on the ground that the joinder of charges would be permissible in view of section 222 of the Indian Code of Criminal Procedure (corresponding to section 168 of the Ceylon Code). The court rejected that argument and held that the joinder was illegal. I fail to see how this case supports reason 1 (*b*) urged by the counsel. Section 179 of the Criminal Procedure Code which regulates the number of offences to be included in an indictment does not have any bearing on the nature or scope of the evidence led to prove that. All that the section requires is that the three offences should have been committed within the space of 12 months. It does not confine within that period the facts that may be proved in establishing the guilt of the accused in respect of such offences.

In supporting ground (2) the accused's counsel relied on *Krishna Lal Mitra vs The Emperor* (A.I.R. 1927 Calcutta 946). In that case there were six distinct and separate charges of falsification of six separate and distinct documents, three pay bills and three monthly Cash Accounts. The court held that such a joinder could not be justified under section 234 of the Indian Code of Criminal Procedure (corresponding to section 179 of our Code).

In the present case the accused is charged with falsifying books, the first count referring to Current Account Ledger No. 3, marked P1, the second count to Sectional Day Book, marked P6, and the 3rd count to Current Account Ledger No. 3, marked P5. Each charge proceeds then to give particulars of the manner in which the offence was committed as contemplated by section 169 of the Code.

The learned counsel for the accused drew my attention to a passage at page 1181 in Ratanlal's "Law of Crimes" (15th edition) which he said supported his contention that there was a misjoinder of charges. That statement in Ratanlal is based on the decision in *Prafulla Chandra Khargoria vs The Emperor* (A.I.R. 1931 Calcutta 8). I find that that judgment is, in fact, an authority against the view put forward on behalf of the accused. In the course of that judgment Sutrawardy, J. says :

> "Section 477 (A) (of the Indian Penal Code) is divided into two parts. In other words, it speaks of two offences which are distinct and not interdependant. Cl. 1 of the section makes the falsification of accounts etc. an offence ; and the latter portion of it makes it an offence to make a false entry or omit or alter or abet the omission or alteration of any material particular from or in etc. The first offence consists in falsifying an account book or paper, writing, or valuable security. The falsification may be made by making false entries in the account or omitting to make entries which should have been made. Cl.2 of the section contemplates an offence which, apart from the falsification of the book, may be committed by a person by simply making false entries or omitting to make true entries. Now the charge framed in this case is primarily for falsification of certain papers and accounts, namely, the pay sheets of General Workshop and Boilershop. That is one particular document stitched together in the form of a book and marked X 3, which the appellant is accused of having falsified. The method by which falsification is made is detailed in the charge by pointing out

four false entries in the accounts, which were made for the purpose of defalcating Rs. 400/–. What the accused is charged with is that on certain dates, between 1st and 13th March, 1929, he falsified X 3 by making four false entries by over-charge, Rs. 100/– on each occasion, with the intention of misappropriating Rs. 400/– at the end of the month when the amount was to be paid off. In my opinion, when a person is charged with falsification of accounts, any number of falsifications may be proved in order to sustain the principal charge of falsification."

Again the following passage occurs in the very case of *Raman Buhary Das vs The Emperor* (*supra*) cited by the counsel for the accused :

"A series of alterations in accounts made to cover a defalcation might all be charged in one charge under the provisions of section 477 (*a*) (of the Indian Penal Code) and there are not three distinct offences committed by an accused person merely by reason of the fact that he makes more than one false entry to cover one defalcation.....It is possible to try a whole series of falsified accounts in one charge."

The same view with regard to false entries is expressed by Gour in "The Penal Law of British India," 5th edition, page 1613, relying on *Aiyagari Venkatramiah vs The Emperor* (1912-13 Criminal Law Journal 251).

I may add that, in considering the decisions of the Indian courts with regard to the joinder of charges, it is necessary to keep in mind the fact that our Code of Criminal Procedure differs in one important particular from the Indian Code. Under section 178 of our Code there is an express provision that sections 179, 180, 181 and 184 may be applied in combination while there is no such provision in the Indian Code.

The objections raised against the indictment cannot, in my opinion, be justified, and I therefore overrule the objection.

The trial will now proceed on the indictment as presented by the Attorney-General.

Objection overruled.

HEARNE, J. & KEUNEMAN, J.

SILVA vs WICKREMASINGHE

S. C. No. 100—*D. C. Matara No.* 6787.

Argued on 27th January, 1943.

Decided on 12th February, 1943.

Execution—Application for writ by plaintiff—Application by defendant to have agreement certified of record as adjustment under section 349 *of the Civil Procedure Code—Finding by court that the agreement did not amount to an adjustment—Is it still necessary for court to consider under section* 344 *of the Civil Procedure Code whether right to execution controlled by such agreement.*

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Held : That independently of whether the terms of a bargain between a judgment-creditor and a judgment-debtor amounts to an adjustment within the meaning of section 349 of the Civil Procedure Code, the terms of the bargain should be considered by the executing court under section 344 of the Civil Procedure Code as to whether the plaintiff's right to execution was controlled, and if so, to what extent and in what manner by such bargain.

Cases referred to : 1939 A.I.R. (P.C.) at 80.

H. V. Perera, K.C., with *S. J. V. Chelvanayagam* and *S. W. Jayasuriya*, for the 6th defendant-appellant.

N. Nadarajah, K.C., with *G. P. J. Kurukulasuriya* and *G. P. A. Silva*, for the plaintiff-respondent.

HEARNE, J.

The plaintiff filed an action on a bond "which was signed by 1st to 5th defendants as principals and the 6th defendant as surety." Decree was entered and at the mortgage sale the plaintiff's son-in-law became the purchaser. A large balance was still outstanding and the plaintiff and the 6th defendant reached an agreement the terms of which were recorded in court—X 10 dated 14th August, 1936, which reads as follows :

(1) The plaintiff undertakes to obtain a retransfer of the two properties sold under mortgage decree in this case in favour of the 6th defendant, the vendor not warranting and defending title.

(2) The 6th defendant undertakes to mortgage the said two properties together with all the buildings and his rights in the residing land free from the existing lease and other encumbrances, if any, created by 6th defendant.

(3) The expense involved in the said retransfer and mortgages are to be borne by the 6th defendant.

(4) The mortgage of the 3 lands aforesaid is to secure the Rs. 2,000/– together with interest at the rate of 15% per annum on the said Rs. 2,000/–. Interest is to be paid half yearly and in default of payment of any half yearly payment of interest, the mortgagee is at liberty to put the bond in suit, interest to run from the date of retransfer.

(5) If the interest is paid regularly the mortgagee agrees not to put the bond in suit for 18 months from this date.

(6) On execution and registration of the said mortgage in favour of the plaintiff, the satisfaction of decee in this case is to be entered.

Subsequently, on the 15th June, 1937, a "Memorandum of Agreement" (A) was signed outside court by the plaintiff and the 6th defendant.

In March, 1941 two applications were dealt with : (1) an application by the plaintiff for writ and (2) an application by the 6th defendant to have "adjustment of the decree arrived at on 14th August, 1936 (X10) recorded as certified." The former was allowed and the latter dismissed. The 6th defendant now appeals.

In his order the judge held that X10 had been superseded by A and that this in itself was fatal to the 6th defendant's application. He also held, on the authority of two Indian cases, that an adjustment which does not

extinguish a decree in whole or in part does not come within section 349 of the Civil Procedure Code. Having eliminated X10 or, alternatively having found against the 6th defendant on the basis of X10, he allowed the plaintiff's application.

Independently of whether the terms of a bargain between a judgment-creditor and a judgment-debtor amounts to an adjustment, the terms of the bargain require to be considered by the executing court " under section 47 of the Indian Code." This view rests upon the authority of the Privy Council in a case to which I shall presently refer. Section 47 corresponds with section 344 of our Code. Even, therefore, if the judge was right in holding that there had been no adjustment which could be recorded under section 349 of the Civil Procedure Code, it was still necessary for him to consider under section 344 of the Civil Procedure Code whether the plaintiff's right to execution was controlled and if so to what extent and in what manner, by X10 or by A, if A had superseded X10.

Counsel for the respondent (plaintiff) argued that if A was legally effective (it was not notarially executed) it merely ousted X10 but did not supersede it in the sense that it did not take its place, so that it did not fall for consideration itself. I am unable to follow this argument. Alternatively he appeared to rest his client's case on X10, for he, thereafter, referred exclusively to the terms of that document and ignored those of A. A, in point of fact, is more favourable to the appellant than X10. It is, however, on X10 that he relied and it is, in reference to it, that this appeal is being decided.

Before dealing with its terms it will be convenient to refer to the case decided by the Privy Council. It is reported in (1939) A.I.R. (P.C.) at page 80.

One of the questions decided was that where in consideration of the judgment-debtor agreeing to pay a higher rate of interest than was provided for in the decree, the judgment-creditor gives the judgment-debtor time to pay the judgment debt, " such a bargain has its effect upon the parties' rights under the decree and the executing court under section 47 has jurisdiction to ascertain its legal effect and to order accordingly." It was expressly said that " it may or may not be that any and every bargain which would interfere with the right of the decree-holder to have execution according to the tenor of the decree comes under the term adjustment." For the purpose of deciding the case it was considered unnecessary to pronounce on that. The underlying principle on which it was decided was that the code contains " no restriction of the parties' liberty of contract with reference to their rights and obligations under the decree, and if they do contract upon terms which have reference to the execution, discharge or satisfaction of the decree the provisions of section 47 involve that questions relating to such terms may fall to be determined by the executing court,"

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In another passage it was stated that " if an agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under section 47." And again " their Lordships see nothing in the Code requiring them to hold that had the judgment-debtor paid the agreed instalments punctually (*i.e.* with interest at the higher rate) the appellants could have executed the decree for the whole sum outstanding contrary to the terms of the compromise."

It may well be argued that, as X10 remained executory nothing had been done either by the plaintiff or 6th defendant it was not an agreement which extinguished the decree but, on the contrary, was only one which would have extinguished the decree if carried into effect. That, however, does not mean that the plaintiff's application automatically succeeded. As I have said it remained to be considered under section 344 and in the light of the terms of X10.

In my opinion X10 was intended to govern the liability of the 6th defendant under the decree and to have effect upon the time and manner of its enforcement. As to the manner of enforcement it was intended that, upon the transfer to the 6th defendant of the two properties purchased by the plaintiff's son-in-law the 6th defendant was to mortgage the plaintiff these properties and his rights in his own residing land " free from the existing lease, etc." for Rs. 2,000/– on which interest at 15% per annum was payable, he was to register the mortgage and with the Rs. 2,000/– obtained, he was to discharge the balance of the debt under the decree. As to the time of payment it was intended as I construe X10, that the 6th defendant was to effect the mortgage referred to and pay the Rs. 2,000/– concurrently with " the transfer " to him by the plaintiff's son-in-law " of the two mortgage premises." I do not think it was intended that he was free to choose his own time after " the transfer."

It was argued by counsel for the respondent that X10 provided for " the satisfaction of the decree to be entered " on the execution and registration of the mortgage in favour of the plaintiff. It did not provide for the eventuality of non-execution and non-registration. As neither had taken place when the plaintiff's application for writ was before the court, it must necessarily be allowed.

This argument implies and on it being put to counsel for the respondent (plaintiff) he admitted it did imply, that even if the plaintiff was in default in regard to what he undertook to do, even if his position was that he had changed his mind, he was entitled to proceed to execution.

To this I cannot accede. It would mean that the court would be setting the seal of approval on unconscionable conduct, it would be allowing the plaintiff to break faith merely because it suited his purpose or for no reason at all.

The judge has not pronounced on the facts, and I would, in these circumstances make the following order: If, on a review of the evidence or of any further evidence he may desire to take in consequence of the view regarding the law which I have stated, he is of the opinion that the deadlock in carrying through the terms of X10 was due to the plaintiff's default, he should hold that he was not, on the application before the court entitled to writ. If, however, he is of the opinion, that although the plaintiff had not done what he had undertaken to do, he was legally justified, by reason of what the 6th defendant had done or had not done or otherwise in repudiating X10 then he should allow the application.

The appeal is allowed and the costs of appeal will abide the result. All costs in the lower court, prior and subsequent to this order, will be in the discretion of the judge.

KEUNEMAN, J.

I agree.

Sent back.

Present: WIJEYEWARDENE, J.

FERNANDO vs ALWIS

S. C. No. 816—*M. C. Colombo No.* 628.

Argued on 15th January, 1943.

Decided on 26th January, 1943.

Supreme Court—Its powers of revision—Can it make an order under section 325 *of the Criminal Procedure Code where a magistrate has convicted and sentenced the accused to a term of imprisonment. Criminal Procedure Code—Sections* 325, 347 *and* 357—*Courts Ordinance—Section* 37.

Held : That where a magistrate has convicted and sentenced an accused person to a term of imprisonment and where in appeal the Supreme Court is of opinion that the accused should be dealt with under section 325 of the Criminal Procedure Code, it could under section 37 of the Courts Ordinance direct the magistrate to discharge the accused conditionally under that section of the Criminal Procedure Code.

Per WIJEYEWARDENE, J. : " One of the important objects of punishment is the reformation of the offender and it is very essential that magistrates should not lose sight of this object when dealing with youthful offenders with a previous good record."

Cases referred to : *Narayanswami Naidu vs Emperor* (1906 – 29 Madras 568.)

S. Saravanamuttu, for the applicant.

E. L. W. Zoysa, Crown Counsel, for the complainant-respondent.

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WIJEYEWARDENE, J.

The accused was charged with having committed criminal breach of trust in respect of a sum of Rs. 140/- entrusted to him by his employer. The accused was convicted on his pleading guilty to the charge and sentenced to 3 months' rigorous imprisonment.

According to an affidavit of the accused filed in this court, the accused is a lad of seventeen years with no previous convictions and an uncle of the accused has replaced the amount lost by the employer. The employer himself has filed an affidavit stating that he found the accused "strictly honest" during the four years the accused was employed under him and expressing his willingness to re-employ the accused. The counsel appearing for the Crown does not dispute the correctness of these statements.

No doubt, the offence committed by the accused cannot be considered as trivial ; but it appears as if the accused has succumbed to sudden temptation and committed a thoughtless rather than a criminal act. One of the important objects of punishment is the reformation of the offender and it is very essential that magistrates should not lose sight of this object when dealing with youthful offenders with a previous good record. It is not very desirable that a young lad of 17 years with no previous convictions should be sent to prison and turned into a social outcast. I think that this is a case where the magistrate should have exercised the discretion vested in him by section 325 of the Criminal Procedure Code and given the young lad a chance of reforming himself instead of sending him to prison early in his life.

The question however arises whether this court could make such an order under section 325 when exercising its revision powers in a case where the magistrate has convicted the accused and sentenced him to a term of punishment. In dealing with a matter in revision, this court could by virtue of section 357 of the Criminal Procedure Code, exercise the appellate powers conferred by section 347 of the code. Now, section 347 enacts that this court may —

> (*b*) in an appeal from a conviction —
>
> (i) reverse the verdict and sentence and acquit or discharge the accused or order him to be re-tried by a court of competent jurisdiction or committed for trial, or
>
> (ii) alter the verdict maintaining the sentence, or with or without altering the verdict increase or reduce the amount of the sentence or the nature thereof.
>
> (*c*) in an appeal found any other order, alter or reverse such order.

Clearly the present case does not fall under section 347 (*c*) as that sub-section refers to an appeal from an order other than that of acquittal or conviction. Could it be dealt with under section 347 (*b*) ? Under section 347 (*b*) (*i*) if I " reverse the verdict " I cannot order the accused to enter into a bond. Under section 347 (*b*) (*ii*) I could only alter the verdict and increase or reduce the amount of the sentence or alter the nature of the sentence. I find

it difficult to hold that I would be acting under section 347 (*b*) if I set aside the conviction and order the accused to enter into a bond.

I find that a similar difficulty arose in India regarding the exercise by an Appellate Court of the powers conferred by section 562 of the Indian Code of 1898 corresponding to section 325 of our code. In *Narayanswami Naidu vs Emperor* (1906–29 Madras 568), White, C.J. and Subramaniar Aiyar, J. found it possible to meet the difficulties created by section 423 of the Indian Code (corresponding to section 347 of our Code) by stating :

> " We do not think it was the intention of the legislature by the use of the words ' court before whom he is convicted ' in section 562, Criminal Procedure Code, to limit the power of making orders under that section to the court of first instance."

I may add that the Indian Code was subsequently amended in 1923 by giving the power in express terms to the High Court to make an order of this nature when dealing with a matter by way of revision.

Without adopting the same line of reasoning as in *Narayanswami Naidu vs Emperor* (*supra*) in constructing section 325 of our code, it is possible, I think, for this court to invoke the powers under section 37 of the Courts Ordinance and make an order under section 325 of our code, and I do not think that in doing so this court will be acting contrary to the provisions of section 357 of the Criminal Procedure Code.

I would therefore set aside the conviction *pro forma* and remit the proceedings to the magistrate with a direction to him to discharge the accused conditionally under section 325 of the Criminal Procedure Code on the accused entering into a bond in such a sum and with such sureties as the magistrate may consider adequate. The bond will provide for the accused appearing for conviction and sentence when called on at any time within 2 years.

Set aside & sent back.

IN THE COURT OF CRIMINAL APPEAL

Present: MOSELEY, A.C.J., (President), HEARNE, J. & DE KRETSER, J.

REX vs JOHANIS *alias* JOHN & PIYASENA

Applications Nos. 139–140 *of* 1942—*S. C. No.* 1—*M. C. Kalutara No.* 14942.

Argued on 18th & 19th January, 1943.

Decided on 1st February, 1943.

Court of Criminal Appeal—Evidence Ordinance sections 3 *and* 105 *—Nature of the burden on the accused of proving the statutory exceptions.*

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Held : (i) That the case of *Rex vs Chandrasekere* lays down that if the existence of circumstances which would bring " the case within one of the exceptions " is involved in doubt, the existence of those circumstances cannot be said to have been proved.

(ii) That the case of *Rex vs Chandrasekere* does not lay down that if two possible views may be taken of a set of proved circumstances the jury is precluded from adopting either of those views.

Per curiam : " If, for instance, an accused rests his defence upon Exception (1) of section 294 of the Penal Code, the jury may decide that he has proved, within the meaning of proof in section 3 of the Evidence Ordinance, the circumstances alleged by him and yet may hold or not hold that he lost his self-control in consequence of the provocation to which he was subjected. Similarly when circumstances are in evidence which the jury regard as having been proved, they may or may not hold that those circumstances established that there was a sudden fight, upon a sudden quarrel, and that the accused ' did not take undue advantage.' It is only if they are in doubt as to whether they should or should not hold that circumstances existed which brought the case within Exception 4 of section 294 of the Penal Code, that the existence of such circumstances cannot be said to have been proved. Even if two views are possible they may have no doubt as to which of these views they prefer to take on the basis of probability."

M. M. Kumarakulasingham, for the appellants.
H. W. R. Weerasooriya, Crown Counsel, for the respondent.

HEARNE, J.

The 1st accused was found guilty of the murder of P. V. Agiris *alias* Kalenis and the 2nd accused of the abetment of " the offence aforesaid which said offence was committed in consequence of such abetment."

In supporting the application of the 1st accused for leave to appeal counsel argued that the verdict of murder was unreasonable for the reason that, althought the accused did not give evidence, there was ample material in the prosecution case on which the jury could have found that the homicide was committed in " a sudden fight." In the course of his argument it was pointed out that the presiding judge had not directed the jury on the law relating to exception 4 of section 294 of the Penal Code or invited them to consider whether a defence based upon the exception arose out of the evidence. We felt that this omission was so closely related to the application before us that it was desirable to consider it and, although a point of law was thus raised in an application to appeal on the facts, a proceeding of which this court in principle has disapproved, we gave leave for it to be argued.

The deceased alone was in a position to speak to all the circumstances which preceded the infliction upon him of fatal injuries the nature of which left no doubt of his assailant's murderous intentions. Three statements alleged to have been made by him and his deposition to the magistrate were put in evidence and counsel directed our attention to variations in what he said at different times. A fair summary of the prosecution case against the 1st accused based upon the dying statements and the deposition of the deceased as well as the evidence of the witness Emalin Nona would be as follows : Emalin Nona, the wife of the deceased, told him she had been abused by the

1st accused. This was in their house where the 1st accused also lived. The deceased questioned the 1st accused, his brother, who said that " he was entitled to abuse her if he so wished " or words to that effect. It is in doubt as to whether the deceased had spoken to his brother in the latter's room or had done so from the room in which he had been engaged in conversation with his wife. On coming out of one or other of these two rooms the deceased heard a noise which suggested to him that a gun was being loaded. The 1st accused " opened the door of his room " (this suggests he had been in his room by himself behind a closed door) and " put the gun out." There is no suggestion that the gun was pointed at the deceased or that any attempt was made by the 1st accused to shoot the deceased. The deceased " held the muzzle, the gun went off, and seizing the 1st accused by one hand he wrenched and threw the gun away " with the other. A struggle took place in the course of which the deceased held the 1st accused by his neck. The latter asked Piyasena, the 2nd accused, to bring a knife which he did. With this knife the 1st accused stabbed the deceased.

It was conceded by Crown Counsel that the deceased met his death in the course of a sudden fight and that premeditation on the part of the 1st accused was excluded by the evidence. These two facts being in his favour the question arises of whether the sudden fight was " upon a sudden quarrel." In the argument of Crown Counsel the sudden fight was occasioned by the act of the deceased in dispossessing the 1st accused of the loaded gun which he had in his hands, that he was entitled to act as he did assuming, as is very probable, he thought his life was in danger and that this in itself could not be regarded as " a sudden quarrel." But even, Crown Counsel, went on, if the aggressive attitude adopted by the deceased when he questioned the 1st accused led the latter to load the gun and point it beyond the door, and even if the quarrel may be regarded as having started then and continued till the " gun incident " occurred, so that it may be said the sudden fight was "upon a sudden quarrel," the jury if directed in accordance with the judgment of this court in *Rex vs Chandrasekere*, could not have held that a defence based upon exception 4 of section 294 of the Penal Code had been proved.

The submission that was made was that, as it was possible for the jury to take two views of the evidence only one of which, according to the argument, could have led them to return a verdict of culpable homicide, the accused had left in doubt " the circumstances which would bring the case within one of the exceptions " and in consequence had not discharged the onus which section 105 read with section 3 of the Evidence Ordinance placed on him.

That, I think, is a misunderstanding of what was decided in *Rex vs Chandrasekere*. This case lays down that if the existence of circumstances which would bring " the case within one of the exceptions " is involved in doubt, the existence of those circumstances cannot be said to have been proved. It does not lay down that if two possible views be taken of a set of proved

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circumstances, the jury is precluded from adopting *either* those views. In fact, as it appears to me, just as inevitably as one cannot have one side of a sheet of paper without the other, there cannot be one view of a matter and not the contrary view as well. If, for instance, an accused rests his defence upon exception 1 of section 294 of the Penal Code, the jury may decide that he has proved, within the meaning of proof in section 3 of the Evidence Ordinance the circumstance alleged by him and yet may hold or not hold that he lost his self-control in consequence of the provocation to which he was subjected. Similarly when circumstances are in evidence which the jury regard as having been proved, they may or may not hold that those circumstances established that there was a sudden fight, upon a sudden quarrel, and that the accused "did not take undue advantage." It is only if they are in doubt as to whether they should or should not hold that circumstances existed which brought the case within exception 4 of section 294 of the Penal Code, that the existence of such circumstances cannot be said to have been proved. Even if two views are possible they may have no doubt as to which of these views they prefer to take on the basis of probability.

In our opinion, had the jury been invited to consider the applicability of exception 4 to the evidence of the case, they may have found, as it was open to them to find, that the accused was not guilty of the offence of murder. As they were not so invited, we think that the 1st accused must have the benefit of the lesser verdict. (42 N.L.R. 317).

In regard to the 2nd accused, it appears that if the 1st accused had been found guilty of culpable homicide the jury following the learned judge's directions on the law, would probably have found him guilty of an abetment of that offence.

We set aside the verdicts and sentences, and substitute in respect of the 1st accused a verdict of culpable homicide and in respect of the 2nd accused a verdict of abetment of that offence. The 1st accused is sentenced to ten years' rigorous imprisonment and the 2nd to five years' rigorous imprisonment.

Verdicts and sentences varied.