The Ceylon Law Weekly

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

VOLUME LIV

WITH A DIGEST

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The respondent, a holder of route licences, complained to the Commissioner of Motor Transport that the applicants were picking and setting down passengers in violation of its rights under the route licences. The Commissioner after inquiry ordered the applicants not to do so, whereupon the applicants appealed to the Tribunal of Appeal constituted under the Motor Car Ordinance No. 45 of 1938. The Tribunal set aside the Commissioner's order. The respondent then applied for a mandate in the nature of a writ of certiorari from the Supreme Court, which was granted on the ground that the Tribunal had acted without jurisdiction.

The applicants petitioned for leave to appeal to the Privy Council from the order of the Supreme Court.

Held (Sansoni, J. dissenting) : (1) That there was no right of appeal to the Privy Council under the Appeals (Privy Council) Ordinance as an application for a writ of certiorari is not " a civil suit or action " within the meaning of section 3 of the Ordinance.

(2) That the words " civil suit or action " should be construed in their ordinary sense of a proceeding in which one party sues or claims something from another in regular civil proceedings.

Per BASNAYAKE, C.J.—The dicta I have cited go to show that proceedings in certiorari do not fall within the category of proceedings known as suits or actions. In certiorari the Court exercises its supervisory functions in order to determine whether the inferior tribunal has exceeded its jurisdiction or committed an error of law apparent on the face of the proceedings, and is not called upon to pronounce judgment on the merits of the dispute between the parties before the inferior tribunal.

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The accused was charged under section 8 (1) of the Price Control Act of 1950 for selling wheat flour in excess of the maximum price fixed by the Price Order. The prosecution produced the Gazette containing the relevant Price Order but failed to produce the notification in Gazette containing the Minister's approval. After leading evidence of the alleged sale the prosecution applied for a postponement to enable it to call a constable who took the sample of wheat to the Government Analyst adding that it would not be calling any other evidence.

The defence Counsel thereupon contended that even if the constable was called, the prosecution must fail as it had omitted to prove that the Price Order had the Minister's approval by producing the relevant Gazette. The prosecution conceded that price orders become valid only after the Minister's approval.

The learned Magistrate upheld the contention and made order " discharging the accused ".

The prosecution appealed without the sanction of the Attorney-General and on a preliminary objection taken to the maintainability of the appeal.

Held : (1) That the appeal must be rejected as the learned Magistrate intended to record a verdict of acquittal on the merits and not merely to make an inconclusive order of " discharge " which would expose the accused to a fresh trial.

(2) That although the order of acquittal was wrong, the Court would not quash it in the exercise of its revisionary powers, because the prosecution has, by making incorrect concessions on the law, contributed towards the erroneous verdict of acquittal.

Per GRATIAEN, J.—Much confusion is likely to arise if the issue " *acquittal* or *discharge* ? " is allowed to be complicated by irrelevant considerations as to whether, upon the merits of the particular case, the Magistrate's decision was wrong or premature. The true test is whether (at whatever stage the decision was made) the Magistrate actually intended to record *a verdict of acquittal on the merits.* If that was the intention, no appeal lies except at the instance or with the written sanction of the Attorney-General, and the acquittal, unless reversed, is a bar to a fresh prosecution to the extent indicated in section 330.

If a prosecuting officer, by making incorrect concessions on the law, has contributed towards an erroneous verdict of acquittal, the accused person should not, as a general rule, be placed in jeopardy a second time.

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The appellant was a cashier of a Co-operative Society registered under the Co-operative Societies' Ordinance (Cap. 107). After an audit it appeared from the books and documents maintained by the appellant that he was accountable for a sum of Rs. 24,099/39 entrusted to him from time to time as cashier. The Deputy Registrar of Co-operative Societies purporting to act under section 50B of the Ordinance addressed him a letter " requiring " him to pay over that sum on demand to the Assistant Registrar who called upon the appellant to pay the money at his office on a specified date and time. The appellant having failed to comply with this demand was charged and convicted with criminal breach of trust under section 50B of the Ordinance.

Held : (1) That section 50B of the Co-operative Societies Ordinance (as amended by the Act of 1949), does not create a new offence of criminal breach of trust separate and distinct from the offence defined in section 388 of the Penal Code.

(2) That section 50B only facilitates, in charges of criminal breach of trust against any officer of a Co-operative Society, proof of dishonest conversion, if he has failed to pay over or produce or duly account for moneys entrusted to him in his official capacity.

(3) That no burden is imposed upon the accused to prove his innocence. If the Court, after considering the explanation of the accused and all other evidence is left in reasonable doubt as to whether the essential element of dishonesty has been established against him, he must be acquitted.

(4) The direction to the jury that they could not convict the appellant in this case unless they were satisfied that he had dishonestly converted to his own use the monies entrusted to him as cashier was a correct direction.

(5) The Deputy Registrar empowered under section 50B of the Ordinance to require that money should be paid to himself, was equally entitled for reasons of administrative convenience to nominate some other person to receive the money at a suitable time and place.

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Costs—Value of action increased by claim in reconvention—Dismissal of claim in reconvention—Order for costs in favour of plaintiff—Should they be taxed in the class in which action was brought—Civil Procedure Code, Second Schedule, Part I.

The plaintiff succeeded, in an action which he valued at Rs. 500/-. The defendant made a claim in reconvention in a sum of Rs. 500/- which was dismissed. An order for costs was made in favour of the plaintiff.

Held : That the costs should be taxed according to Class III in the Second Schedule (Part I) of the Civil Procedure Code and not according to Class II in which the action was brought, as the increase in value resulting from the claim in reconvention was for all purposes.

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Court of Criminal Appeal—Expert Evidence—Identification of deceased by superimposition of photograph on deceased's skull—Section 45, Evidence Ordinance—Power of Court to recall a witness—Section 138 (4) Evidence Ordinance—Discharge of a jury—When may Court do so?—When may opinions of experts in treatises be read to the jury?—Proviso, section 60, Evidence Ordinance—Scope of section 46, Evidence Ordinance.

(1) Where a person is called under section 45 of the Evidence Ordinance as an expert skilled in science or art, it must be established to the satisfaction of the Court that he is a person skilled in the science or art in which he is called to give expert testimony. The opinion of a medical witness based on the superimposition of a photograph that the skull produced is the skull of the deceased cannot be accepted, in the absence of proof that the medical witness is an expert and also that this method of identification is a science or art.

(2) Under section 138 (4) of the Evidence Ordinance, a Court is not bound to permit a witness to be recalled either for further examination-in-chief or cross-examination. The section vests a discretion in the Court to be exercised on the material placed before it.

(3) A Judge would not be justified in discharging a jury merely because a witness is seen conversing with a juror. The discharge of a jury is a matter within the discretion of the Judge to be exercised on reliable material placed before him. A jury should not be discharged unless the Judge is satisfied that it is necessary to do so in the interests of justice. Where an allegation of impropriety is made against a juror or a witness, the Judge should hold an inquiry before discharging the jury. A juror should be free to talk to anyone on matters unconnected with the subject of trial, but should avoid conversing in public with a witness during the trial.

(4) Under the proviso to section 60 of the Evidence Ordinance, opinions of experts which have not been admitted in evidence should not be permitted to be read to the jury. A Counsel or pleader is not entitled to read to the jury the opinion of an expert expressed in a treatise, unless such opinion has been proved by the production of the treatise in a case where the expert himself is dead or cannot be called as a witness.

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Plaintiff proved the assault, but failed to establish that he suffered any special damage.

Held : That the plaintiff was entitled to nominal damages and awarded him a sum of Rs. 25/-.

Tort—Death caused by servant employed under the Crown—Action against Crown for damages—

Liability of—Applicability of English Law—Civil Law Ordinance, Chapter 66, section 3—Crown proceedings Act 1947 of United Kingdom—Is it applicable to Ceylon?

As a result of death caused by the driver of a train belonging to the Ceylon Government, the plaintiff-appellant, as the father of the deceased, sued both the driver and the Government of Ceylon in damages alleging that the death was caused by the negligence of the driver in the course of his employment.

The trial Judge dismissed the action against the Government of Ceylon on the ground that the Crown was not liable in damages for the negligent acts of the servants.

It was contended for the appellant that under the Civil Law Ordinance (Chap. 66), section 3, the law applicable in Ceylon would be " the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England." Since under the Crown Proceedings Act 1947 the Crown in England was liable in tort for the negligence of its servants, the Crown in Ceylon would also be liable in the same way.

Held : (1) That the Ceylon Courts have adopted the English Doctrine of Employer's Liability—That is, the liability of the master for the negligent act of his servant is not based on any principle relating to law of Agency, but rather the special relationship existing between master and servant, which makes the act of the servant, the act of the master, provided it is done within the scope of his employment.

(2) That the Crown Proceedings Act 1947 is not applicable to Ceylon as its operation is limited only to the United Kingdom and is further restricted to acts of an " officer " of the Crown who is paid out of certain funds of the United Kingdom.

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Held : (1) That the writ had not been validly issued.

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The accused was charged under section 183 of the Penal Code for obstructing a Government Surveyor in the discharge of his public functions. The complainant-surveyor produced a copy of a notice sent by him to the accused under registered cover before the survey and the postal receipt issued thereon. In cross-examination the complainant admitted that he took no process through Court to compel the accused to produce the original and the defence objected to the admission of secondary evidence of its contents on the ground that notice to produce the original had not been given as prescribed by section 66 of the Criminal Procedure Code. The defence however, stated, that a letter was received by the accused with a request to produce the original, but that was not a compliance with the provisions of the said section 66. The learned Magistrate refused an application for adjournment to enable the complainant to take out notice through Court and discharged the accused.

The complainant appealed.

Held : (1) That there does not appear to be any provision of law prescribing a procedure for giving an accused person notice to produce a document at his trial.

(2) That the persons to whom a summons may be issued under section 66 of the Criminal Procedure Code do not include accused persons.

(3) That, therefore, the learned Magistrate should have considered whether such notice had been given as was reasonable under the circumstances of the case as required by section 66 of the Evidence Ordinance.

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Held : (1) That the significance of the words " no access " in section 112 of the Evidence Ordinance is not fully conveyed by assigning a precise verbal definition of the word " access " itself.

(2) That " no access " would be established in any case in which on the evidence available, it was right to conclude that at no time during the relevant period had there been " personal access " of

husband to wife under such circumstances that there might be sexual intercourse.

(3) That if the evidence in a case did disclose that at any time during the period there had been such " personal access ", then " no access " would not be established unless the presumption that sexual intercourse had resulted were rebutted by evidence that displaced that presumption.

(4) That such presumption arising from " personal access " is a rebuttable one and nothing less than cogent evidence should be relied on for the purpose.

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Held : That evidence regarding boundaries of adjoining lands contained in documents of title of persons, who are strangers to an action and have not been called, may become inadmissible only if objection to their production is taken in the original Court and they cannot be objected to for the first time in appeal.

Per SINNETAMBY, J.—We accordingly in reaching our decision have taken into account description of boundaries in deeds between strangers to the action and in doing so have followed several earlier decisions which approved of that practice as being in conformity with the law of the land and which unfortunately were not considered by the learned Appeal Judges who decided *Peeris vs. Sawunhamy* and *Solomon vs. William Singho.*

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The fact that liquor was unlawfully manufactured must be proved beyond reasonable doubt by the prosecution in a charge of possessing unlawfully manufactured liquor. A Government Analyst's report that a liquor is not similar to those of either approved brands of imported liquors or to that manufactured under licences issued under the Excise Ordinance is not sufficient, as the liquor in question may be of an unapproved brand of imported or smuggled liquor.

In such a case a charge of possessing unlawfully manufactured liquor under section 44 of the Excise Ordinance cannot be maintained.

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The accused was charged with possession of unlawfully manufactured liquor, in breach of section 44 of the Excise Ordinance. The liquor was a tonic manufactured according to a standard book on ayurvedic medicine prescribed by the College of Indigenous Medicine, and was intended for abdominal troubles. The accused also held a diploma of the College of Indigenous Medicine, and was registered as a medical practitioner in their Register.

Held : That the charge must fail as (1) the article in question was a *bona ide* medicated article for medicinal purposes ; (2) That the accused was a medical practitioner within the meaning of section 55 of the Excise Ordinance.

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Held : That where in a charge under section 12 of the Excise Ordinance, the relevant notification was not correctly referred to, a conviction could not be sustained.

Per WEERASOORIYA, J.—" The offence is alleged to have been committed on the 5th of May, 1956, and almost a year would have elapsed before a second trial can take place. Moreover, the accused is in no way responsible for the situation that has arisen, and I do not think that in the circumstances I should order a second trial. The accused is acquitted.

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By a deed of gift No. 2110 of 1883, Mututantrige Simon Fernando and his wife, Colombapatabendige Maria Perera, donated a property called "The Priory" to their daughters, M. Cecilia Fernando and M. Jane Fernando, subject to the following conditions:—

"That the said M.....Simon Fernando shall during his lifetime be entitled to take use and appropriate to his own use the issues, rents and profits of the said premises and that after his death and in the event of his wife C.....P..... Maria Perera surviving him she shall during her lifetime be entitled to take use and appropriate to her own use a just half of the said issues, rents and profits, the other half being taken, used and appropriated by the donees to wit, the said M Cecilia Fernando and M.....Jane Fernando and subject also to the conditions that the said donees.....shall not nor shall either of them be entitled to sell, mortgage, lease for a longer term than four years at a time or otherwise alienate or encumber the said premises nor shall the same or the rents and profits thereof be liable to be sold in execution for their debts or for the debts of any or either of them and the said premises shall after their death devolve on their lawful issues respectively and in the event of anyone of the said donees dying without lawful issue her share, right and interest in the said premises shall devolve on and revert to the surviving donee subject however to the conditions and restrictions aforesaid."

The deed further provided that "M.....John Jacob Cooray.....doth hereby on behalf of the said M.....Cecilia Fernando and M.....Jane Fernando, who are minors jointly with M..... Alfred Thomas Fernando and M.....James Fernando, brothers of the said minor donees accept the gift and grant of the said premises subject to the respective conditions aforesaid. Under an order of the District Court dated the 18th June, 1896, in proceedings under the Entail and Settlement Ordinance of 1876, initiated by the original donors, "The Priory" was given in exchange for another property called "Sirinivasa" subject to the condition that Cecilia Fernando and Jane Fernando "shall not sell, mortgage or otherwise alienate the said premises except with the consent of the original donors Simon and Maria Fernando or the survivor of them", and subject to the life interest of the original donors. "The Priory" was freed from the restrictions in the original deed of gift. The conveyances were dated 23rd June, 1896.

On the same date, Cecilia conveyed to her father, Simon, her half share in "Sirinivasa" for Rs. 45,000/-, and Simon gifted "The Priory" to Cecilia absolutely.

Simon and Jane on 30th June, 1900, partitioned "Sirinivasa", so that Jane received the eastern portion and Simon received the western portion.

On the 30th November, 1905, Jane with the consent of her mother, Maria, sold her divided portion to Simon, who sold the whole of "Sirinivasa" to James Fernando. Two lots out of the property were purchased by the defendant's immediate predecessor-in-title.

The present action was brought by the children of Jane for a declaration of title to the said lots against the defendant. The District Judge delivered judgment for the plaintiffs, but the Supreme Court set aside the judgment.

In allowing the appeal of the plaintiffs, the Privy Council held that—

(1) the acceptance of the gift on behalf of the fiduciaries Jane and Cecilia (minors) by their brother-in-law, Cooray, and their brothers, Alfred and James, was sufficient acceptance on their behalf;

(2) the acceptance by Jane and Cecilia (fiduciaries) was sufficient acceptance on behalf of their issue (fidei commissaries);

(3) a gift can be a gift in favour of a family (*favorem familiae*), even though it comes to an end with the first generation of fidei commissaries. Such a gift is not confined to a fidei commissum which goes on from generation to generation (2);

Per LORD KEITH.—"The great weight of authority derived from legal decision in Ceylon until the decision in the present case supports that view. In a matter in which so much was left open by the early commentators their Lordships attach great weight to a current of legal decision in a country in which fidei commissa are extensively resorted to by its inhabitants, are part of its law and become frequent subject of consideration by its Courts."

(4) Persons having a life interest are entitled to initiate proceedings under section 5 of the Entail and Settlement Ordinance of 1876;

(5) Although the order of the Court dated the 18th June, 1896, varied the conditions contained in the original deed of gift, the effect of that order, read with sections 4, 7 and 8 of the Ordinance of 1876 was that the property taken in exchange, "Sirinivasa" became subject to the terms of the original fidei commissum;

(6) A purchaser was bound to examine the chain of title even beyond the order of Court of 1896, in view of the imperative terms of section 8 of the Ordinance (3);

(7) Even a *bona fide* purchaser without any notice of a defect in the title was bound by such fidei commissum (4).

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Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949—Section 51—Powers of Supreme

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Held : That the appellate jurisdiction conferred on the Supreme Court by section 15 of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949 necessarily involves the power to set aside the order appealed from, and such a power implies a power to order the Commissioner to take any consequential steps for the disposal of the application for registration.

S. M. SOLAMUTHU *vs.* THE COMMISSIONER FOR THE REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 28

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Order under section 9 (2)—Is it an appealable order—Section 15—Presumption under section 20—What should be proved before conclusive effect can be given to it.

Held : (1) That an order under section 9 (2) of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949 is an appealable order.

(2) That before the presumption of law referred to in section 20 of the Act is raised, clear and unambiguous evidence furnishing conclusive proof of the matters required by that section should be available.

SOCKALINGAM CHETTIAR *vs.* THE COMMISSIONER FOR THE REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 56

Irrigation Ordinance

Irrigation Ordinance (Cap. 312) sale under, for non-payment of rates—Purchase by Crown—Title vested in Crown absolutely on issue of certificate of sale under section 66 (2)—Creation of new title as by partition decree.

Where a land is sold under the provisions of the Irrigation Ordinance for non-payment of irrigation rates and purchased by the Crown, and where a certificate of sale under section 66 (2) of the Ordinance is issued, the title to the said land vests in the Crown absolutely and free from all encumbrances.

So long as such title remains vested in the Crown all previous titles must be regarded as wholly extinguished or suspended by operation of law and a new title created in the Crown which is good against all persons.

Per WEERASOORIYA, J.—These provisions indicate that in the case of a sale of the land in the first instance to a purchaser other than the Crown only the right, title and interest to and in the land (free of all encumbrances) are transmitted, whereas in the case of a sale to the Crown the land itself vests in the Crown absolutely and free of all encumbrances.

VELLAITHAMBY *vs.* THE ATTORNEY-GENERAL ... 44

Jurisdiction

Jurisdiction—Action in Court of Requests for recovery of Rs. 125/—After trial judgment for Rs. 66/—Failure to take plea of exclusive jurisdiction of Rural Court—Is such judgment valid—Sections 11 and 12 of the Rural Courts Ordinance No. 12 of 1945 as amended by No. 13 of 1945—Section 636 of the Civil Procedure Code.

The plaintiff instituted this action in the Court of Requests claiming Rs. 125/- from the defendant, being the former's share of the timber sold and appropriated by the latter. After trial judgment was entered in favour of the plaintiff in a sum of Rs. 66/-. The defendant appealed.

Held : (1) That the learned Commissioner of Requests had no jurisdiction to enter the said judgment inasmuch as by sections 11 and 12 of the Rural Courts Ordinance No. 12 of 1945 (as amended by Ordinance No. 13 of 1945) Rural Courts are vested with exclusive jurisdiction in respect of claims of this value.

(2) That notwithstanding the failure on the part of the defendant to raise the issue of want of jurisdiction on this ground at the trial the Court is bound to dismiss the action in view of the imperative provision, section 636 of the Civil Procedure Code.

WILLIAM SINGHO *vs.* EDWIN SINGHO ... 78

Jury

When is Judge justified in discharging jury.

REGINA *vs.* SINNAPPUGE PINHAMY ... 49

Landlord and Tenant

Landlord and tenant—Tenancy agreement letting dwelling house and coconut garden—House and garden subsequently assessed as separate units—Action by plaintiff-tenant to recover excess rent—Landlord's plea of letting house and garden separately—Applicability of Rent Restriction Act—Meaning of the term " premises "—English Law.

Under a written agreement in 1946 the plaintiff took on rent a house and a coconut garden, bearing one assessment number. In December, 1951, the house and the coconut garden were divided and separately assessed. The plaintiff filed action for the recovery of excess rent paid by him for a period anterior to December, 1951. It is not disputed that the rents received would be excessive if the premises let under the agreement were regarded as one unit.

The District Court dismissed the action on the ground that there was no over-payment of rent as the subject matter of the agreement related to two separate units : the house and its immediate adjuncts, and the coconut garden to which the Rent Restriction Act did not apply.

Held : (1) That the terms of the agreement established that the parties regarded the contract as a letting of a house with a garden as an adjunct and that the rent charged was in excess of the legal rent.

(2) That where land and a house are let as one unit, the subsequent division into two will not make the original letting as divisible into two separate units, the Rent Restriction Act being applicable only to the house, and not to the land.

Per SINNETAMBY, J.—" It seems to me that where a house has been let together with land what one has to ascertain is whether the house is an adjunct of the land or the land an adjunct of the house. It is a question of fact.....If the land is considered to be an adjunct of the house, in my view, the Rent Restriction Act will apply, but if the converse is the case the Act will not apply. In order to decide this it seems to me the simple test to apply is to consider how the parties regarded the transaction."

E. NALLATHAMBY *vs.* MRS. G. M. LETAN ... 74

Local Authorities Election Ordinance No. 53 of 1946

Local Authorities Election Ordinance No. 53 of 1946, section 76 (1) (a)—Applicability of section 2 (2) to village committee—Proof—Gazette notice—Can Court take judicial notice?—Evidence Ordinance, section 57.

In a prosecution under section 76 (1) (*a*) of the Local Authorities Election Ordinance No. 53 of 1946 for having delivered nomination papers to a returning officer at a by-election for a ward of a Village Committee, knowing them to be forged, and as proof that the provisions of section 2 (2) of the said Ordinance applied to that particular Village Committee a Gazette notice was produced after the case was closed.

Held : That the Court could not under section 57 of the Evidence Ordinance take judicial notice of the fact that an order had been made applying the provisions of section 2 (2) of the Local Authorities Election Ordinance to that particular Village Committee. That order is not a law or a rule having the force of law.

TENNAKOON BANDA *vs.* P. D. CAROLIS, INSPECTOR OF POLICE 10

Maintenance Ordinance

Maintenance Ordinance—Sections 2 and 3—Wife's application for maintenance—Failure to prove cruelty—Dismissal — Fresh application alleging adultery—Does dismissal of first application operate as res judicata?

Held : That failure to prove desertion at a particular time does not mean that there cannot be desertion at a subsequent time.

PEMAWATHIE *vs.* SIRISENA 43

Mortgage

Hypothecary action—Mortgage of land to plaintiff —Death of mortgagor—Sale of hypothecated property by widow, 1st defendant to 2nd defendant, who retained part of purchase price to settle mortgage debt—Notice by 2nd defendant to plaintiff to accept principal and interest and cancel bond—Refusal by plaintiff—Action by 2nd defendant against plaintiff for cancellation of bond—Amount due deposited in Court—Before service of summons action filed by plaintiff on bond, against 1st defendant only—Plea by 1st defendant that property sold to 2nd defendant and action filed for cancellation of bond—At trial plaintiff's action dismissed of consent—No right reserved to bring fresh action—Withdrawal of 2nd defendant's action before summons served ex parte*—Plaintiff later consenting to accept money deposited by 2nd defendant—Refusal by Court on objection by 2nd defendant—Money deposited paid to 2nd defendant—Conveyance of mortgaged property to 3rd defendant.*

Second hypothecary action by plaintiff against 1st defendant as legal representative of deceased mortgagor and 2nd and 3rd defendants—Plea by defendants that decree entered of consent in earlier action operated as res judicata*—Civil Procedure Code, sections 406 and 408—Mortgage Ordinance (Cap. 74), Section 16—Mortgage Act No. 6 of 1949, section 7.*

D mortgaged a land with plaintiff in 1947. D died in 1948 leaving his widow, the 1st defendant and a daughter. 1st defendant transferred the land to the 2nd defendant, who retained in his hands the amount due on the mortgage and noticed the plaintiff to receive payment and discharge the bond. On plaintiff's refusal to accept payment the 2nd defendant filed case No. 3312 D.C., Kandy, for cancellation of the bond and deposited the amount due on the bond in Court. Before summons were served, the plaintiff, filed D.C., Kandy, 1364 M.B. on the bond against the 1st defendant (personally and as legal representative of D) praying for hypothecary, decree without making the 2nd defendant a party and without reference to the transfer in favour of the 2nd defendant.

In her answer the 1st defendant pleaded *inter alia* the sale to the 2nd defendant and that the latter had already sued for the cancellation of the bond. At the trial (of D.C. 1364 M.B.) the following order was made by Court " Of consent action dismissed, no costs ". Liberty to file fresh action was neither applied for nor reserved. The 2nd defendant, thereafter and before summons in D.C. 3312 was served, moved to withdraw his action with liberty to bring a fresh action and for permission to withdraw money deposited in Court, which was allowed *ex-parte*. Thereafter, the plaintiff through his proctor consented to accept the money and cancel the bond and moved to withdraw the money deposited (not yet withdrawn). 2nd defendant objected to this application which was refused. The amount in deposit was paid to the 2nd defendant.

After various other steps, the plaintiff filed this action for a hypothecary decree against the 1st defendant as the legal representative of the mortgagor, and the 2nd and 3rd defendants (the last named being a donee of the property from the 2nd defendant) the defendants in their answers pleaded *inter alia* that the decree entered in the earlier mortgage action, viz., D.C. 1364 M.B. operated as *res judicata* between the plaintiff and the defendant and therefore the action was not maintainable. The learned District Judge held that the money was due on the bond, but dismissed the action on the ground that section 406 of the Civil Procedure Code precluded the plaintiff from maintaining the action. The plaintiff appealed.

Held : (1) That the provisions of section 7 (1) of the Mortgage Act, No. 6 of 1949 must be read subject to the provisions of sections 406 and 408 of the Civil Procedure Code.

(2) That whether one regards the dismissal of the previous action by the appellant as a withdrawal under section 406 or as an adjustment under section 408 of the Civil Procedure Code, the effect of the decree passed in that section is to preclude the appellant from bringing the same action, notwithstanding the provisions of section 7 (1) of the Mortgage Act No. 6 of 1949.

(3) That so far, at least, as it is sought to obtain a decree against the 1st defendant in her representative capacity for the payment due on the bond, the present action is " for the same matter " as the previous one.

(4) That since the mortgage is only accessory to the original obligation or debt, once the original obligation is extinguished by reason of the operation of the previous decree of Court, the appellant has no independent remedy against the 3rd defendant to have the mortgaged property sold for the debt.

(5) That the provisions of section 7 (1) of the Mortgage Act is satisfied if the mortgagor is sued

as a defendant but no relief is claimed against him and they do not enable a second claim for the payment of money due on a mortgage being successfully maintained against the mortgagor or his estate when a previous action has been dismissed in circumstances in which the appellant's earlier action was decided.

Per WEERASOORIYA, J.—But with regard to the order made on the 15th December, 1949, it seems to me that generally speaking a Court should not grant a plaintiff permission in terms of section 406 (1) of the Civil Procedure Code without notice to all the persons whose names appear on the record as parties to the action even though summons may not yet have been served on some or all of them.

EDWIN *vs.* DIAS *et al* 104

Motor Traffic Act, No. 14 of 1951

Motor Traffic Act No. 14 *of* 1951, *Section* 186—*Statement in license that lorry "will usually be kept" at a place outside the area of operation referred to therein—Lorry found driven unladen between area of operation and place where it "will usually be kept"—Conviction under section* 186—*Can it be sustained.*

The license issued in respect of a lorry stated that the lorry "will usually be kept" at a place outside the area of operation specified in the license. A police officer found the lorry being driven by the accused unladen at a point between the area of operation and the place where it "will usually be kept".

Held : That a conviction under section 186 of the Motor Traffic Act for using the lorry on a highway outside the area of operation cannot be sustained.

PLANDIRI PEDIGE JOHN *vs.* POLICE SERGEANT, GALEWELA 5

Motor Traffic Act No. 14 *of* 1951—*Charge under section* 225—*Defective charge—No evidence to establish offence.*

Where the charge against the accused was that he, knowing or having reason to believe that an accident had occurred between a lorry and a car, caused the lorry driver to push the lorry and disappear from the scene with the intention of screening the lorry driver from punishment.

Held : (1) That the charge was defective in that it did not disclose the offence prescribed by section 225 of the Motor Traffic Act.

(2) That the evidence did not establish that there was an intention on the part of the accused to screen the alleged offender.

(3) That the accused had not caused the disappearance of evidence which relate to the commission of an offence under section 225.

DHARMADASA *vs.* D. B. SENEVIRATNE, SUB-INSPECTOR OF POLICE 13

Motor Traffic Act No. 14 *of* 1951—*Failure to construct and maintain motor bus according to Regulation* 12 *of the Construction of Vehicles Regulations—Owner charged under section* 216 (2) (*b*) *of the Motor Traffic Act—Liability of company.*

The appellant company was charged under section 216 (2) (*b*) of the Motor Traffic Act for having failed to construct and maintain a motor bus in such condition so as to prevent the emission of smoke from the bus in such quantity as to be a nuisance to one Perera in breach of Regulation 12 of the Construction of Vehicles Regulations. The Act did not prohibit the user of such a motor vehicle.

Held : (1) That in the absence of a prohibition against the use of a motor vehicle, which does not conform to the Regulation, the use of such a vehicle did not amount to contravention of section 216 (2) of the Act.

(2) That section 216 (2) contemplates the user of a motor vehicle, and the words in the section "where anything is done or omitted to be done in connection with a motor vehicle, in contravention of any provision of this Act or any regulation" cannot be extended to cover breaches of regulations relating to construction and equipment of motor vehicles under the Act.

(3) That there was no evidence that the particular motor bus had not been constructed or maintained in accordance with the provisions of Regulation 12.

SRI LANKA OMNIBUS CO., LTD. *vs.* P.S. 2466 PERERA 29

Motor Traffic Act No. 16 *of* 1956—*Sections* 86, 87 *and* 90—*Application for a public carrier's permit—Class of goods not specified in the application—Discretionary power of the Commissioner to issue permit.*

Where on the application by a person for a public carrier's permit specifying certain kinds of goods he proposed to carry, the Commissioner of Motor Transport granted the permit authorising to carry a class of goods not specified in the application.

Held : That the Commissioner is not precluded from including in the permit authority to carry goods of a class or classes which have not been specified in the application.

SAMARAKOON *vs.* (1) COMMISSIONER OF MOTOR TRAFFIC, (2) K. A. D. JAMES APPU ... 99

Charge—Driving recklessly or in a dangerous manner—Breach of section 153 (2) *Motor Traffic Act—Is the charge bad for duplicity—Sufficiency of particulars of charge—Criminal Procedure Code, Section* 169.

The accused was convicted on the following charge :—

The accused did "being the driver of bus No. IC. 2405 drive the same on a public road to wit : along Alawwa-Narammala Road recklessly or in a dangerous manner in breach of section 153 (2) of the Motor Traffic Act No. 14 of 1951 and thereby committed an offence punishable under section 219 (1)".

In appeal it was contended on behalf of the accused that—

(*a*) The charge sets out two distinct offences in the alternative and is therefore bad for duplicity.

(*b*) The charge is bad in that it does not set out particulars of the manner in which the offence was committed.

Held : (1) That there is no uncertainty about the charge as driving recklessly or in a dangerous manner connotes the commission of one offence in alternative ways. The charge sets out the manner in which the accused drove his vehicle.

(2) That the manner in which the offence was committed is manifest in the charge and the nature of the case required no further particulars in the charge.

Muslim Law

Muslim Law—Marriage—Money given by plaintiff's father to defendant husband on the occasion of the registration of marriage—Amount entered as "stridanum" in the marriage certificate—Claim by plaintiff of the money as "stridanum"—Defendant's contention money that paid was a personal gift—Principle of construction to be followed—Intention of parties to prevail over the designation of the donation.

Where a sum of money was given by the father of the plaintiff wife to the defendant husband on the occasion of the registration of the marriage, and the amount was entered as "stridanum" in the marriage certificate.

Held: (1) That the plaintiff could recover the money from the defendant as there was evidence to justify the trial judge's finding that the money was intended by the parties to be a marriage settlement in favour of the plaintiff and not a personal gift to the defendant.

(2) That where there is a conflict between the designation of the donation and the intention of the parties making the donation, the intention should prevail.

Per DE SILVA, J.—"But I am unable to agree with the learned District Judge when he stated. "It will be a contradiction in terms to describe a gift given to a man as "Stridanum". By this dictum if he meant that in no circumstances could a gift described as "Stridanum" be construed as a gift to the bridegroom it is too wide a proposition and finds no support for the recent decisions of this Court."

Muslim Law—Donation subject to fidei commissum *under Last Will*—Fidei commissum *property partitioned by decree of Court—Property sold by fiduciary and* fidei commissaries—*Validity of sale—Does Roman-Dutch Law or Muslim Law govern sale? Extent of the applicability of Muslim Law in Ceylon.*

By Last Will one A.R. donated in equal shares a certain property to H and M subject to the condition that they shall not sell, mortgage, alienate or in any way encumber the said premises or the rents, profits on income arising thereof but shall only possess and enjoy the same during their natural lives and after their death the same shall devolve on their respective heirs and descendants".

The property was subsequently partitioned under a decree of Court and M, his wife, and his two sons sold by deed to the 2nd defendant, the lot allotted to M under the decree. The plaintiffs, the grand children of M, contended that the sale was void as Muslim Law applied. It was not disputed that there was a valid *fidei commissum* under the Last Will.

Held: (1) That a contract of sale between Muslims is not governed by Muslim Law but by Roman-Dutch Law.

(2) That under the Roman-Dutch Law all those who have an interest in regard to the *fidei commissum* have a right to alienate the property and the sale in the present case was valid.

Per BASNAYAKE, C.J.—It would appear therefore that in the case of Muslims their special laws govern the following matters:—Marriage, Divorce, Status and Mutual Rights and Obligations of the Parties to a Marriage or Divorce, Intestate Succession, and Donations of Immovable Property not involving *fidei commissa*, Usufructs and Trusts. It should be noted that the Legislature has not extended the application of Muslim Law to contracts of sale and that donations involving *fidei commissa* are excluded from the scope of the Muslim Law and the Roman-Dutch Law is declared applicable to them.

Partition

Partition Ordinance, sections 52, 4, 8 *and* 9—*Prescription Ordinance, sections* 3 *and* 13—*Partition decree—Obtained by fraud and collusion—Decree conclusive against all persons—Claim on prescriptive-title—Entitled to damages only—Investigation of title inadequate—Duties of trial court and appeal court.*

By an executor's conveyance dated 1888 certain immovable property was transferred to a daughter of the testator subject to the conditions contained in the will which set out *inter alia* that she, her issue or heirs should not sell, mortgage or alienate the property but should hold it in trust for her grand-children. In 1949 seven of her grand-children instituted a partition action against 36 other grand-children, all 43 of them claiming to be all the persons interested in the property. After the decree or sale was entered in the partition action the appellants who were not made parties to it instituted the present proceedings in 1950 to have the decree set aside as null and void or alternatively claiming damages on the ground that they were entitled to the entire property on prescriptive title as successors in title of a person who had acquired it under a Fiscal's conveyance executed in 1916 in pursuance of a mortgage decree against the testator's daughter (referred to above). The trial Judge held that the present respondents had acted fraudulently and collusively in failing to make the appellants parties in the partition action.

Held: (1) That a partition decree was conclusive against all persons whomsoever including a person whose title to an interest in the land had been concealed from Court by fraudulent collusion between the parties and accordingly the only remedy available to such a person is damages and was not entitled to have the partition decree set aside.

Nono Hami vs. De Silva (1891) 9 S.C.C. 198 and *Jayawardena vs. Weerasekera* (1917) 4 C.W.R. 406 applied.

Dictum of Ennis, J. in *Fernando vs. Marshal Appu* (1922) 23 N.L.R. 370 suggesting a a possible exception to this rule was not approved of.

(2) That a paramount duty is cast upon the Court by the Partition Ordinance to ascertain by a proper investigation of title who are the actual owners of the land sought to be partitioned. And, further, on an appeal in a partition action if it appears to the Supreme Court that the investigation into title has been inadequate it should of its own

motion, if necessary, and acting under its powers of revision set aside the decree and make an order for proper investigations.

(3) That the appellants under the Prescription Ordinance had acquired a good title to the property and were entitled to be compensated by way of damages to the full extent of the value of the property at the date of the commencement of the proceedings.

Mather vs. Thamotheram Pillai (1903) 6 N.L.R. 246, 250 approved.

(4) That once parties relying on prescription had brought themselves within section 3 of the Prescription Ordinance the onus rested on anyone relying on the proviso to that section to establish their claim to an estate in remainder or reversion at some relevant date and they could not discharge that onus unless they established that their right fell into possession at some time within the period of 10 years. *Chelliah vs. Wijenathan* (1951) 54 N.L.R. 337 considered and commuted upon.

MOHAMEDALY ADAMJEE AND OTHERS *vs.* HADAD SADEEN AND OTHERS 58

Partition Act, No. 16 of 1951, sections 8 and 10 (1)—Date fixed by Court to deposit survey fees—Has the Court discretion to extend such time.

Held : That the Court has the discretion to alter the time originally fixed for the deposit of survey fees under section 8 of the Partition Act, No. 16 of 1951, provided that such alteration is made before the expiration of that time.

Per H. N. G. FERNANDO, J.—" We do not have in this appeal to decide the question whether the Court has a discretion to extend the time for the deposit of the fees *after* the date originally fixed, but the reasons which I have given in this judgment should not be construed to be an answer in the negative to that question.

SINNATHAMBY SUBRAMANIAM *vs.* KANAPATHIPILLAI THANGAVADIVELU AND OTHERS ... 95

Prescription

Possession—Prescriptive title to land—Honest belief of just cause of possession—Ignorance of other's rights—Necessary ingredients—Prescription Ordinance, Chap. 55, section 3.

To acquire title to land by prescriptive possession the possessor must honestly believe that he had a just cause of possession and must have been ignorant that what he possessed does not belong to another. Such possession must have been in good faith, and obtained *nec vi* (not violently), *nec clam* (not by stealth), *nec precario* (not by sufferance).

DAWOOD *vs.* NATCHIYA 3

Partition decree obtained by fraud and collusion—Decree conclusive against all persons—Claim on prescriptive title—Entitled to damages only.

MOHAMEDALY ADAMJEE AND OTHERS *vs.* HADAD SADEEN AND OTHERS 58

Profits Tax Act No. 5 of 1948

Profits Tax Act No. 5 of 1948, section 9—Determination of chargeable surplus of profits or income—Section 9 (a)—Meaning of " capital employed in the business "—Limited liability company producing tea—Provision made for payment of Income Tax and dividends to shareholders—Does it amount in law to capital employed in the business of the company for the accounting period.

Held : That monies held in deposit by a company (*a*) for the payment of Income Tax which would shortly fall due and (*b*) for the payment of dividends which would shortly be declared, would amount to " capital employed in the business " of that company within the meaning of section 9 of the Profits Tax Act No. 5 of 1948.

Per GUNASEKARA, J.—(*a*) " The ground upon which Lord Simonds based his conclusion was that a right which is assumed to be an asset belonging to a limited company " cannot be capital employed in its trade unless it is an asset so employed ".

(*b*) " In my opinion there is no ground for limiting to what is required for the purposes of a trade or business the amount of cash that can be regarded as capital employed in it. But assuming that it was necessary in this case to determine what sum the appellant company needed to have available in cash for working expenses, I am unable to agree that the Board determined this question without evidence when it held that a reasonable sum would be the equivalent of the cost of upkeep for 3 months rather than 2 months ".

COMMISSIONER OF INCOME TAX *vs.* THE GLASGOW ESTATE CO., LTD. 7

Res Judicata

See UNDER MORTGAGE 104

Roman-Dutch Law

Governs contract of sale between Muslims.

MOHIDEEN AND OTHERS *vs.* SULAIMAN AND OTHERS 108

Shop and Office Employees (Regulation of Employment and Remuneration) Act

Shop and Office Employees (Regulation of Employment and Remuneration) Act—Charge of keeping shop open after hours and serving customers—Has Assistant Commissioner of Labour power to sanction prosecution—Evidence Ordinance, section 114.

Held : (1) That an Assistant Commissioner of Labour has, under section 46 (2) of the Shop and Office Employees (Regulation of Employment and Remuneration) Act, power to sanction prosecution for offences under the Act and to exercise any power, duty or function of the Commissioner of Labour, subject to directions, if any, by the Commissioner. It is not necessary to prove that this authority is derived from a direction given by the Commissioner.

(2) That the presumption under section 114 of the Evidence Ordinance applies in this case.

KARIYAWASAM, INSPECTOR OF LABOUR *vs.* S. A. C. A. RAFEEK 46

Thesawalamai

Thesavalamai—Person married before 17th July, 1911, and dying in 1938—Devolution of property on surviving spouse—Applicability of sections 9 and 11 of Part I of the Thesavalamai Regulation No. 18 of 1806 and sections 14 and 37 of the Matrimoni al

Rights and Inheritances (Jaffna) Ordinance No. 1 of 1911—How far do headings of a section control the text.

Where a person subject to the Thesavalamai married before 17th July, 1911, died after the commencement of the Matrimonial Rights and Inheritance (Jaffna) Ordinance No. 1 of 1911, the surviving spouse who had not married was entitled to the possession of the lands by virtue of sections 9 and 11 of the Thesavalamai Regulation No. 18 of 1806. In such a case section 37 of Ordinance No. 1 of 1911 would not be applicable.

Per BASNAYAKE, C.J.—Headings in a statute do not always control the text. Headings in statutes belong to two classes *The King vs. Suppar*, 18 N.L.R. 322 at 326—headings which can be read grammatically into the group of sections to which they relate and headings which have no direct connection with the language of such sections. Headings of the first class constitute a sort of preamble (*Martins vs. Fowler* (1926) A.C. (P.C.) 746), to the sections immediately following them and are not used in more recent statutes. Headings of the latter class are generally regarded as having been inserted for the purpose of convenience of reference, and not as being intended to control the interpretation of the sections grouped under such heading as in the case of the Ordinance under consideration.

Tort

The Crown in Ceylon is not liable to tort for the negligent acts of its servants.

Urban Councils

Urban Councils Ordinance, No. 61 of 1939 (Chap. 199)—Sections 76, 196 (41)—Closing Order, under Housing and Town Improvement Ordinance (Chap. 199) who should make the application.

Held : (i) That the officer empowered by section 76 of the Urban Councils Ordinance (Chapter 199) to apply to a Magistrate for a closing order is the Chairman of the Local Authority.

(ii) That where an Urban Council has been dissolved and a Special Commissioner appointed to administer the affairs of the Council, the latter is entitled to make the application by virtue of sub-section 41 of section 196 of Ordinance No. 61 of 1939.

(iii) That where the Secretary of the Council made such application without proof that he had been delegated for the purpose, the Magistrate had no jurisdiction to entertain the application.

Village Committee

Applicability of section 2 (2) of Local Authorities Election Ordinance No. 53 of 1946 to Village Committee.

Words and Phrases

'*Action*'

Present : WEERASOORIYA, J. AND FERNANDO, J.

JAYAWARDENE vs. CASSIERE

S. C. No. 26—D. C. (Inty.) Colombo 17929/M

Argued on : 19th and 20th March, 1956
Delivered on : 30th April, 1956

Execution of Decree—Order directing plaintiff to deliver to defendant certain articles or in default a sum of money—How such a decree may be executed—Need to comply strictly with procedure laid down in Sections 320 and 321 of the Civil Procedure Code.

Where a decree was entered under which the plaintiff was to deliver to the defendant certain articles of jewellery and other movables or in default to pay a certain sum of money and where the execution-creditor sought to execute the decree as one for payment of money without complying with the procedure laid down in Sections 320 and 321 of the Civil Procedure Code,

Held : (1) That the writ had not been validly issued.
(2) That sections 320 and 321 lay down the procedure for the execution of such decrees and the execution-creditor should act in strict compliance with them.

Cases referred to : *Appuhamy vs. Appuhamy*, 14 N. L. R. 8.
Ran Menika vs. Dingiri Banda, 25 N. L. R. 465.
Punchiappuhamy vs. Fernando, 46 N. L. R. 179.

C. Renganathan with *P. Nagueswaram*, for the plaintiff-appellant.

A. C. Nadarajah, for the defendant-respondent.

WEERASOORIYA, J.

The plaintiff sued the defendant in May 1947, for the recovery of a sum of Rs. 1,250/- being the principal and accrued interest due on a loan transaction. The defendant filed answer denying liability and counter-claiming the return of certain articles of jewellery and other movable property valued at Rs. 4,000/- or in the alternative for judgment in that amount. After trial the plaintiff's action was dismissed and judgment was given in favour of the defendant in terms of her counter-claim. An appeal filed by the plaintiff against this judgment was dismissed on the 28th March, 1952.

The decree that was affirmed in appeal directed the plaintiff to deliver to the defendant within two weeks from the date thereof the articles which formed the subject matter of the latter's counter-claim or in default to pay the sum of Rs. 4,000/-. The substantial relief prayed for by the defendant was the return to her of these articles which she alleged had been given by her to the plaintiff as security for a loan of Rs. 1,000/-. The trial Judge held that the defendant had repaid the loan of Rs. 1,000/- and that she was entitled to the return of the pledged articles or in default to be paid their value, and he gave judgment accordingly. In my opinion the decree which was entered in terms of this judgment was a decree for the delivery of movable property under head (B) of Section 217 of the Civil Procedure Code. The execution of such a decree is governed by the special provisions contained in Sections 320 to 322 of the Code.

Section 191 of the Code provides that in an action for movable property " if the decree be for delivery of such property, it shall also state the amount of money to be paid as an alternative, if delivery cannot be had ". The decree entered in the present case seems to have been drawn up in terms of this section in that it called upon the plaintiff to pay the sum of Rs. 4,000/- in default of delivery of the movable property as ordered. Under Section 320 the writ of execution of a decree for the delivery of movable property is required to be in form No. 62 in the First Schedule to the Code. Section 321 provides how such a writ shall be executed : the Fiscal or his officer must demand from the judgment-debtor delivery of the movable property and on the latter failing to comply with the demand the executing officer is authorised to seize the said property and deliver it to the judgment-creditor ; but if delivery cannot be had, the Court may, on a special application made in that behalf by the judgment-creditor, with notice to the judgment-debtor, direct a writ of execution by seizure and sale of the judgment-debtor's property, or a warrant for the arrest of the judgment-debtor, or both, to issue to the Fiscal. Section 322 provides that the amount of money directed to be levied in the

writ by seizure or sale of the judgment-debtor's property shall be the amount of pecuniary loss, as nearly as can be estimated, which is occasioned to the judgment-creditor by reason of the judgment-debtor's default in making delivery of the movable property in terms of the decree; and the section contains a further provision that the execution of the writ, and of the warrant for the arrest of the judgment-debtor, shall be effected according to and subject to the rules prescribed for the writ of execution and warrant of arrest issued for the enforcement of decrees to pay money. It was held in the case of *Appuhamy vs. Appuhamy* 14 N.L.R. 8 that where in a decree for the delivery of movable property the amount of money to be paid as an alternative is specified in terms of Section 191, the Court would, for the purposes of Section 322, have before it a pre-estimate of the pecuniary loss referred to in the latter section and that it is not necessary for the Court to arrive at a fresh estimate unless further loss has occurred by non-delivery.

It is clear that in the present case the procedure laid down in Sections 320 to 322 was not followed in executing the decree which the defendant had obtained against the plaintiff. Instead, the defendant's proctor appears to have regarded the decree as one for the payment of money and to have proceeded to execution of it on that basis. As a preliminary step the plaintiff was examined under Section 219 of the Civil Procedure Code as to his assets. In the course of that examination he stated that the movable property which under the decree he became liable to deliver to the defendant had been sold by him about two or three months after the decree and that he was not possessed of any assets other than the salary he received as a public servant. Thereafter on application made by the defendant's proctor the Court issued to the Fiscal a writ of execution for the recovery of the sum of Rs. 4,000/- by seizure and sale of the plaintiff's property. On the 29th March, 1954, this writ was returned to Court unexecuted with a report by the Fiscal that no property had been pointed out for seizure. On the 18th of February, 1954, the defendant's proctor moved by way of petition and affidavit for an inquiry in terms of Section 298 (1) of the Civil Procedure Code with a view to the issue of a warrant for the arrest of the plaintiff and his committal to jail in execution of the decree. After an inquiry in the course of which certain preliminary objections taken by the plaintiff on the ground that the correct procedure for the execution of this decree had not been followed were overruled, the Court made an order for the issue of a warrant on the plaintiff for his arrest and committal to jail. The present appeal has been preferred by the plaintiff against this order.

Mr. Renganathan who appeared for the plaintiff at the hearing of the appeal relied mainly on the case of *Ran Menika vs. Dingiri Banda* 25 N.L.R. 465 in support of his submission that the order appealed from is wrong. In that case the judgment-creditor sued the judgment-debtor for declaration of title to an undivided share of a land and she obtained a decree in terms of her claim and for costs of suit. After the costs due had been taxed the judgment-creditor took certain steps to have her decree for costs executed. The judgment-debtor was examined under Section 219 of the Civil Procedure Code and he stated that he was not possessed of any property. On the strength of this admission the judgment-creditor, without taking out writ of execution against the property of the judgment-debtor, moved for his attachment. Tnis was granted by Court but was later re-called on representations made by the judgment-debtor's proctor. The judgment-creditor appealed against the order recalling the attachment. The appeal came up for hearing before a Divisional Bench of this Court. In support of the order appealed from it was contended that under Section 298 (1) of the Civil Procedure Code there could be no attachment of the person of the judgment-debtor since that section implies that a writ of execution against his property had previously issued. In upholding this contention, Garvin, A.J., who delivered the judgment of the Bench, stated that the provisions of the Code relating to the arrest of a judgment-debtor are in their nature penal and should be strictly construed and that even if on the admission of the judgment-debtor that he was possessed of no property, the issue of a writ of execution against his property may have appeared to be a mere formality, it had to be complied with so long as it is required by the law.

Applying this decision (which is binding on us) to the facts of the present case, Mr. Renganathan argued that the plaintiff's admissions that he had already disposed of the movable property which he had been directed under the decree to deliver to the defendant and that he was not possessed of any other property against which execution could be levied did not entitle the defendant to proceed to execution of the decree as if it were a decree for the payment of money and that it was, nevertheless, incumbent on the defendant to have followed the procedure prescribed in Sections 320 and 321 of the Code.

Mr. Nadarajah who appeared for the defendant argued *contra* that prior to the order of attachment appealed from, a writ had in fact issued to the Fiscal for the seizure and sale of the plain-

tiff's property, a return had also been made to that writ that no such property had been pointed out for seizure and that, therefore, the decision in *Ran Menika vs. Dingiri Banda* (supra) does not apply. But it seems to me that this argument does not take note of the fact that the writ in question was not a step in the procedure required to be adopted under Sections 320 and 321 of the Code but was issued on the erroneous assumption that the decree to be executed was a money decree. In my opinion this writ cannot be regarded as having been validly issued, and the position, therefore, is not different from that in the case referred to.

In *Appuhamy vs. Appuhamy* (supra) certain observations in the judgment of Hutchinson, C.J., seem to suggest that a judgment-creditor who has a decree for the delivery of movable property which is drawn up in terms of Section 191 of the Code may himself make the demand for delivery of such property instead of having recourse to the Fiscal through Court, and that if the demand is refused it would be open to him to apply for execution of the decree as a money decree. I am unable, however, to construe these observations as implying that the application for execution of the decree as a money decree may be made otherwise than under the provisions of Section 321 (2) of the Code. On the authority of the decision in *Punchiappuhamy vs. Fernando* 46 N.L.R. 179 it may re regarded as settled that the judgment-creditor cannot, in such a case, at his option demand payment of the money instead to accepting delivery of the movable property where the judgment-debtor tenders such property or it is available for seizure by the Fiscal; nor can he, if the demand for payment of the money is not satisfied, proceed in the first instance to execute the decree as a decree for payment of money.

In my opinion the appeal of the plaintiff must be allowed and the order of attachment set aside with costs in both Courts. It is with some reluctance that I have come to this conclusion since there is no merit on the plaintiff's side except for the irregular procedure adopted in the case, and he has indicated all along his intention of not complying with the decree entered against him as far back as 1949. The order which I have made will not preclude the defendant, if she is so advised, from proceeding to execution of the decree and attachment of the plaintiff in accordance with the correct procedure as indicated in this judgment subject, however, to any valid objection that may be taken by the plaintiff.

FERNANDO J.

I agree.

Appeal allowed.

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

DAWOOD vs. NATCHIYA

S. C. No. 401—*D. C. Kurunegala No.* 8533.

Argued on: 19th and 20th July, 1955.
Delivered on: 20th July, 1955.

Possession—Prescriptive title to land—Honest belief of just cause of possession—Ignorance of other's rights—Necessary ingredients—Prescription Ordinance Chap. 55, section 3.

To acquire title to land by prescriptive possession the possessor must honestly believe that he had a just cause of possession and must have been ignorant that what he possessed does not belong to another. Such possession must have been in good faith, and obtained *nec vi* (not violently), *nec clam* (not by stealth), *nec precario* (not by sufferance).

H. W. Jayawardene, Q.C., with *P. Ranasinghe*, for the defendant-appellant.
C. R. Gunaratne, for the plaintiff-respondent.

BASNAYAKE, A.C.J.

The plaintiff Esi Lebbelage Jainambu Natchiya (hereinafter referred to as plaintiff) purchased the subject matter of this action, a field called Thambahitiyawekumbura bearing assessment No. 766, situated at Galbodagama, about one amunam of paddy-sowing, extent within the limits of the Town Council of Polgahawela from Abdul Gany Saibo Mohamed Hussain (hereinafter referred to as Hussain) on 21st August, 1951, for a sum of Rs. 5,000/-. The plaintiff alleges that the defendant Hassim Ismail Davood (hereinafter referred to as the defendant) entered into forcible possession of this field about 4th February, 1952, and asks that he be ejected therefrom and that the plaintiff be declared entitled thereto and for damages in a sum of Rs. 250/- and continuing damages at Rs. 350/- per annum.

It would appear that the defendant was at one time the owner of this field. By bond No. 1770 dated 30th March, 1931, the defendant and his wife Uduma Lebbe Pathumma Natchiya created a usufructuary mortgage over this field and five other lands in favour of Dr. E. V. Ratnam of Colombo. It would appear from the defendant's own evidence that despite the usufructuary mortgage with Dr. Ratnam's permission he continued to possess the lands. In November, 1940, Dr. Ratnam sued on the mortgaged bond and in December, 1940, obtained decree in a sum of Rs. 4,000/-. In January, 1941, before the execution of the decree Hussain a friend of the defendant purchased this field and the other five lands for a sum of Rs. 5,000/-. It would appear that Hussain an Indian Muslim was the adopted son of a Muslim dignitary and spiritual leader by the name of Abdul Gany Bawa and that the defendant was a disciple of his. Hussain and the defendant moved on very friendly terms. They had been together on pilgrimage to India and Hussain lived with the defendant whenever he went to Polgahawela. The evidence appears to indicate that Hussain's purchase of the defendant's land was actuated more by considerations of friendship than of acquisition of land. He appears to have stepped in to save the defendant's lands from a forced sale and for that purpose he went to the extent of borrowing the money from a Chettiar.

The field in question was situated behind the residing house of the defendant and the evidence is that the defendant got it cultivated through cultivators engaged by him on a basis of a share of the crop. He paid taxes in respect of the land in Hussain's name clearly showing that he did not possess as master but as agent. Although he claims to have acquired a prescriptive title by adverse user he does not say when he ceased to possess under the permission granted by Dr. Ratnam and commenced possession *ut dominus*.

Acquisition of title to land by prescription is governed by section 3 of the Prescription Ordinance.

To acquire title to immovable property by possession for the period prescribed by law for the acquisition of a prescriptive title, it is necessary that the possessor must honestly believe that he had a just cause of possession, and must have been ignorant that what he possessed did belong to another. This integrity is always presumed, if it is not proved that he has possessed knowing the thing to be another's.

In other words possession will not enable the possessor to acquire a prescriptive title after the effluxion of the period fixed by law unless the possession is in good faith and is obtained *nec vi* (not violently) *nec clam* (not by stealth) *nec precario* (not by sufferance).

In the instant case the defendant having commenced his possession with the leave and licence of the usufructuary mortgagee continued to remain in possession knowing that not he but Hussain to whom he had sold the land was the owner. Though there is no proof that the defendant paid any rent or produce or performed any service or duty, an acknowledgment by him of a right existing in Hussain can fairly and naturally be inferred from the circumstances of the case.

Learned Counsel for the appellant relied on certain decisions of this Court in support of his argument that the defendant had acquired a title by prescription.

Those cases have no application to the facts of this case and need not therefore be discussed. For the above reasons, the appeal is dismissed with costs.

Pulle, J.
I agree.

Appeal dismissed with costs.

Present : T. S. Fernando, J.

EBERT FERNANDO vs. GOONEWARDENA

S. C. No. 1200 *of* 1955—*M. C. Colombo South* 65526

Argued on : 3rd August, 1956
Decided on : 21st August, 1956

Excise Ordinance—Section 44*—Charge of possessing unlawfully manufactured liquor—Proof of Government Analyst's report—Its sufficiency to maintain charge.*

The fact that liquor was unlawfully manufactured must be proved beyond reasonable doubt by the prosecution in a charge of possessing unlawfully manufactured liquor. A Government Analyst's report that a liquor is not similar to those of either approved brands of imported liquors or to that manufactured under licences issued under the Excise Ordinance is not sufficient, as the liquor in question may be of an unapproved brand of imported or smuggled liquor.

In such a case a charge of possessing unlawfully manufactured liquor under Section 44 of the Excise Ordinance cannot be maintained.

Cases referred to : *Fernando vs. Goonewardena*, (1955) 57 N. L. R. 17.

S. B. Lekamge, for the accused-appellant.
P. Weerasinghe, Crown Counsel, for the Attorney-General.

T. S. FERNANDO, J.

The appellant was convicted in the Magistrate's Court on a charge of possession of 1½ gallons of unlawfully manufactured liquor in breach of Section 44 of the Excise Ordinance. The question of possession is not contested on this appeal, but learned Counsel for the appellant argues that there was no proof before the Magistrate's Court that the liquor produced there and marked P. 2 was unlawfully manufactured. The burden of establishing that the liquor was unlawfully manufactured lay upon the prosecution, and to discharge this burden it relied upon a report of the Government Analyst, the relevant portions of which are reproduced below :—

> " The analytical characteristics of P. 2 indicate that P.2 is a fermented liquor but not a distilled spirit.
> The characteristics of P. 2 are not similar to those of samples of either approved brands of imported liquors or liquor manufactured under licences issued under the Excise Ordinance.
>
> In my opinion P. 2 is a liquor which does not fall under the following categories :—
> (1) *Approved brands of imported liquors* ;
> (2) Liquors manufactured under licences issued under the Excise Ordinance".

The prosecution had to exclude the possibility (*a*) that P.2 was a liquor lawfully manufactured in the Island and (*b*) that it was foreign liquor, *i.e.*, liquor manufactured outside the Island and imported here. The Analyst's report excludes possibility (*a*) referred to above, but does it exclude possibility (*b*)? The report shows that the liquor in question was not of an " approved brand " of imported liquor. What is meant by " approved " is not explained in the Analyst's report or in the oral evidence in the case. It has been suggested in the course of the argument before me that " approved " means approved by Government, and that it is only approved brands of foreign liquor that may lawfully be imported into the Island. It is not fanciful, however, to suggest that there may be in this country imported liquor that is not of an " approved " brand in the sense suggested at the argument. For example, there may certainly be liquor of an unapproved brand smuggled into this country. Such liquor would not be unlawfully manufactured liquor as contemplated in the Excise Ordinance. Whatever offence a person may be committing by possessing such liquor he cannot be said to be possessing unlawfully manufactured liquor.

Learned Crown Counsel referred *me to* the decision of my brother Sansoni in the case of *Fernando vs. Goonewardena* (1955) 57 N. L. R. 17 where a report of the Government Analyst similar to that produced in this case was the only evidence relied on by the prosecution to establish a charge of possession of unlawfully manufactured liquor. In that case the point that has now been taken was not raised, and my brother was not called upon to consider it.

For the reasons indicated above, I am of opinion that the prosecution failed to discharge the burden that lay upon it to establish beyond a reasonable doubt that the liquor in question was unlawfully manufactured, and I therefore set aside the conviction and sentence and direct that the appellant be acquitted.

Set aside.

Present : GUNASEKARA, J.

ILANDARI PEDIGE JOHN vs. POLICE SERGEANT, GALEWELA

S. C. No. 396 *P*/1956—*M. C. Dambulla Case No.* 7270

Argued on : 14th June, 1956
Decided on :

Motor Traffic Act No. 14 *of* 1951, *Section* 186—*Statement in license that lorry " will usually be kept " at a place outside the area of operation referred to therein—Lorry found driven unladen between area of operation and place where it " will usually be kept "—Conviction under section* 186—*Can it be sustained.*

The license issued in respect of a lorry stated that the lorry " will usually be kept " at a place outside the area of operation specified in the license. A police officer found the lorry being driven by the accused unladen at a point between the area of operation and the place where it " will usually be kept ".

Held : That a conviction under section 186 of the Motor Traffic Act for using the lorry on a highway outside the area of operation cannot be sustained.

Cases referred to : *Fenton vs. Hampton*, 11 Moo. P. C. 347 at 360.

C. D. S. Siriwardene, for accused-appellant.

Pullenayagam, C. C., for Attorney-General.

GUNASEKARA, J.

This is an appeal by the driver of a lorry against a conviction under Section 186 of the Motor Traffic Act, No. 14 of 1951, for using the lorry on a highway outside the area of operation specified in the revenue licence, which was the Anuradhapura and Polonnaruwa districts. The evidence against him was that a police officer found the lorry being driven by him at Makulugaswewa, a place outside this area.

The licence states that the lorry " will usually be kept " at Halpe, Mirigama, which is outside the Anuradhapura and Polonnaruwa districts. The place where the lorry was found lies between these districts and Mirigama, and the lorry was empty at the time. It is contended for the appellant that in view of these circumstances the prosecution has failed to prove that it was being " used " within the meaning of Section 186.

At the time of the alleged offence the owner of the lorry held a private carrier's permit, granted by the Commissioner of Motor Traffic under Part V of the Act, which authorized him to use the lorry in the area of operation for the carriage of goods in connection with his business as a " contractor and supplier of building materials and cadjans ". It described his " principal place of business " as Halpe, Mirigama, and the " area of operation " as the Anuradhapura and Polonnaruwa districts. Thus, the carrier's permit, read in the light of the revenue licence, purported to authorize the use of the lorry for the carriage of goods in the area of operation specified in the permit, although the lorry would usually be kept at Mirigama, outside that area.

The discretion to issue carrier's permits that is vested by the Act in the Commissioner is not fettered by any requirement that a lorry specified in a permit may not be one that will usually be kept at a place outside the area of operation. Indeed, the Act contemplates a discretion in the Commissioner to include in a permit authority even to carry goods outside that area ; for Section 86 (3) requires an applicant for a permit to specify " the place or places, if any, outside the proposed area of operation between or from or to which it is proposed to carry goods ".

A permit to use within a specified area a lorry that will usually be kept at a place outside it must be taken to authorize the driving of the lorry, unladen, between that place and the area of operation for the purposes of its authorized use in the area of operation ; for whenever anything is authorized and it is found impossible to do that thing unless something else not authorized in express terms be also done, then that something else will be supplied by necessary intendment (*Fenton vs. Hampton* 11 Moo. P. C. 347 at 360). It follows that Section 186 must be so construed as not to apply to a lorry to which such a permit relates, when the lorry is driven unladen between the place where it is usually kept and the area of operation, for the purposes of its authorized use in that area. There is nothing in the evidence in this case to exclude the possibility that when the lorry in question was found at Makulugaswewa it was being driven in accordance with the authority granted by the permit. The appeal must therefore be allowed.

Another fatal defect in the case for the prosecution is that there is no evidence that the place where the lorry is alleged to have been used was a highway. I do not base my decision on this ground, however, because the point was not argued at the hearing of the appeal.

The conviction of the appellant and the sentence passed on him are set aside and he is acquitted.

Set aside.

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

COMMISSIONER OF INCOME TAX vs. THE GLASGOW ESTATE CO., LTD.

S. C. No. 5/1955—Income Tax Case Stated—BRA/FT—4

Case Stated for the opinion of the Honourable the Supreme Court under Section 74 of the Income Tax Ordinance, Chapter 188 and Section 14 of the Profits Tax Act No. 5 of 1948.

Argued on : 30th April, 1956, 2nd and 3rd May, 1956.
Decided on : 26th October, 1956

Profits Tax Act No. 5 of 1948, section 9—Determination of chargeable surplus of profits or income —Section 9 (a)—Meaning of " capital employed in the business "—Limited liability company producing tea—Provision made for payment of Income Tax and dividends to shareholders—Does it amount in law to capital employed in the business of the company for the accounting period.

Held : That monies held in deposit by a company (*a*) for the payment of Income Tax which would shortly fall due and (*b*) for the payment of dividends which would shortly be declared, would amount to " capital employed in the business " of that company within the meaning of section 9 of the Profits Tax Act No. 5 of 1948.

Per GUNASEKARA, J.—(*a*) "The ground upon which Lord Simonds based his conclusion was that a right which is assumed to be an asset belonging to a limited company " cannot be capital employed in its trade unless it is an asset so employed ".

(*b*) " In my opinion there is no ground for limiting to what is required for the purposes of a trade or business the amount of cash that can be regarded as capital employed in it. But assuming that it was necessary in this case to determine what sum the appellant company needed to have available in cash for working expenses, I am unable to agree that the Board determined this question without evidence when it held that a reasonable sum would be the equivalent of the cost of upkeep for 3 months rather than 2 months ".

Cases referred to : *Liberty & Co., Ltd. vs. The Commissioners of Inland Revenue* (1924) 12 T. C. 630.
James Waldie & Sons, Ltd. vs. The Commissioners of Inland Revenue (1919) 12 T. C. 113.
Inland Revenue Commissioners vs. Laurence Philipps & Co. (Insurance), Ltd. (1947) 2 All. E. R. 144.
Northern Aluminium Co., Ltd. vs. Inland Revenue Commissioners (1946) 1 All. E. R. 546 at 550, 552.
Birmingham Small Arms Co., Ltd. vs. Inland Revenue Commissioners (1951) 2 All. E. R. 296.

M. Tiruchelvam, Dy. S.-G., with *A. Mahendrarajah, C. C.*, and *I. F. B. Wickremanayake, C. C.*, for the appellant.

H. V. Perera, Q.C., with *S. Ambalavanar*, for the respondent.

GUNASEKARA, J.

This is an appeal by the Commissioner of Income Tax by way of a Case Stated under section 74 of the Income Tax Ordinance (Cap. 188) read with section 14 of the Profits Tax Act, No. 5 of 1948. Section 9 of the latter enactment provides that the chargeable surplus of profits or income of any person for each profits tax year shall be ascertained by deducting from the taxable profits or income of that person for that year an allowance equal to the larger of the two following amounts :

(*a*) an amount equal to six per centum of the capital employed in the business of that person at the commencement of the accounting period of which the profits are assessed to tax in that year, or

(*b*) an amount of fifty thousand rupees.

The main question that arises upon the appeal is the meaning of the expression " capital employed in the business " that is used in this section.

The respondent is a limited company engaged in producing tea. In an appeal to the Commissioner of Income Tax against an assessment to profits tax for the year 1951 it claimed that an item of cash amounting to Rs. 475,162 should have been included in the computation of the capital employed in its business at the commencement of that year. This item, according to the company's balance sheet for 1950, was made up as follows :—

National Bank of India, Ltd.—		
Current Account	... Rs.	468,258·55
Dividend Account	... ,,	5,137·35
Estate Current Account	... ,,	1,624·62
Cash on Estate	... ,,	141·30
	Rs.	475,161·82

The assessor had reduced the amount to Rs. 375,162, on the ground that that was " a reasonable estimate of the amount of cash used

by the company for the purpose of the business ". Upon a reference back to the assessor the question was discussed between an assistant commissioner and the company, and the former offered to fix the amount at Rs. 320,000. At the hearing of the appeal before the Commissioner the assessor contended that the amount must be further reduced by a sum of Rs. 140,632, made up as follows :—

Net dividend paid in respect of 1950	... Rs.	73,125
Income tax for 1951/1952	... ,,	67,507
	Rs.	140,632

The Commissioner agreed with this contention and fixed the amount of the cash to be included in the computation of the capital employed in the business at Rs. 180,000. Upon an appeal by the company the Board of Review increased the amount by Rs. 190,000. The Commissioner had included in the sum fixed by him a sum of Rs. 120,000 as the equivalent of two months' estate expenditure, which he held would be sufficient for the current requirements of the business. The Board increased this sum by Rs. 50,000, on the ground that " a prudent Tea Estate Co. would keep more than two months' costs of upkeep in ready cash, because unforeseeable contingencies like a slump, strike accompanied by violence or an unusual pestilence, may suddenly demand abnormal expenditure ". They held that they should allow under this head the equivalent of the " costs of upkeep " for three months, which they estimated at Rs. 170,000. They also held that " it was plainly necessary for the appellant company to have in deposit on 1-1-1951 the cash required (1) to pay the income tax which would shortly fall due, *i.e.* Rs. 67,507/-, (2) the dividend of Rs. 73,125/-", and that the Commissioner " was wrong in reducing the capital employed by the amount of those two items."

The questions of law that are said to arise for decision upon this appeal are formulated in the stated case as follows :—

" (1) Can the monies held in deposit (*a*) for the payment of Income Tax which will fall due and (*b*) for the payment of the dividends, amount in law to capital employed in the business of the Glasgow Estates Co. Ltd., for the accounting period in question ?

(2) Were the Board of Review justified in holding, in the absence of evidence, that three months' cost of upkeep be held as working expenses in place of the two months' cost fixed by the Commissioner?"

At the commencement of the chargeable accounting period, that is to say on the 1st January, 1951, the income tax for 1951-1952 had not been assessed and the dividend in question had not been declared. The Board took the view that " the company was well advised to have cash in hand to meet those claims " and that therefore the cash that was necessary for the purpose must be taken to have been capital employed in the business. It is contended for the Crown that tax and dividends must be paid out of profits and that therefore the sum of Rs. 140,000 cannot be treated as capital. It is also contended that in any event cash that was reserved for these payments was money that was to be paid out and not money that was to be employed in the business.

On the question of the meaning of " capital employed in the business " the learned Deputy Solicitor-General cited, among other cases, those of *Liberty & Co., Ltd. vs. The Commissioners of Inland Revenue* (1924) 12 T. C. 630 and *James Waldie & Sons, Ltd. vs. The Commissioners of Inland Revenue* (1919) 12 T. C. 113. The question that was considered in each of these cases was whether certain sums forming part of the capital employed in a business were also investments and should therefore be excluded in the computation of the amount of the capital employed in the business for the purposes of excess profits duty under certain provisions of the Finance (No. 2) Act, 1915. The sums in question in the former case were held to be investments and in the latter not. The question whether they were investments arose, however, only upon the assumption that they formed part of the " capital employed in the business ". These cases, therefore, throw no light on the question whether this expression means anything more than the " capital of the business ". The same comment may be made on the case of *Inland Revenue Commissioners vs. Laurence Philipps & Co. (Insurance), Ltd.* (1947) 2 All. E. R. 144, which too is relied on by the learned Deputy Solicitor-General. The question there was whether certain loans were investments and should therefore be left out of account, as provided in Schedule VII to the Finance (No. 2) Act. 1939, in the computation of the capital employed in a business in the relevant period.

It is contended for the Crown that the expression means capital that " is actually earning profits " and does not include capital in the form of cash lying idle in the bank. The learned Deputy Solicitor-General cited in support of this contention an observation made by Lord Greene, M.R., in *Northern Aluminium Co., Ltd. vs. Inland Revenue Commissioners* (1946) 1 All. E. R. 546 at 550, 552, as to the meaning of " capital employed

in the trade or business in any chargeable accounting period " in the proviso to section 13 (3) of the Finance (No. 2) Act, 1939. But the distinction drawn there is not between capital actually earning profits and capital lying idle, but between capital actually earning profits in the relevant period and " notional and artificial capital which had no real existence " during that period. What Lord Greene said was :

> " That (*i.e.* ' capital employed ') seems to me quite clearly to refer to capital actually employed, not to some item which is artificially going to be written back into the capital in some future year, but capital which is in fact being employed for the purpose of earning profits. You earn profits with real capital, not with something which, on a subsequent re-opening of the accounts, is going artificially to be attributed to a particular period."

The question whether there is any distinction that can be drawn between one part of the capital of a business as being employed in the business and another as not being so employed did not arise for consideration. The learned Judge was only concerned to point out that the capital provisions of the Act " are dealing with realities, things which are really assets and really liabilities, and not with something which is for profit purposes (which is quite a different conception) to be artificially regarded as a liability to be written back into the accounting period ".

It was pointed out in the case of *Laurence Philipps & Co. (Insurance), Ltd. (supra)* that " there is never any difficulty about regarding money lying idle in the bank as money employed in the business providing there is a reasonable probability of it being wanted in the accounting year or in a short space of time thereafter ". The qualification that there must be such a reasonable probability was necessary in view of a provision in the Finance (No. 2) Act, 1939, Schedule VII, Part II, para. 3 that " any moneys not required for the purposes of the trade or business " shall be left out of account in the computation of the capital employed in the trade or business in any chargeable accounting period. Our Profits Tax Act, No. 5 of 1948, contains no such provision, although there was a similar provision in section 10 (5) of the Excess Profits Duty Ordinance, No. 38 of 1941, as amended by Ordinance No. 6 of 1942. Under our law, therefore, there is no ground for limiting to an amount that will probably be " wanted in the accounting year or in a short space of time thereafter " the amount of any cash in the bank that can be regarded as employed in the business, but the entirety of such an asset must be regarded as being so employed inasmuch as it is available for any purpose of the business.

The case of *Birmingham Small Arms Co., Ltd. vs. Inland Revenue Commissioners* (1951) 2 All. E. R. 296 was cited by the learned Counsel for the Crown. The question that arose for decision there was whether a right of claim to compensation for war damage, under the War Damage Act, 1941, was an asset the value of which, during a chargeable accounting period, formed part of the capital employed in the trade or business of the appellant company, within the meaning of the Finance (No. 2) Act, 1939, Schedule VII, Part II, paragraph 1 (1) ; which provides for the valuation of various kinds of assets in the computation of " the amount of the capital employed in a trade or business (so far as it does not consist of money.)" When the company was assessed to excess profits tax for the period 1st August, 1940, to 31st July, 1941, no account was taken of this claim in the computation of the amount of the capital employed in their trade or business. The company appealed against the assessment, contending that the right of claim, which was in respect of damage caused before the 31st May, 1941, became an asset of the trade or business on that day upon the coming into force of Regulations under the War Damage Act. The appeal was dismissed by the Commissioners for the Special Purposes of the Income Tax Acts, who held that the claim, regarded as an asset, did not appear to them to be employed in the trade. An appeal from their determination to the King's Bench Division was dismissed, and further appeals taken successively to the Court of Appeal and the House of Lords were also dismissed. The appeal to the House of Lords was heard by Lord Simonds, Lord Normand, Lord Oaksey, Lord Radcliffe and Lord Tucker.

The ground upon which Lord Simonds based his conclusion was that a right which is assumed to be an asset belonging to a limited company " cannot be capital employed in its trade unless it is an asset so employed ", and that he saw no reason for disturbing the finding of the commissioners who had determined as a fact that the right in question had not been so employed ; Lord Normand, Lord Radcliffe and Lord Tucker were of the view that the dismissal of the appeal should be based on a different ground, that the right was not an asset of the kind contemplated by the relevant provision of the Finance (No. 2) Act, 1939 ; and Lord Oaksey said that he was not prepared to dissent from the conclusions at which the rest of their Lordships had arrived.

The opinion of Lord Simonds is relied upon by the learned Deputy Solicitor-General as supporting a view that an asset can form part of the capital employed in a trade or business only if it " is actually earning profits " or is " actively " employed in the trade or business. I am unable

to agree that support for this view can be found in that opinion. Having pointed out that the right in question " consisted of a right, subject to proof which might be difficult, to an indeterminate sum payable at a future and uncertain date ", and that that was the position during the two months of the relevant accounting period with which alone the appeal was concerned, Lord Simonds formulated as follows the question that arose :

> " The question, then, is what was the average amount of capital employed by the trade or business of the appellants during the accounting period, or, more precisely, was it right, in order to bring up that average to include at any, and what, figure the value of the right to which I have referred for the last two months of the period ? "

Discussing the answer to this question, he rejected a contention that " every asset of a trade or business is part of the capital employed in the trade or business unless expressly excepted by statute ", and that therefore the Commissioners must be held to have misinterpreted the word " employed " ; but he did not hold that an asset is not " employed in a trade or business " unless it was "actually earning profits" or was " actively employed ". On the other hand, the opinions of Lord Normand, Lord Radcliffe and Lord Tucker definitely negative such a view. Lord Normand held that " para. 1 (1) of Part II of Schedule VII to the Finance (No. 2) Act, 1939, does not call for an inquiry whether an asset (within the meaning of the paragraph) was ' actively ' employed in the company's trade or business in the relevant year " ; Lord Radcliffe that the did not think that the words " capital employed in a trade or business" bore any significant difference of meaning from the words " capital of a trade or business "; and Lord Tucker that " the words ' capital employed'.....do not refer to the actual use made of a particular asset in the relevant accounting period once it is shown to have been a form of capital put into the business and still there ".

I do not think there can be any question that the Board of Review were right in regarding the item of cash with which the present case is concerned as being " a form of capital put into the business and still there ". A decision by the company to retain in the form of cash the equivalent of the amounts that were likely to be needed for the payment of the income tax that would shortly fall due and dividends that would shortly be declared would not be a withdrawal of that amount of cash from the capital or even an earmarking of any money for these purposes ; for the sum so retained in the form of cash would continue to be available for any purpose of the business. I am therefore unable to accept the contention that the sum of Rs. 140,000, which the Commissioner regarded as representing the amount needed for the payment of the income tax for 1951—1952 and the dividend declared in 1951, cannot be treated as capital.

In my opinion there is no ground for limiting to what is required for the purposes of a trade or business the amount of cash that can be regarded as capital employed in it. But assuming that it was necessary in this case to determine what sum the appellant company needed to have available in cash for working expenses, I am unable to agree that the Board determined this question without evidence when it held that a reasonable sum would be the equivalent of the cost of upkeep for three months rather than two months. The Board had before it sufficient material in the form of evidence as to the nature and extent of the business done by the company.

The appeal must be dismissed with costs.

BASNAYAKE, C.J.
I agree.

Appeal dismissed.

Present : GUNASEKARA, J.

TENNAKOON BANDA vs. P. D. CAROLIS, INSPECTOR OF POLICE

S. C. No. 1552/1955—*M. C. Kurunegala No.* 17726

Argued on : 1st and 2nd March, 1956.
Decided on : 21st August, 1956.

Local Authorities Election Ordinance No. 53 of 1946, *section* 76 (1) (*a*)—*Applicability of section* 2 (2) *to village committee—Proof—Gazette notice—Can Court take judicial notice ?—Evidence Ordinance, section* 57.

In a prosecution under section 76 (1) (*a*) of the Local Authorities Election Ordinance No. 53 of 1946 for having delivered nomination papers to a returning officer at a by-election for a ward of a Village Committee, knowing them to be forged, and as proof that the provisions of section 2 (2) of the said Ordinance applied to that particular Village Committee a Gazette notice was produced after the case was closed.

Held : That the Court could not under section 57 of the Evidence Ordinance take judicial notice of the fact that an order had been made applying the provisions of section 2 (2) of the Local Authorities Election Ordinance to that particular village committee. That order is not a law or a rule having the force of law.

A. B. Perera with *J. C. Thurairatnam*, for the accused-appellant.

S. S. Wijesinghe, C. C., for the Attorney-General.

GUNASEKARA, J.

The appellant was convicted of having on the 25th May, 1955, committed two offences punishable under section 76 (1) (*a*) of the Local Authorities Elections Ordinance, No. 53 of 1946, by delivering to a returning officer two nomination papers knowing them to be forged.

The offences are alleged to have been committed at a by-election for a ward of the electoral area of the Gokarella Village Committee, at which the appellant was a candidate. In terms of section 2 (2) of the Local Authorities Elections Ordinance the provisions of that Ordinance are to apply to each Village Committee " with effect from such date as the Minister may specify, by Order published in the *Gazette*, in relation to such Committee ". At the trial, after the prosecution and the defence had closed their respective cases, it was submitted for the defence that there was no evidence to prove that the provisions of the Ordinance had been applied to this Village Committee. The prosecuting officer thereupon brought to the notice of the Magistrate an order made under section 2 (2) and published in the Government Gazette of the 5th August, 1949, by which they were so applied. The learned Magistrate purported to take judicial notice of the order, holding that it is a fact of which a Court must take judicial notice in terms of section 57 of the Evidence Ordinance. It is contended for the appellant that the fact that the Ordinance had been applied to the Village Committee of Gokarella was not a fact of which the Court could take judicial notice but was one that had to be proved by the prosecution, and that the Gazette could not properly be admitted in evidence to fill a gap in the case for the prosecution after that case had been closed.

The learned Crown Counsel supported the view that the Court could take judicial notice of the order. He also contended that in any event it had been proved that the appellant had virtually admitted the fact in question and therefore there was no gap in the case for the prosecution that could be filled by the production of the Gazette.

The ground on which the first of these contentions is based is that section 57 of the Evidence Ordinance requires the Court to take judicial notice of " all laws, or rules having the force of law, now or heretofore in force or hereafter to be in force in any part of the Island ". At the material time the Local Authorities Elections Ordinance was in force in every part of the Island, including Gokarella, and it had come into force in all parts of the Island at the same time. The question, however, is not whether the Court could take judicial notice of the Ordinance or of the fact that it was in force in Gokarella, but whether it could take judicial notice of the fact that an order had been made applying its provisions to the Village Committee in question. That order is not a law or a rule having the force of law. I am therefore unable to accept the learned Crown Counsel's contention that the Court could take judicial notice of it.

His second argument is based on the circumstance that the election in which the appellant participated as a candidate was one held in the manner prescribed by the Local Authorities Elections Ordinance and not the Village Communities Ordinance. The nomination papers in question are in the form prescribed by the Local Authorities Elections Ordinance, and that form differs from the one prescribed by the Village Communities Ordinance in that the signatures must be attested by a justice of the peace or a commissioner of oaths or a notary ; and they were delivered by the appellant to a person whom the Elections Officer had purported to appoint under the former Ordinance as the returning officer for the ward and not to the Government Agent or Assistant Government Agent, who would have been the returning officer if the election had been held under the latter Ordinance. I do not think that these circumstances exclude the possibility that the appellant did not give his mind at all to the question as to whether the election was held under the provisions of one Ordinance or the other. The appellant gave evidence at the trial but the suggestion that his conduct involved an admission that the minister had made an order applying the provisions of the Local Authorities Elections Ordinance to the Gokarella Village Committee was not put to him, and the Magistrate's finding is based solely on the notification in the Gazette to which he was referred after the cases for both sides had been closed.

I set aside the conviction of the appellant and the sentence passed on him and I acquit him.

Set aside.

Present : WEERASOORIYA, J. AND DE SILVA, J.

SUBRAMANIUM vs. THILLIAMPALAM

S. C. 613/1955—*D. C. (F) Trincomalee* 3717

Argued and decided on : 13th and 14th September, 1956

Civil Procedure—Listing of documents—Is there any provision requiring defendant to list his documents—Document wrongly rejected as it had not been listed—Appeal—When should Appellate Court interfere—Evidence Ordinance, section 167.

Held : (1) That there is no provision in the Civil Procedure Code which requires a defendant to list his documents in the District Court.

(2) That where an appeal is taken from an order wrongly rejecting a document sought to be produced by the defendant on the ground that it had not been listed, the Appellate Court should not interfere if it appears, that the rejected evidence, had it been admitted, ought not to have varied the decision.

Dodwell Gunawardena with *V. Kumaraswamy* and *T. P. Amarasinghe*, for defendant-appellant.

E. Gunaratne with *S. Rajaratnam*, for plaintiff-respondent.

WEERASOORIYA, J.

In this case, judgment has been entered in favour of the plaintiff-respondent in the sum of Rs. 3,520/65, being the balance due to him for timber supplied to the defendant-appellant on an agreement the details of which appear in the document P 1.

When the defendant was giving evidence at the trial he sought to mark in evidence a diary said to contain particulars of the various payments made by him to the plaintiff. Objection was taken to the admission of this diary in evidence by plaintiff's counsel on the ground that it had not been listed and this objection was upheld. The only provisions of the Civil Procedure Code regarding the listing of documents are contained in sections 51 and 54 and it is clear that these provisions refer to a plaintiff and not to a defendant. While the order of the learned Judge is, therefore, wrong, the question arises whether this is a ground for sending the case back for re-trial, which is the course that Mr. Gunawardene, who appears for the defendant-appellant, asks this Court to adopt.

Section 167 of the Evidence Ordinance, however, provides that where the improper rejection of evidence by the Court of first instance is sought to be made a ground for a new trial, the Appellate Court will not interfere if it appears that the rejected evidence, had it been admitted, ought not to have varied the decision. The diary itself has not been produced for our inspection. The defendant stated in evidence that the diary would show the payment of a sum of Rs. 450/- and of various other sums totalling Rs. 769/60 but none of these payments were put to the plaintiff in cross-examination. The sum of Rs. 450/- is said to have been paid through the Udaiyar who was, however, not called as a witness. The judgment makes it clear that in regard to payments not admitted by the plaintiff the learned trial Judge was not prepared to act on the evidence of the defendant unless it was corroborated by independent evidence. In the circumstances we consider that even had the diary been admitted in evidence it ought not to have affected the decision against the defendant.

One of the payments which the defendant alleged he had made was a sum of Rs. 792/65 in support of which he produced the receipt D 5. D 5 purports to be a receipt granted by the labourers who had received the payment, and the plaintiff has, admittedly, signed it as a witness. D 5 shows that the sum of Rs. 792/65 was paid on the plaintiff's behalf. Learned counsel for the plaintiff concedes that the defendant is entitled to the benefit of this payment and that the sum for which decree has been entered against the defendant must be reduced by a corresponding amount.

With regard to the claim in reconvention put forward by the defendant and which was rejected by the learned trial Judge, we see no reason to interfere with the finding on that point.

The decree will be varied by substituting for the sum of Rs. 3,520/65 for which judgment has been entered for the plaintiff the sum of Rs. 2,728. There will be no costs of appeal.

DE SILVA, J.

I agree.

Decree varied.

Present : T. S. FERNANDO, J.

N. B. DHARMADASA vs. D. B. SENEVIRATNE, SUB-INSPECTOR OF POLICE

S. C. No. 946 *of* 1956—*M. C. Badulla* 6548

Argued on : 14th November, 1956
Decided on : 17th November, 1956

Motor Traffic Act 14 *of* 1951—*Charge under section* 225—*Defective charge—No evidence to establish offence.*

Where the charge against the accused was that he, knowing or having reason to believe that an accident had occurred between a lorry and a car, caused the lorry driver to push the lorry and disappear from the scene with the intention of screening the lorry driver from punishment.

Held : (1) That the charge was defective in that it did not disclose the offence prescribed by section 225 of the Motor Traffic Act.
(2) That the evidence did not establish that there was an intention on the part of the accused to screen the alleged offender.
(3) That the accused had not caused the disappearance of evidence which relate to the commission of an offence under section 225.

A. L. Jayasuriya, for the accused-appellant.
T. A. de S. Wijesundera, Crown Counsel, for the Attorney-General.

T. S. FERNANDO, J.

There are several reasons why the conviction of the appellant of an offence punishable under section 225 of the Motor Traffic Act, No. 14 of 1951, should be quashed, but it would be sufficient if I indicate two of them.

In the first place, the charge framed against the appellant is in my opinion defective. It reads as follows :—

" That (he) being a person knowing or having reason to believe that an *accident* had occurred between lorry C. L. 4063 and private car EL 3422 caused the lorry driver to push the lorry and disappear from the scene with the intention of screening the lorry driver from legal punishment ; "

Section 225 provides a penalty for causing disappearance of evidence of the commission of an offence under the Motor Traffic Act with the intention of screening the offender. In the charge framed against the appellant there is no allegation that he knew or had reason to believe that an *offence* under the Act, and if so, what offence had been committed but an allegation that he knew or had reason to believe that an *accident* had occurred between the two vehicles. The occurrence of an accident does not imply that the driver of either vehicle concerned has necessarily committed an offence under the Act.

Secondly, even if the charge had been in order, is there any evidence of an intention on the part of the appellant to screen the alleged offender from legal punishment ? All that the appellant did was to help in pushing the lorry and thus clear the way for himself. How did that act assist in screening the lorry driver from punishment ? It is neither alleged nor shown that the removal of the lorry made it impossible or even difficult for the prosecution to establish the offence. According to Police Sergeant Ratnayake's evidence, the driver of the lorry was charged " in connection with this accident " and convicted. There is no evidence which shows or tends to show that the driving away of the lorry amounted to a disappearance of the evidence of the commission of an offence. On the other hand, it is a reasonable inference that the appellant assisted in pushing the lorry because the lorry was in the way of the progress of his own car. Where a motorist assists in clearing for the passage of traffic a road which had been obstructed as a result of a collision between other vehicles, a Court should be slow to infer that the intention of the motorist was to screen possible offenders against the Motor Traffic Act.

In this case the prosecution has failed to show that (*a*) the appellant knew or had reason to believe that an offence under the Act had been committed, (*b*) the appellant caused the disappearance of evidence of the commission of such an offence, and (*c*) there was any intention on the part of the appellant to screen any offender from legal punishment. In the circumstances I set aside the conviction and direct that the appellant be acquitted.

Set aside.

Present : GUNASEKARA, J.

K. RASIAH vs. G. K. ALICE PERERA

S. C. No. 1541/1955—*M. C. Colombo South No.* 64625

Argued on : 27th February, 1956
Decided on : 21st August, 1956

Evidence—Notice to accused to produce document at trial—Applicability of section 66 *of the Criminal Procedure Code—What is the procedure to be followed in the absence of any special provision of law regarding such notice—Evidence Ordinance, section* 66.

The accused was charged under section 183 of the Penal Code for obstructing a Government Surveyor in the discharge of his public functions. The complainant-surveyor produced a copy of a notice sent by him to the accused under registered cover before the survey and the postal receipt issued thereon. In cross-examination the complainant admitted that he took no process through Court to compel the accused to produce the original and the defence objected to the admission of secondary evidence of its contents on the ground that notice to produce the original had not been given as prescribed by section 66 of the Criminal Procedure Code. The defence however, stated, that a letter was received by the accused with a request to produce the original, but that was not a compliance with the provisions of the said section 66. The learned Magistrate refused an application for adjournment to enable the complainant to take out notice through Court and discharged the accused.

The complainant appealed.

Held : (1) That there does not appear to be any provision of law prescribing a procedure for giving an accused person notice to produce a document at his trial.

(2) That the persons to whom a summons may be issued under section 66 of the Criminal Procedure Code do not include accused persons.

(3) That, therefore, the learned Magistrate should have considered whether such notice had been given as was reasonable under the circumstances of the case as required by section 66 of the Evidence Ordinance.

Cases referred to : *de Mel vs. Haniffa* (1952) 53 N. L. R. 483.

V. S. A. Pullenayagam, C. C., for complainant-appellant.

No appearance for respondent.

GUNASEKARA, J.

This is an appeal by the complainant in a case tried summarily in the Magistrate's Court of Colombo South against an order discharging the accused.

The charge alleged that the respondent had committed an offence punishable under section 183 of the Penal Code by voluntarily obstructing the appellant, a Government surveyor, " in the discharge of his public function, to wit, surveying the land called Danketiya Kumbura under the written authority of the Assistant Land Commissioner granted under section 6 read with section 2 (2) of Ordinance No. 61 of 1942 ". At the trial the appellant, who was the first witness called for the prosecution, produced in evidence a document (P 2), which he said was a copy of a notice that he had sent to the respondent by registered post before the survey, and he also produced a post office receipt (P 3) for a registered postal article, which he said related to the posting of the notice to the respondent. He admitted under cross-examination that " no process was taken through Court to compel the accused to produce the original of the notice ". The respondent's proctor thereupon objected to the admission of secondary evidence of its contents on the ground that notice to produce the original had not been given to the respondent in the manner prescribed by law. He stated that the appellant had " sent a letter under registered cover to the accused asking her to produce the original of a notice sent to her informing her of the survey ", but he maintained that that letter was not a sufficient notice inasmuch as it was not a notice that had been " sent in accordance with the provisions of section 66 of the Criminal Procedure Code ". The appellant's counsel then moved for an adjournment to enable him " to take out notice through Court ". The learned Magistrate refused this application and discharged the respondent.

In terms of section 65 (1) of the Evidence Ordinance, secondary evidence may be given of the contents of a document when the original is

shown or appears to be in the possession or power of the person against whom the document is sought to be proved and when after the notice mentioned in section 66 such person does not produce it. Section 66 of the Evidence Ordinance provides that secondary evidence of the contents of the documents referred to in section 65, subsection (1), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his proctor, such notice to produce it as is prescribed by law ; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case.

The contention for the defence, which was accepted by the learned Magistrate, was that a procedure for giving the necessary notice to produce is laid down in section 66 of the Criminal Procedure Code ; which provides that whenever any Court considers that the production of any document or other thing is necessary or desirable for the purposes of any proceeding under the Code by or before such Court it may issue a summons to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it or to produce it at the time and place stated in the summons. But there is no substance in this contention, for the persons to whom a summons may be issued under section 66 of the Criminal Procedure Code do not include accused persons : *de Mel vs. Haniffa* (1952) 53 N. L. R. 433.

There does not appear to be any provision of law prescribing a procedure for giving an accused person notice to produce a document at his trial. Therefore, if it was necessary that the appellant should have given the respondent notice to produce the document of which P 2 purports to be a copy before secondary evidence of its contents could be admitted, the learned Magistrate should have considered whether such notice had been given as was " reasonable under the circumstances of the case ". I agree, however, with a contention that was advanced by Mr. Pullenayagam that the case falls within the proviso to section 66 of the Evidence Ordinance, that such notice shall not be required in order to render secondary evidence admissible when the document to be proved is itself a notice.

I set aside the order made by the learned Magistrate and direct that the trial be proceeded with in due course of law.

Set aside.

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

K. H. FERNANDO vs. S. A. PERERA

S. C. No. 204 *of* 1955—*D. C. (F) Colombo* 27203/*M*

Argued on : 27th and 30th July, 1956
Decided on : 8th November, 1956

Damages—Action for—Bodily injury and pain of mind and body consequent on assault by defendant—Failure to prove special damage—Nominal damages.

Plaintiff sued defendant for recovery of Rs. 1,000/- as damages alleged to have been suffered by him in consequence of bodily injury and pain of mind and body caused to him by the latter assaulting him.

Plaintiff proved the assault, but failed to establish that he suffered any special damage.

Held : That the plaintiff was entitled to nominal damages and awarded him a sum of Rs. 25/-.

M. M. Kumarakulasingham, for the plaintiff-appellant.
C. Chellappah, for the defendant-respondent.

T. S. FERNANDO, J.

The plaintiff appeals against a dismissal by the learned District Judge of Colombo of an action which he instituted for the recovery of a sum of Rs. 1,000/- as damages estimated to have been suffered by him in consequence of bodily injury and pain of mind and body caused to him by the defendant assaulting him on 8th June, 1951.

The plaintiff was at the date of the alleged assault a minor supervisor of the fitter gang in the Ceylon Government Railway while the defend-

ant was an assistant building foreman, also in the Railway. The plaintiff's complaint is that on 8th June, 1951, when he, in the course of his duties involving the carriage of materials, requested the defendant to allow him the use of a lorry for the transport of materials, the defendant brought up the question of the nature of the evidence the plaintiff had given at a departmental inquiry in which the defendant was concerned. The defendant, he said, taxed him with giving evidence in a manner contrary to that indicated by the defendant as desirable. This led to words between the plaintiff and the defendant and, according to the plaintiff, he was thereafter held by the neck by the defendant and pushed causing him to knock against a ladder, fall down and sustain injuries which became apparent only some days later. The plaintiff alleged further that the injuries he received necessitated medical treatment, first at the hands of an ayurvedic physician and later at the General Hospital for a period extending over nine months.

The defendant in his answer denied the assault altogether and asserted that all he did on 8th June, 1951, was to chase the plaintiff away from the office of the Signals Foreman as the plaintiff turned abusive when his request for the services of a lorry for the transport of certain corrugated sheets was refused.

It is unnecessary for the purposes of this appeal to go into the motive for or the causes which led to the exchange of words that admittedly took place at the office of the Signals Foreman on this day. It is sufficient to consider whether the assault was established. The plaintiff's evidence on the point was corroborated by his witnesses (1) William, a carpenter with some 38 years' service in the Railway in that capacity ; and (2) Dias, a temporary labourer also in the Railway. The defendant, although he denied the assault and asserted in the course of his examination-in-chief that he was calling as his witnesses the office peon and two other workmen to testify that all that happened on the 8th June was a chasing away of the plaintiff from the office, refrained from calling any evidence to support his denial of the assault.

The learned District Judge has found that there was no assault and has answered the only substantial issue in the case against the plaintiff. In doing so, he has stated (*a*) that every time the plaintiff related an incident he had to deny or qualify it, (*b*) that the plaintiff's witnesses contradicted him and corroborated the defendant, (*c*) that the plaintiff's version is discredited by his own letter D 1 written to the District Engineer on the day following the alleged assault, and (*d*) that the witness William has denied the presence at the scene of the other witness Dias. I regret I can find no support for any of these statements in the evidence led in the case, and it is difficult to resist the argument that the learned District Judge had seriously misdirected himself on the facts in making all four statements referred to above. There is no warrant in the recorded evidence for the statement that each time the plaintiff related an incident he had to deny or qualify it ; I find that the plaintiff's witnesses, William and Dias, corroborated him and not the defendant on the issue as to the assault and the fall that resulted ; the letter D 1 written on 9th June, 1951, the day following the alleged assault, bears out substantially the version of the incident the plaintiff related in Court ; the criticism levelled by the learned District Judge at the non-inclusion of a reference in this letter to the plaintiff's incapacity to work and to his injuries is not well-founded as the plaintiff's own evidence is that the injuries and the incapacity for work manifested themselves much later ; and William undoubtedly testified to seeing Dias coming up and helping the plaintiff to get up after his fall.

In the circumstances which I have referred to above, I am of opinion that there was no reason for rejecting the evidence led for the plaintiff that he was assaulted by the defendant on the day in question. A justification of the assault was not even attempted as the defence relied upon a denial of the assault. I am therefore of opinion that the plaintiff was entitled to succeed on the main issue in the case.

In regard to the damages claimed, however, the plaintiff has completely failed to established that he has suffered any special damages. Justice will be done in this case if the plaintiff is awarded merely nominal damages which I fix in a sum of Rs. 25/-. He will be entitled to the costs of trial as if the action had been one instituted in the lowest class in the Court of Requests. I would however award him the costs of the appeal to this Court in the Rs. 1,000/- District Court class.

H. N. G. Fernando, J.

I agree.

Allowed.

(For Headnote and Connected Judgment see page 7 (Supra).)

COMMISSIONER OF INCOME TAX vs. THE GLASGOW ESTATE CO. LTD.

S. C. No. 5/1955—Income Tax Case stated BRA/PT-4

Delivered : 26th October, 1956

Cases referred to : *Acme Flooring Co* case 1948 (1) All E. R. 546.
Inland Revenue Commissioners vs. Lawrence Philipps & Co 1947 (2) All E. R. 144.
Birmingham Small Arms case 1951 (2) All E. R. 296.

BASNAYAKE, C.J.

I have had the advantage of reading the judgment prepared by my brother Gunasekara with which I agree.

The Board of Review has held as a question of fact that there was a reasonable probability of a sum of Rs. 370,000/- out of the money in the cash account of the Company being required by the assessee for his business. That is a finding of fact which falls within the province of the Board and is final under our Income Tax Ordinance.

The statement of Atkinson, J. in the *Acme Flooring Co* case 1948 (1) All E. R. 546 in regard to the manner in which this question of the capital employed in a business should be approached appeals to me and I quote his words :—

> " A man could not be allowed to retain very, very large sums of money where the possibilities of their being required were so unlikely or so remote that no reasonable man would retain the money lying idle in order to meet such vague possibilities. I imagine (the Special Commissioners) have to ask themselves this question : ' What would a reasonable business man regard as sufficient money to retain lying idle to meet his future commitments—certainly the commitments in the near future ? ' The Commissioners say : ' We accept that '. I think they have said : ' We go beyond that, but we do not think that he ought to be allowed to look too far ahead '. To my mind, where the line is to be drawn is obviously a question of fact. I cannot interfere merely because I think I would have drawn the line somewhere more favourable to the trader. It is for the Commissioners to say."

In the later case of *Inland Revenue Commissioner vs. Lawrence Philipps & Co.* 1947 (2) All E. R. 144 the same Judge said :

> " There is never any difficulty about regarding money lying idle in the bank as money employed in the business providing there is a reasonable probability of it being wanted in the accounting year or in a short space of time thereafter."

The view that it is the function of the Special Commissioners to determine as a fact whether an asset belonging to a Company is an asset employed in its trade has never been doubted. It was reasserted in the *Birmingham Small Arms* case 1951 (2) All E. R. 296. Though the questions stated by the Board for the opinion of this Court have been answered they are strictly not questions of law which arise on the stated case.

Present :— GRATIAEN, J.

J. H. WANIGASEKARA, FOOD AND PRICE CONTROL INSPECTOR, vs. K. SIMON

S. C. 934/1955—M. C. Matugama No. 21356

Argued on : 16th December, 1955
Decided on : 16th January, 1956

Control of Prices Act, No. 29 of 1950—Offence under section 8 (1)—Failure to produce Notification of Minister's approval of Price Order—Application for date to call only one formal prosecution witness—Submission by defence that failure to produce Minister's approval fatal even if formal witness called—Prosecution conceding that price orders become valid only after Minister's approval—Magistrate upholding contention for defence—Order discharging accused—Appeal from order without sanction of Attorney-General—Maintainability of appeal—When revisionary powers will not be exercised.

The accused was charged under section 8 (1) of the Price Control Act of 1950 for selling wheat flour in excess of the maximum price fixed by the Price Order. The prosecution produced the Gazette containing the relevant Price Order but failed to produce the notification in Gazette containing the Minister's approval. After leading evidence of the alleged sale the prosecution applied for a postponement to enable it to call a constable who took the sample of wheat to the Government Analyst adding that it would not be calling any other evidence.

The defence Counsel thereupon contended that even if the constable was called, the prosecution must fail as it had omitted to prove that the Price Order had the Minister's approval by producing the relevant Gazette. The prosecution conceded that price orders become valid only after the Minister's approval.

The learned Magistrate upheld the contention and made order " discharging the accused ".

The prosecution appealed without the sanction of the Attorney-General and on a preliminary objection taken to the maintainability of the appeal.

Held : (1) That the appeal must be rejected as the learned Magistrate intended to record a verdict of acquittal on the merits and not merely to make an inconclusive order of " discharge " which would expose the accused to a fresh trial.

(2) That although the order of acquittal was wrong, the Court would not quash it in the exercise of its revisionary powers, because the prosecution has, by making incorrect concessions on the law, contributed towards the erroneous verdict of acquittal.

Per GRATIAEN, J.—Much confusion is likely to arise if the issue " *acquittal* or *discharge* ? " is allowed to be complicated by irrelevant considerations as to whether, upon the merits of the particular case, the Magistrate's decision was wrong or premature. The true test is whether (at whatever stage the decision was made) the Magistrate actually intended to record *a verdict of acquittal on the merits.* If that was the intention, no appeal lies except at the instance or with the written sanction of the Attorney-General, and the acquittal, unless reversed, is a bar to a fresh prosecution to the extent indicated in section 330.

If a prosecuting officer, by making incorrect concessions on the law, has contributed towards an erroneous verdict of acquittal, the accused person should not, as a general rule, be placed in jeopardy a second time.

Cases referred to : *Food and Price Control Inspector vs. Piyasena* S. C. Minutes of 22-11-55 (594, M. C. Matale 4316) see 53 C. L. W. p. 25.
Senaratne vs. Lenohamy (1917) 20 N. L. R. 44.
Silva vs. Rahiman (1924) 26 N. L. R. 463.
Gabriel vs. Soysa (1930) 31 N. L. R. 314.
Sumangala Thero vs. Piyatissa Thero (1937) 39 N. L. R. 265.
Fernando vs. Rajasooriar (1946) 47 N. L. R. 399.
Don Abraham vs. Christoffelsz (1953) 55 N. L. R. 92.
Dias vs. Weerasingham (1953) 55 N. L. R. 135.
Solicitor-General vs. Aradiel (1948) 50 N. L. R. 233.
The King vs. William (1942) 44 N. L. R. 73.
Archibald (Edn. 33rd.) p. 153.

A. C. Alles, C.C., with *V. S. A. Pullenayagam, C.C.*, for the complainant-appellant.
H. W. Jayawardene, Q.C., with *G. P. J. Kurukulasuriya*, for the accused-respondent.

GRATIAEN, J.

This is an appeal by the complainant (a Food and Price Control Inspector) against an order purporting to " discharge " the accused who was tried for an alleged contravention of section 8 (1) of the Control of Prices Act No. 29 of 1950. Mr. Jayawardene raised a preliminary objection to the maintainability of the appeal, his argument being that the so-called order of " discharge " was in reality " a verdict of acquittal " under section 190 of the Criminal Procedure Code, and that no appeal could be preferred against it except at the instance or with the written sanction of the Attorney-General. The inadvertent use by a Magistrate of the word " discharge " in describing an " acquittal " admittedly cannot deprive an accused person of the protection of section 336.

The charge framed against the accused was to the effect that he had on March 1st, 1955, sold 2 lbs. of wheat flour to a bogus customer at a price in excess of the maximum retail price fixed for that commodity in terms of a statutory " price order " applicable to the area in which the transaction took place. This " price order " (P4) had been duly published in the Government Gazette No. 10510 of 20th March, 1953, and was described in the charge with sufficient particularity to comply with the requirements of Chapter 17 of the Code.

The accused having pleaded not guilty, the prosecution led evidence at the trial to prove the alleged sale (for 56 cents) of 2 lbs. of a commodity which the Government Analyst had certified in his report P6 to be wheat flour. The controlled price was 48 cents, and all that remained to establish *prima facie* the commission of the offence was proof that the wheat flour referred to in the Government Analyst's report was the identical sample taken to him for analysis by a Police constable on the orders of the Magistrate. This witness was not available in Court, however, and a postponement of the trial was asked for in order to lead his evidence on another date. The appellant expressly stated that he would then close the case for the prosecution.

Under normal circumstances a postponement for this limited purpose would probably not have been refused. The defence objected, however, that no useful purpose would be served by putting the trial off for another date in order to record evidence on a matter which (for the purposes of the argument) might be regarded as conceded by the accused. The defence submitted that in any event the case for the prosecution must necessarily fail because (1) food price orders become operative only after they have been approved by the Minister of Agriculture and Food, and (2) the appellant's omission to lead evidence of such approval was therefore fatal to his case ; in other words, a verdict of acquittal, without calling for a defence, would inevitably have resulted at the close of the case for the prosecution even if the identification of the sample referred to in the Analyst's certificate was established.

In reply to this submission the appellant conceded that " price orders become valid only after they are approved by the Minister ". He claimed, however, that he had in fact sufficiently established the Minister's approval of the price order P 4 and presumably for that reason, offered no further evidence on that particular issue. The learned Magistrate (in my opinion wrongly) upheld the objection raised by the defence and made an order " discharging the accused at this stage ".

Mr. Alles cited an unreported decision of this Court in *Food and Price Control Inspector vs. Piyasena* S. C. Minutes of 22-11-55 (594—M. C. Matale 4316), see 53 C. L. W., p. 25 where Weerasooriya, J. pointed out that " once a price order has been made and signed (and also perhaps duly published) it becomes fully operative independently of any further efficacy it may receive from the subsequent notification of its approval by the Minister." Mr. Jayawardene did not challenge the correctness of this ruling, and was also prepared to concede that the prosecution had already satisfactorily established by admissible evidence the fact that P4 had received Ministerial approval. Nevertheless, he submitted, the order in his client's favour, right or wrong, was a " verdict of acquittal " against which no appeal could be entertained except upon compliance with the requirements of section 336.

It is not always easy to distinguish between an " acquittal " under section 190 and a " discharge" under section 191, and the apparent conflict of authority in some earlier rulings of this Court has perhaps added to the confusion. We are bound by the majority decision of the Full Bench in *Senaratne vs. Lenohamy* (1917) 20 N. L. R. 44 to the effect that a " discharge " under section 191 signifies " the discontinuance of criminal proceedings " but " does not include an acquittal " (Section 2). In other words, a discharge under section 191 connotes an " *inconclusive order* " which falls short of a decision resulting in " *a definite verdict* " (per De Sampayo, J.). The distinction between a judgment upon the evidence in a civil action and the vexatious " non-suit " santioned by the procedure of former times seems to suggest a helpful analogy.

In *Silva vs. Rahiman* (1924) 26 N. L. R. 463, Jayawardena, J. held that an order abruptly terminating a summary trial " without allowing the prosecution to lead any evidence " amounted only to an order of " discharge ". In *Gabriel vs. Soysa* (1930) 31 N. L. R. 314, Garvin, J. decided, by way of contrast, that an accused person who was charged with unlawfully obstructing arrest under a warrant had in truth been " acquitted " when the Magistrate, without calling for a defence, upheld an objection that (in view of the evidence led by the prosecution) the warrant was bad in law. Garwin, J. explained that " the Magistrate *intended to acquit* because in his view the whole prosecution failed " with the result that the continuation of the trial was in his opinion purposeless.

Some of the dicta in *Gabriel vs. Soysa* (supra) were later criticised by Soertsz, J. in *Sumangala Thero vs. Piyatissa Thero* (1937) 39 N. L. R. 265 but, with great respect to the doubts expressed on that occasion, I would adopt Garvin, J.'s ruling that it is unobjectionable in certain situations to enter a verdict of acquittal under section 190 even before the case for the prosecution has been closed—provided that the Magistrate is satisfied that any further evidence which the complainant proposes to lead would not suffice to establish a *prima facie* case of guilt against the accused person. In such an event, the verdict is based on a judicial decision (be it right or wrong) that the case for the prosecution has (for one reason or another) already collapsed irreparably—so much so that, as in the well-known precedent of *Humpty Dumpty's case*, no amount of ingenuity could " put it together again ". Indeed, Soertsz, J. himself agreed in *Fernando vs. Rajasooriar* (1946) 47 N. L. R. 399, that an " acquittal " at this earlier stage would be justified where, in the view taken by the Magistrate, any further evidence would be of no avail ; see also the more recent judgments of Nagalingam, A.C.J. in *Don Abraham vs. Christoffelsz* (1953) 55 N. L. R. 92 and *Dias vs. Weerasingham* (1953) 55 N. L. R. 135. It stands to reason, however, that premature acquittals of this kind are generally inadvisable ; if based on misdirection, they might well result in a re-trial being ordered on appeal, thereby putting the accused person to further expense and anxiety.

Much confusion is likely to arise if the issue "*acquittal* or *discharge*?" is allowed to be complicated by irrelevant considerations as to whether upon the merits of the particular case, the Magistrate's decision was wrong or premature. The true test is whether (at whatever stage the decision was made) the Magistrate actually intended to record *a verdict of acquittal on the merits.* If that was the intention, no appeal lies except at the instance or with the written sanction of the Attorney-General, and the acquittal, unless reversed, is a bar to a fresh prosecution to the extent indicated in section 330.

It has been suggested in *Solicitor-General vs. Aradiel* (1948) 50 N. L. R. 233 that our Code makes "no distinction between an acquittal on the merits and an acquittal on any other ground". On the other hand, Soertsz, J. in *Fernando vs. Rajasooriar* (supra) held that, *as far as section* 190 *is concerned*, a verdict on the merits is essential to support a plea of *autrefois acquit*; see also the judgment of the Court of Criminal Appeal in *The King vs. William* (1942) 44 N. L. R. 73. As at present advised, I take the view that under our Code, as in England, a plea of *autrefois acquit* presupposes that the indictment or accusation in the earlier proceedings was sufficient in law to sustain a conviction for the offence charged on the second trial. *Archibald* (*Edn*, 33*rd.*) *p.* 153. Similarly, an order "discontinuing" the proceedings against an accused person on the ground that the charge is defective operates only as a "discharge" under section 191. In such an event, the purport of the Magistrate's decision is that there is no charge upon which a verdict (either of conviction or of acquittal) under section 190 can properly be based.

We are now in a position to analyse the order which the learned Magistrate intended to make in the present case. The charge itself was unexceptionable and is admittedly sufficient in form and content to sustain a conviction. When the case for the prosecution was virtually closed, the Magistrate decided wrongly (but within the scope of his jurisdiction) that the prosecution had failed to establish one of the assumed elements of the offence charged—namely, that the "price order" alleged to have been contravened had come into operation at the relevant date by virtue of Ministerial approval. Accordingly, he upheld the submission raised by the defence that the only additional evidence which the prosecution proposed to lead (for the purpose of establishing a different element of the defence) would be of no avail. It is therefore clear that the learned Magistrate intended to record a verdict of acquittal on the merits, and not merely to make "an inconclusive order of discharge" which would expose the respondent to the risk of a fresh trial (for the same offence) at which the prosecution would be given another opportunity to supply assumed gaps in the earlier evidence.

For these reasons, I reject the petition of appeal for non-compliance with the requirements of section 336. Although the order of acquittal was wrong, I am not disposed to quash it in the exercise of my revisionary powers. If a prosecuting officer, by making incorrect concessions on the law, has contributed towards an erroneous verdict of acquittal, the accused person should not, as a general rule, be placed in jeopardy a second time.

Appeal rejected.

Privy Council Appeal No. 45 of 1955

Present: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD TUCKER, LORD COHEN, MR. L. M. D. DE SILVA

KALIKUTTY KANAPATHIPILLAI vs. VELUPILLAI PARPATHY

from

THE SUPREME COURT OF CEYLON

Judgment of the Lords of the Judicial Committee of the Privy Council, Delivered the 24th July, 1956

Evidence Ordinance, section 112—*Meaning of 'no access'—How it may be proved.*

Held: (1) That the significance of the words "no access" in section 112 of the Evidence Ordinance is not fully conveyed by assigning a precise verbal definition of the word "access" itself.

(2) That "no access" would be established in any case in which on the evidence available, it was right to conclude that at no time during the relevant period had there been "personal access" of husband to wife under such circumstances that there might be sexual intercourse.

(3) That if the evidence in a case did disclose that at any time during the period there had been such " personal access ", then " no access " would not be established unless the presumption that sexual intercourse had resulted were rebutted by evidence that displaced that presumption.
(4) That such presumption arising from " personal access " is a rebuttable one and nothing less than cogent evidence should be relied on for the purpose.

Delivered by Lord Tucker.

This appeal concerns a judgment of the Magistrate's Court of Batticaloa in Ceylon dated 31st January, 1951, whereby it was adjudged that the appellant was the father of an illegitimate child born to the respondent on 24th May, 1950, and ordered that he should pay the respondent Rs. 30 a month for its maintenance.

The appellant lodged a petition of appeal from this judgment with the Supreme Court on 19th February, 1951, but his appeal was subsequently rejected by the Supreme Court as incompetent on the ground that the petition had been lodged out of time.

The present appeal, at the hearing of which the respondent was not represented, comes before the Board pursuant to special leave granted by Her Majesty in Council on 22nd February, 1952. It involves the meaning of the word " access " in a provision of section 112 of the Evidence Ordinance of Ceylon, with regard to which there has been over the years a considerable divergence of opinion in the Supreme Court of Ceylon.

The provision reads as follows :—

> " The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that such person is the legitimate son of that man, unless it can be shown that that man had no access to the mother at any time when such person could have been begotten or that he was impotent."

The respondent brought proceedings under the Maintenance Ordinance against the appellant in respect of a child born to her on 24th May, 1950.

The relevant facts are as follows :—

The respondent was married about nine years before the hearing to one Mylvaganam. He left her after a few years—whether 2 or 4 is not clear—and went to live with another woman at a village called Annamalai some 3 or 4 miles from Kallar where the respondent was living at all material times. For 5 or 7 years before the hearing the respondent and her husband had been living apart and during this time three children were born to Mylvaganam's mistress.

It is not now contended that there are any grounds for disturbing the findings of the Magistrate that the appellant and respondent had sexual intercourse in August, 1949, and that such intercourse resulted in the birth of the child on 24th May, 1950, unless the appellant can invoke the provisions of section 112 of the Evidence Ordinance set out above. It is accordingly unnecessary to refer to the evidence upon which the Magistrate based his decision on the issue of sexual intercourse between the appellant and the respondent.

For present purposes it can be taken that the only relevant facts are (1) that in August, 1950, the respondent was living at Kallar where she had sexual intercourse with the appellant in his house in which she was residing with him and his wife and daughter ; (2) that at this time Mylvaganam was living with his mistress and children at Annamalai some 3 or 4 miles distant. To these facts must be added the uncontradicted evidence of the respondent, accepted by the Magistrate, that she had never seen her husband from the time he left her.

The question is whether as a matter of law, as the Magistrate held, these facts warrant a finding of no access. It was submitted by counsel for the appellant that " access " in this section means opportunity for intercourse in the geographical sense that it was physically possible for the parties at the relevant time to have had sexual intercourse if they had so desired and consequently that in order to prove non-access impossibility of the creation of such opportunity must be established.

In 1923 this question was considered in Ceylon by a Full Bench in the case of *Jane Nona vs. Leo* (1923) 25 N. L. R. 241, where a previous decision in the case of *Sopi Nona vs. Marsiyan* (1903) 6 N. L. R. 379, was overruled and it was held that " access " means " actual intercourse ". Subsequently in 1946, Howard, C.J., in *Ranasinghe vs. Sirimanna*, 47 N. L. R. 112, held that in view of the decision of the Privy Council in *Karapaya Servai vs. Mayandi*, A. I. R. (1934), P. C. 49, on the corresponding section of the Indian Evidence Act (which is in identical language save for the omission of the words " or that he was impotent ") *Jane Nona's* case could no longer be considered as binding on him, and that " access " should be interpreted as meaning " possibility " or " opportunity " of intercourse. This decision was followed in *Selliah vs. Sinnammah* (1947) 48 N. L. R. 261.

In 1948, however, Basnayake, J., in *Pesona vs. Babonchi Baas*, 49 N. L. R. 442, and in 1950 Swan, J., in *Kiri Banda vs. Hemâsinghe*, 52 N. L. R. 69, considering the Privy Council decision on an Indian Act not binding on them, felt

themselves free to revert to and follow the Full Bench decision in *Jane Nona* (*supra*).

In this state of the authorities their Lordships consider it is desirable that they should endeavour to state what is in their view the true meaning to be given to this word in the context in which it appears in this Ordinance. They are of opinion that the language of this section, though not purporting or intended to reproduce exactly the English law on this subject, was clearly influenced by the English legal outlook on the subject matter as disclosed in the authorities in the course of years in which the word " access " so frequently appears.

It is true that the word has not in every case been used in precisely the same sense, but perhaps for present purposes the passage which is most helpful is the one referred to by Basnayake, J., in the case of *Pesona vs. Babonchi Baas* (*supra*) at page 455, where he quotes the words used by Lord Eldon in *Head vs. Head* (1823) Turn. L. R. at 140, with reference to the opinion of the Judges in the Banbury Peerage Case. It runs as follows :—

> " I take them to have laid down, so as to give it all the weight which will necessarily travel along with their opinion, although not a judicial decision, that where access according to the laws of nature, by which they mean, as I understand them, sexual intercourse, has taken place between husband and wife, the child must be taken to be the child of the married person, the husband, unless on the contrary it be proved that it cannot be the child of that person. Having stated that rule, they go on to apply themselves to the rule of law where there is personal access, as contradistinguished from sexual intercourse, and on that subject I understand them to have said, that where there is personal access, under such circumstances that there might be sexual intercourse, the law raises the presumption that there has been actually sexual intercourse, and that that presumption must stand, till it is repelled satisfactorily by evidence that there was not such sexual intercourse."

Their Lordships are of opinion that the significance of the words " no access " in section 112 of the Evidence Ordinance is not fully conveyed by assigning a precise verbal definition to the word " access " itself. They are satisfied that a test which considers merely the bare geographical possibility of the parties reaching each other during the relevant period must be rejected completely. Taken at its face value such a test could hardly ever exempt a husband from the onus of paternity and could work real injustice in many cases. Again, their Lordships are of opinion that " no access " would be established in any case in which, on the evidence available, it was right to conclude that at no time during the period had there been " personal access " of husband to wife in the sense given to that phrase in the passage from Lord Eldon's judgment which has been quoted above. On the other hand, if the evidence in a case did disclose that at any time during the period there had been such personal access—and it must be remembered that the section may often have to be applied when there has been no separation between the married pair—then " no access " would not be established unless the presumption that sexual intercourse had in fact resulted were rebutted by evidence that displaced the presumption. It is only necessary to add that, though the presumption arising from personal access is, as has been said, a rebuttable one, it is in the nature of things that nothing less than cogent evidence ought to be relied on for this purpose.

Applying this test to the facts as found by the Magistrate it is clear that the absence of such personal contact as would give rise to the presumption of sexual intercourse was established and his order consequently justified. His finding would equally be unassailable if non-access required positive proof of no actual sexual intercourse.

Their Lordships do not consider that this decision in any way conflicts with the judgment of the Board in *Karapaya vs. Mayandi* (1934 A. I. R. (P. C.) 49, where the finding that the appellants had failed to establish non-access at the material date, December, 1911, could be justified on either view of the meaning of the word access. It is true that in delivering the judgment of the Board, Sir George Lowndes said : " It was suggested by counsel for the appellants that ' access ' in the section implied actual cohabitation, and a case from the Madras reports was cited in support of this contention. Nothing seems to turn upon the nature of the access in the present case, but their Lordships are satisfied that the word means no more than opportunity of intercourse."

This shows that their expression of opinion was purely *obiter*. Moreover the judgment does not define precisely what is meant by " opportunity of intercourse " and certainly lends no support to the appellant's test of bare geographical possibility.

As was said in the judgment of the Board in the recent case of *Alles vs. Alles* (1950) 51 N. L. R. 416 at 418 :—" The issue remains whether on the whole of the evidence made available it can safely be concluded that there was no access at a time when the child could have been conceived."

In the present case their Lordships are of opinion that the conclusion of " no access " was one which it was safe and proper for the Magistrate to draw and they will accordingly humbly advise Her Majesty that this appeal should be dismissed.

Present : SINNATAMBY, J. AND L. W. DE SILVA, A.J.

KAWANNA ENA SEYED MOHAMED *et al* vs. M. C. PERERA *et al.*

S. C. (F) 313 *L*/1954—*D. C. Kandy Case No.* 2841/*L*

Argued on : 17th, 18th, 20th and 21st September, 1956.
Decided on : 10th October, 1956.

Evidence—Identity of land—Statements regarding boundaries of lands contained in documents of title of persons who are strangers to an action and not called—Admitted at trial without objection—Is such evidence inadmissible—Effect of such evidence—Can objection be taken for first time in appeal—Civil Procedure Code, section 154.

Held : That evidence regarding boundaries of adjoining lands contained in documents of title of persons, who are strangers to an action and have not been called, may become inadmissible only if objection to their production is taken in the original Court and they cannot be objected to for the first time in appeal.

Per SINNETAMBY, J.—We accordingly in reaching our decision have taken into account description of boundaries in deeds between strangers to the action and in doing so have followed several earlier decisions which approved of that practice as being in conformity with the law of the land and which unfortunately were not considered by the learned Appeal Judges who decided *Peeris vs. Sawunhamy* and *Solomon vs. William Singho.*

Cases referred to : *Solomon vs. William Singho* (54 N. L. R. 512).
Peeris vs. Savunhamy (54 N. L. R. 207).
Soney Lall vs. Darbedo (1935 A. I. R. Patna 167).
Sahab Chandra vs. Gour Chandra, 1922 A. I. R. Calcutta 160).
Silva vs. Kindersley, 18 N. L. R. 85.
Siyadoris vs. Danoris, 42 N. L. R. 311.
Opalagalla Tea and Rubber Estates Ltd. vs. Hussain, 45 N. L. R. 254.
Shahzadi Begum vs. Secretary of State for India (1907) 34 Cal. 1059.
Sangarapillai vs. Arumugam, 2 Leader 161.

C. Thiagalingam, Q.C., with *E. G. Wickremanayake*, Q.C., *Dunuwila* and *Arulambalam*, for plaintiffs-appellants.

H. W. Jayawardene, Q.C., with *L. G. Weeramantry* and *Ranasinghe*, for Defendants-respondents.

SINNETAMBY, J.

After stating the facts and holding that the plaintiff has satisfactorily established the identity of the premises in dispute, His Lordship proceeded to state as follows :—

In the course of the argument learned Counsel for the appellants cited the case of *Solomon vs. William Singho* (54 N. L. R. 512) and contended that we should not take into consideration boundaries described in title deeds of adjoining lands belonging to " strangers to the action " who have not been called to give evidence in the lower Court. The defendant particularly relied on many such deeds including encumbrance sheets where the name of the land and the description of the boundaries are taken from the first deed registered in that folio. Plaintiffs-appellants also made use of entries in the encumbrance sheets produced by the defendants in support of their case. Learned Counsel for the defendants-respondents likewise objected to these descriptions of boundaries being considered on the same ground. Both Counsel relied on the case already referred to and on the earlier case of *Peeris vs. Savunhamy* (54 N. L. R. 207) in which the same question was considered. As this matter involved an important question of practice we heard as full an argument as was possible in the circumstances particularly as we were not disposed to agree with the decisions cited. It was contended by learned Counsel that the learned Judges who decided these cases held that the principles therein enunciated were of general application irrespective of whether objection to the production was or was not taken in the Court of first instance. Learned Counsel for respondents, who also appeared in the Appeal Courts at the hearing of both these cases, assured us that no objection had been taken at the hearing of the cases in the original Courts. I have since verified and found this statement correct by reference to the original record in the case of *Solomon vs. William Singho* (*supra*). In *Peeris vs. Savunhamy* (*supra*), Dias, J who delivered the judgment of the Court referred to the judgment of *Soney Lall vs. Darbedo* (1935) A. I. R. Patna 167) where the Full Bench expressed its view on certain questions of law referred to it for its opinion and held that statements of boundaries in title deeds between third parties

are not admissible under section 32 of the Evidence Ordinance. Dias, J. did not, however, expressly follow it in regard to one of the deeds produced. Instead he said, " the value of the deed as evidence even if admissible is almost nil ", and proceeded to give his opinion on that basis. In the case of *Solomon vs. William Singho* (*supra*), Gratiaen, J. who was one of the two Judges who constituted the Bench in *Peeris vs. Savunhamy* (*supra*) held that such recitals in deeds between third parties are " hearsay evidence in the issues under consideration and are inadmissible ". The recitals in question were used for the purpose of establishing the identity of lands alleged to be lying on one of the boundaries. The opinion of so eminent a Judge of this Court is entitled to the greatest weight and we have accordingly given it very careful consideration. Documents are constantly put in evidence in the course of a trial, sometimes without objection and sometimes by express consent. To rule every such document out on the ground of hearsay would necessitate parties calling into the witness box persons whose testimony in regard to the authenticity of the document neither side disputes though the contents may be disputed. To accept such a proposition as a legally sound and valid basis on which trials in the original Courts should be conducted would add in no small measure both to the cost of litigation and to the law's delays, which we constantly hear so much about. We have therefore investigated this matter as fully as we can with much assistance as learned Counsel were able to give us and we have come to the conclusion that evidence of documents of title of persons who are strangers to the action and have not been called may become inadmissible only if objection to their production is taken in the original Court and that they cannot be objected to for the first time in appeal. We are fortified in our view by certain decisions of our own Courts and the express *provisions of section* 154 *of our Code of Civil Procedure*, which incidentally finds no counterpart in the Indian Code—learned Counsel who assisted in investigating this matter for us were unable to point to any corresponding provision.

The recital of the facts in the Patna case which was referred to in *Peeris vs. Savunhamy* (*supra*) does not disclose whether objection was taken in the original Courts to the documents which formed the subject matter of the reference. It is difficult to assume, however, that in the original Court no objection was taken in view of the numerous decisions of the Indian Courts under Order 13 rule 6 of the Code to the effect that " when evidence has been led without objection it is not open to the opposite party to challenge it at a later stage of the litigation. But where evidence had been recorded in direct contradiction of an imperative provision of the law the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppel, none of which is available against a positive legal enactment, does not apply ". (*Saheb Chandra vs. Gour Chandra*, 1922 A. I. R. Calcutta 160).

This statement of the law in the Calcutta case is however embodied as a positive enactment on our Code of the Civil Procedure in the explanation to section 154, which finds no counterpart in the Indian Code. This provision has been construed and acted upon in our Courts over a long period of time, *vide Silva vs. Kindersley*, 18 N. L. R. 85, and the cases referred to therein and *Siyadoris vs. Danoris*, 42 N. L. R. 311. The explanation in question is as follows :—

> " If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the Court should admit it."

What is meant by the expression " forbidden by law " was considered in the case of *Siyadoris vs. Danoris* (42 N. L. R. 311) and construed to mean absolute prohibition and not to include a case where evidence was required not to be received or used unless certain requirements were fulfilled—an instance of absolute prohibition which immediately comes to mind is income tax returns made by a person to the Income Tax Department.

The 18 N. L. R. case was decided by de Sampayo, J. and Walter Pereira, J., two very distinguished and experienced Judges of this Court, and this case was not considered in the two cases which we have been invited to follow, nor were the express provisions of section 154 taken into account.

The judgment in *Solomon vs. William Singho* (*supra*) does not indicate what the arguments of Counsel were in regard to this matter but there is no reference in it either to the earlier decisions we have referred to or to section 154 instead the decision in the Patna case was presumably adopted. As we have pointed out the facts do not clearly indicate whether in the Patna case objection was taken at the trial to the production of the deeds in question or not.

We accordingly in reaching our decision have taken into account description of boundaries in deeds between strangers to the action and in doing so have followed several earlier decisions which approved of that practice as being in conformity with the law of the land and which unfortunately were not considered by the learned Appeal Judges who decided *Peeris vs. Savunhamy* and *Solomon vs. William Singho* (*supra*).

We would accordingly set aside the judgment appealed from and enter judgment for plaintiffs-appellants as prayed for subject to the following modifications :—

Plaintiffs are not awarded any damages, but plaintiffs will pay 2nd defendant compensation for improvements which will have to be assessed on proper evidence led before the District Judge. The case will go back for that limited purpose. Plaintiffs will be entitled to costs of appeal and costs of trial so far had in the Court below. The costs of the further hearing in regard to compensation will be in the discretion of the District Judge.

Set aside.

L. W. DE SILVA, A.J.

I have nothing to add to the judgment of my brother except in regard to the reception and value of documentary evidence bearing on the identity of the property in suit. At the hearing of this appeal, learned Counsel for the appellants objected to the admissibility of certain documents which are either deeds of title relating to contiguous lands or encumbrance sheets descriptive of them. They were produced at the trial for the purpose of enabling the Court to identify the land in issue by reference to boundaries. No objection was taken to these documents at the time they were tendered in evidence at the trial. At the end of it, however, the plaintiff's Counsel in the course of his argument did no more than cite to the District Judge the case of *Peeris vs. Savunhamy*, 54 N. L. R. 207.

This method of trying to whittle away the evidence already received is not known to our law. It has been held in the case cited that for the purpose of identifying property in dispute, statements of boundaries in title deeds between third parties are not admissible under section 32 of the Evidence Ordinance. Some of the documents were held by Dias, S.P.J. to be admissible in evidence while the evidentiary value of another document, even if it was admissible was considered to be almost nil. This decision with which Gratiaen, J. concurred, followed a ruling by a Full Bench of Patna in *Soney Lall vs. Darbedo* 1935 A. I. R. Patna 167. In the course of the argument before us, the appellants' Counsel also brought to our notice the case of *Solomon vs Don William Singho*, 54 N. L. R. 512, where too the view was taken by Gratiaen, J. with whom Gunasekere, J. agreed, that the recitals of boundaries in the deeds of third parties were at best hearsay evidence and were inadmissible. No other decisions were cited to us. In neither of these reported cases had the parties to the documents or their successors given evidence at the trial. Learned Counsel for the respondents also supported these judgments. Both decisions have assumed that a Court of Appeal has an unqualified right to rule on the admissibility of documents received without objection in the Court of trial.

I do not think that the matter could be disposed of in that way, and regret I am unable to agree with the view taken in the two cases reported in the 54 N. L. R. In *Siyadoris vs. Danoris* 42 N. L. R. 311 the point was specifically decided that objection to a deed admitted in evidence without objection at the trial cannot be entertained in appeal on the ground that the document had not been duly proved. The same principle was followed in *Opalagalla Tea and Rubber Estates Ltd. vs. Hussain*, 45 N. L. R. 254, where no objection was taken to certain letters admitted in evidence without legal proof in the District Court.

In neither case reported in 54 N. L. R. is there any reference to section 154 of the Civil Procedure Code, the explanation to which is as follows :—

If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the Court should admit it.

In *Shahzadi Begum vs. Secretary of State for India* (1907) 34 Cal. 1059, the Privy Council held that it was too late on the appeal to object to the admissibility in evidence of a document which had been admitted without objection in the first Court.

The appellants' Counsel, however, argued that the law of evidence should receive primary consideration and cannot be made subordinate to a rule of procedure. There is no substance in this contention since it is in direct opposition to the explanation to section 154 of the Civil Procedure Code. A similar argument was rejected by Hutchinson, C.J. in *Sangarapillai vs. Arumugam* 2 Leader 161, where it was held that if evidence, which is repugnant to sections 91 and 92 of the Evidence Ordinance is let in by consent, it is too late for either party to object to it in appeal since the requirements of section 154 of the Civil Procedure Code were not observed. The question

raised as to admissibility cannot, therefore, now be entertained.

The only other matter for consideration is the evidentiary value of the document. This is covered by the decision in *Silva vs. Kindersley* 18 N. L. R. 85, which I brought to the notice of Counsel at the hearing of this appeal. Pereira, J. with whom de Sampayo, A.J. agreed, pointed out that a document not objected to by the opposing party in a civil suit is to be deemed to constitute legally admissible evidence as against the party who is sought to be affected by it. The contention that the testimony of a Superintendent of Surveys was of no value, because the plans and surveys he relied on depended largely for their correctness on a third party's field books, was rejected because those field books had been admitted in evidence in Court below without objection.

The Patna case on which the decision of *Peeris vs. Savunhamy* rests is neither sufficient nor persuasive authority for at least two reasons. Firstly the Patna Court was called upon to deal with a general problem. Two questions of law formed part of the reference put before the Patna Bench : (1) Whether statements of boundaries in documents of title between third parties are admissible in evidence under section 32 (3), Evidence Act. Are they admissible under any other provision of the Act if the third parties are dead, or outside the jurisdiction of the Court? and (2) was the case of 1916 Pat. 416 correctly decided? Secondly the Patna Bench did not take into account provisions of law similar to those contained in section 154 of the Civil Procedure Code. This section is one of several provisions regulating the orderly manner in which trials are to be conducted in Courts of first instance. To permit objections to be taken for the first time in appeal regarding the admissibility of documentary evidence not forbidden by law is to divert the orderly conduct of trials into an undesirable course not sanctioned by our law.

I concur in the order made by my brother and agree that the appellants have proved their title to the property in suit and are entitled to succeed.

Present : Basnayake, C.J., Gunasekara, J., Pulle, J., de Silva, J., & Sansoni, J.

SOOSAIPILLAI vs. SOOSAIPILLAI

S. C. 119*L*/52—*D. C. Jaffna* 5605

Argued on : 17th May, 1956

Decided on : 4th July, 1956

Thesavalamai—Person married before 17*th July*, 1911, *and dying in* 1938—*Devolution of property on surviving spouse—Applicability of sections* 9 *and* 11 *of Part I of the Thesavalamai Regulation No.* 18 *of* 1806 *and sections* 14 *and* 37 *of the Matrimonial Rights and Inheritances* (*Jaffna*) *Ordinance No.* 1 *of* 1911—*How far do headings of a section control the text.*

Where a person subject to the Thesavalamai married before 17th July, 1911, died after the commencement of the Matrimonial Rights and Inheritance (Jaffna) Ordinance No. 1 of 1911, the surviving spouse who had not married was entitled to the possession of the lands by virtue of sections 9 and 11 of the Thesavalamai Regulation No. 18 of 1806. In such a case section 37 of Ordinance No. 1 of 1911 would not be applicable.

Per Basnayake, C.J.—Headings in a statute do not always control the text. Headings in statutes belong to two classes *The King vs. Suppar*, 18 N. L. R. 322 at 326—headings which can be read grammatically into the group of sections to which they relate and headings which have no direct connection with the language of such sections. Headings of the first class constitute a sort of preamble (*Martins vs. Fowler* (1926) A. C. (P. C.) 746), to the sections immediately following them and are not used in more recent statutes. Headings of the latter class are generally regarded as having been inserted for the purpose of convenience of reference, and not as being intended to control the interpretation of the sections grouped under such heading as in the case of the Ordinance under consideration.

Cases referred to : *Swamipillai vs. Soosaipillai* (1947) 49 N. L. R. 83.
Ambalavannar vs. Ponnamma and the Secretary, District Court, Colombo (1941) 20 C. L. W. 1 at 4.
The King vs. Suppar, 18 N. L. R. 322 at 326.
Martins vs. Fowler (1926) A. C. (P. C.) 746.

C. Renganathan with *M. Shanmugalingam*, for defendant-appellants.

S. Thangarajah, for plaintiff-respondent.

Basnayake, C.J.

The only question that arises for determination on this appeal is whether sections 9 and 11 of Part I of the Tesawalamai apply to the estate of a spouse married before 17th July, 1911, the date of commencement of the Jaffna Matrimonial Rights and Inheritance Ordinance (hereinafter referred to as the Ordinance), dying after that date. This very question has been decided in the affirmative in the case of *Swamipillai vs. Soosaipillai* (1947) 49 N. L. R. 83, and I am in entire agreement with the opinion expressed by Windham, J. in that case.

A contrary view appears to have been taken by de Kretser, J. in the earlier case of *Ambalavanar vs. Ponnamma and the Secretary, District Court, Colombo* (1941) 20 C. L. W. 1 at 4, wherein he has expressed the opinion that sections 9 and 11 of the Tesawalamai have been repealed by section 40 of the Ordinance.

The latter case cannot be regarded as in point as the judgment does not state that the deceased spouse was married before the Ordinance came into force. The Tesawalamai is undoubtedly repealed by section 40 of the Ordinance, but only in respect of those to whom the Ordinance applies and then only in so far as it is inconsistent with the Ordinance. I am unable to agree with the view taken by de Kretser, J. if he intended that section 40 affected the rights of those who fall outside the ambit of the Ordinance, viz., those who were married before its commencement.

The facts on which the above question arises for decision are as follows :—One Anasipillai who was married to the plaintiff in 1901 died in August 1938, leaving a major son by name Tiruchelvar who died in 1944. By deed No. 2230 of 19th November, 1941, (D1) Tiruchelvar sold the lands in dispute to the 1st defendant claiming them by right of inheritance from his mother. The plaintiff, who has not re-married, claims the right of possession of the lands left by Anasipillai by virtue of section 11 of Part I of the Tesawalamai.

Learned counsel for the appellant contended that the provision that applies to the instant case is section 37 of the Ordinance, and not section 11 of Part I of the Tesawalamai. He argued that the limitation imposed by section 14 of the Ordinance is confined to Part III of it and has no application to Parts IV and V and that section 37, which occurs in Part IV, is therefore not governed by section 14, which reads as follows :—

> " The following sections of this Ordinance shall apply to the estate of such persons only as shall die after the commencement of this Ordinance, and shall be then unmarried, or if married shall have been married after the commencement of this Ordinance."

The words "following sections of this Ordinance" are wide enough to extend to all the sections that follow section 14, and there is nothing in the context of that section or the sections that follow it which has the effect of confining the limitations imposed by it to the sections in Part III of the Ordinance. Those words in my opinion are wide enough to catch up all the succeeding sections, including sections 37 and 38 though they be in Part IV. Both Parts III and IV deal with the estates of deceased persons.

Learned counsel also laid great emphasis on the heading to Part III of the Ordinance. He contended that the heading " Inheritance " confines the application of section 14 to Part III. Headings in a statute do not always control the text. Headings in statutes belong to two classes *The King vs. Suppar*, 18 N. L. R. 322 at 326—headings which can be read grammatically into the group of sections to which they relate and headings which have no direct connection with the language of such sections. Headings of the first class constitute a sort of preamble *Martins vs. Fowler* (1926) A. C. (P. C.) 746 to the sections immediately following them and are not used in more recent statutes. Headings of the latter class are generally regarded as having been inserted for the purpose of convenience of reference, and not as being intended to control the interpretation of the sections grouped under each heading as in the case of the Ordinance under consideration. Headings may be looked at only for the purpose of resolving any doubt as to ambiguous words. They cannot be used to give a different effect to clear words of a section. In the instant case the section is in my opinion clear, and the heading cannot be called in aid to give it a different meaning.

It is also evident from section 4 that the Ordinance does not apply to persons married before its commencement except where it is otherwise expressly provided therein.

For the above reasons I am of opinion that section 37 of the Ordinance has no application to the instant case.

Learned counsel's contention is therefore not entitled to succeed. The appeal is accordingly dismissed with costs.

Gunasekara, J.
I agree.

Pulle, J.
I agree.

de Silva, J.
I agree.

Sansoni, J.
I agree.

Appeal dismissed.

Present : GUNASEKARA, J. AND SINNETAMBY, J.

In the matter of an application under the Indian and Pakistani Residents (Citizenship) Act
and
In the matter of an appeal under section 15 of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949

SITHAMBALAM MOOKAN SOLAMUTHU vs. THE COMMISSIONER FOR THE REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS

Citizenship Case No. 84/1956—Application No. C/4417/O

Argued on : 9th and 10th August, 1956
Decided on : 9th November, 1956

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Section 15—Powers of Supreme Court to remit case to Commissioner for fresh inquiry, where order appealed from is set aside.

Held : That the appellate jurisdiction conferred on the Supreme Court by section 15 of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949 necessarily involves the power to set aside the order appealed from, and such a power implies a power to order the Commissioner to take any consequential steps for the disposal of the application for registration.

Cases referred to : *Pitchamuthu vs. Commissioner for Registration of Indian and Pakistani Residents* (1955) 57 N. L. R. 184.
Paramasivam vs. Commissioner for Registration of Indian and Pakistani Residents 56 N. L. R. 514 at 517—518.

Cecil de S. Wijeratne, for applicant-appellant.

R. S. Wanasundera, C.C., for respondent.

GUNASEKARA, J.

This is an appeal against an order made under the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, refusing an application made by the appellant, Sithambalam Mookan Solamuthu, for registration as a citizen of Ceylon.

The application is dated the 20th July, 1951, and the order in question was made by a Deputy Commissioner on the 14th December, 1955, after an inquiry held on that day in pursuance of a decision under section 9 (3) (*a*) of the Act. One of the questions for determination at this inquiry was whether the appellant had been continuously resident in Ceylon during the period 1st January, 1936 to 20th July, 1951. The only evidence adduced at the inquiry was that of the appellant himself, who presented his case in person. At the close of his evidence the Deputy Commissioner made the following order :—

"Applicant has no witnesses to prove the period of residence from 1-1-36 to 1947. During this period he states he was at Erracht Estate and at Sunderland Estate. Particulars verified at Sunderland Estate show that Solamuthu s/o Mookan who had been at Sunderland Estate is married, whereas the applicant states that he is not married. As such this evidence cannot relate to applicant. There is also no evidence of residence of applicant at Erracht Estate. It was open to applicant to produce witnesses to prove his period of residence, but he failed to do so. He has no documentary evidence either. I refuse the application and inform the applicant accordingly."

The verification that is referred to by the Deputy Commissioner was an investigation made by an officer of his department behind the appellant's back. The rejection of the appellant's testimony that he was resident on Sunderland Estate is based entirely upon an allegation in the investigating officer's report which was not disclosed to the appellant and which he was given no opportunity of meeting. It was not open to the Deputy Commissioner to reject the appellant's evidence upon such a ground. He was also in error when he held that there was "no evidence of residence of applicant at Erracht Estate". On that point he had before him the oral evidence of the appellant and a certificate from the Superintendent of the estate which the appellant had submitted in support of his application. For these reasons, the order that is appealed from must be set aside.

There has been no proper inquiry into the appellant's application, and an order cannot be made upon it until such an inquiry has been held. It is contended for the Crown that this Court has no power to remit the case to the respondent for a fresh inquiry. It seems to me that even in that view of the law a fresh inquiry must be held once

this Court has set aside the order that is the subject of the appeal; for the proceedings upon the application cannot end at the point at which they would then be left, but must be continued by the Commissioner from that point.

The learned Crown Counsel has cited the case of *Pitchamuthu vs. Commissioner for Registration of Indian and Pakistani Residents* (1955) 57 N. L. R. 184 as supporting his contention. The decision in that case, however, provides no answer to the present question. The question there was whether, in a case where the order that was appealed from was not shown to be wrong, this Court had the power to remit the case to the Commissioner to enable the appellant to supplement his case by adducing further evidence. That is different from the present question, which is whether, in a case where the order that is appealed from is set aside, this Court can order a fresh inquiry. In my opinion, the appellate jurisdiction that is conferred on the Court by section 15 of the Act necessarily involves a power to set aside the order that is appealed from; and such a power in turn implies a power to order the Commissioner to take any consequential steps which it may be necessary for him to take so that he may dispose of the application for registration. In *Paramasivam vs. Commissioner for Registration of Indian and Pakistani Residents* 56 N. L. R. 514 at 517—518 Gratiaen, J. held, *obiter*, that this Court has the power and the duty to order a fresh inquiry whenever justice cannot be achieved by other means. With all respect, I agree with that view.

I would set aside the order made by the Deputy Commissioner and order that a fresh inquiry be held in pursuance of section 9 (3) (*a*) of the Act, and I would order the respondent to pay the appellant Rs. 105 as the costs of this appeal.

SINNETAMBY, J.

I agree.

Set aside.

Present: N. SINNETAMBY, J.

SRI LANKA OMNIBUS CO., LTD., vs. P. S. 2466 PERERA

S. C. 136 *P*/1956—*Municipal Magistrate's Court, Colombo Case No.* 89369

Argued on: 31st October, 1956 and 13th November, 1956
Decided on: 26th November, 1956

Motor Traffic Act No. 14 *of* 1951—*Failure to construct and maintain motor bus according to Regulation* 12 *of the Construction of Vehicles Regulations—Owner charged under section* 216 (2) (*b*) *of the Motor Traffic Act—Liability of company.*

The appellant company was charged under section 216 (2) (*b*) of the Motor Traffic Act for having failed to construct and maintain a motor bus in such condition so as to prevent the emission of smoke from the bus in such quantity as to be a nuisance to one Perera in breach of Regulation 12 of the Construction of Vehicles Regulations. The Act did not prohibit the user of such a motor vehicle.

Held: (1) That in the absence of a prohibition against the use of a motor vehicle, which does not conform to the Regulation, the use of such a vehicle did not amount to contravention of section 216 (2) of the Act.

(2) That section 216 (2) contemplates the user of a motor vehicle, and the words in the section " where anything is done or omitted to be done in connection with a motor vehicle, in contravention of any provision of this Act or any regulation " cannot be extended to cover breaches of regulations relating to construction and equipment of motor vehicles under the Act.

(3) That there was no evidence that the particular motor bus had not been constructed or maintained in accordance with the provisions of Regulation 12.

Cases cited: *Thomas Singho vs. S. I. Police, Gampaha*, 55 N. L. R. 395 followed.
Fernando vs. Amerasekera, 57 N. L. R. 303 dissented from.
De Mel vs. Balasuriya, 36 N. L. R. 218.

R. A. Kannangara, for the accused-appellant.

A. C. Alles, Acting Deputy Solicitor-General, with *B. E. de Silva, Crown Counsel*, for complainant-respondent.

SINNETAMBY, J.

The appellant company was charged in this case with failing to so construct and maintain motor bus bearing No. I. C. 1217 in such condition as to prevent the emission of smoke from the said vehicle in such quantity as to be a nuisance to P. S. 2466 Perera. It was sought to make the company liable under section 216 (2) (*b*) of the Motor Traffic Act. The appellant company is the registered owner of the vehicle and the charge alleges that it acted in contravention of Regulation 12 of the Motor Traffic (Construction of Vehicles) Regulations of 1951. The learned Magistrate found the appellant guilty. This appeal is against that conviction.

The regulations in question, it will be observed, were made under sections 19 and 239 of the Motor Traffic Act. Section 239 is the section which empowers the Minister to make regulations under the Act and section 19 provides that regulations may be made in regard to the construction and equipment of motor vehicles. Section 3 provides that no vehicles should be registered unless it complies with the provisions of the regulations made in regard to construction and equipment. It is thus manifest that the primary object of the regulations in question was to lay down conditions in regard to construction and equipment which had to be complied with before a vehicle was first registered. Section 192 provides for the making of regulations in regard to the use of motor vehicles and the Minister has made some regulations under the provisions of this section which had been published in the same Gazette of 27-2-1952. It will thus be seen that one set of regulations dealt with "construction" while another set dealt with "use". Regulation 12 of the (Construction of Vehicles) Regulations under which the charge was preferred is to the following effect :—

> "Every vehicle must be so constructed and maintained in such condition as to prevent the emission of smoke, grease, oil, ashes, water, steam or visible vapour from the motor vehicle in such quantity as to be a nuisance or to cause damage to any highway or annoyance or damage to any person."

There is no regulation under the (Use of Vehicles) Regulations which prohibits the user of a motor vehicle which is not constructed or maintained in the manner provided for by Regulation 12 quoted above.

It was contended in appeal that there was no prohibition against user provided for either in the Act or by regulations of a vehicle which did not comply with the requirements of the (Construction of Vehicles) Regulations. Reliance was placed upon the judgment in the case of *Thomas Singho vs. S. I. Police, Gampaha* 55 N. L. R. 395. Pulle, J. there held that in the absence of a prohibition against the user of a motor vehicle which does not conform to the (Construction of Vehicles) Regulations it could not be said that the use of a vehicle which did not so conform was in contravention of the regulations within the meaning of section 216 (2) of the Motor Traffic Act. The learned Judge drew attention to the absence in the Motor Traffic Act of a section corresponding to section 5 of the Motor Car Ordinance of 1938 which expressly prohibited the user of a motor vehicle which did not comply with regulations made under the Ordinance. There is also similar provision in the Motor Traffic Act in England. But in the Motor Traffic Act of 1951 this provision has been omitted. Failure, therefore, to comply with a regulation which did not expressly prohibit user but only related to construction and equipment did not, the learned Judge held, amount to an offence. With this view I respectfully agree.

Though counsel did not refer to it, my attention was drawn to a case in which Fernando, J. had made some observations by way of *obiter* on the reasoning of Pulle, J. in the above case. This is the case of *Fernando vs. Amerasekera* 57 N. L. R. 503. In that case the charge was laid under Regulation 6 of the (Construction of Vehicles) Regulations which required a vehicle to be equipped with at least one efficient braking system with two means of operation. The vehicle in question was in fact equipped with a braking system that conformed to the requirements of the regulation in question but it was not at optimum efficiency. The learned Judge held that there was no breach of Regulation 6 of the (Construction of Vehicles) Regulations but that there was a breach of Regulation 4 of the Motor Traffic (Use of Vehicles) Regulations which required the braking system to be maintained in good and efficient working order while the vehicle is being used on the highway. The learned Judge then referred to the case of *Thomas Singho vs. S. I. Police, Gampaha* (*supra*), and stated that he did not agree that the legislature did not intend that a failure to equip a motor vehicle with an efficient braking system in terms of Regulation 6 of the (Construction of Vehicles) Regulations should be punishable as an offence. He referred to sub-section (2) of section 216 and stated that although it did not cover the *use* of a vehicle the sub-section penalised the owner and the driver "if anything is omitted to be done in connection with a motor vehicle in contravention of.....any regulation". He added that the terms of this provision "are wide enough to include the case of a vehicle in relation to which an efficient braking system or any other equipment is required by any regulation to be fitted to motor vehicles". With this view I regret I am unable to agree. Sub-section (2) of section 216 obviously contemplates the user of a motor vehicle ; for, unless the vehicle is being used it will not be possible to ascertain the driver who is made equally liable as the owner for anything which is done or omitted to be done. In the case of an Omnibus Company no one can say who the driver of an omnibus is unless the vehicle at the time was being used on the highway.

A provision in section 80 of the Motor Car Ordinance No. 20 of 1927 similar to the provisions of section 216 was construed by the Supreme Court in *de Mel vs. Balasuriya* 36 N. L. R. 218. Section 80 of this Ordinance provided as follows :

80 (1) " If any motor car is used which does not comply with or contravenes any provision of this Ordinance or of any regulation, or of any order lawfully made under this Ordinance or any regulation ; or

(2) If any motor car is used in such a state or condition or in such a manner as to contravene any such provision ; or

(3) If anything is done or omitted in connection with a motor car in contravention of any such provision ; then unless otherwise expressly provided by this Ordinance—

(*a*) The driver of the motor car at the time of the offence shall be guilty of an offence unless the offence was not due to any act, omission, neglect, or default on his part ; and

(*b*) The owner of the motor car shall also be guilty of an offence, if present at the time of the offence, or, if absent, unless the offence was committed without his consent and was not due to any act or omission on his part, and he had taken all reasonable precautions to prevent the offence.

Dalton, J. made the following observations in regard to section 80 (3) which is very similar to section 216 (2) :

" Turning now to section 80 of the Ordinance, it is provided by sub-sections (1) and (2) that if any motor car is used which does not comply with any provision of the Ordinance, or is used in such a state or condition as to contravene any such provision, the owner shall be guilty, if present at the time the offence is committed, or in certain circumstances if absent also. The provisions of the Ordinance referred to in sub-sections (1) and (2) are, it seems to me, provisions to which motor cars must comply or conform before they are used, in respect of such matters as equipment, construction, registration, licensing or condition. One can understand the owner being made responsible, for instance, for the proper equipment and safe condition of the car he allows his driver to use. Sub-section (3) refers to a contravention of those same provisions. It would appear to provide for anything that may be omitted from sub-sections (1) and (2), for all three sub-sections must be read together. If anything is done or omitted in connection with a motor car in contravention of any such provision, then in the cases set out in sub-section (3) (*c*) the owner is also guilty."

I take these views expressed by the learned Judge to mean that section 80, sub-section (3) is intended to cover contraventions which are not caught up by sub-sections (1) and (2) and apply only in circumstances when sub-sections (1) and (2) would apply : that is, when the vehicle is being *used* and the user is prohibited by any provision of, or by any regulation made under, the Ordinance. I agree respectfully with the opinion expressed by the learned Judge. In this view of the matter the charge against the defendant company must fail.

There was yet another objection to the conviction urged by learned Counsel which in my view should succeed. The vehicle itself was not examined by any competent person either at the time of the alleged offence or at any time thereafter. The only evidence is that it was emitting smoke at the relevant time and there is nothing on record to show that this particular vehicle had not been constructed or maintained in accordance with the provisions of Regulation 12 of the (Construction of Vehicles) Regulations. To establish this part of the case the prosecution called an expert employed by the Gal Oya Development Board who has been described as a Mechanical Engineer and who holds a degree in Engineering in addition to certain other qualifications. He gave some general evidence in regard to vehicles of the Gal Oya Development Board using Diesel engines and he made a general statement that the reasons for a Diesel engine emitting smoke are bad compression, faulty filters, faulty fuel injection, excessive fuel injection and wrong timing. These, he said, are the main causes which make a vehicle to emit smoke and that it is chiefly due to faulty maintenance. He added that 99% of smoking is due to that cause. In my view general evidence of this nature is insufficient to bring home to an accused person liability in respect of a criminal charge. There must be specific evidence that the vehicle in question was examined and that the emission of smoke was due either to faulty construction or lack of proper maintenance. For these reasons I would set aside the conviction and acquit the accused-appellant.

Set aside.

Present : SANSONI, J. AND SINNETAMBY, J.

LAWRENCE MARIAN vs. SOOSAI JESUTHASAN *et al*

S. C. 282—*D. C. Jaffna No.* 11447/*L*

Argued on : 18th July, 1956
Decided on : 20th July, 1956

Evidence Ordinance sections 67 *and* 68—*Notary, when does he become an attesting witness.*

Held : That to become an attesting witness within the meaning of section 68 of the Evidence Ordinance, a notary must personally know the executant and be in a position to bear witness to the fact that the signature on the deed executed before him is the signature of the executant.

Cases referred to : *Seneviratne vs. Mendis* (7 C. W. R. 211, 1 C. L. Recorder 47).
Raman vs. Assen Naina (1 Curr. L. R. 256).
Velupillai vs. Sivakamipillai (1 A. C. R. 180).

C. Renganathan with *V. K. Palasundaram*, for defendant-appellant.
C. Chellappah, for plaintiffs-respondents.

SINNETAMBY, J.

This was an action *rei vindicatio* instituted by plaintiff in respect of a 2/3 share of the land described in the plaint. The defendant claimed to be the absolute owner of the entire land on deed bearing No. 311 dated 2/8/39 executed by his mother, marked D1. Plaintiff's claim was based on inheritance from the same source. The only issue therefore for adjudication was whether the deed D1 was duly executed went to trial on this issue.

The defendant gave evidence to the effect that he went with his mother and the attesting witnesses to the notary to get D1 executed. He admitted that one attesting witness was alive and the other dead. He was questioned as to whether his mother placed her thumb impression in the deed D1 but an objection being taken this question was disallowed. One of the grounds urged at the argument was that this order was a wrong order though this point was not specifically raised in the petition of appeal. For the purpose of this decision I shall proceed on the assumption that the answer to this question is in the affirmative.

One ground of appeal was that the learned Judge refused a postponement to enable the plaintiff to call the attesting witness. There is nothing in the record to suggest that any such application was made and the Judge himself has assured us that if such an application had been made he would have recorded it. Both proctors in this case have filed conflicting affidavits on this question and in the circumstances we are of opinion that this appeal should proceed on the basis that no such application was in fact made. Learned Counsel appearing for the appellant at the trial presumably took the view that he had available sufficient proof of the due execution of the deed ; otherwise, it is difficult to understand why he chose to proceed with the trial without first making sure that the application for a postponement which it is alleged he made was duly recorded.

It was argued at the hearing of the appeal that there would be sufficient proof of execution if the notary before whom a deed is executed was called coupled with proof that the executant it was who signed it. In this case the executant placed her thumb impression. It was urged that in this case there was a sufficient compliance with the provisions of Section, 67 and 68 of the Evidence Ordinance as the notary was called and there was tendered proof *Aliunde* of the executant's signature of thumb impression. It was contended that the notary was an attesting witness within the meaning of Section 68 irrespective of whether he knew the executant or not. Reliance was placed on the decision of this Court in *Seneviratne vs. Mendis* (7 C. W. R. 211. 1 C. L. Recorder 47); *Raman vs. Assen Naina* (1 Curr. L. R. 256) was differentiated on the ground that in that case there was no evidence that the executant set his signature to the impugned deed. It was contended that the effect of Section 67 read in conjunction with Section 68 rendered it sufficient for proof to be established by calling the notary irrespective of whether he knew the executant or not and proving the signature of the executant by other evidence. This in my view is a fallacy. The signature to a document can be attested without a notary. "To attest" means to "bear witness to a fact" vide *Velupillai vs. Sivakamipillai* (1 A. C. R. 180). The notary therefore to become an attesting witness within the meaning of Section 68 of the Evidence Ordinance must be able to bear witness to the fact that it was the executant who set his signature to the document. A document affecting land is executed before a notary to comply with the provisions of Ordinance 7 of 1840 and that fact alone does not make the notary an attesting witness. To become an attesting witness a notary must personally know the executant and be in a position to bear witness to the fact that the signature on the deed executed before him is the signature of the executant.

In the present case the notary says he did not know the executant. No attesting witness has been called and the defendant's evidence even if admitted to the effect that it was his mother who set her thumb impression to D1 would not establish proof of due execution. For these reasons I would dismiss the appeal with costs.

SANSONI, J.
I agree.

Appeal dismissed with costs.

Privy Council Appeal No. 37 of 1952

Present : Earl Jowitt, Lord Oaksey, Lord MacDermott, Lord Cohen, Lord Keith of Avonholm

L. P. ABEYAWARDENE vs. C. S. WEST

From
THE SUPREME COURT OF CEYLON

S. C. No. 572—D. C. Col. No. 2680. (*Reported* 53 *N. L. R.* 217)

Decided on : 14th January, 1957.

Fidei-commissum, gift subject to, by parents S and M to minor children—Donors reserving life interest in half-share—Acceptance by brothers on behalf of minor donees—Application by S and M to District Court under Entail and Settlement Ordinance of 1876 *to exchange property gifted for another subject to condition that donees shall not alienate same except with consent of original donors and subject to their life interest—Order granted in terms applied for—Conveyances executed in terms of the order—Re-transfer of exchanged property by donees to S—Transfer of same by S to his son who by will passed it to trustees—Sale by trustees—Does purchaser get title free of the original fidei-commissum ?*

Acceptance of original gift subject to fidei-commissum—Is acceptance by brothers sufficient?—Does such acceptance amount to an acceptance on behalf of the fidei-commissaries?—Gift in favour of family—Is such gift effective if it comes to an end with the first generation of fidei-commissaries?

Entail and Settlement Ordinance No. 11 *of* 1876, *Sections* 4, 5, 7 *and* 8—*Can persons having life interest only initiate proceedings under section* 5 ?—*Effect of order permitting exchange—Duty of purchaser of property conveyed on order under the Entail and Settlement Ordinance—Is he bound to examine title beyond order of Court ?—Is a* bona fide *purchaser bound by such fidei-commissum ?*

By a deed of gift No. 2110 of 1883, Mututantrige Simon Fernando and his wife, Colombapatabendige Maria Perera, donated a property called " The Priory " to their daughters, M. Cecilia Fernando and M. Jane Fernando, subject to the following conditions :—

> " That the said M..... Simon Fernando shall during his lifetime be entitled to take use and appropriate to his own use the issues, rents and profits of the said premises and that after his death and in the event of his wife C..... P..... Maria Perera surviving him she shall during her lifetime be entitled to take use and appropriate to her own use a just half of the said issues, rents and profits the other half being taken used and appropriated by the donees to wit, the said M..... Cecilia Fernando and M..... Jane Fernando and subject also to the conditions that the said donees..... shall not nor shall either of them be entitled to sell, mortgage, lease for a longer term than four years at a time or otherwise alienate or encumber the said premises nor shall the same or the rents and profits thereof be liable to be sold in execution for their debts or for the debts of any or either of them and the said premises shall after their death devolve on their lawful issues respectively and in the event of anyone of the said donees dying without lawful issue her share right and interest in the said premises shall devolve on and revert to the surviving donee subject however to the conditions and restrictions aforesaid."

The deed further provided that " M..... John Jacob Cooray..... doth hereby on behalf of the said M..... Cecilia Fernando and M..... Jane Fernando, who are minors jointly with M..... Alfred Thomas Fernando and M..... James Fernando, brothers of the said minor donees accept the gift and grant of the said premises subject to the respective conditions aforesaid. Under an order of the District Court dated the 18th June, 1896, in proceedings under the Entail and Settlement Ordinance of 1876, initiated by the original donors, " The Priory " was given in exchange for another property called " Sirinivasa " subject to the condition that Cecilia Fernando and Jane Fernando " shall not sell, mortgage or otherwise alienate the said premises except with the consent of the original donors Simon and Maria Fernando or the survivor of them ", and subject to the life interest of the original donors. " The Priory " was freed from the restrictions in the original deed of gift. The conveyances were dated 23rd June, 1896.

On the same date, Cecilia conveyed to her father, Simon, her half share in " Sirinivasa " for Rs. 45,000/-, and Simon gifted " The Priory " to Cecilia absolutely.

Simon and Jane on 30th June, 1900, partitioned " Sirinivasa ", so that Jane received the eastern portion and Simon received the western portion.

On the 30th November, 1905, Jane with the consent of her mother, Maria, sold her divided portion to Simon, who sold the whole of " Sirinivasa " to James Fernando. Two lots out of the property were purchased by the defendant's immediate predecessor-in-title.

The present action was brought by the children of Jane for a declaration of title to the said lots against the defendant. The District Judge delivered judgment for the plaintiffs, but the Supreme Court set aside the judgment.

In allowing the appeal of the plaintiffs, the Privy Council held that—

(1) the acceptance of the gift on behalf of the fiduciaries Jane and Cecilia (minors) by their brother-in-law, Cooray, and their brothers, Alfred and James, was sufficient acceptance on their behalf;
(2) the acceptance by Jane and Cecilia (fiduciaries) was sufficient acceptance on behalf of their issue (fidei-commissaries);
(3) a gift can be a gift in favour of a family (*favorem familiae*), even though it comes to an end with the first generation of fidei-commissaries. Such a gift is not confined to a fidei-commissum which goes on from generation to generation (2);

Per Lord Keith.—" The great weight of authority derived from legal decision in Ceylon until the decision in the present case supports that view. In a matter in which so much was left open by the early commentators their Lordships attach great weight to a current of legal decision in a country in which fidei-commissa are extensively resorted to by its inhabitants, are part of its law and become frequent subject of consideration by its Courts."

(4) Persons having a life interest are entitled to initiate proceedings under section 5 of the Entail and Settlement Ordinance of 1876;
(5) Although the order of the Court dated the 18th June, 1896, varied the conditions contained in the original deed of gift, the effect of that order, read with sections 4, 7 and 8 of the Ordinance of 1876 was that the property taken in exchange, " Sirinivasa " became subject to the terms of the original fidei-commissum;
(6) A purchaser was bound to examine the chain of title even beyond the order of Court of 1896, in view of the imperative terms of section 8 of the Ordinance (3);
(7) Even a *bona fide* purchaser without any notice of a defect in the title was bound by such fidei-commissum (4.)

Cases referred to : (1) *Francesco vs. Costa and others* (1889) 48 S. C. C. 189.
(2) *Lewishamy vs. De Silva* (1906) 3 Bal. 43.
(3) *Perera vs. Marikar* (1884) 6 S. C. C. 138.
(4) *Mudaliyar Wijetunge vs. D. Rossie et al* (1946) 47 N. L. R. 361.
Soysa vs. Mohideen (1914) 17 N. L. R. 279.
Abeyesinghe vs. Perera (1915) 18 N. L. R. 222.
Ayamperumal vs. Meeyan (1917) 4. C. W. R. 182.
Fernando vs Alwis (1935) 37 N. L. R. 201.
Vallipuram vs. Gasperson (1950) 52 N. L. R. 169.
De Silva vs Thomis Appu (1903) 7 N. L. R. 123.
Carolis vs. Alwis (1944) 45 N. L. R. 156.
Ex parte Orlandini and others (1931) O. P. D. 141.
Crooks and another vs. Watson and others (1956) 1 S. A. L. R. 277.
(3) *Mirando vs. Coudert* (1916) 19 N. L. R. 90.
(4) *Abdul Hameed Sitti Kadija vs. De Saram* (1946) A. C. 208.
Abdul Cader vs. Habibu Umma (1926) 28 N. L. R. 92.

Lord Keith of Avonholm

The appellant is plaintiff for himself and as substituted for other two plaintiffs, his brothers, both now deceased, in an action brought in the District Court of Colombo for declarator that the original plaintiffs were entitled to a parcel of land in Colombo known as " Sirinivasa " and for other relief. The respondent is defendant in the action. She holds the land under gift from her father, who bought the land in dispute (on a title traceable back to the same source from which the appellant's claim is traced), and thereafter gifted it to the respondent subject to a fidei-commissum. The District Judge granted the declarator sought subject to certain conditions that it is not material here to notice. The respondent appealed to the Supreme Court which allowed the appeal with costs both there and below. From that judgment appeal has been taken, with leave of the Supreme Court, to their Lordships' Board.

The dispute turns upon the effect of a gift of land made in 1883 subject to a fidei-commissum and subsequent transactions. The material portions of the deed of gift, Deed No. 2110, are in the following terms :—

" Know all men by these Presents that we, Mututantrige Siman Fernando and Colombapatabendige Maria Perera, husband and wife residing at Horetuduwa in Panadura being desirous of making some provision for our children and in consideration of the love and affection we bear to our daughters Mututantrige Cecilia Fernando and Mututantrige Jane Fernando and for divers other good causes and considerations us hereunto moving do hereby give grant, assign, set over and assure by way of gift subject to the conditions hereinafter stated, unto the said Mututantrige Cecilia Fernando and Mututantrige Jane Fernando (hereinafter called the donees) the following property, to wit :

(description of property)

To have and to hold the said premises with the easements, rights and appurtenances thereunto belonging or used or enjoyed therewith or known as part and parcel thereof unto them the said Mututantrige Cecilia Fernando and Mututantrige Jane Fernando, their heirs, executors and administrators in equal undivided shares forever subject however to the conditions following that is to say that the said Mututantrige Siman Fernando shall during his life time be entitled to take use and

appropriate to his own use the issues, rents and profits of the said premises and that after his death and in the event of his wife Colomba Patabendige Maria Perera surviving him she shall during her life time be entitled to take use and appropriate to her own use a just half of the said issues, rents and profits the other half being taken used and appropriated by the donees to wit, the said Mututantrige Cecilia Fernando and Mututantrige Jane Fernando and subject also to the conditions that the said donee Mututantrige Cecilia Fernando and Mututantrige Jane Fernando shall not nor shall either of them be entitled to sell, mortgage, lease for a longer term than four years at a time or otherwise alienate or encumber the said premises nor shall the same or the rents and profits thereof be liable to be sold in execution for their debts or for the debts of any or either of them and the said premises shall after their death devolve on their lawful issues respectively and in the event of anyone of the said donees dying without lawful issue her share right and interest in the said premises shall devolve on and revert to the surviving donee subject however to the conditions and restrictions aforesaid.

And these presents further witness that Mututantrige John Jacob Cooray also of Horetuduwa aforesaid doth hereby on behalf of the said Mututantrige Cecilia Fernando and Mututantrige Jane Fernando, who are minors jointly with Mututantrige Alfred Thomas Fernando and Mututantrige James Fernando, brothers of the said minor donees accept the gift and grant of the said premises subject to the respective conditions aforesaid.

In witness whereof we the said Mututantrige Siman Fernando and Colomba Patabendige Maria Perera and we the said Mututantrige John Jacob Cooray, Mututantrige Alfred Thomas Fernando and Mututantrige James Fernando do set our respective hands to three of the same tenor as these presents at Horetuduwa aforesaid, this Fourth day of October, in the year One thousand eight hundred and eighty-three.

Signed, sealed and delivered in the presence of us :

Sgd. (Illegibly).
„ (In Sinhalese).
„ John J. Cooray.
„ A. J. Fernando.
„ James Fernando.
„ N. M. Fernando.
„ L. Fernando.

Sgd. C. de A. Gunaratne,
N. P."

There is appended to this deed the notary's docquet attesting that it had been read over and explained to the parties and that they and the subscribing witnesses were all known to him, the notary.

It is not disputed that this deed was effectual to constitute a valid fidei-commissum, subject to a question at issue between the parties as to its revocability. The plaintiff and his two brothers, now deceased, were the children of Jane and so indicated as fidei-commissarii under the deed, though not born at its date. The parcel of land thus gifted was known as " The Priory ".

By application under Ordinance No. 11 of 1876 in the District Court of Colombo, made on the 17th June, 1896, in which Siman and Maria were petitioners and Cecilia and Jane and James Fernando were respondents, the petitioners asked the Court to appoint James as guardian *ad litem* of Jane, who was then 19½ years of age, to authorise Cecilia and James as such guardian to convey " The Priory " to Siman free from all conditions and restrictions in consideration of the petitioners transferring to Cecilia and Jane another property called " Sirinivasa " subject to certain conditions which need not be here set out as they are incorporated in the order of the Court next to be noticed. All parties consented to the application. The professed reason for the exchange was that it was not desirable or beneficial for Cecilia and Jane to hold in common " The Priory " and that Siman was anxious to make better provision for these two daughters. " The Priory " was valued at Rs. 45,000 and " Sirinivasa " at Rs. 90,000.

On the following day, the 18th June, the District Judge pronounced the following order :—

" It is hereby adjudged and ordered that James Fernando of Horetuduwa be and he is hereby appointed guardian of Jane Fernando (the second respondent) in this matter to represent her in these proceedings.

It is further ordered and decreed that upon the petitioners transferring and assigning unto the first and second respondents Cecilia Fernando and Jane Fernando the allotments of land (fully described in Schedule B to the said petition of the petitioner) situated at Edinburgh Crescent, Flower Road and Green Path, Colombo, and the buildings thereon called and known as " Sirinivasa " bearing assessment No. 8 subject to the conditions following, that is to say, viz., that they the 1st and 2nd respondents shall not sell, mortgage or otherwise alienate the said premises except with the consent of the petitioners or the survivor of them and that the first petitioner shall during his life time be entitled to make, use, enjoy and appropriate to his own use the rents, issues and profits of the said premises and that after his death and in the event of the second petitioner surviving him she shall during her life time be entitled to take, use, enjoy and appropriate to her own use one just half of the said rents, issues and profits the other half thereof being taken, used, enjoyed and appropriated by the 1st and 2nd respondents that the said Cecilia Fernando and James Fernando as guardian of the said Jane Fernando, do and

they are hereby authorised and empowered to convey and assign unto the said Mututantrige Siman Fernando, the 1st petitioner, the aforesaid lands and premises called and known as "The Priory" (fully described in Schedule A in the said petition) absolutely and free from all conditions and restrictions contained in Deed No. 2,110 dated the 4th day of October, 1883, and that the said Cecilia Fernando and James Fernando as guardian as aforesaid do and they are hereby empowered and authorised to execute and deliver the necessary Deed of Conveyance of the said premises in favour of the said Mututantrige Siman Fernando absolutely and free and clear of all conditions and restrictions."

Following on this Order an exchange of lands was made by a conveyance by Cecilia and James, as guardian of Jane, of "The Priory" to Siman "freed and clear from all and every restrictions and conditions" in the Deed of Gift of 1883 and a conveyance by Siman and Maria "by way of gift" to Cecilia and Jane of "Sirinivasa" subject to the conditions, set out verbatim, contained in the said Order of Court. The respective conveyances are each dated 23rd June, 1896. On the same date by another conveyance Cecilia conveyed to Siman her one undivided moiety of "Sirinivasa," which she had just received from her father, in consideration of the sum of Rs. 45,000. By a fourth conveyance of the same date Siman conveyed to Cecilia "as a gift absolute and irrevocable" "The Priory" which had just been conveyed to him by Cecilia and Jane.

So far as "Sirinivasa" was concerned Siman and Jane held this now in undivided moieties. On 30th June, 1900, they having agreed on a partition, Siman by Deed of Indenture conveyed his undivided share in the eastern portion of "Sirinivasa" as delimited in the deed to Jane and Jane conveyed to Siman her undivided share in the western portion as delimited.

On 30th November, 1905, by Deed of Indenture, Jane, who was now married, with consent of her husband and of her mother, Maria, conveyed her divided share of "Sirinivasa" to Siman in consideration of the sum of Rs. 75,000. Siman thereafter by Indenture dated 6th December, 1907, conveyed the whole of "Sirinivasa" to his son James Fernando, in consideration of the sum of Rs. 175,000. Under James's will the land passed to trustees for charitable purposes and was divided by them into separate lots. The respondent's father became purchaser, *inter alia*, of two of these lots. These are the subject matter of this action and as already indicated, were gifted to the respondent by her father subject to a fidei-commissum in favour of her issue, failing whom, her brother and his issue.

On these facts a number of difficult and important questions have been argued before the Board. No question of registration arises in the case. The appellant's case is based on the acceptance by Jane, his mother, of the gift of 1883, which acceptance he says enured to the benefit of himself and his deceased brothers as fidei-commissaries under the deed of gift. Both Jane and Cecilia were minors in 1883 and acceptance was made on their behalf by Cooray and their brothers Alfred and James. Cooray, as appears from the evidence in the case, was Jane's brother-in-law, married to her sister Isabella. The deed was executed before a notary who attested that he knew all the parties. Their Lordships see no reason to think that this was not a valid acceptance on behalf of Cecilia and Jane. Their natural guardians, their father and their mother, could not accept for them, because they were the donors. In similar circumstances acceptance on behalf of a minor donee by his grandmother (who was the other donee) was held good in *Francesco vs. Costa and Others*, (1889), 8 S.C.C. 189, as was also acceptance by a brother on behalf of his minor brother in *Lewishamy vs. De Silva* 1906, 3 Balasingham 43. One of the grounds of judgment in these cases was that the donors had allowed such acceptances to be made on behalf of their minor children. Forms to be found in the Appendix to Raj Chandra's book on Fidei-Commissa disclose similar acceptances. The Supreme Court and the District Judge held that, in any event, the daughters had ratified the acceptance on their behalf by their subsequent conduct. Their Lordships do not feel called on to consider this point. In the circumstances of this case they consider that acceptance on their behalf by three of their nearest male relatives, other than their father, was sufficient acceptance of the gift to them.

There remains, however, the question whether the acceptance by Jane and Cecilia (the fiduciaries), was an acceptance for their children the fidei-commissaries. This is one of the major issues between the parties. If there was no acceptance for the fidei-commissaries the gift to them was revocable in the lifetime of the donors at any time before their acceptance and there is no doubt that the conduct of the donors and the fiduciaries in the various transactions already mentioned would amount to such revocation. The District Judge held on earlier authority in

Ceylon that acceptance by Jane was acceptance for her issue. The Supreme Court on a review largely of passages from commentators on Roman-Dutch law held that there was no acceptance for the fidei-commissaries.

Their Lordships would observe that the learned jurists of the 16th and 17th centuries were far from united in their opinions on various points arising with reference to donation and fidei-commissa and this left much scope for the consolidation of debatable points by legal decision. Their Lordships also accept as a correct approach in considering the authority of the early Dutch jurists the following passage from Professor Lee's Introduction to Roman-Dutch Law (4th Edn. p. 15) :

> " The works of the older writers, on the contrary, have a weight comparable to that of the decisions of the Courts, or of the limited number of " books of authority " in English law. They are authentic statements of the law itself, and, as such, hold their ground until shown to be wrong. Of course the opinions of these writers are often at variance among themselves or bear an archaic stamp. In such event the Courts will adopt the view which is best supported by authority or most consonant with reason ; or will decline to follow any, if all the competing doctrines seem to be out of harmony with the conditions of modern life ; or, again, will take a rule of the old law, and explain or modify it in the sense demanded by convenience."

On the question of acceptance for or by a fidei-commissary reference was made in the Supreme Court and before their Lordships to Perezius's Praelectiones (1653) Bk. VIII Tit. LV §§ 7 to 12. This learned commentator opens paragraph 7 thus :—

> " The greater dispute is whether a donor who has gifted property to another with this pact and limitation that after a certain time he should restore it to some third person can in the meantime revoke this pact."

He proceeds to point out that there was a divergence of opinion on whether the third party needed to accept to prevent revocation by the donor, the majority view being that no acceptance was necessary. In subsequent paragraphs he considers special cases of events happening before the date of restoration, viz. acceptance by a notary for the third party, death of the donee, delivery by the donee of the subject of gift to the third party, death of the donor, confirmation of the gift by the donor's oath. He then comes to another case which he deals with in paragraph 12. The following is a translation of the relevant portion of this paragraph.

> " Lastly the former opinion (by which Perezius means the opinion of the majority stated in paragraph 7) would be the more correct if the gift made to one person is made in favour of a family in which the donor wishes the property gifted to remain ; for by no pact can it be revoked in respect of after-comers ; for it is sufficient in order that it may be considered a perpetual donation that the first donee has accepted it so that there is no need of a subsequent acceptance where the burden imposed on a first donee results in an action available to all as Molina says (de Hisp. primog. L.4 c.2 n.75) because it would be absurd, in order to make a fidei-commissum irrevocable, to require the acceptance of infants and persons not yet born ; so that as the gift cannot be revoked in respect of these it follows that the same thing must be said with regard to those who precede them lest property left to the family should go to more remote relations to the exclusion of closer ones. See Anton Gomez in L.40 Tauri n.34 ; also Molina (d.loco) who say that it has thus been decided at the present day by the laws of the King of Spain, especially L.44 Tauri where delivery alone made to the one first called to the succession of the Majorate has the effect of making the Majorate itself absolutely irrevocable both in respect of himself and also of after-comers."

Of this passage their Lordships would observe that the writer speaks of a " perpetual donation " not of a perpetual fidei-commissum. " *Satis enim est ut censeatur donatio perpetua quod primus eam acceptaverit, ulteriore acceptatione opus non sit.*" In its context their Lordships think it clear that perpetual donation here means an irrevocable donation.

Their Lordships have not had their attention directed to any other commentary of the early writers which deals with this matter as fully as Perezius has done. Mr. Justice Basanayake in the Supreme Court quotes certain passages from Van Leeuwen's Censura Forensis (1662) and Pothier's Law of Obligations (1761). Van Leeuwen does not appear, however, to be dealing with fidei-commissa, but with donations generally and indeed would seem to exclude fidei-commissa as appears from the following passage (iv.12.18) : " But there is a doubt whether a gift can be conferred on anyone through an intermediate person, as it verges on a fidei-commissum, which cannot be created by gift or other disposition inter vivos, nor can it hold good." This view that a fidei-commissum cannot be created by gift *inter vivos*, if at one time doubtful, does not now prevail in Roman-Dutch law. But the passage would seem to exclude Van Leeuwen as an authority on the problem with which their Lordships are concerned. Pothier was not of course an authority on Roman-Dutch law. He did not accept the doctrine of *jus quaesitum tertio* but he did recognise gifts made *sub conditione* or *sub modo*. In this connection he poses the questiou (Law of Obligations, Evans translation, Vol. I, p. 39) :

"Hence arises another question, whether after giving you anything with the charge of restoring it to a third person in a certain time, or of giving him some other thing, I can release you from the charge without the intervention of such person, who was no party to the act, and who has not accepted the liberality which I exercised in his favour."

Here again, as did Perezius, he sets out the two conflicting views of learned writers on this question without arriving at any conclusion. Their Lordships are then left in the position that, so far as has been shown, there is nothing in the older writers more definite than the passage quoted from Perezius.

In connection with this passage from Perezius there was canvassed before this Board—a matter which entered into the ratio of the judgment of the Supreme Court—whether the gift in the present case is a gift made in favour of the family, "*si donatio concernat favorem familiae*". The view of the Supreme Court was that it was not a gift in favour of the family because it came to an end with the first generation of fidei-commissaries, that is with Jane's children who were free to dispose of the property as they wished. What the Court required was a fidei-commissum enduring indefinitely from generation to generation, in other words a perpetual fidei-commissum. Reliance for this view was placed particularly on certain passages in Sande's Treatise on Restraints on Alienation (1633) (Webber's translation). Their Lordships are unable to draw the same conclusion from the passages in question when taken in their context with other passages. The material passages are to be found in Part III, Chapter V of the treatise and their Lordships will quote more fully from this chapter than was done in the Supreme Court. Chapter V is headed "What fidei-commissum is induced from this prohibition upon alienation". The writer first considers two types of fidei-commissum which he calls conditional and simple or absolute. Broadly the distinction is between a prohibition of alienation outside the family (conditional) and a direct bequest such as "I leave my landed property to the family" coupled with a prohibition against alienation (simple and absolute). It is to be observed that the writer is speaking of testamentary dispositions and not of gifts *inter vivos* but that would not appear to be material. The importance of the distinction was in the results that might follow and Sande discusses these very fully. Sande clearly favours restricting restraints on alienation as much as possible. In paragraph 10 he says:

"And in case of doubt a testator should not be considered to burden his descendants with the perpetual and indefinite fidei-commissum, by a prohibition restraining the heir from alienating. And a substitution made in favour of a family, of descendants, or of several persons under a collective name, takes place in the highest grade which survives at the time when the condition arises, and it is not extended to the lower grades unless the testator has expressly so willed."

He returns to this point in paragraph 11:

"But the point we are discussing is not in what order succession to a fidei-commissum to a family takes place, but whether a testator, by a simple prohibition against alienation outside the family, wishes to induce a perpetual fidei-commissum among the members of the family, and to make this apply to many, so that one after another, and so on, as long as a single member of the family survives, is considered to be burden by fidei-commissary substitution. We say it is not so, because in cases of doubt a direct substitution rather than an oblique and fidei-commissary one is presumed."

Sande elaborates the matter further in paragraphs 13, 14 and 15 which, to preserve the context their Lordships quote in full:—

"13. The argument which the supporters of the opposite view take up is very weak. They say, since persons of different grades are described under a collective term, and since they therefore cannot be admitted to the inheritance all at the same time, but must succeed in the order of succession, one after the other, that the term must have some extended meaning. This is quite true; but the extension is one not of time, but of grades, so that many grades are called to the fidei-commissum, which, however, rest only in the first grade of those who are admitted, and is not extended from that to lower grades; and thus many grades may be called, but only one can be said to be admitted.

14. Since this is what takes place when a fidei-commissum is expressly bequeathed to a family, it would much rather take place in a tacit fidei-commissum, which is induced by interpretation from a prohibition against alienation outside the family, for otherwise a tacit fidei-commissum would induce a greater multitude of fidei-commissa than an express one. Therefore a fideicommissum which is implied from a prohibition upon alienation is binding only on one person (unicum), and therefore if he, who has succeeded by virtue of such tacit fidei-commissum to the estate on account of alienation which has been made by another, afterwards alienates the same estate to a stranger he would do so with impunity.

15. This is so except where it can be gathered from the words of the Will itself that the intention of the testator was otherwise; for example, if wishing to provide for the preservation of his family, he says, "I will, or I order, that the landed property be retained, remain and be left in the family, so that it may never go out of the family." For from these words would be induced a real, multiplex and perpetual fidei-commissum, which would last as long as any one of the family survived. And therefore, even although the landed property has once been left in the family, yet it would be against the will of the testator that it should at any time thereafter go out of the family."

Sande concludes Chapter V with the passage : " The truer view is that when the testator wills that his goods remain in his family and his name *in perpetuo*, then the fidei-commissum is never closed but is indefinitely extended."

Consideration of the effect of prohibitions of alienation in favour of a family will be found in others of the early commentators. Their Lordships would quote only one passage from Voet's Commentaries on the Pandects (1698-1704) dealing with Fidei-Commissa (Macgregor's translation) XXXVI.1.28 :

> " Where a fidei-commissum is left to a family the nature and effect of such a bequest is not the same in every case. For the bequest may be of such a kind that the fidei-commissum is a single one ; and, where it has operated once, or where there has been one restitution to the family, the fidei-commissary obligation is determined ; nor is the person who by virtue of such a restitution to the family has acquired the property or the inheritance obliged after his death to restore it to another member of the same family, but he is able to transfer it to a stranger by act *inter vivos* or by last Will. But on the other hand, it may be a recurring (multiplex) fidei-commissum, circulating as it were throughout the family, with the result that the person to whom in the first instance restitution has been made as being one of the family is bound to restore the inheritance to another member of the family, and he again to a third member, and so on, so long as there are members of the same family surviving."

Their Lordships are unable to extract from these passages that a fidei-commissum in favour of the family is confined to a fidei-commissum which goes on from generation to generation. The writers seem to contemplate a fidei-commissum which comes to an end with the first generation as being a fidei-commissum in favour of the family. The question whether it is perpetual or not will depend on the language used by the testator, or donor. Nor can their Lordships see any reason why it should be so limited. When the gift in this case was made Jane was a child. It would be impossible for any issue of hers to accept for very many years. The reason given by Perezius that " it would be absurd, in order to make a fidei-commissum irrevocable, to require the acceptance of infants and persons not yet born " is as valid in the case of her children as it would be in the case of children to come into existence in a perpetual fidei-commissum. No doubt the same could be said of a fidei-commissum to stranger beneficiaries yet unborn. But a donation in favour of the family is an exception and the presumption of acceptance by a parent fiduciary for his immediate descendants is as valid as the presumption of acceptance for descendants to the third or fourth generation.

The great weight of authority derived from legal decision in Ceylon until the decision in the present case supports that view. In a matter in which so much was left open by the early commentators their Lordships attach great weight to a current of legal decision in a country in which fidei-commissa are extensively resorted to by its inhabitants, are part of its law and become frequent subject of consideration by its Courts. The earliest authority to which their Lordships were referred is the case of *Perera vs. Marikar*, 1884, 6 S.C.C. 138. The facts and judgment are concisely set out in the head note :

> " A father conveyed certain houses by post-nuptial settlement to his married daughter, subject to the condition that she should enjoy the same for her life with restraint on anticipation or incumbrance, and that after her death they should be enjoyed by her heirs and descendants in perpetuity. The daughter accepted this gift. Afterwards, the daughter having as yet no issue, the father made a will by which he devised the same houses to the daughter absolutely, and died, and his executor executed a conveyance of the houses in favour of the daughter, her heirs, executors and her assigns for ever. After the father's death a son, the plaintiff, was born to the daughter.
>
> Held, (*dissentiente* Burnside, C.J.), affirming the decision of the District Court, that the plaintiff, when he came into esse had an interest in the houses, which could not be defeated by any act of the testator subsequent to the settlement, and consequently that plaintiff, on establishing that he was the son of the settlor's daughter, was entitled to recover the houses in ejectment from defendant, who claimed through a person to whom the daughter had conveyed the houses after the executor's conveyance to her."

The judgment of the majority of the Court (Clarence and Dias, J.J.), was delivered by Mr. Justice Clarence. He refers to Voet and Perezius and quotes from the passage in Perezius already quoted by their Lordships. He then proceeds :

> " I find, therefore, the Roman-Dutch Jurists, so far as their hypothetical reasoning or imaginary cases go, favouring what seems to me the common sense view, that where a voluntary family settlement is made, by which somebody benefits immediately and other classes contingently on their being born and living to inherit the settlement, takes effect in favour of these future classes immediately on its taking effect, qua the immediate participator ; and for these reasons I think that the decision of the learned District Judge in upholding the plaintiff's demurrer must be affirmed."

It has been said in a later case (*Mudaliyar Wijetunga vs. Duwalage Rossie et al* (1946) 47 N.L.R. 361 at 370) that *Perera vs. Marikar* was not a case of a perpetual fidei-commissum but a fidei-commissum unicum. But the point, in their Lordships' view is immaterial as the ratio of the judgment in the passage quoted from Clarence, J.

is not, in their Lordships' view, dependent on the character of the fidei-commissum so long as it is in favour of a family. The decision was a decision of the full Court. It has been followed in a series of cases which their Lordships find it unnecessary to examine at length. None so far as their Lordships have noted was a case of a perpetual, or multiplex, fidei-commissum. The cases constitute a very long train of authority.

In *Soysa vs. Mohideen* (1914), 17 N.L.R. 279 it was argued that the Perezius exception must be confined to the case of a *familia* which includes other people besides children and descendants. De Sampayo, A.J. said of this argument. " But no such distinction is intended, and the reasoning applies even more strongly to a fidei-commissum, in favour of a family in the narrower sense of a man's own children and descendants. Perezius means to lay down generally that acceptance by the immediate donee, who is the head of the family, is valid acceptance on behalf of all those who follow him, and that, then, the entire donation is considered *perpetua* or at once complete in respect of all the succeeding beneficiaries." In referring here to " descendants " the learned Judge appears to mean children of the fiduciaries because in that case the gift was to three nephews and a niece and their issue with a devolution over failing issue. In *Abeyesinghe vs. Perera* (1915) 18 N.L.R. 222 where the fidei-commissum was clearly confined to the legitimate children of the fiduciary, Chief Justice Wood Renton regarded *Soysa vs. Mohideen* as a precedent and followed it. *Perera vs. Marikar* and *Soysa vs. Mohideen* were followed in *Ayamperumal vs. Meeyan* (1917) 4 C.W.R. 182 ; *Fernando vs. Alwis* (1935) 37 N.L.R. 201 at 226 ; *Wijetunga vs. Rossie et al* (1946) 47 N.L.R. 361 ; and *Vallipuram vs. Gasperson* (1950) 52 N.L.R. 169, which were all cases where the fidei-commissary heirs were confined to children of the fiduciary donees. Reliance was placed by Counsel for the respondent on decisions in a contrary sense in *De Silva vs. Thomis Appu* (1903) 7 N.L.R. 123 and *Carolis vs. Alwis* (1944) 45 N.L.R. 156. In the latter case Soertsz, J. found himself able to distinguish the case in hand from *Perera vs. Marikar* and *Mohideen vs. Soysa*. For the reasons already given their Lordships think he was in error in thinking that the ratio of the decision in *Perera vs. Marikar* proceeded on the view that it was a perpetual fidei-commissum. He also seems to have been in error in thinking that *Perera vs. Marikar* was not a full Court decision.

The same view has been taken in South Africa in a case which is indistinguishable on its facts from the present case and on grounds substantially the same as those which appealed to the Judges of the Ceylon Courts who followed the precedent of *Perera vs. Marikar*. See *Exparte Orlandini and Others* (1931), O.P.D. 141. Much stress, however, was placed by the respondent on a recent case in the Supreme Court of South Africa, *Crookes and Another vs. Watson and Others* (1956) (1), S.A.L.R. 277. his was a case of an *inter vivos* trust, declared irrevocable, by which the settler gifted certain shares to two trustees under trust to hold the same for the purposes, *inter alia*, of paying his daughter, on her attaining 25 years of age, the net income up to £1,000 per annum, to accumulate any balance of income and on the daughter's death to distribute the trust fund among her lawful issue equally, whom failing among her surviving brothers and the issue of any deceased brother and failing surviving brothers among her next of kin. The trustees were empowered to realise the shares and invest the proceeds. In the trust deed the trustees declared that they accepted the gifts in trust and the trust mentioned. After the daughter had reached the age of 25 years the settlor proposed to amend the trust deed to the effect of paying her £5,000 out of the trust fund and paying her the whole of the net income. The daughter's husband and her brothers consented for themselves and as guardians of their minor children. A curator *ad litem* was appointed to represent unborn issue and other unascertainable beneficiaries. The decision of the majority of the Court (Centlivres, C.J., Van den Heever, J.A. and Steyn, J.A., *diss.* Schreiner, J.A. and Fagan, J.A.) was that the ultimate beneficiaries acquired no rights under such a trust until they accepted and that the trust was revocable till accepted. It would appear that the daughter was regarded as having accepted the benefit conferred on her. The Court below had held that the trust was " a contract for the benefit of third parties having the effect of a fidei-commissum " and that " in the case of the settlement of property in a family the acceptance of the first donee enures for the benefit of and is considered an acceptance by all the donees ". One member of the lower Court was prepared to support the judgment also on an additional ground which seems to have appealed to the minority in the Supreme Court but which it is not material to notice here. The English law of trusts, it should be noted, does not prevail in South Africa and an *inter vivos* trust appears to be regarded as a contract entered into between the settlor and the trustees for the benefit of third parties which in general may be revocable before acceptance by the third parties. The Court dealt *inter alia*

with the question whether what was called the Perezius exception applied to exclude the general rule that acceptance was necessary. For various reasons the Supreme Court held it did not. The shares were not gifted to the daughter but to the ultimate beneficiaries who took them free of any fidei-commissum. The daughter took only the income up to £1,000 per annum and her acceptance of that could not be regarded as an acceptance by her of the corpus on behalf of the ultimate beneficiaries. The shares might be sold and so it could not be said that they came within the conception of Perezius and other authorities of a family settlement by which " the subject matter of the donation is inalienable and must remain intact ". Their Lordships are unable to find in the judgments of the majority any clear indication that in their view the Perezius exception is confined to the case of a perpetual fidei-commissum in favour of the family. Van den Heever, J.A. (p. 296), would appear to come nearest to that view. Centlivres, C.J. (p. 289) merely says, " In other words where there is a settlement in favour of a family and the first member of the family accepts, his acceptance enures for the benefit of all succeeding members of the family ". It appears to their Lordships that the ratio of the judgment did not require any consideration of whether the Perezius exception was confined to a perpetual fidei-commissum. The judgment did not bear to overrule the earlier case of *Orlandini* where it was not so limited. Their Lordships are unable to take the view that the decision is in conflict with the long tract of decision in Ceylon which, in any event, their Lordships think for the reasons stated should prevail.

If there was an irrevocable fidei-commissum of " The Priory " in favour of Jane's children by virtue of the gift and acceptance of 1883, the next question is whether that applies to " Sirinivasa " as a result of the proceedings that took place in 1896, when " The Priory " was exchanged for " Sirinivasa ". Mr Justice Basnayake in the Supreme Court took the view that these proceedings were not initiated by the proper parties, but this view was not supported by Counsel for the respondent before the Board. Their Lordships would only observe that they fail to understand why Siman as a person entitled to the possession and receipts of the rents and profits of " The Priory " as usufructuary should not come under the express language of section 5 of the Entail and Settlement Ordinance, 1876, as a person entitled to petition the Court and in any event the fiduciaries, Cecilia and Jane, were consenting parties to the Order made.

A more important question is what was the effect of the Order of the Court. It directed, in accordance with the terms of the application that " the first and second respondents (Cecilia and Jane) shall not sell, mortgage or otherwise alienate the said premises except with the consent of the petitioners (Siman and Maria) or the survivor of them ". No reference was made, as in the original gift, to the premises devolving after the death of Cecilia and Jane on their respective issue. Their Lordships would refer here to the provisions of sections 4, 7 and 8 of the Ordinance of 1876, so far as relevant. These are as follows :—

> " 4. Whenever any immovable property is now or shall hereafter be held under or subject to any entail, fidei-commissum, or settlement, whereby the alienation of such property is prohibited or in any way restricted, it shall be lawful for the District Court of the district in which such property is situate, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under such entail, fidei-commissum, or settlement, and subject to the provisions and restrictions hereinafter contained, from time to time to authorize a lease, exchange, or sale of the whole or any part or parts of such property, upon such terms and subject to such conditions as the said Court shall deem expedient.....
>
> 7. All money received under or by virtue of any sale effected under the authority of this Ordinance shall be applied, as the District Court shall from time to time direct, to some one or more of the following purposes, that is to say :—
>
> (1) the discharge or redemption of any charge or incumbrance affecting the property, or affecting any other property subject to the same entail, *fidei-commissum*, or settlement ; or
>
> (2) the purchase of other immovable property to be settled in the same manner as the property in respect of which the money was paid ; or
>
> (3) investments in the Loan Board or in Government securities, the interest thereof being made payable to the party for the time being otherwise entitled to the rents and profits of the land sold ; or
>
> (4) the payment to any person becoming absolutely entitled.
>
> 8. Any property taken in exchange for any property exchanged under the provisions of this Ordinance shall become subject to the same entail, *fidei-commissum*, or settlement, as the property for which it was given in exchange was subject to at the time of such exchange."

In their Lordships' view it is clear from these provisions that the purpose and intendment of the Ordinance was to preserve in the event of any sale or exchange of premises subject to a fidei-commissum the terms of the fidei-commissum and to apply these to the land taken in exchange or to the price of the premises sold

which was to be treated as a *surrogatum* of the original gift. In the present case it is section 8 that applies and, in their Lordships' opinion, "Sirinivasa" when received in exchange for "The Priory" must be taken to have been held in terms of the original fidei-commissum. This was the view also of the District Judge and of Mr. Justice Basnayake in the Supreme Court. It was argued for the defendant that the prohibition on alienation imposed on the fiduciaries except with the consent of their parents was a relaxation of the absolute prohibition imposed in the original gift and so defeated the fidei-commissum, but for the reasons already given this would be contrary to the terms of the Ordinance and if such is the construction of the Order the terms of the Ordinance in their Lordships' view must prevail. But, in their Lordships' opinion, the better view is that the Order affected only the powers of the fiduciaries in respect of their own rights and interests in the land in question and it may be that, as they consented to the Order, it was competent to modify the terms of the original gift in this respect. But that could not affect the rights of the fidei-commissaries.

It was argued that on the law as it was understood in 1896 there was no acceptance binding the donors and the fiduciaries in a question with the fidei-commissaries then unborn, and that it was open to the donors and the donees and the Court to alter the terms of the original gift to the effect of cutting out, or revoking the gift to, the fidei-commissaries. Their Lordships are unable to hold, as already indicated, that this was understood to be the law in 1896 or that the Court in 1896 gave any consideration to the question. But in any event the effect of the Ordinance of 1876 was to write the terms of the original fidei-commissum into the substituted gift and the consequences of what was done in 1883 must be considered to-day when the fidei-commissaries make their claim and not in 1896 when there was none in existence.

It was further argued that the respondent, or her father who purchased the property, need not look further back in the chain of title than the Order of the Court in 1896 and was entitled to rely on the terms of that Order. Their Lordships are unable to assent to that argument in view of the imperative terms of section 8 of the Ordinance. Reference was made to the case of *Mixando vs. Coudert* (1916), 19 N.L.R. 90 in support of the respondent's contention. In their Lordships' view that case has no application to the circumstances here. That was a case where property had been sold many years previously under the Ordinance No. 11 of 1876. There were some irregularities in the procedure when the property was ordered to be sold and the Court apparently thought that it had been subject to a fidei-commissum. But the result was that until set aside the order could be regarded as a sale under section 7 of the Ordinance which would discharge the property of the fidei-commissum. The purchaser was held to have acquired a free and absolute title unless the whole proceedings were rescinded. Their Lordships see no reason to doubt the soundness of that decision. The ratio of this decision would apply, in their Lordships' opinion, to "The Priory" which was exchanged free of any fidei-commissum for "Sirinivasa" but it could not affect "Sirinivasa" which was taken under burden of the fidei-commissum.

It was said also that the defendant's father was protected as being a *bona fide* purchaser without any notice of a defect in his title. Their Lordships are prepared to assume that the defendant's father was such a purchaser. But this cannot avail the defendant. Fidei-commissa have long been recognised in the law of Ceylon and, apart from any question of prescription, or of prior registration in a case where a conveyance has been obtained from a fiduciary who may be taken to hold on an alternative title of intestacy, they have been held to prevail against a *bona fide* purchaser. A fiduciary though vested in the dominion of the property gifted has that dominium only during his life and cannot convey more than he enjoyed. On his death, or other event, the fidei-commissary becomes the owner of the property. The doctrines of English law have no play in this sphere. This has already been recognised by this Board in the case of *Abdul Hameed Sitti Kadija vs. De Saram* (1946) A.C. 208.

The remaining point in the appeal concerns the partition of "Sirinivasa" which took place between Jane and her father in 1900. When Cecilia conveyed to Siman her undivided moiety of "Sirinivasa" on 23rd June, 1896, she parted with the dominium and, in their Lordships' opinion, with all her rights and interest in the property. So long as she held her undivided share she could have made a partition agreement with her sister Jane and it is conceded that in such an event the fidei-commissum would have attached to each of the divided portion for the benefit of Jane's issue and Cecilia's issue respectively. See *Abdul. Cader vs. Habibu Umma* (1926), 28 N.L.R. 92. In their Lordships'

opinion Siman stood in Cecilia's shoes and was entitled to make a partition agreement with Jane. He was a co-owner with Jane and had all the rights of a co-owner so long as Cecilia was alive, otherwise there was no one who could effect a partition with Jane. This was the view taken by the District Judge. It was suggested that there was no evidence that Cecilia was alive when the partition was made. But it is clear from the proceedings in the Courts below that it was the common assumption that Cecilia was alive and the District Judge held that the partition was good and binding on the fidei-commissaries on that assumption. The Supreme Court did not have to deal with the question of partition on the view that it took of the question of acceptance. But it is clear that no point was taken for the respondent on appeal to the Supreme Court touching the question of Cecilia's being dead. Nor is the point taken in the respondent's case on appeal to this Board. The inference is that it was well known that Cecilia was alive at the date of the partition. But on any view their Lordships would not be prepared to allow the point to be taken now.

For these reasons their Lordships will humbly advise Her Majesty to allow the appeal, to set aside the judgment and decree of the Supreme Court and to restore the judgment and decree of the District Court. The respondent must pay the costs of the appeal to this Board and of the appeal to the Supreme Court of Ceylon.

Appeal allowed.

Present : Sansoni, J.

PEMAWATHIE vs. SIRISENA

S. C. 933—*M. C. Negombo No.* 83179

Argued on : 15th February, 1957
Decided on : 20th February, 1957

Maintenance Ordinance—Sections 2 *and* 3—*Wife's application for maintenance—Failure to prove cruelty—Dismissal—Fresh application alleging adultery—Does dismissal of first application operate as* res judicata ?

Held : That failure to prove desertion at a particular time does not mean that there cannot be desertion at a subsequent time.

Cases referred to : *Gunahami vs. Arnolis Hami* 3 N. L. R. p. 128.
Subaliya vs. Kannangara 4 N. L. R. p. 121.

M. M. Kumarakulasingham for defendant-appellant.

S. W. Jayasooriya with *Norman Abeysinghe*, for applicant-respondent.

Sansoni, J.

This is a maintenance action between husband and wife. The wife sued her husband for maintenance in 1953. Her husband invited her to live with him but she declined the invitation, alleging cruelty on his part. After inquiry her application for maintenance was dismissed on the ground that she had failed to establish her charge of cruelty.

She filed a 2nd application for maintenance in 1956, and her application has been granted after inquiry. The husband has appealed against this order and it has been contended that the dismissal of the earlier application operates as *res judicata* to bar the present application.

Now at the inquiry into the 2nd application the wife alleged, and proved, that her husband was guilty of adultery.

The issue which was the subject of inquiry and decision on the 1st application, viz. cruelty, was therefore quite different from the issue which was inquired into and decided on the present application. The 1st application failed because the applicant could not prove the charge of cruelty during the period preceding that application. The 2nd application raised the issue whether the husband had committed adultery, and the application was based on the failure to

maintain his wife during a period subsequent to the order made on the 1st application, no issue of adultery was raised at the 1st inquiry.

I fail to see how the earlier dismissal precludes the Court from allowing the 2nd application. There is authority for this view in *Gunahami vs. Arnolis Hami* 3 N.L.R. p. 128 and *Subaliya vs. Kannangara*, 4 N.L.R. p. 121. In those cases Bonser, C.J., laid it down that the question of failure to maintain is one that may be raised from time to time. When the question is one of paternity or marriage a previous finding between the parties would be *res-judicata*, but a failure to prove desertion at a particular time does not mean that there cannot be desertion at a subsequent date.

I therefore, dismiss this appeal with costs.

Appeal dismissed.

Present : WEERASOORIYA, J. AND SINNETAMBY, J.

VELLAITHAMBY vs. THE ATTORNEY-GENERAL

S. C. No. 11—*D. C. (F) Batticaloa* 1090/*L*

Argued on : 22nd and 23rd January, 1957
Delivered on : 22nd February, 1957

Irrigation Ordinances (Cap. 312) sale under, for non-payment of rates—Purchase by Crown—Title vested in Crown absolutely on issue of certificate of sale under section 66 (2)—Creation of new title as by partition decree.

Where a land is sold under the provisions of the Irrigation Ordinance for non-payment of irrigation rates and purchased by the Crown, and where a certificate of sale under section 66 (2) of the Ordinance is issued, the title to the said land vests in the Crown absolutely and free from all encumbrances.

So long as such title remains vested in the Crown all previous titles must be regarded as wholly extinguished or suspended by operation of law and a new title created in the Crown which is good against all persons.

Per WEERASOORIYA, J.—These provisions indicate that in the case of a sale of the land in the first instance to a purchaser other than the Crown only the right, title and interest to and in the land (free of all encumbrances) are transmitted, whereas in the case of a sale to the Crown the land itself vests in the Crown absolutely and free of all encumbrances.

Cases referred to : *James vs. Carolis* 17 N. L. R. 76 at 81.
Nugawela vs. The Municipal Council, Kandy 40 N. L. R. 166.
Sivacolundu vs. Noormaliya 22 N. L. R. 427.
Bernard vs. Fernando 16 N. L. R. 438.

Walter Jayawardene with *A. S. Vanigasooriyar*, for plaintiff-appellant.

V. Tennekoon, C.C., with *M. Fernando, C.C.*, for defendant-respondent.

WEERASOORIYA, J.

On the 18th June, 1945, two allotments of land called Akkarai Vyal were sold under the provisions of the Irrigation Ordinance (Cap. 312) for non-payment of Irrigation rates due in respect of them and were purchased by the Crown, and on the 19th March, 1946, there were issued the two certificates of sale D2 and D3 vesting title to them in the Crown. Section 66 (2) of the Ordinance provides that on such a sale taking place a certificate substantially in the form given in Schedule II of the Ordinance shall be issued. The certificates D2 and D3 are substantially in that form, and it is clear from the provisions of section 66 (2), read with the terms of the relevant form of certificate, that on the issue of the certificates the said two allotments vested absolutely in the Crown free from all encumbrances. Although the certificates D2 and D3 were subsequently registered, purportedly under the provisions of the Registration of Documents Ordinance (Cap. 101), it was granted by learned Crown Counsel that the registration was not in accordance with the provisions of section 15 (1) (*a*) of that Ordinance and that they must, therefore, be deemed not to have been duly registered.

Notwithstanding the sale, the original owners purported to transfer the two lands for consideration by deed P1 of the 26th December,

1945, and the subsequent devolution of the title so disposed of appears from the deeds P2 to P6, under the last of which the plaintiff-appellant claims to have acquired title. All these deeds have been duly registered. P3 to P6 were executed subsequent to the issue of the certificates D2 and D3.

The case for the appellant is that the deeds in his chain of title prevail against the unregistered certificates D2 and D3 by virtue of section 7 (1) of the Registration of Documents Ordinance and it is on that basis that he filed this action against the Crown for declaration of title to the two lands and consequential relief. The learned District Judge dismissed the action with costs, and the present appeal has been filed against that order.

One of the questions canvassed at the trial and in appeal was whether the Crown is bound by the provisions of the Registration of Documents Ordinance. But this question, which does not appear to be covered by any previous authority, need not be considered as the appellant's claim must fail on another point of fundamental importance the decision of which, in my opinion, and also as conceded by learned Counsel for the appellant, is fatal to the appeal.

To deal with that point immediately, it is clear that the provisions of section 7 (1) of the Registration of Documents Ordinance would not come into operation unless the appellant shows that the deeds in his chain of title, as well as the two certificates of sale, are from the same source, (vide the case of *James vs. Carolis* 17 N.L.R. 76 at 81.) The effect of a certificate of sale vesting title absolutely and free from encumbrances was considered in *Nugawela vs. The Municipal Council, Kandy* 40 N.L.R. 166. The question that arose there was whether a land sold for non-payment of Municipal rates and purchased by the Kandy Municipal Council had vested in the Council, by virtue of a certificate of sale issued under the relevant provisions of law, free from any obligation to perform or commute certain services which governed the tenure of the land prior to the sale, and that question was answered in the affirmative by a bench of two Judges who, in doing so, dissented from an earlier decision of this Court (also of two Judges) in *Sivacolundu vs. Noormaliya* 22 N.L.R. 427. For the purpose of the present case, however, it is not necessary to attempt to resolve the conflict between these two decisions as on a consideration of the relevant provisions of the Irrigation Ordinance (Cap. 312) it is possible to reach the conclusion that by virtue of the certificates D2 and D3 there came into existence an entirely new title in the Crown to the lands in suit which was not dependent on any transmissible interest which the proprietor of the land or other person had in them immediately prior to the sale.

Sub-section (1) of section 2 of that Ordinance (which has since been replaced by the Irrigation Ordinance, No. 32 of 1946) provides that an irrigation rate under the Ordinance with reference to any land to which it relates is a charge in favour of the Crown, and under sub-section (4) such charge " shall be binding on the land and every part thereof, and such land and every part thereof, and the proprietors of such land and every part thereof, shall be liable for the payment of the same, into whosoever hands the ownership, possession, tenancy, or occupancy of such land or any part thereof under any circumstances may at any time pass, until the said charge shall be extinguished, and such charge shall have priority over all mortgages, hypothecations, encumbrances, and charges whatsoever, whether antecedent in date or otherwise, affecting the land ". Section 62 provides for the seizure and sale of any land for default in the payment of rates due in respect of it. Sub-section (1) of section 66 deals with a sale to a purchaser other than the Crown and it provides that on the issue of a certificate of sale in the prescribed form the land shall vest in the purchaser free from all encumbrances whatsoever. Sub-section (2) of section 66 deals with a purchase on behalf of the Crown and in such a case, in terms of the prescribed certificate of sale, on the issue thereof the land would vest absolutely in the Crown free from all encumbrances. Section 67 deals with the cancellation of a sale of land purchased by the Crown on payment (at any time before re-sale to a third party) by or on behalf of the proprietor of the amount due in respect of the land, and it provides that on an endorsement being made by the Government Agent on a certified copy of the certificate which issued under section 66 (2) and on the registration of such endorsement in the office of the Registrar of Lands the land shall re-vest in the proprietor as though such sale had never been made. Section 68 provides for a re-sale of the land to a third party by a similar endorsement and it is important to note that on such an endorsement being registered in the office of the Registrar of Lands what is declared to vest in the purchaser is the right, title and interest which would have been acquired by him if he had purchased the land at the original sale. These provisions indicate that in the case of a sale of the land in the first instance to a purchaser other than the Crown only the right, title and interest to and in the land (free of all encumbrances) are transmitted, whereas in the case of a sale to the Crown the land itself

vests in the Crown absolutely and free of all encumbrances.

In my opinion, as long as the title to the lands in suit remains vested in the Crown all previous titles must be regarded as wholly extinguished, or suspended, by operation of law, and a new title created in the Crown which is good against all persons. The position appears to be no different from a decree for partition of land which, it was held in *Bernard vs. Fernando*, 16 N.L.R. 438 creates a new title in the parties and which, though unregistered, prevailed over a subsequent registered conveyance by which one of the co-owners sold his undivided interests in the land prior to partition.

The appeal is, therefore, dismissed with costs.

SINNETAMBY, J.

I agree.

Appeal dismissed.

Present : SINNETAMBY, J.

P. KARIYAWASAM, INSPECTOR OF LABOUR vs. S. A. C. A. RAFEEK

S. C. 689/56—*M. C. Balapitiya Case No.* 13919

Argued on : 22nd October, 1956
Decided on : 30th October, 1956

Shop and Office Employees (Regulation of Employment and Remuneration) Act—Charge of keeping shop open after hours and serving customers—Has Assistant Commissioner of Labour power to sanction prosecution—Evidence Ordinance, section 114.

Held : (1) That an Assistant Commissioner of Labour has, under section 46 (2) of the Shop and Office Employees (Regulation of Employment and Remuneration) Act, power to sanction prosecution for offences under the Act and to exercise any power, duty or function of the Commissioner of Labour, subject to directions, if any, by the Commissioner. It is not necessary to prove that this authority is derived from a direction given by the Commissioner.

(2) That the presumption under section 114 of the Evidence Ordinance applies in this case.

V. T. Thamotheram, Senior Crown Counsel, for the complainant-appellant.

N. E. Weerasooria, Q.C., D. E. V. Dissanayaka and *E. D. Wikramanayake*, for the accused-appellant.

SINNETAMBY, J.

The accused appellant was charged in this case under the Shop and Office Employees (Regulation of Employment and Remuneration) Act with having kept his shop open after hours and with serving a customer who had come there to purchase goods. The learned Magistrate found that the accused had contravened the provisions of the Act but, nevertheless, proceeded to acquit him on the ground that the prosecution had not been sanctioned by the Commissioner of Labour as required by section 64 of the Act. The appeal is against this finding.

It would appear that the prosecution was in fact sanctioned by the Assistant Commissioner. The proceedings do not show that any exception was taken to the prosecution till the final stages of the trial, presumably, when Counsel addressed the Court. Section 68 of the Act provides that the word " Commissioner " includes " subject to any direction given by the Commissioner under section 46 (2) any Deputy or Assistant Commissioner ". I reproduce the entirety of section 46 from which it is apparent that there is a distinction drawn between a Deputy or Assistant Commissioner and an officer appointed under sub-section 3 :

Section 46. (1) The Commissioner of Labour shall be the officer in charge of the general administration of this Act.

(2) Subject to any general or special directions of the Commissioner, any Deputy or Assistant Commissioner of Labour may exercise, perform or discharge any power, duty or function of the Commissioner under this Act or under any regulation.

(3) There may be appointed such number of officers and servants as may from time to time be required for the purpose of carrying out or giving effect to the provisions of this Act.

(4) The Commissioner may either generally or specially authorise any officer appointed under sub-section (3) to exercise, perform or discharge any power, duty or function of the Commissioner under this Act or under any regulation.

Sub-section (2) empowers a Deputy or Assistant Commissioner to exercise the function of a Com-

missioner subject to the proviso that it can be modified or restricted by general or special direction of the Commissioner. Sub-section 4 does not give this general power to the officer appointed under sub-section 3 but such officer can exercise that power only if he is specially authorised to do so. It will thus be seen that a Deputy or Assistant Commissioner derives his authority by virtue of his office but this is subject to a limitation which may be placed upon it. The special officer, on the other hand, derives his power from the authority granted to him by the Commissioner. Before, therefore, such a special officer can exercise the functions of a Commissioner he must first show that he has the authority. It is obvious that in such a case a prosecution launched with the sanction of such an officer must on the face of it show that the officer had the authority granted to him.

The case of the Deputy Commissioner is otherwise. Normally he can exercise the functions of a Commissioner unless prevented from doing so by special directions. Where, therefore, a prosecution is authorised by an Assistant Commissioner it would be reasonable to infer that no limitation had been placed upon his powers. His act is an official act and in my view the presumption created by section 114, illustration E, of the Evidence Ordinance would apply. Section 114, illustration E, is to the following effect :

> " The Court may presume that judicial and official acts have been regularly performed."

If therefore an official purports to act by virtue of his office there is presumption that he did so regularly without any limitation being placed upon his powers. He derives his power by virtue of his office unlike a person appointed under section 46 (3) where the right is derived from the authority that is given. In my view therefore it was not necessary for the prosecution to prove the negative fact that no limitation had been placed upon the normal powers which an Assistant Commissioner is empowered to exercise.

Learned Crown Counsel drew my attention to section 393 of the Criminal Procedure Code in regard to the delegation of the Attorney-General's powers. Under that section the Solicitor-General and Crown Counsel derive their authority on a special or general direction from the Attorney-General. In that respect it is somewhat similar to the case of a special officer appointed under section 46 (3). But even in such a case where no objection was taken at the trial the Supreme Court has applied the principle embodied in section 114, illustration E, of the Evidence Ordinance following the maxim, " omnia praesumuntur rite esse acta " (*vide* 5 Balasingham's Notes 19).

I accordingly hold that the prosecution was in order and duly sanctioned. I therefore set aside the order of acquittal and remit the case to the Magistrate for him to deal with the accused according to law.

Set aside.

Present : SINNETAMBY, J.

A. J. H. A. WADOOD vs. M. J. S. COORAY, CHIEF PREVENTIVE OFFICER, EXCISE STRIKING FORCE

S. C. 620-620A/1956—*M. C. Avisawella Case No.* 19917

Argued on : 26th October, 1956 and 30th October, 1956
Decided on : 9th November, 1956

Excise Ordinance—Accused charged with possession of unlawfully manufactured excisable article—Defence of bona fide *medicated article for medicinal purposes—Accused, qualified Ayurvedic Physician of the College of Indigenous Medicine—Is he a medical practitioner ?—Section* 55, *Excise Ordinance.*

The accused was charged with possession of unlawfully manufactured liquor, in breach of section 44 of the Excise Ordinance. The liquor was a tonic manufactured according to a standard book on ayurvedic medicine prescribed by the College of Indigenous Medicine, and was intended for abdominal troubles. The accused also held a diploma of the College of Indigenous Medicine, and was registered as a medical practitioner in their Register.

Held : That the charge must fail as (1) the article in question was a *bona fide* medicated article for medicinal purposes ; (2) That the accused was a medical practitioner within the meaning of section 55 of the Excise Ordinance.

Cases cited : *Amerasekere vs. Lebbe* 17 N. L. R. 321.
Assheton Smith vs. Owen (1906) 1 Ch. 179.

H. W. Jayawardena, Q.C., with *A. C. M. Uvais*, for accused-appellant.
K. V. Shanmuganathan, Crown Counsel, for complainant-respondent.

SINNETAMBY, J.

The accused-appellant was charged with manufacturing an excisable article without proper authority in breach of section 14 (*a*) of the Excise Ordinance and with possessing an excisable article consisting of over 108 gallons of liquor which was alleged to be unlawfully manufactured in breach of section 44 of the Excise Ordinance. The learned Magistrate convicted him on both counts and sentenced him to pay a fine of Rs. 1,000/- on each count. This appeal is against the conviction and sentence.

It would appear that the accused is an ayurvedic physician duly qualified to practice as such, having passed the examination held by the College of Indigenous Medicine. He has been duly registered as a general practitioner in the Register kept by the Board of Indigenous Medicine. The facts are not disputed. The accused admits that he did manufacture the liquid in question which, however, he says is a tonic manufactured according to particulars given in a standard book on ayurvedic medicine called " Aristaya Prakaraya " published by Dr. Jayasekera which is prescribed as a text book in the College of Indigenous Medicine. The tonic is intended for abdominal troubles. The quantity of alcohol according to the Government Analyst is very small, much less than in such imported tonics as Waterbury's Compound, Ferelex and Vitamin B Complex. This is in itself a factor which supports the attitude taken up by the defence, namely, that section 55 of the Excise Ordinance is applicable and that the possession and manufacture was in respect of a *bona fide* medicated article for medicinal purposes by a medical practitioner. The learned Magistrate has come to the conclusion that the article was not a *bona fide* medicated article but, in my view, he is mistaken and I think this matter is concluded by the fact that the tonic in question was manufactured in accordance with details given in a book dealing with the composition of ayurvedic medicine which is recognised and used as a standard book by the College of Indigenous Medicine. Despite, therefore, the various reasons the Magistrate adduced in justifying the conclusion he reached that the article in question was not a *bona fide* medicated article for medicinal purposes, the fact that it was manufactured in accordance with particulars contained in such a book confirms me in the view I take, namely, that it was a *bona fide* medicated article. The accused's evidence that it was so manufactured stands uncontradicted. Furthermore, it is in evidence that he was once before charged for a similar offence in respect of manufacturing the same article and acquitted. This fact shows the *bona fides* of the accused.

The only question that therefore now arises is whether the possession and manufacture was that of a medical practitioner. The Crown relied upon the case reported in 17 N. L. R. 521 (*Amerasekere vs. Lebbe*) in support of its contention that the accused was not a medical practitioner within the meaning of section 55 of the Excise Ordinance. In that case the majority of the Court held that the vedarala was not a medical practitioner within the meaning of that term as used in section 55 of the Excise Ordinance. It must, however, be remembered that vedaralas, though they practised eastern medicine, were not required to undergo any system of training, not required to pass an examination, and not required to be registered as vedaralas. But in the case of an ayurvedic physician like the accused in this case he has first to qualify before he can practise and he has also to be registered : on him are conferred certain privileges by the Ordinance creating the Board of Indigenous Medicine, and his certificates in regard to the health of a person are required to be accepted as evidence in Courts of Law. Learned Crown Counsel referred to a passage in Maxwell to the effect that terms used in a statute are to be read in their meaning at the date of the passing of the Act. He argued that the only kind of medical practitioner recognised when the Excise Ordinance was passed were those who were registered under the Medical Ordinance then in force, viz. No. 2 of 1905. But it has been held that this doctrine of " contemporanea expositio " cannot be applied in construing acts which are comparatively modern (*vide Assheton Smith vs. Owen*, (1906) 1 Chancery 179) see also Craies 5th Edn., p. 79.

The case of a qualified ayurvedic physician holding a diploma of the College of Indigenous Medicine is in my view different to that of a vedarala. Having regard to the fact that the state by registration regards them as qualified practitioners entitled to practice medicine and confers on them the privileges enumerated in section 10 of the Ordinance (No. 17 of 1941), I fail to see how it can be contended that they do not come within the meaning of the general term " medical practitioner " as used in section 55 of the Excise Ordinance. In my opinion the accused has established facts which bring him within the exception created by section 55 of the Excise Ordinance, and he is entitled to be acquitted. I accordingly set aside the conviction and sentence and acquit the accused-appellant.

Set aside.

IN THE COURT OF CRIMINAL APPEAL

Present : BASNAYAKE, A.C.J. (PRESIDENT), PULLE, J. AND WEERASOORIYA, J.

REGINA vs. SINNAPPUGE PINHAMY

Appeal No. 102 *of* 1955 *with Application No.* 157 *of* 1955—*S. C.* 16/*M. C. Puttalam* 3120

Argued on : 29th and 30th November and 1st and 2nd December, 1955
Decided on : 12th December, 1955

Court of Criminal Appeal—Expert Evidence—Identification of deceased by superimposition of photograph on deceased's skull—Section 45, *Evidence Ordinance—Power of Court to recall a witness—Section* 138 (4) *Evidence Ordinance—Discharge of a jury—When may Court do so ?—When may opinions of experts in treatises be read to the jury ?—Proviso, section* 60, *Evidence Ordinance—Scope of section* 46, *Evidence Ordinance.*

(1) Where a person is called under section 45 of the Evidence Ordinance as an expert skilled in science or art, it must be established to the satisfaction of the Court that he is a person skilled in the science or art in which he is called to give expert testimony. The opinion of a medical witness based on the superimposition of a photograph that the skull produced is the skull of the deceased cannot be accepted, in the absence of proof that the medical witness is an expert and also that this method of identification is a science or art.

(2) Under section 138 (4) of the Evidence Ordinance, a Court is not bound to permit a witness to be recalled either for further examination-in-chief or cross-examination. The section vests a discretion in the Court to be exercised on the material placed before it.

(3) A Judge would not be justified in discharging a jury merely because a witness is seen conversing with a juror. The discharge of a jury is a matter within the discretion of the Judge to be exercised on reliable material placed before him. A jury should not be discharged unless the Judge is satisfied that it is necessary to do so in the interests of justice. Where an allegation of impropriety is made against a juror or a witness, the Judge should hold an inquiry before discharging the jury. A juror should be free to talk to anyone on matters unconnected with the subject of trial. but should avoid conversing in public with a witness during the trial.

(4) Under the proviso to section 60 of the Evidence Ordinance, opinions of experts which have not been admitted in evidence should not be permitted to be read to the jury. A Counsel or pleader is not entitled to read to the jury the opinion of an expert expressed in a treatise, unless such opinion has been proved by the production of the treatise in a case where the expert himself is dead or cannot be called as a witness.

(5) Section 46 of the Evidence Ordinance permits a Counsel to show that the evidence of an expert witness is inconsistent with the opinions of other experts. But he is not entitled to ask a witness questions which he is not qualified to answer.

Authorities referred to : *Rex vs. Twiss* 13 C. A. R. 177.
Rex vs. Green (1950) 1 All E. R. 38-34 C. A. R. 33.
Rex vs. Furlong 34 C. A. R. 79.
Fromhold vs. Fromhold 1953 W. N. 278.
Straffen vs. London Times 23-7-1952.
Rex vs. Baba 6 N. L. R. 35.

G. E. Chitty with *R. A. Kannangara, A. S. Vanigasooriar, Daya Perera* and *N. C. J. Rustomjee* (*Assigned*), for the accused-appellant.

V. S. A. Pullenayagum, Crown Counsel, for the Attorney-General.

BASNAYAKE, A.C.J.

At the conclusion of this appeal we did not announce our decision as we wished to deliver our judgment in writing in view of the importance of some of the points raised by learned Counsel for the appellant.

In regard to the first ground of appeal we do not think that the verdict is unreasonable and cannot be supported by the evidence in the case. There is overwhelming evidence which, if believed, points conclusively to the prisoner as the man who murdered the deceased Katpahan Rasiah *alias* Arunasalam. While learned Counsel for the appellant did not dispute that the evidence, if believed, had this effect, he argued strenuously that the witnesses D. M. K. Punchirala and Kapuru Banda Dissanayake were entirely untrustworthy and no part of their testimony should have been acted upon. The learned Commissioner has, however, placed before the Jury all the matters that should be considered in weighing their testi-

mony. The infirmities in the evidence of those witnesses are not of such character as to justify us in holding that a verdict based on such evidence is unreasonable. The weight to be attached to the testimony of a witness is a matter for the Jury.

A number of points have been taken on the ground of misdirection, but it is not necessary to discuss them all as the learned Commissioner has dealt with the case very fairly in his charge to the Jury. In certain respects the learned Commissioner's charge is even unduly favourable to the prisoner.

Learned Counsel dwelt at great length on the evidence of the Judicial Medical Officer (hereinafter referred to as the medical witness), who expressed the opinion that the skull produced in the case was that of the deceased. He based his opinion entirely on the examination of a superimposition of an enlarged photograph of the head of the deceased on a photograph of his skull. The photographic work of enlargement and superimposition was done by a C. I. D. official photographer of some experience, working under the instructions of the medical witness. Under cross-examination the medical witness stated that there was no doubt in his mind that the skull was the skull of the deceased, but on further cross-examination he admitted that in super-imposition of a photograph on a skull a lot depends on the skill of the photographer and that there might be cases of individuals who have very much similar skulls. He also admitted in the course of cross-examination that that was the first and only case of identification by superimposition he had done. It was not so reliable as identification by finger-prints. He nevertheless maintained that in this instance he had no doubt that the skull belonged to the deceased on his examination of the superimposition.

Learned Counsel contended that that opinion was not relevant as there was no evidence that the medical witness was an expert on identification by superimposition of photographs. Under section 45 of the Evidence Ordinance opinions of persons specially skilled in science, or art, are relevant when the Court has to form an opinion as to science, or art. It has not been established that there is a science or art of identification of dead persons by superimposition of photographs. Neither the photographer nor the medical witness gave a detailed account of how the superimposition was done, nor did the medical witness give any cogent reasons for his assertion that the skull was without doubt the skull of the deceased. When an expert is called to give evidence the side calling the witness should elicit from him his qualifications and experience in order to establish to the satisfaction of the Court that he is a person who is specially skilled in the science on which he is called to give expert testimony. The record shows the qualifications of neither the medical witness nor the C. I. D. photographer, both of whom appear to have been called as experts on the matter of superimposition. The mere reference to the medical witness as "J.M.O., Colombo." is insufficient for the purpose of making his evidence relevant under section 45 of the Evidence Ordinance in regard to matters other than those which properly fall within the functions of a medical practioner.

The medical witness's evidence alone is not conclusive of the identity of the deceased. It can only be taken as an item in the chain of evidence that was led to establish his identity. It is as such that the learned Judge directed the Jury to regard it. He pointed out that the identification of deceased persons by the superimposition of photographs was not a recognised science ; that the opinion based on such examination was not infallible ; that even if the superimposition was perfectly accurate there can be no " absolute certainty " that the identity was established ; and that there was a possibility of the existence of other skulls which would fit into the picture. The effect of all this was to remove from the mind of the Jury any impression that the dogmatic assertion of the medical witness might have created. In view of the caution with which the Jury has been asked to treat the evidence provided by the superimposition of the photograph of the head of the deceased on his skull, we do not think that the learned Counsel's submission that the Jury has been misdirected on the point can be sustained.

A point was also made of the fact that the learned Commissioner refused to allow the C. I. D. photographer to be recalled. This witness gave evidence on the second date of the trial, and the application was made on the seventh date of the trial, which lasted ten days, after the medical witness had been recalled at the instance of the defence and cross-examined at great length. The learned Counsel who made the application for the recall of the C. I. D. photographer did not give reasons or explain why he wanted him recalled or what evidence he sought to get out of him at that stage. It was contended that the learned Judge was bound to allow such an application under section 138 (4) of the Evidence Ordinance which enables the Court to permit a witness to be recalled either for further examination-in-chief or for further cross-examination.

There is nothing in the language of the section which imposes on the trial Judge an obligation to recall a witness on the mere asking of the prosecution or the defence, nor are we able to agree

with learned Counsel that the Court is bound to permit a witness to be recalled whenever an application is made in that behalf. That section vests a discretion in the Court and that discretion is one that must be exercised on the material before it. A party asking for the recall of the witness must indicate, to the trial Judge, why he wants the witness recalled, and satisfy him that it is necessary for a just decision of the case. We are not prepared to say that the learned Commissioner has improperly exercised his discretion in this case.

It was urged on behalf of the appellant that the medical witness was seen talking to a juror during the luncheon adjournment on the second day of the trial and that the learned Commissioner was wrong in refusing to discharge the Jury when it was brought to his notice. At the time the medical witness was alleged to have conversed with the Juror he had finished his evidence and had not been informed, and had no reason to think, that he would be recalled. In fact the application was made on the sixth date of trial and six days after the alleged conversation. The official record in regard to this matter reads as follows :—

> " Mr. Balasuriya brings to my notice that he saw Dr. P. S. Gunawardena, J. M. O., Colombo, who is a witness in this case, speaking to a juror, Mr. P. H. A. Fernando, during the luncheon interval yesterday. He requests me to make a note of this in Chambers. He does not want me to inquire into this matter in open Court as he says this might prejudice the prisoner more.
>
> " I indicate to him that I am unable to entertain any application for a re-trial without an investigation into the charge that he is making and satisfying myself that the conversation was improper and was likely to prejudice a fair trial in this case. Mr. Balasuriya states that he does not desire to have an investigation into this matter and therefore he is not asking for a re-trial."

The appellant's pleader tendered no affidavits in support of his allegation. Even if an affidavit had been tendered we do not think that the above material disclosed any valid ground for discharging the Jury. A Judge would not be justified in discharging the Jury merely because a witness is seen conversing with a Juror. There would be no justification whatever for such a course when the witness happens, as in this instance, to be a witness who has no interest in the case. The discharge of the Jury is a matter within the discretion of the Judge. That discretion has to be exercised judicially on reliable material placed before him. A Jury should not be discharged unless the Judge is satisfied that it is necessary to do so in the interests of justice.

When such an allegation is made an investigation as to the impropriety of such conversation must be held if the Jury is to be discharged. For, if a Judge were to discharge a Jury, without inquiry, upon a mere allegation that the Juror was seen talking to a witness he would be doing grave harm both to the witness and the Juror. Jurors are administered an oath of separation whenever the Court adjourns. By that oath Jurors undertake not to hold communication with any person other than a fellow Juror upon the subject of the trial during their separation.

In view of that oath the need for the Judge satisfying himself that there has been in fact an improper conversation between Juror and witness is greater. For a discharge without inquiry may cast on the Juror an undeserved reflection that he had acted contrary to the terms of his oath. A Juror should be free to talk to anyone on matters unconnected with the subject of the trial. It would be an interference with the rights of Jurors if they were to be totally debarred from conversing with a witness under any circumstances. Nevertheless, prudence demands that a Juror should avoid conversing in public with a witness during the trial. Similarly a witness should avoid conversation with a Juror in public however familiar and friendly he may be with him in private life. The importance attached to keeping the Jury beyond any kind of influence can be realised from the fact that in the early days in England Jurors were kept together from the commencement of a trial till its conclusion. But today we are satisfied with the safeguard of an oath of separation. The greater is the need therefore not only to ensure that the oath is observed strictly but also to make it appear that it is so observed.

What we have said above should not be taken as an invitation to Jurors to throw discretion to the winds and converse freely in public with witnesses on subjects other than the trial.

Jurors and witnesses should be mindful of the fact that the uninformed and uninitiated onlooker is likely to draw wrong inferences from a conversation between a witness and a Juror. For that reason Jurors should be extremely circumspect.

Learned Crown Counsel drew our attention to the case of *Rex vs. Twiss* 13 C. A. R. 177 where it was sought to have a Jury discharged on the ground that certain of the witnesses for the Crown were seen conversing with some of the Jurors at a cafe during the luncheon adjournment. Darling, J., in refusing the application on the ground that there was nothing in the affidavits to show that the conversation was on the subject of the trial, said :

" It is necessary for us to consider whether what the juryman did was of such a character as to lead us to think that there may have been an injustice done to the appellant in this case. It is not enough to say that he spoke to somebody ; it is not enough to say that the person to whom he spoke was a witness in the case, although that makes it necessary to consider the matter more carefully."

Learned Counsel for the appellant relied on the case of *Rex vs. Green* 1950 (1) All E. R. 38 and 34 C. A. R. 33, where a conviction was quashed on the ground that a written communication, which had not been made known to the parties, had passed between the Jury and the recorder while the Jury were in their room considering the verdict, but that decision was made on the ground that it had been said by the Divisional Court more than once that any communication between the Jury and the Presiding Judge must be read out in Court, so that both parties, the prosecution and the defence, may know what the Jury are asking and what is the Judge's answer. That decision has no application to the present case.

It was distinguished in the subsequent case of *Rex vs. Furlong* 34 C. A. R. 79 in which the Court, while confirming that the proper practice is that any communication from the Jury after they have retired to consider their verdict, and the Judge's answer thereto, should be read out in open Court before the Jury have returned their verdict and that the Judge has a discretion whether he will allow Counsel or the prisoner if undefended to address him on the Jury's communication, refused to quash the conviction on the ground that the communication between the Judge and the Jury after the Jury had retired was not read out in open Court before the verdict. This is what happened in that case. In the course of the deliberations, the Jury desired to ask a question of the learned Judge. The Judge at that time had gone to his lodgings which were very close to the Court—just across the road. He directed his clerk to go into Court and ask the Jury to put their question into writing, and the Jury put their question into writing and handed it to the bailiff. The Judge came over to the Court immediately after he had written his answer to the question and the answer was taken back to the Jury. The Judge intended to announce in Court at once what the question and answer were, but the Jury came back to Court before he had the opportunity of doing so, and he accepted their verdict and read out the communication thereafter.

In the course of the argument in that case a point was made that the Judge's clerk entered the Jury room. It was found that he did not, but the Court held that even if he did it would not have been in itself an irregularity because the Court had always the power to allow somebody to make a communication to the Jury if it is a communication proper to be made and if it is made by the direction of the Court.

In the subsequent case of *Fromhold vs. Fromhold* 1952 W. N. 278, which is a civil case, it was held that there is no difference in practice between civil and criminal cases in regard to communication between Judge and Jury, and that it was the duty of the Judge to disclose the contents of any communication from the Jury. Although the proceedings were quashed and a re-trial was ordered, the failure to make known to the parties the communication from the Jury was not the ground for the order.

In the case of *Straffen* London Times—23/7/52, in the course of the trial it was brought to the notice of the Judge that a Juryman had a conversation about the case with a person other than a fellow Juror at the Southsea Liberal Club. In that case the Jury was discharged on material which had been placed before the trial Judge, and after they were discharged an investigation was held in open Court at which the Jurors were given an opportunity of being represented if they wished to do so.

Learned Counsel also made a point of the fact that the appellant's pleader was not permitted to refer in his address to " medical textbooks " and to " the Ruxton Case ", and that the accused was prejudiced thereby. There is no record of what exactly the pleader for the defence wanted to read to the Jury and of the ruling given by the learned Commissioner. Learned Counsel was unable to cite any authority in support of the proposition that Counsel is entitled to read to the Jury extracts from treatises on medical jurisprudence which have not been properly admitted in evidence. We are unable to agree with learned Counsel's submission that it was permissible under the proviso to section 60 of the Evidence Ordinance to read to the Jury the opinions of experts which had not been admitted in evidence. The only reported decision on the point is clearly against him *Rex vs. Baba* (6 N. L. R. 35). In that case Counsel for the defence sought to read to the Jury passages from Taylor's Medical Jurisprudence containing opinions expressed there in relation to homicidal mania. The trial Judge on objection taken by the Crown refused to allow the defence Counsel to do so. After the trial the presiding Judge submitted for the opinion of two Judges of this Court the question, whether he was right in

refusing to allow Counsel to read to the Jury opinions from a book which (1) had not proved to be what learned Counsel asserted it was ; (2) nor was found to contain the opinion of an expert on homicidal mania ; (3) nor had been referred to in any way before, so that, if it did contain opinions which were applicable to the facts of the case under trial, there had been no opportunity for the Counsel for the Crown to test or discuss such opinions.

The reference was heard before Moncrieff, A.C.J. and Wendt, J. It was held that Counsel was not entitled to read to the Jury extracts from any scientific treatise unless such extract had been introduced by way of evidence in the course of the trial and before Counsel's address. We were invited by Counsel to review and overrule this desicion as, he submitted, it was wrong. We are unable to uphold the submission of Counsel and we wish to state that we are in entire accord with the ruling that Counsel or pleader is not entitled to read to the Jury the opinion of an expert expressed in any treatise commonly offered for sale unless such opinion has been proved by the production of the treatise in a case where the expert himself is dead or cannot be called as a witness.

Learned Counsel also complained that the appellant's pleader was not permitted to cross-examine the medical witness by reading to him extracts from a treatise entitled " The Medico-Legal Aspects of the Buck Ruxton Case ". Under section 46 of the Evidence Ordinance Counsel is entitled to show that an expert witness's opinion is inconsistent with the opinions of other experts. The learned pleader was allowed to cross-examine the medical witness on those lines. The learned Commissioner intervened only when the pleader asked the medical witness questions which he was not qualified to answer. In disallowing the first of such questions he said :

> " I disallow this question. If Professor Glaister says something which this witness is competent to answer, I will allow."

We are unable to find in the rulings of the learned Commissioner any departure from the provisions of the Evidence Ordinance. We do not think therefore that the complaint is justified.

Learned Counsel for the appellant also referred to the last two paragraphs of section 57 of the Evidence Ordinance. Those two paragraphs read :

> " On all matters of public history, literature, science, or art, the Court may resort for its aid to appropriate books or documents of reference. If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so."

It is not necessary to discuss this provision as the Court was not called upon by the appellant's pleader at any stage of the proceedings to take judicial notice of the opinions he attempted to read to the Jury.

Another ground of appeal argued at length was that the learned Commissioner " failed to charge the Jury either adequately or properly on the bearing of police assault, duress, and influence on the case ". This ground relates to the evidence adduced by the prosecution through witnesses who in the course of the Police investigation had produced various articles which, on their testimony at the trial, had been sold, bartered or given to them by the appellant (allegedly according to the prosecution) after the deceased had been murdered. There was evidence that some of these articles formed the stock-in-trade of the deceased who was an itinerant seller of jewellery, and that the other articles too belonged to him. One witness, indeed, states under cross-examination that he had been " mercilessly " assaulted by the police and asked " to come out with things " which he did not know. But he denied any part of the evidence which he gave at the trial was false or that it was induced by the assault. This witness also spoke to people in the village generally having been assaulted by the police, but when the appellant's pleader sought to enlarge on this theme the learned Commissioner intervened and cautioned the witness against speaking about matters which were not within his personal knowledge. This caution was repeated by the learned Commissioner when the village headman was questioned in cross-examination about complaints received by him from various people in the village that they had been assaulted by the police. The view taken by the learned Commissioner seemed to have been that evidence relating to the existence of a state of fear among the inhabitants of the village where the murder had been committed and which had been brought about by assaults or reports of assaults at the hands of the police was inadmissible as hearsay. Learned Counsel for the appellant contended, on the other hand, that such evidence was relevant and admissible as having an important bearing on the credibility of the witnesses who in those circumstances had come forward and made statements to the police on the basis of which they were called to give evidence at the trial. We are not satisfied, however, that this evidence was sought to be elicited at the trial on the ground of

relevancy urged by learned Counsel for the appellant at the hearing before us. Even otherwise, at the conclusion of the case for the prosecution there was sufficient evidence on record which if believed pointed to the fact (although it was denied by the police officers themselves) that the police had, in the course of their investigation, been guilty of acts of intimidation and assault. The learned Commissioner did not, in his charge to the Jury, invite them to disregard this evidence. On the contrary he specifically asked them to consider whether the witnesses concerned had given false evidence as a result of fear induced by assaults or threats of assault. We are of the opinion, therefore, that this ground fails.

For the above reasons the appellant is not entitled to succeed and his application is refused and the appeal is dismissed.

Appeal dismissed.

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

BAPTISTE vs. (1) SELVARAJAH, (2) PUSHPARANEE SELVARAJAH

S. C. No. 622 (*Final*) *of* 1956—*D. C. Colombo* 3123

Argued on : 19th December, 1956
Decided on : 12th April, 1957

Divorce—Condonation, What constitutes—Civil Procedure Code, section 601.

Held : That where the evidence indicated that the living together in one house of the husband and wife subsequent to a date on which the wife committed adultery with another man was by force of circumstances, the husband could not be said to have condoned the wife's adultery.

S. Sharvananda (with him, *K. Rajaratnam*), for the 2nd defendant-appellant.

V. Ratnasabapathy, for plaintiff-respondent.

T. S. Fernando, J.

The plaintiff (husband) instituted an action on 19th October, 1953, claiming a dissolution of his marriage with the 1st defendant (wife) on the grounds of—

(*a*) her adultery with the 2nd defendant on several occasions between November, 1952, and 17th September, 1953.

(*b*) her malicious desertion on the said 17th September, 1953.

He further claimed (1) damages from the 2nd defendant in a sum of Rs. 15,000/- and (2) the custody of the child of the marriage between his wife and himself.

At the trial the acts of adultery on which the plaintiff relied to establish his case were confined to three, and in the course of a careful analysis of the evidence led before him the learned District Judge has found only the second of these three acts, viz. the act of adultery alleged to have taken place in the plaintiff's house in December, 1952, proved to his satisfaction. He has held that the plaintiff is entitled to a decree for divorce on the ground of such adultery as well as by reason of the malicious desertion on the part of the 1st defendant proved to have taken place on 17th September, 1953. The 1st defendant filed no answer, but was present at the trial, at first unassisted but later represented by a proctor. She neither gave nor called any evidence on her behalf and in fact has not appealed against the judgment of the District Court.

In regard to the claim against the 2nd defendant which was one for damages only, the learned District Judge has, in view of his finding that the 2nd defendant was guilty of adultery with the 1st defendant in December, 1952, awarded to the plaintiff a sum of Rs. 5,000/- as damages. It may be noted that the 2nd defendant himself neither gave nor called any evidence at the trial. While it is not contended on appeal that the finding of the learned Judge in regard to adultery in December, 1952, is unsustainable, it is argued on behalf of the 2nd defendant that such adultery was condoned by the plaintiff's subsequent conduct in relation to his wife and that condonation of the adultery has the effect under our law of wiping out the offence altogether and rendering it incapable of revival. It is accordingly contended that in terms of section 601 of the Civil

Procedure Code the plaintiff's action should have been dismissed and such dismissal would include a dismissal of the claim against the co-defendant.

While the Civil Procedure Code casts a duty upon the trial Judge to satisfy himself upon a trial in a divorce action whether the plaintiff in such action has condoned the act or conduct which constitutes the ground upon which the dissolution of the marriage is prayed for, it is noteworthy that the 2nd defendant did not himself raise the question of condonation either in his answer or in the issues accepted at the trial. However that may be, the question of condonation was specifically considered by the learned District Judge and he has reached a finding that the evidence of the plaintiff did not establish that he had condoned the act of adultery in December, 1952. In contesting this finding, learned counsel for the 2nd defendant places reliance on the evidence that the plaintiff notwithstanding the adultery in December, 1952, lived with the 1st defendant until her desertion in September, 1953. It is necessary to examine the evidence on the point in view of its importance to the argument raised on behalf of the 2nd defendant. I reproduce below the relevant evidence as it appears in the cross-examination of the plaintiff :—

Q : When you took her back on those two occasions you lived the same life as husband and wife ?

A : Yes. I merely lived in the same house but I had nothing to do with her. We were under the same roof, but not in the same room. We ate at the same table and went about together.

Q : Didn't you want to resume marital relations ?

A : She did not consent to it.

Q : Otherwise you were willing ?

A : Not that I was willing. She also complained of womb trouble and I took her to Dr. Thiagarajah because he attended on her at her first confinement. I did not ask her for marital relations. She refused in the sense that she did not like to live with me as husband and wife in the same room. I was also not willing. Her normal behaviour was different to what it was earlier.

Q : Why didn't you resume marital relations ?

A : Because I did not want.

Q : Your answer was that because she was not willing ?

A : I did not want and she was not willing. Because she acted in a different manner to what she was before she went a second time.

Certain evidence elicited in the course of the cross-examination of one of the plaintiff's witnesses, viz. Excise Inspector Webber, in regard to apparent reconciliation was also referred to by counsel, but it is clear upon a close analysis of that evidence that Webber was there referring to a reconciliation after an earlier allegation of adultery and not a reconciliation after the incident of December, 1952. In fact it was Webber's position that after the later incident he himself made no effort to bring husband and wife together. The learned District Judge was therefore correct in considering the question as he did upon the evidence of the plaintiff alone. It is apparent from his evidence that no sexual intercourse took place between his wife and himself after the incident of December, 1952, but it is stressed that the parties refrained from sexual intercourse merely because the wife did not consent to it on account of her " womb trouble " and that so far as the plaintiff was concerned he was quite willing to forgive his wife and was prepared to resume all marital relations. I do not consider that it is a fair inference from this evidence that the plaintiff was willing to resume married life as before ; on the other hand, it seems to me that the evidence bears out the reasonableness of the conclusion reached by the trial Judge that there was no condonation. Apart from the passage from Latey on Divorce relating to the circumstances in which marital offences are condoned cited by the learned District Judge in the course of his judgment, I may usefully refer in this context to the following observations contained at page 309 of Harlo on *The South African Law of Husband and Wife* :—

> " Since reconciliation involves a mutual intention on the part of both spouses to restore what was sundered, an invitation by the innocent spouse to have intercourse which is rejected by the guilty spouse does not constitute condonation..... The mere fact that the spouses continue to live under the same roof does not necessarily show condonation, for the parties may do so by force of circumstances. But if it can be shown that the parties continued or resumed life in common, because they became reconciled, and that the guilty spouse has been restored to his or her former position, there is condonation even though no sexual intercourse has taken place."

The fair inference from the evidence, in my opinion, is that the living together in one house of husband and wife with their child from Dec-

ember, 1952, till the wife's desertion in September, 1953, was the result of the force of circumstances rather than of a true reconciliation. Apart from that, the verdict of the trial Judge being supportable on the evidence before him should, in my opinion, be affirmed.

It is true that the learned District Judge has proceeded to consider the question of the liability of the 2nd defendant even on the assumption that the plaintiff had condoned the adultery; but that question, in my opinion, is only of academic interest in view of the finding already reached on the facts. It is therefore unnecessary to consider the able and interesting argument by learned counsel for the 2nd defendant that the effect of the condonation of the matrimonial offence must be considered according to the rules of the Roman-Dutch Law which is the law by which we are governed in this country in matters of divorce and not of the English law which the learned District Judge has purported to follow and apply in his judgment.

In view of the conclusion we have reached on the facts I would dismiss the appeal with costs.

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

Appeal dismissed.

Present : GUNASEKARA, J. AND T. S. FERNANDO, J.

S. SOCKALINGAM CHETTIAR vs. THE COMMISSIONER FOR THE REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, COLOMBO

Citizenship Case No. 107/1956—*Application No. D*/1586

In the matter of an Appeal under section 15, *of the Indian and Pakistani Residents (Citizenship) Act No.* 3 *of* 1949.

Argued on : 10th September, 1956
Decided on : 21st January, 1957

Indian and Pakistani Residents (Citizenship) Act, No. 3 *of* 1949—*Order under section* 9 (2)—*Is it an appealable order—Section* 15—*Presumption under section* 20—*What should be proved before conclusive effect can be given to it.*

Held : (1) That an order under section 9 (2) of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949 is an appealable order.

(2) That before the presumption of law referred to in section 20 of the Act is raised, clear and unambiguous evidence furnishing conclusive proof of the matters required by that section should be available.

Cases referred to : *Sivam Pillai vs. Commissioner for Registration of Indian and Pakistani Residents* (1953) 54 N. L. R. 310. (disapproved)
Marimuttu vs. Commissioner for Registration of Indian and Pakistani Residents (1956) 57 N. L. R. 307.
K. Easiah vs. Commissioner for Registration of Indian and Pakistani Residents (1953) 58 N. L. R. 37. (distinguished)

S. Thangarajah, applicant-appellant.
J. W. Subasinghe, for respondent.

GUNASEKARA, J.

This is an appeal from an order made under section 9 (2) of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, refusing an application made by the appellant for the registration of his wife and himself as citizens of Ceylon.

It was contended by the learned Crown Counsel, on the authority of the decision of Swan, J. in *Sivan Pillai vs. Commissioner for Registration of Indian and Pakistani Residents*, (1953) 54 N.L.R. 310 that an order made under section 9 (2) is an administrative act and is therefore not appealable. With all respect to the learned Judge, it seems to me that this view is in conflict with the express terms of section 15 of the Act, which provides that " an appeal against an order refusing.....an application for registration may be preferred to the Supreme Court in the prescribed manner by the applicant ". An

order made under section 9 (2) is such an order, and therefore, according to the plain meaning of the language of section 15, is an order against which an appeal may be preferred. There appears to be no ground for reading into section 15 a provision excluding from its operation orders made under section 9 (2). I therefore hold that the order in question is an appealable order.

The application was made on the 3rd August, 1951. A Deputy Commissioner who considered the application was of opinion that a *prima facie* case had not been established, and it therefore became necessary for him, in terms of section 9 (1), to cause to be served on the appellant a notice setting out the grounds on which the application would be refused and giving the appellant an opportunity to show cause to the contrary within a period of three months from the date of the notice. The necessary notice was signed by the Deputy Commissioner on the 7th September, 1955. On the 14th December, 1955, he made the order that is the subject of this appeal, holding, among other things, that the notice had been duly served on the appellant.

The order does not state upon what material this finding is based. The learned Crown Counsel has submitted to us that it is based on the evidence furnished by the presence of two documents in the Commissioner's file, namely, the notice itself and an envelope addressed to the appellant, which bears certain post marks and endorsements. It is contended for the respondent that the right conclusion to be drawn from this evidence is that the notice was sent to the appellant by post in a registered letter, which was eventually returned undelivered. If that is the right conclusion the fact that the letter was returned undelivered proves of course that actually the notice was not served on the appellant. But the learned Crown Counsel seeks to rely on the provision in section 20 of the Act that a notice which is required to be served on an applicant " shall, where it is not served personally on him, be deemed to have been duly served if it has been sent to him by post in a registered letter addressed to his last known place of residence or of business ".

The presumption of law for which provision is made by this section is one that the applicant is not permitted to rebut (*Marimuttu vs. Commissioner for Registration of Indian and Pakistani Residents*) (1956) 57 N.L.R. 307. Moreover, the evidence relied on for proof of the facts necessary to raise the presumption would ordinarily be evidence that the applicant has had no opportunity of challenging or contradicting. For both reasons the evidence must be conclusive before these facts can be held to be proved.

If the notice that had been served on the appellant had been " sent to him by post in a registered letter addressed to his last known place of residence or of business ", clear and unambiguous evidence furnishing conclusive proof of those facts should have been readily available in the files and registers kept in the Commissioner's office. The learned Crown Counsel has not been able to point even to an office minute, or other entry in any official record or register, stating that the notice was so sent to the appellant or sent to him at all. I agree with a contention that was advanced by Mr. Thangarajah that the fact that the notice and the envelope are in the file is insufficient by itself to prove conclusively that what the envelope contained when it was posted was the notice.

The Deputy Commissioner himself has not held that the notice has been sent to the appellant in a registered letter addressed to his last known place of residence or of business and that it must therefore be deemed to have been duly served on him. The effect of his finding is that it was in fact served. The presence of the document in the file, however, proves the contrary, and there is no sufficient evidence of the facts that must be proved before it can be deemed to have been served.

The order appealed from must be set aside and the respondent must be directed to cause to be served on the appellant a fresh notice in terms of section 9 (1) of the Act and to proceed thereafter in due course of law. The appellant must have his costs of appeal, which I would fix at Rs. 105.

POSTSCRIPT

Since the above judgment was written my brother has drawn my attention to the case of *K. Easiah vs. Commissioner for Registration of Indian and Pakistani Residents* (1953) 58 N.L.R. 37, where Gratiaen, J. has expressed agreement with Swan J.'s conclusion in *Sivan Pillai's case* (1953) 54 N.L.R. 310. Gratiaen, J. points out that both are cases in which the appellant failed to avail himself of the opportunity given to him by a notice in terms of section 9 (1) of the Act to show cause why his application should not be

refused, and says that Swan, J. has held " that in such circumstances the remedy by way of appeal to this Court was not available ", and that he himself agrees with this conclusion but " would prefer not to attempt to solve the difficult question whether the order under appeal is of a judicial, a quasi-judicial or a purely administrative character ". He goes on to consider the appeal on its merits and dismisses it on the ground that there is no error made by the tribunal of first instance to which the appellant can point. The appeal was dismissed, as in the later case of *Marimuttu* 57 N.L.R. 307 (where Gratiaen, J. delivered the judgment of the Court), and was not rejected as in *Sivan Pillai's case*.

As I read the judgment in *Easiah's case*, what was decided was not that the applicant had no right of appeal and therefore the appeal could not be entertained, but that in the circumstances of that case the appeal could not succeed.

T. S. FERNANDO, J.
I agree.

Appeal allowed.

Present at the Hearing : EARL JOWITT, LORD OAKSEY, LORD COHEN, LORD KEITH OF AVONHOLM, MR. L. M. D. DE SILVA

MOHAMEDALY ADAMJEE AND OTHERS vs. HADAD SADEEN AND OTHERS

Privy Council Appeal No. 24 of 1955

Judgment of the Lords of the Judicial Committee of the Privy Council, Delivered the 11th December, 1956.

Partition Ordinance, section 52, 4, 8 and 9—Prescription Ordinance, sections 3 and 13—Partition decree—Obtained by fraud and collusion—Decree conclusive against all persons—Claim on prescriptive-title—Entitled to damages only—Investigation of title inadequate—Duties of trial court and appeal court.

By an executor's conveyance dated 1888 certain immovable property was transferred to a daughter of the testator subject to the conditions contained in the will which set out *inter alia* that she, her issue or heirs should not sell, mortgage or alienate the property but should hold it in trust for her grandchildren. In 1949 seven of her grandchildren instituted a partition action against 36 other grandchildren, all 43 of them claiming to be all the persons interested in the property. After the decree for sale was entered in the partition action the appellants who were not made parties to it instituted the present proceedings in 1950 to have the decree set aside as null and void or alternatively claiming damages on the ground that they were entitled to the entire property on prescriptive title as successors in title of a person who had acquired it under a Fiscal's conveyance executed in 1915 in pursuance of a mortgage decree against the testator's daughter (referred to above). The trial Judge held that the present respondents had acted fraudulently and collusively in failing to make the appellants parties in the partition action.

Held : (1) That a partition decree was conclusive against all persons whomsoever including a person whose title to an interest in the land had been concealed from Court by fraudulent collusion between the parties and accordingly the only remedy available to such a person is damages and was not entitled to have the partition decree set aside.

Nono Hami vs. De Silva (1891) 9 S. C. C. 198 and *Jayawardena vs. Weerasekera* (1917) 4 C. W. R. 406 applied.

Dictum of Ennis, J. in *Fernando vs. Marshal Appu* (1922) 23 N. L. R. 370 suggesting a possible exception to this rule was not approved of.

(2) That a paramount duty is cast upon the Court by the Partition Ordinance to ascertain by a proper investigation of title who are the actual owners of the land sought to be partitioned. And, further, on an appeal in a partition action if it appears to the Supreme Court that the investigation into title has been inadequate it should of its own motion, if necessary, and acting under its powers of revision set aside the decree and make an order for proper investigation.

(3) That the appellants under the Prescription Ordinance had acquired a good title to the property and were entitled to be compensated by way of damages to the full extent of the value of the property at the date of the commencement of the proceedings.

Mather vs. Thamotheram Pillai (1903) 6 N. L. R. 246, 250 approved.

(4) That once parties relying on prescription had brought themselves within section 3 of the Prescription Ordinance the onus rested on anyone relying on the proviso to that section to establish their claim to an estate in remainder or reversion at some relevant date and they could not discharge that onus unless they established that their right fell into possession at some time within the period of 10 years. *Chelliah vs. Wijenathan* (1951) 54 N. L. R. 337 considered and commuted upon.

Per Lord Cohen.—" The Trial Judge should insist upon the production of the relevant extracts from the registers kept under the Land Registration Ordinance (Chapter 101). They may reveal registered instruments suggesting the possible existence of title in persons other than the parties before the Court. The names of all such persons should be ascertained by due investigation and they should be given notice of the proceedings. Whether they appear in Court or not, the effect of such instruments upon the title set up by the parties before the Court should be examined. The Trial Judge should also investigate in sufficient detail the question of possession. He should have before him sworn testimony specifying by name the persons actually in possession and satisfy himself that they are some or all of the parties before the Court or that they are in possession under some or all of such parties. He should in case of doubt cause the parties in possession to be summoned for the purposes of his investigation. He should also ask for the production of the originals or duplicates of receipts for rates and reconcile the material furnished by the receipts with the evidence given. The fraud which has been established in the Partition Action under consideration could not have taken place if the steps indicated by their Lordships had been taken."

Sir Lyan Ungoed-Thomas, *Q.C.*, with *Raymond Walton*, *E. S. Amerasinghe* and *Kadirgamer*, for the plaintiffs-appellants.

Ralph Milner, with *Miss J. Bisschof*, for the respondents 1—8, 12, 14 & 21.

Lord Cohen

The dispute between the parties relates to immovable property situate at Kollupitiya within the Municipality and District of Colombo, Western Province. Their Lordships will refer to it hereafter as " the property. " The property formerly belonged to one Idroos Lebbe Marikkar (hereinafter referred to as " Marikkar "). He died in 1876, probate of his will being granted on the 29th May, 1876. In accordance with directions contained in the will the estate was divided amongst those who would have been Marikkar's intestate heirs in such a manner that each received the equivalent in value of what would have been his or her share upon an intestacy. In that division the property was conveyed by the surviving Executor by a Deed No. 2575 of the 14th September, 1888, to Savia Umma, a daughter of the testator. The conveyance was made subject to the conditions imposed by the will, including a provision that the said Savia Umma or her issues or heirs should not sell, mortgage or alienate the property but should hold the same in trust for " the grandchildren of my children and the grandchildren of my heirs and heiresses " as therein mentioned.

On the 15th July, 1949, a Partition Action was started in the District Court of Colombo by seven of the present respondents against the other thirty six respondents, the forty-three respondents, grandchildren of Savia Umma, between them claiming to be all the persons interested in the property. To these proceedings the appellants were not made parties. In the plaint in the Partition Action the plaintiffs allege in paragraph 19 that the parties to the Partition Action and their predecessors in title had been in undisturbed and uninterrupted possession of the property. The plaintiffs asked for sale under the Partition Ordinance (No. 10 of 1863) and for division of the proceeds.

At this point it is convenient to refer to the relevant provisions of the Partition Ordinance. Section 2 provides that " when any landed property shall belong in common to two or more owners, it is and shall be competent to one or more of such owners to compel a partition of the said property, or, should such partition be impossible or inexpedient,.....to apply for a sale thereof, and in either case to file in any Court of competent jurisdiction a libel..... " as therein mentioned.

Section 4 gives direction as to investigation of the title of the plaintiffs (*a*) in the event of default of appearance by any defendant (*b*) after appearance if there is a dispute as to title or if any defendant shall claim a larger share than the plaintiffs have stated to have belonged to him. The Section goes on to provide that the Court shall try and determine any material question in dispute between the parties and shall decree a partition or sale according to the application of the parties or as to the Court shall seem fit. Section 5, 6 and 7 deal with what is to be done in the event of a decree of partition being made. With these Sections their Lordships are not concerned in the present case. Section 8 gives directions as to the carrying out of a decree for sale. Once the decree has been made no further decree is necessary, and it is provided that a certificate under the hand of the Judge of the Court that the property has been sold under order of the Court and setting forth the name of the purchaser thereof and that the purchase money has been paid into Court by him shall be evidence in any Court of the purchaser's title without any deed of transfer from the former owners.

Section 9, which is the most important Section requiring consideration on the present Appeal, provides as follows :—

> " The decree for partition or sale given as hereinbefore provided shall be good and conclusive against all persons whomsoever whatever right or title they have or claim to have in

the said property although all persons concerned are not named in any of the said proceedings nor the title of the owners nor of any of them truly set forth and shall be good and sufficient evidence of such partition and sale and of the titles of the parties to such shares or interests as have been thereby awarded in severalty.

Provided that nothing herein contained shall affect the right of any party prejudiced by such partition or sale to recover damages from the parties by whose act whether of commission or omission such damages had accrued."

Returning now to the Partition Action, on the 29th March, 1950, the District Judge made a decree in the course of which he declared the shares of the various parties to the Action and ordered and decreed that the property should be sold as therein mentioned and the proceeds be brought into Court to abide by the further order of the Court.

It is to be noted that the present appellants had not been made parties to that action. They claim to be entitled to the whole of the property as descendants of one Adamjee Lukmanjee who had acquired the property from one Leonora Fonseka. She had acquired it under a Fiscal's Conveyance executed as the result of mortgage proceedings in the District Court of Colombo against the said Savia Umma and her husband. The Fiscal's Conveyance did not set out the restrictions on Savia Umma's power to deal with the property which were contained in the 1888 Conveyance under which she acquired title.

At this point their Lordships must observe that all the deeds and documents on which the apellants rely for their title were duly registered in accordance with the provisions of the Registration Ordinance but that neither the probate of Marikkar's will nor the Deed of 1888 were so registered. The appellants argued that the relevant sections of the Land Registration Ordinance gave them priority over the title of the respondent under the will and the conveyance of 1888.

The relevant Section of the Registration Ordinance at the time of the execution of the conveyance to Mr. Adamjee Lukmanjee was Section 17 of Ordinance No. 14 of 1891. This Ordinance was repealed by Ordinance No. 23 of 1927, and Section 7 of the repealing Ordinance provided that an instrument executed or made on or after the 1st January, 1864, whether before or after the commencement of the repealing Ordinance should unless it was duly registered under the Ordinance be void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which might be duly registered under the Ordinance. For reasons which will appear hereafter their Lordships do not find it necessary to deal with the argument based upon the Registration Ordinance.

From the decree of the District Judge in the Partition Action certain respondents appealed to the Supreme Court on the question whether they had received their proper shares under the decree of the District Judge. Before that appeal could be heard in the Supreme Court the appellants, who had become aware for the first time of the Partition proceedings petitioned on the 20th May, 1950, for an injunction restraining sale of the property. In paragraph 16 of their Petition they pleaded that they should have been made parties to the action and should have had and should have been given notice thereof, and they asked by way of relief for an injunction restraining any sale of the property, for an order setting aside or vacating the decree in the Partition Action and for a declaration that the decree in the Partition Action was null and void and of no force or effect in law.

What happened on that Petition does not appear clearly from the Record. Their Lordships are left in doubt whether the attention of the Supreme Court at the hearing of the appeal from the Partition decree was ever called to this Petition for injunction and other relief. Had the attention of the Supreme Court been directed to this matter it is possible that they would have considered carefully whether there had been sufficient investigation of the respondents' title and if there had not been sufficient investigation they might have directed a new trial under the powers referred to later in this judgment.

On the 20th May, 1950, the appellants also lodged their plaint in the proceedings which have now reached their Lordships' Board. In clause 14 thereof they pleaded that by themselves and through their predecessors in title they had been in the sole and uninterrupted and undisturbed possession of the property to the exclusion of all others from at least the 29th day of March, 1916, and that they had prescribed to the property. That pleading was directed to the Prescription Ordinance No. 22 of 1871. Section 3 of that Ordinance so far as material provided as follows:—

"Proof of the undisturbed and uninterrupted possession by a Defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or Plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action,

shall entitle the Defendant to a decree in his favour with costs. And in like manner when any Plaintiff shall bring his action.....proof of such undisturbed and uninterrupted possession as hereinbefore explained by such Plaintiff..... or by those under whom he claims, shall entitle such Plaintiff.....to a decree in his favour with costs.

" 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."

Returning now to the plaint the relief claimed by the appellants was, so far as relevant, as follows :—

(*a*) An order that the Court do set aside or vacate the decree in the Partition proceedings.

(*b*) A declaration that the said decree was null and void and of no force or effect in law, and in the alternative

(*c*) damages in the sum of Rs. 100,000/-.

Answers were put in by some of the defendants and issues were settled. In due course the action came on for trial before District Judge L. B. de Silva. He answered the various issues, his findings so far as material to the present appeal were as follows :—

(1) the respondents had acted wrongly, unlawfully, fraudulently and collusively in failing to make the appellants party to the Partition Action or in giving them any notice thereof ;

(2) the value of the property at the date of the action was Rs. 100,000/- ;

(3) the appellants had not acquired a prescriptive title to the premises since they had not discharged the onus which the District Judge held rested on them of establishing when the respondents' right to possession as *fidei commissarii* accrued to them. Therefore

(4) the appellants could only claim such rights as accrued to them by virtue of the priority conferred on them by the Registration Ordinance.

He held further that the effect of that Ordinance was that the will being void, Savia Umma could only have vested in Leonora Fonseka and through her in the appellants' predecessors in title such interests as she had in the property on an intestacy and that such interest was only 1/16th of the value of the property, *i.e.* Rs. 6,250. He added, however, the value of the improvements which he found the appellants and their predecessors in title to have effected on the property and accordingly awarded to the appellants by way of damages under the proviso to section 9 of the Partition Ordinance the sum of Rs. 29,687/50. He rejected their claim to set aside the decree or to have it declared null and void on the ground that the effect of section 9 of the Partition Ordinance was that the decree was final and binding and that the only remedy of any person including a person who had been defrauded by the action of the parties who obtained the decree was limited to a claim in damages.

The plaintiffs appealed to the Supreme Court who affirmed the decision of the District Judge, and it is from that decision that the appellants, with the leave of the Supreme Court, now appeal to their Lordships.

Having regard to the finding of the trial Judge as to the fraud and collusion issue and the confirmation of that finding by the Supreme Court, it is plain that the appellants were entitled to some relief, and the questions for their Lordships' decision are :—

(1) Whether the plaintiffs can now insist on having the decree in the Partition Action set aside or are limited by section 9 of the Partition Ordinance to their claim for damages, and

(2) whether, if they are so limited, they must accept the figure of Rs. 29,687/50 awarded to them by the trial Judge or are entitled to receive Rs. 100,000/- which the parties agree would be the correct figure if the appellants were entitled absolutely to the property at the date of commencement of the proceedings.

The appellants support their claim to have the decree set aside on two grounds. First, they say that notwithstanding the wide language of section 9 fraud is something outside the ambit of that section, and that on general principles a decree obtained by fraud is both under English law and under the law of Ceylon always liable to be set aside in independent proceedings. Their Lordships heard an interesting argument on this point from Sir Lynn Ungoed-Thomas on behalf of the appellants, and despite the wide language of the Ordinance they might have been persuaded to accept it had there not been a long succession of authority in the Courts of Ceylon establishing the principle, for which justification can be found in the language of the section, that " a partition decree is conclusive against all persons whomsoever, and that a person owning an interest in the land partitioned whose title even by fraudulent collusion between the parties had been concealed from the Court in the partition proceedings is not entitled on that ground to have the decree set aside, his only remedy being an action for damages ." The citation which their Lordships have made was from the decision of Sir Alexander Wood Renton in *Jayawardene vs. Weerasekera* reported in (1917) 4 C. W. R. 406 at p. 407. That decision followed on a continuous series of decisions dating back as far as 1891, see *Nono Hami vs. De Silva*, 9 S. C. C.

198. Prior to that year there had been some conflict of decision, but in the case last cited Burnside, C.J., said at p. 199 that section 9 " makes a partition decree obtained under the Partition Act final and conclusive in all respects, save as to the right contained in the proviso of any party prejudiced by it to his action for damages ". He went on : " It was urged that it was a principle of law that fraud vitiated everything obtained by it. That is too general a proposition. It is true that the law abhors fraud, and equity had an undoubted jurisdiction to relieve against every species of fraud ; yet when adequate relief can be had at law, where in fact there is a full, perfect, and complete remedy otherwise, it is not the course to interfere. (*Deere vs. Guest*, 1 M. & C. 516, and per Lord Hardwicke, " Smith's Manual of Equity, " p. 51). Now, looking at the very distinct declaration contained in the 9th section, and to what must have been the object which the Legislature had in view, I can come to no other conclusion than that the proviso was meant to conserve the only remedy, except by way of appeal, which could be sought against a decree already pronounced, namely, one which sounded in damages ; if it were not so, the operation of the Ordinance must be disastrous. No single decree could escape a litigious spirit to reopen it on the ground of fraud, and no date would exclude such contests. The object of the partition act was to quiet the title to land, and leave persons prejudicially affected by any such decree, by reason of any cause whatever, to their remedy in damages at law, and this to my mind is a full and perfect remedy, and it is unfortunate if any mere dicta should have led to any uncertainty on the point ".

Since that date there has been no decision conflicting with the principle laid down as stated by Sir Alexander Wood Renton in the passage already cited, and their Lordships, whatever their view might otherwise have been as to the correctness of the decision, would not be prepared to disturb a principle so long recognised and on the basis of which many titles may have been established.

Since Sir Alexander Wood Renton gave his judgment in 1917 there has been no decision to the contrary. Sir Lynn referred to a dictum of Ennis, J., in the case of *Fernando vs. Marsal Appu* 23 N. L. R. 370, in which the learned Judge said that he did not consider it necessary to go into the question of whether in exceptional circumstances, where the property is still in the sole possession of the parties whose fraud is set up, the Court could not on proof of fraud take away the property from them. Sir Lynn said that the present was such a case and that it was still open to their Lordships to say that as the decree for sale had not actually been carried out and as the fraud had been proved they could take away the property from the respondents. Their Lordships' attention was not called to any case where the possible exception suggested in the passage stated had been recognised. Bearing in mind that section 9 expressly provides for the binding nature not of the sale but of the decree for sale, and that section 8 does not contemplate any decree subsequent to that decreeing that sale should take place, their Lordships do not think it right to recognise the alleged exception to the general rule.

Alternatively the appellants submitted that there had been no proper investigation of title in the present case and that consequently the decree was not a decree within the terms of section 9 of the Partition Ordinance. The Supreme Court have laid it down that it is the duty of the Court before entering a decree to satisfy itself that the parties to the case have title to the hand. The District Judge in the present case referred to a decision of the Full Bench reported in 6 N. L. R. 246 where it was held that a paramount duty is cast upon the Court by the Partition Ordinance to ascertain who are the actual owners of the land sought to be partitioned before entering up a decree which is good and conclusive against the world. Layard, C.J., went on to say at p. 250 " As collusion between parties to a partition action is always possible, and as in such a suit the parties get their title from the decree of the Court awarding them a definite piece of land, and as a decree for partition under section 9 of the Ordinance is good and conclusive against all persons whomsoever, whatever their rights may be, whether they are parties to the suit or not, it appears to me that no loophole should be allowed to a Judge by which he can avoid performing the duty cast expressly upon him by the Ordinance. " Their Lordships find themselves in complete agreement with what was said by Layard, C.J., in that case. The facts of each case will indicate the manner in which the Judge can best carry out his duty and their Lordships would not attempt to lay down a complete course of procedure for the Trial Judges to follow in every case. Their Lordships think however that the following matters should be attended to in the generality of cases.

The Trial Judge should insist upon the production of the relevant extracts from the registers kept under the Land Registration Ordinance (Chapter 101). They may reveal registered in-

struments suggesting the possible existence of title in persons other than the parties before the Court. The names of all such persons should be ascertained by due investigation and they should be given notice of the proceedings. Whether they appear in Court or not, the effect of such instruments upon the title set up by the parties before the Court should be examined. The Trial Judge should also investigate in sufficient detail the question of possession. He should have before him sworn testimony specifying by name the persons actually in possession and satisfy himself that they are some or all of the parties before the Court or that they are in possession under some or all of such parties. He should in case of doubt cause the parties in possession to be summoned for the purposes of his investigation. He should also ask for the production of the originals or duplicates of receipts for rates and reconcile the material furnished by the receipts with the evidence given. The fraud which has been established in the Partition Action under consideration could not have taken place if the steps indicated by their Lordships had been taken.

It is to be observed, however, that Chief Justice Layard did not go on to say what would be the effect if a decree was made and was either not appealed from or was confirmed on appeal. Their Lordships do not think it permissible for a Court in a subsequent action to disregard the decree merely because they come to a different conclusion from that of the trial Judge as to what were the appropriate steps to take in the particular case in the investigation of the title. The decree which is " good and conclusive against all persons whomsoever " under section 9 is a " decree for partition or sale given as hereinbefore provided. " Their Lordships are of opinion that the words " as hereinbefore provided " has reference to section 4 which requires the Court to investigate title. Once it appears that the Court has done so then any defect in the method of investigation would not vitiate the decree any more than an error of law or of fact by a Judge would in the generality of cases vitiate a decree duly entered and not appealed from or confirmed on appeal. It has been held by the Supreme Court of Ceylon that a decree entered without any investigation of title, has not the conclusive effect provided by section 9. Thus *Gooneratne vs. The Bishop of Colombo* (32 N. L. R. 337) was decided on the basis that there was nothing to show " that the Judge made any enquiries into title " and that " the decree was passed on the defendants' admission. " It was held that the decree for sale had not a conclusive effect under section 9 of the Ordinance. The basis of the decision in *Umma Sheefa vs Colombo Municipal Council*, 36 N. L. R. 38, which was strongly relied upon by the appellant, was that " in the result apart from the consent of parties there was no evidence that the parties to the action or any of them were co-owners of the premises " so that it could not have been said that there had been any investigation of title. It was held that the decree for sale did not have a conclusive effect. With these decisions their Lordships agree, but they have no application to the present case. In the Partition case under consideration the District Judge did hold an investigation into title although his investigation has not been sufficiently exhaustive to prevent the perpetration of the fraud which has taken place.

What their Lordships have said in the preceding paragraph is applicable when it is sought by separate action to set aside a decree in a partition action or in a separate action to challenge the conclusive effect of a partition decree. On an appeal in a partition action if it appears to the Court of Appeal that the investigation has been defective it should set aside the decree and make an order for proper investigation. Nothing in the partition action can be final or conclusive until the appeal is concluded. But the fact that lack of proper investigation may be sufficient for an Appeal Court acting in the same case to set aside a decree does not detract from the conclusive effect of section 9 when the decree is being considered in a separate case. Their Lordships would add that if it appears to the Supreme Court when hearing an appeal in a partition case, that investigation of title has been inadequate it should, even though no party before it has raised the point, set aside the decree acting under its powers or revision.

For the reasons their Lordships have given they are unable to accept the submission on behalf of the appellants that the partition decree should be set aside. They turn therefore to the question of damages. The appellant based his claim to the Rs. 100,000/- on two grounds. First he said that he had acquired title by prescription and for that reason alone must be entitled to recover the Rs. 100,000/- as being the value of the property as a whole at the material date. Alternatively he pleaded that he had a valid title by reason of the provisions of the Registration Ordinance to which their Lordships have already referred. Their Lordships do not find it necessary to go into the question raised under the Registration Ordinance, since they are satisfied that under the Prescription Ordinance the appellants have acquired a good title to the property for the value

of which they now ask to be compensated. It was common ground between the parties that the onus of proving the ten years' undisturbed and uninterrupted possession adverse or independent to the title of the respondents rested in the first instance on the appellants. But it was said on behalf of the respondents that once they had established that they had an interest as *fidei commissarii* under the last will of Marikkar the onus of proving the date on which their right to possession accrued to the respondents rested on the appellants. As the trial Judge put it "Once the defendants established that they are *fidei commissarii* it is for the plaintiffs to establish that as against them *qua fidei commissarii* plaintiffs have acquired a title by prescription. To do so, the plaintiffs must prove the burden under Section 3 of the Prescription Ordinance that they have acquired a title by prescription subsequent to the accrual of the rights of the defendants as *fidei commissarii.*"

Their Lordships are unable to agree with the Courts in Ceylon on this point. Looking at the matter first as a question of construction they think that once parties relying upon prescription have brought themselves within the body of section 3 the onus rests on anyone relying upon the proviso to establish their claim to an estate in remainder or reversion at some relevant date and they cannot discharge this onus unless they establish that their right fell into possession at some time within the period of ten years. The view which their Lordships have reached as a matter of construction seems strongly supported by the provision of section 106 of the Ceylon Evidence Act No. 14 which reads " when any fact is especially within the knowledge of any person the burden of proving that fact is upon him ". In the case under consideration knowledge of the date of the death of Savia Umma and her children would be especially within the knowledge of the respondents and the dates might well be unascertainable by the appellants.

It was suggested that the opinion which their Lordships have reached on the construction of the section with the assistance of the Evidence Act is in conflict with the decision of the Supreme Court under section 13 of the Prescription Ordinance in the case of *S. K. Chelliah vs. Wijenethan* reported in 54 N. L. R. p. 337. This section modifies the operation of section 3 of the Prescription Ordinance in the case of disabilities referred to in the section, namely infancy, idiocy, unsoundness of mind, lunacy, or absence beyond the seas. In that case Gratiaen, J. said at p. 342 :

> " Where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights. If that onus has *prima facie* been discharged, the burden shifts to the opposite party to establish that, by reason of some disability recognised by Section 13, prescription did not in fact run from the date on which the adverse possession first commenced. Once that has been established, the onus shifts once again to the other side to show that the disability had ceased on some subsequent date and that the adverse possession relied on had uninterruptedly continued thereafter for a period of ten years."

The language of section 13 is so different from that of the proviso to section 3 that their Lordships would not be prepared to hold that even if the decision in the case cited were correct it was applicable to the very different language to the proviso used in section 9. They are not prepared in giving their decision in the present case to overrule the decision in Chelliah's case, but they desire to point out that so far as can be gathered from the judgments in that case, the attention of the Supreme Court was not directed to section 106 of the Evidence Act. Should a similar case ever come before this Board they would like the assistance of observations of the Supreme Court as to the application of that section. They stress this point because the knowledge, *e.g.* of duration of absence beyond the seas must as a rule be within the cognisance of the party relying on such absence, and it might well be impossible for the opposite party to ascertain when the absence ceased.

For the reasons their Lordships have given, they will humbly advise Her Majesty to allow the appeal and increase the damages awarded to Rs. 100,000/-. The respondents must pay the plaintiffs' costs of this appeal as well as their costs of the appeal to the Supreme Court. The order of the District Court as to costs will stand.

Appeal allowed.

Present : GUNASEKERA, J. AND SINNETAMBY, J.

NADARAJA vs. THE ATTORNEY-GENERAL AS REPRESENTING THE GOVERNMENT OF CEYLON *et al*

S. C. No. 97 (Inty.)—D. C. Colombo Case No. 26071/M

Argued on : 27th July, 1956 and 6th August 1956
Decided on : 27th September, 1956

Tort—Death caused by servant employed under the Crown—Action against Crown for damages—Liability of—Applicability of English Law—Civil Law Ordinance chapter 66, sections 3—Crown proceedings Act 1947 of United Kingdom—Is it applicable to Ceylon ?

As a result of death caused by the driver of a train belonging to the Ceylon Government, the plaintiff-appellant, as the father of the deceased, sued both the driver and the Government of Ceylon in damages alleging that the death was caused by the negligence of the driver in the course of his employment.

The trial Judge dismissed the action against the Government of Ceylon on the ground that the Crown was not liable in damages for the negligent acts of the servants.

It was contended for the appllant that under the Civil Law Ordinance (Chap. 66) section 3, the law applicable in Ceylon would be " the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England." Since under the Crown Proceedings Act 1947 the Crown in England was liable in tort for the negligence of its servants, the Crown in Ceylon would also be liable in the same way.

Held : (1) That the Ceylon Courts have adopted the English Doctrine of Employer's Liability—That is, the liability of the master for the negligent act of his servant is not based on any principle relating to law of Agency, but rather the special relationship existing between master and servant, which makes the act of the servant, the act of the master, provided it is done within the scope of his employment.

(2) That the Crown Proceedings Act 1947 is not applicable to Ceylon as its operation is limited only to the United Kingdom and is further restricted to acts of an " officer " of the Crown who is paid out of certain funds of the United Kingdom.

(3) That the Crown in Ceylon was not liable in tort for the negligent acts of its servants.

Cases referred to : *Colombo Electric Co., vs. The Attorney-General* 16 N. L. R. 161.
Dias vs. Constantine 20 N. L. R. 338.
Broom vs. Morgan (1953) 1 A. E. R. 849.
Williams vs. Howarth (1905) A. C. 551.
Anson : Contract (20th ed.) p. 386.
Sarmond : Law of Torts (9th ed.) p. 86, 89.
McKerron : Law of Delict (4th ed.) 119, 120, 121, 122.
Restatement of the Law of Agency Vol. 1, 10, 11, 559.
Paton : Jurisprudence p. 281.
Winfield : Law of Torts (6th ed.).

S. Sharvananda, for plaintiff-appellant.

V. Tennekoon, Crown Counsel with *A. E. Keunaman*, Crown Counsel, for the defendant-respondent.

SINNETAMBY, J.

The facts of this case are shortly as follows :— A railway train belonging to the Ceylon Government and driven by the 1st defendant struck and injured a lad by the name of Ravindran who subsequently on the same day, viz. 5-4-51 succumbed to his injuries. The plaintiff who is the father of Ravindran and had also been appointed the Administrator of his Estate instituted the action against the 1st defendant and the Government of Ceylon as 2nd defendant for the recovery of damages alleging negligence on the part of the 1st defendant in driving the said railway train and a failure on the part of the second defendant to fulfil its duty to take reasonable care to avoid acts and omissions it can reasonably foresee.

When issues were being framed at the commencement of the trial in the Court below learned Counsel for the appellant suggested *inter alia* the following issues :—

Issue 5. Was the 1st defendant at the relevant time acting as the agent of the 2nd defendant.

Issue 6. If issue 5 is answered in the affirmative is the 2nd defendant liable.

Issue 7. If issue 6 is answered in the affirmative to what damages is the plaintiff entitled (a) as Administrator of the Estate of the late Ravindran, (b) personally against the second defendant.

Objection was taken at the trial to the word " Agent " in issue 5 by learned Crown Counsel and in consequence these words were deleted from that issue. The proceedings do not show that the word " servant " was substituted in its place as was obviously intended but issue 13 and the pleadings framed by learned Crown Counsel makes it clear that the case proceeded to trial on this basis. Issue 15 is as follows :—

" Is the Crown liable in damages for the acts of negligence of its servants."

In para 2 of the amended plaint the basis on which the plaintiff seeks redress against the 2nd defendant is set out and is as follows :—

" The 1st defendant was a servant of the Government of Ceylon : he was an engine driver and he drove train No. 589 within the scope of his empolyment on 5th April, 1951.

and again para 26 is in the following terms :—

" The Government of Ceylon as carriers by land are subject to the liabilities in respect of negligence of its servants causing damage while they were carrying and acting for their master."

Even at this early stage Counsel appears to have appreciated that a distinction does not exist between a " servant " and an " Agent ".

Among the defences raised in the answer of the 2nd defendant the most important one was that the Crown was not liable to be sued in tort in Ceylon. The learned District Judge on the invitation of Counsel decided to take up issue 13 and certain other issues relating to the constitution of the action as preliminary issues. After hearing argument the learned Judge answered issue 13 in favour of the Crown and dismissed plaintiff's action as against the 2nd defendant. It is against this finding that the appeal has been preferred.

Ever since the decision in Colombo Electric Co. vs. The Attorney-General reported in 16 N.L.R. 161 the law in regard to the liability of the Crown to be sued in tort has been regarded as authoritatively settled. In that case the Supreme Court after reviewing all the earlier decisions came to the conclusion that by virtue of the Royal Prerogative an action of tort is not maintainable against the Government of Ceylon and that even under the Roman Dutch Law there is no authority for the proposition that the Crown is liable to be sued in tort.

The argument advanced in the appeal, however, was that the law in this respect has undergone a change since the enactment in England of the *Crown Proceedings Act in* 1947. The argument proceeded on the following lines :—

Under the Civil Law Ordinance Cap. 66, Section 3 the Law applicable in all questions or issues relating to Principals and Agents shall be " the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England ; " the relationship of master and servant is the same as that of Principal and Agent ; the law applicable to the liabilities of the master must therefore be the law administered in England at the corresponding period ; in consequence since 1947 the Crown in Ceylon would be liable in the same way as in England for the negligence of its servants.

We are indebted to learned Counsel for their exhaustive and helpful arguments which have been of great assistance to us in arriving at a decision. The question that immediately arises for consideration is whether the liability of the master for the tortious acts of his servant arises from some principle relating to the Law of Agency or is it quite independent of any such principle.

Who then is an Agent ? For the purpose of a contract " Agency " has been defined to be the relationship that exists when one man represents another as being employed by him for the purpose of bringing him into legal relations with a third. (Anson, 20th Ed.p. 386). Dealing with Principal and Agent Salmond in his textbook on the Law of Torts (9th Ed.) Section 24 p. 86 observes :—

" Any person who authorises or procures a tort to be committed by another is responsible for the tort as if he had committed it himself . . . Principal and Agent therefore are jointly liable as joint wrongdoers for any tort authorised by the former and committed by the latter."

It will thus be seen that the relationship of Principal and Agent can not only exist in regard to contracts but also in regard to torts. In regard to torts committed by an Agent not expressly authorised or subsequently ratified by

his Principal the general rule as stated by Salmond is as follows (p. 86).

> " Speaking generally a Principal is liable only for those acts of his Agent which have actually authorises. He is not in general liable for unauthorised torts committed by the Agent in the course of his agency."

McKerron dealing with the same subject puts it in this way (4th Ed. p. 119, 120) :

> " But for the unauthorised act of an Agent, i.e. a person having express or implied authority to represent or act on behalf of another person who is called his Principal, the Principal is not in general responsible, even though the act was committed by the Agent in the execution of his employment. To this rule there are two chief exceptions. The first is where the act complained of was committed by the Agent acting in his capacity of Agent . . . The second exception is where the relationship of Principal and Agent is that of Master and Servant."

The subject is dealt with exhaustively and with much clarity in the Restatement of the Law of Agency published by the American Law Institute. Under the heading " Torts of Agents who are not Servants " (Vol. 1, Section 250, p. 559) the law with special reference to physical injury is stated as follows :

> " Except as stated in Section 251, a principal is not liable for physical harm caused by the negligent physical conduct of an Agent, who is not a servant, during the performance of the principal's business unless the act was done in the manner directed or authorised by the principal or the result was one intended or authorised by the principal."

Section 251 deals with cases where the principal becomes liable for the acts of an Agent which the principal is under a duty to perform with care, examples of which are given under section 214, p. 472. In this case we are only concerned with physical harm to another and the law is thus stated : the principal is liable if agent is negligent in performing " an act which the Principal is under a duty to have performed with care. "

All the text writers, may be somewhat loosely, deal with the Rights and Liablities of Master and Servant under the heading of " Principal and Agent. " Bowstead, however, in his book on Agency does not devote any particular chapter to this subject. Salmond for instance says :

> " If we use the term Agent to mean any person employed to do work for another, we may say that Agents are of two kinds distinguishable as (1) servants and (2) independent contractors." (9th Ed. p. 89.)

In the Restatement of the Law of Agency the learned authors comment as follows (p. 11) :

> " A master is a species of principal and a servant is a species of agent . . . The word ' servant ' is used in contrast with ' Independent Contractor ,' a term which includes all persons who contract to do something for another and who are not servants with respect thereto."

Regarding the servant as a species of agent the next question that arises is whether the master's liability for his servant's torts is the outcome of the relationship between Principal and Agent which would in that event be common to all types of agency or is it something special and peculiar to the relationship of master and servant quite independent of the principles governing the Law of Agency. I may be excused for repeating that on the answer to this question would depend the question of whether the law now prevailing in England in regard to the liabilities of the Crown to be sued in tort obtains in Ceylon or not.

If the liablity of the master for the tortious acts of his servants can be traced to some principle governing the Law of Agency the English law it seems to me would apply even to such incidental matters as the correct Court in which the action should be brought or the correct party to be sued. I am confirmed in this view by the decision of our Courts in regard to matters of a similar nature, e.g. it has been held that recourse may be had to the principles of English Law to decide the correct Forum in which an action for the recovery of the purchase price on a contract of sale of goods should be brought. Section 58 of the Sale of Goods Ordinance provides for the application of the English Law in regard to matters on which the Ordinance itself is silent. In *Dias vs. Constantine* (20 N. L. R. 338) the Supreme Court took the view that an action for the recovery of the purchase price on a contract for the sale of goods could be brought in the Court within whose jurisdiction the creditor resides. According to English Law the Debtor should seek out the Creditor and pay while under the Roman Dutch Law the converse is the case. Similar considerations influenced our Courts in deciding that the absence of consideration invalidated a promissory note though under the Roman Dutch Law cause would have been sufficient to render a promise valid.

In regard to the law governing the Rights and Liablilities of Master and Servant in relation to third parties it would, I think, be correct to say that our Courts have adopted the English doctrine of employers' liability. McKerron in his book on the Law of Delict explains the furthest limit to which the Roman Dutch Law went in the following words (Section 34, p. 121, 4th Ed.):

> " In Roman Law a person might in certain circumstances be held liable for the wrongs of his servants, but, except where the servant was a slave there was no

general principle of liability. The Roman Dutch writers speak with uncertain voice on the subject. Some of them deny the existence of any general rule of liability; others would appear to affirm it. But it would seem that the furthest that the authorities go is to hold the master liable for the wrongs committed by his servants (famuli) in the course of carrying out some duty or service *specifically* entrusted to them."

What then is the principle or principles on which the liability of the master for the torts of his servant is based. In the Restatement of the Law of Agency the learned authors observe as follows :

" The liability of a master for the torts of his servants is greater in extent than the liability of a principal for the torts of his agent who is not a servant." (pp. 10 & 11).

With the advance of civilisation, with new inventions and labour saving devices, and with a new outlook on the obligations of one class or section of society to another, it is but natural that the law which was once considered sufficient to meet all needs should with the passage of time be found wanting. It had accordingly to be modified and extended to meet new situations as they arose. There thus developed in the relationship of master and servant a set of obligations which was peculiar to that relationship which cannot be traced to any previously recognised principle of law. The master was held liable for all wrongs committed by the servant within the scope of his employment. Even the meaning of the term " within the scope of his employment " has from time to time been extended to cover new concepts and new ideas. These had no relationship to the Law of Agency though from time to time various attempts have been made to explain them by bringing them within one or other recognised legal principle. McKerron in dealing with this question states (p. 122) :

" Many reasons for the rule have been advanced. Perhaps the best explanation is given by Pollock. ' I am answerable ' he says ' for the wrongs of my servant or agent, not because he is authorised by me or personally represents me but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.' But this proposition cannot be accepted without considerable qualification. The truth would appear to be that the doctrine of employers' liability cannot be justified on purely logical grounds, but must be regared in the ultimate analysis as based upon consideration of social policy."

The later and more recent decisions of the English Courts make it reasonably clear that the liability of the master for the torts of his servants is based upon the peculiar relation that exists between master and servant and does not come within any recognised principle of the Law of Agency. Winfield in his textbook on the Law of Torts traces the history of this particular instance of vicarious liability (pp. 137 & 138, 6th Ed.). According to him in the early Norman period liability of the master existed only when there was a command or consent on the part of the master to the servant's wrong. Subsequently the need for an express command gave way to a rule that the master was liable if an implicit command could be inferred from the general authority he had given to the servant. " Trade " says Winfield " has become far too complicated to allow the *particular command* theory, which suited the old simple relation of master and servant well enough, to cover persons like factors or agents who were not accustomed to take their orders like a slave or a private soldier. Of course this does not explain why the master should be liable at all, and for the rule various reasons—all unconvincing—were given by the lawyers . . . " During the 19th century the Implied Command Theory was displaced by the " scope of employment " theory which is now the rule. Winfield continues :

" A scientific reason for the rule is hard to find. It seems to be based on a mixture of ideas—the master can usually pay while the servant cannot; that a master must conduct his business with due regard to the safety of others; that the master profits from the servant's employment and by employing the servant has set the whole thing in motion."

The basis of the master's liability came up recently for consideration before the Court of Appeal in *Broom vs. Morgan* (1953, 1A. E. R. p. 849). If the liability was " vicarious " then the master's liability would arise only if the servant himself was liable to the third party. In this particular case the plaintiff and her husband were employed by the defendant to work in a beer and wine house. Plaintiff was injured through the negligence of her husband a wife cannot sue her husband in tort under the English Procedural Law—and it was argued that where the servant, in this case the husband, was immune no vicarious liability can arise. The Court of Appeal held that despite the legal immunity of the husband plaintiff was liable, and Denning, L. J. made the following observations :

" I am aware that the employer's liability for the acts of his servant has often been said to be a vicarious liability but I do not so regard it . . . The reason for the master's liability is not the economic reason that the employer usually has money and the servant has not. It is the sound normal reason that the servant is doing the master's business and it is the duty of the master to see that his business is properly and carefully done."

The judgement of Denning, L. J., it will be seen, proceeded on the footing that there was a breach

on the part of the master of the duty which the law imposes on him to take care that his business is conducted without negligence. There was no question of an express or implicit authority coming in and the servant's act was regarded as the master's act. Denning, L. J. continued :

> " You may describe it as a vicarious act if you please but not as a vicarious liability. My conclusion in this part of the case is that the master's liability for hte negligence of the servant is not a vicarious liability but a liability of the master himself owing to his failure to see that his work was properly done."

Though the observations of Lord Justice Denning may be regarded as *obiter* they nevertheless set out a basis on which the master's liability for the act of his servant can be explained. With the views of this learned Judge I do with great respect agree.

I am therefore of the opinion that the liability of the master for the negligent act of his servant is not based on any principle relating to the Law of Agency but rather to the special relationship existing between master and servant which makes the act of the servant the act of the master provided it is done within the scope of his employment.

I shall now deal with one other proposition of law which learned Counsel for the appellant advanced though with some diffidence in support of his appeal. He contended that the Crown was indivisible, that there is only one Queen, and if the immunity of the Crown to be sued in tort ceases to exist in England is also ceases to exist in every other part of her domain. In support he relied on the case reported in 1905 A.C. p. 551. In that case it was held that where a Colonial Government had entered into a contract with the respondent for military service any money paid by the Imperial Government was in part discharge of the moneys due under the contract. The judgement proceeded on the basis that the contract of service was with the Crown and payment whether by the Mother Country or the colony was payment on behalf of the Crown. It must be remembered that this decision was as far back as 1905 when the concept of the Commonwealth of Nations was unkown and also legislation for the colonies was still in the hands of the Imperial Government. The position of a Dominion Government vis-a-vis the Imperial Government is entirely different to that of a Colonial Government.

> " The principle that the Crown is one and indivisible is very important and significant from a political point view. But when stated as a legal principle it tends to dissolve into verbally impressive mysticism."

The Crown in its various dominions acts through its Ministers and in each unit governs through a separate Dominion Parliament. Claims by one Dominion against another are not unknown. This would not be possible if the old concept of the Queen being unitary and indivisible is carried to its logical conclusion for then the Queen cannot make a claim against Herself. As Paton puts it :

> " In spite of historical theory the Crown is now a symbol of free association of nations each with an individual and international personality."

It follows that the Queen can in one dominion forego or place restrictions by Act of Parliament on her rights and Preogatives without such right or preregative being in any way affected in another dominion. That fact therefore that in England by virtue of the Crown Proceedings Act the Queen has foregone the immunity of being sued in tort should not in any way affect her privileges elsewhere. Indeed the Act itself specifically provides that it shall only apply to the United Kingdom and not to Northern Ireland, and section 40 (2) provides that nothing in this Act shall apply to the Crown except in respect of her Majesty's Government in the United Kingdom. Quite apart from other considerations by virtue of the specific provisions in the Act itself it cannot be possibly made to apply to the dominions merely by reason of the theory, which can no longer be held to be applicable, of the unity and indivisibility of the Crown.

There is yet another and more important limitation imposed by the Crown Proceedings Act. Section 2 (1) a refers to the Crown's liability in respect of Agents and Servants—we are in this case concerned with servants. Section 2 (6) restricts the Crown's liability to acts of an " officer of the Crown " who is paid out of the " Consolidated Fund of the United Kingdom, monies provided by Parliament, the Road Fund or any other Fund certified by the Treasury. " Section 38 (2) defines " officer of the Crown " to include any servant of the Crown. It will thus be seen that any servant of the Crown who is not paid out of the United Kingdom Fund etc., does not come within the definition, and for torts committed by them the Crown would not be liable.

I am therefore of the opinion that the Crown Proceedings Act has in no way changed the law in Ceylon in regard to the liability of the Crown to be sued in tort. The judgement of the learned District Judge is affirmed and the appeal dismissed with costs.

GUNASEKERA, J.

I agree,

Dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present : GRATIAEN, J. (PRESIDENT), GUNASEKERA, J., K. D. DE SILVA, J.

C. S. DISSANAYAKE vs. REGINA

Appeal No. 12 *of* 1955—*S. C.* 16/*M. C. Panadura* 28939

Argued on : 2nd and 3rd May, 1955.
Decided on : 20th May, 1955.

Co-operative Societies Ordinance (*Cap.* 107) *as amended by Co-operative Societies Amendment Act No.* 21 *of* 1949—*Charge against cashier under section* 50*B—Requisition by Deputy Registrar addressed to cashier to pay over money for which he was accountable to officer nominated—Failure to comply with it—Conviction for Criminal Breach of Trust—Is dishonesty, an essential element in the charge—Validity of Deputy Registrar's requisition to pay money to an officer nominated by him.*

The appellant was a cashier of a Co-operative Society registered under the Co-operative Societies' Ordinance (Cap. 107). After an audit it appeared from the books and documents maintained by the appellant that he was accountable for a sum of Rs. 24,099/39 entrusted to him from time to time as cashier. The Deputy Registrar of Co-operative Societies purporting to act under section 50 B of the Ordinance addressed him a letter " requiring " him to pay over that sum on demand to the Assistant Regisrtar who called upon the appellant to pay the money at his office on a specified date and time. The appellant having failed to comply with this demand was charged and convicted with criminal breach of trust under section 50 B of the Ordinance.

Held : (1) That section 50 B of the Co-operative Societies Ordinance (as amended by the Act of 1949), does not create a new offence of criminal breach of trust separate and distinct from the offence defined in section 388 of the Penal Code.

(2) That section 50 B only facilitates, in charges of criminal breach of trust against any officer of a Co-operative Society, proof of dishonest conversion, if he has failed to pay over or produce or duly account for moneys entrusted to him in his official capacity.

(3) That no burden is imposed upon the accused to prove his innocence. If the Court, after considering the explanation of the accused and all other evidence is left in reasonable doubt as to whether the essential element of dishonesty has been established against him, he must be acquitted.

(4) The direction to the jury that they could not convict the appellant in this case unless they were satisfied that he had dishonestly converted to his own use the monies entrusted to him as cashier was a correct direction.

(5) The Deputy Registrar empowered under section 50 B of the Ordinance to require that money should be paid to himself, was equally entitled for reasons of administrative convenience to nominate some other person to receive the money at a suitable time and place.

Cases referred to : *The King vs. Ragal* (1902) 5 N. L. R. 314.
Somanandar vs. Udma Lebbe (1924) 24 N. L. R. 146.
Gunasekera vs. the King (1952) 53 N. L. R. 522.
R. vs. Jayawardene S.C. 27/M.C. Polonnaruwa 11993

M. M. Kumarakulasingham, for accused-appellant.
V. T. Thamotheram, C.C., for the Attorney-General.

GRATIAEN, J.

The appellant was the cashier of a Co-operative Society registered under the provisions of the Co-operative Societies Ordinance (Cap. 107) as amended by the Co-operative Societies (Amendment) Act No. 21 of 1949. He was convicted at the Kalutara Assizes of the offence of " criminal breach of trust " in the following circumstances :—

The accounts of the Society had been audited in March 1953 in terms of section 17 of the Ordinance, and it appeared from books and documents maintained by the appellant as cashier that he was accountable for a sum of Rs. 24,099/39 entrusted to him from time to time in that capacity. A letter P12B dated 11th May 1953 was thereupon addressed to him by the Deputy Registrar of Co-operative Societies (who was admittedly vested by the appropriate Minister with all the statutory powers of a Registrar) " requiring " him " to pay over the said sum of Rs. 24,099/39 on demand by Mr. D. P. Gunawardene, Assistant Registrar of Co-operative Societies ". It purported to be a requisition under section 50B of the Ordinance.

This letter was forwarded to the appellant together with a covering letter P12A dated 13th August 1953 from Mr. Gunawardene calling upon him to hand over the money in question to Mr. Gunawardene at the latter's office at 10 a.m., on 18th May 1953. No part of the money was, however, paid by the appellant at the specified time, or at any time thereafter. He was in due course charged with criminal breach of trust, punishable under section 50B of the Ordinance (as amended by the Act of 1949) which reads as follows :—

> " 50 B. It shall be lawful for the Registrar, after the accounts of registered Society have been audited as provided in Section 17 or after an inquiry or inspection into the affairs of a registered Society has been held under section 35, to require any person, being a person entrusted with or having the dominion of any money in his capacity as an officer or a member or a servant of the Society, to pay over or produce such amount of money or balance thereof which is shown in the books of accounts or statements kept or signed by such person as held or due from him as such officer, member or servant ; and if such person, upon being so required, fails to pay over or produce such amount of money or balance thereof forthwith or to duly account therefor, he *shall be guilty of criminal breach of trust*, and shall on conviction be subject to imprisonment of either description for a term which may extend to ten years and also be liable to a fine."

It is necessary to give a meaning to the words " shall be guilty of the offence of criminal breach of trust ". The offence itself has not been separately defined in either the Ordinance or the amending Act. We receive guidance, however, from the interpretation consistently given by the Supreme Court to these indentical words in a similar context in section 392A of the Penal Code (introduced by Ordinance No. 22 of 1889) relating to alleged defalcations by public servants. Section 50B does not create a new offence, also designated " criminal breach of trust ", containing elements separate and distinct from the elements of the well-known offence bearing the same name and defined in section 388 of the Penal Code. Applying the *ratio decidendi* of the earlier decisions in *The King vs. Ragal* (1902) 5 N.L.R. 314, *Somanandar vs. Udma Lebbe* (1924) 24 N.L.R. 146 and *Gunasekera vs. The King* (1952) 53 N.L.R. 522, we held that the intention of section 50B of the Ordinance was merely to facilitate, in charges of criminal breach of trust against any officer of a Co-operative Society, proof of dishonest conversion if he has failed to pay over or produce or " duly account for " monies admitted under his own hand to be due by him in his official capacity. In other words, proof of the facts enumerated in section 50B furnishes *prima facie* evidence—indeed, strong *prima facie* evidence—that the officer concerned had dishonestly converted the funds to his own use and thereby committed the offence of criminal breach of trust. No burden, however, is imposed on the accused person to prove his innocence in such a situation, so that if the Court, upon consideration of all the evidence, is left in reasonable doubt as to whether, for instance, the essential element of dishonesty has been established against him, he must be acquitted.

Proof of the facts specified in section 50B does not give rise to an irrebuttable presumption that the offence of " criminal breach of trust " has been committed. That theory must be rejected if we take as a guide to the interpretation of this penal enactment the particular mischief which the legislature intended to remove (as in cases now covered by section 392A of the Code) and also pay regard to the earlier construction given by the Courts to the language of the earlier penal statute which meets a precisely similar difficulty of proof where defalcation by a public servant is alleged. Parliament could not have conceived that the stigma of a conviction for " criminal breach of trust " involving liability to a term of imprisonment for 10 years was appropriate to a case where the dishonesty of a man was left in doubt at the end of his trial or was conclusively negatived. Nor is there compelling evidence in section 50B of an intention to shift the burden of proof to an accused person charged with an offence of such gravity.

For these reasons the learned Commissioner quite correctly directed the jury that they could not convict the appellant in the present case unless they were satisfied that he had dishonestly converted to his own use the monies admittedly entrusted to him as cashier of the Society. The verdict necessarily implies that his own explanation at the trial of his failure to produce the money was rejected as quite untrue. The evidence accepted by the jury therefore established that he had failed duly to account for " the shortage in the absence of an explanation, consistent with his innocence, which might reasonably be true. I the result, the Crown discharged the heavy burden of establishing the appellant's guilt. No complaint was made before us to the effect that the verdict was unreasonable.

We were invited by the defence to squash the verdict on the ground that the appellant had only been " required " to produce the money by a person who was not authorised by section 50B to call for it. The argument was elaborated as follows :—

(1) Only the Registrar or an officer duly vested with the statutory powers of a Registrar is authorised to " require " the payment or

production of money so as to satisfy the conditions laid down by section 50B; and such powers cannot validly be delegated;

(2) in addition, the officer authorised by section 50B must "require" the payment (or Production) of the money to (or before) himself and no one else;

(3) although the Deputy Registrar was vested with the requisite statutory powers, his letter P12B amounted only to an invalid delegation to Mr. Gunawardene of the power to "require" the payment or production of the money;

(4) Mr. Gunawardene alone "required" the appellant to pay the money in terms of P12A; but the appellant was under no obligation to comply with this demand as Mr. Gunawardene admittedly had no power to take action under section 50B.

The first of these submissions is certainly correct, but the rest of the argument is without substance. The statutory power of the Deputy Registrar to require the payment of the money in this case is conceded, and his letter P12B, although some parts of it were drafted in unduly legalistic terms, constituted a valid demand for payment under section 50B. He was of course entitled to "require" that the money should be paid to himself, but he was equally entitled, for reasons of administrate convenience, to nominate some other person to receive the money at a suitable time and place. The words "on demand" in P12B are not indicative in the present context of a decision by the Deputy Registrar to elegate or surrender his statutory powers to Mr. Gunawardene. On the contrary, Mr. Gunawardene's letter P12B to the appellant was written in accordance with the Deputy Registrar's wishes and under the authority of P12B which it accompanied. No usurpation by Mr. Gunawardene of statutory powers which he did not enjoy was involved at any stage of the transaction. The letters P12B and P12A, read together, meant, and were understood to mean, that the Deputy Registrar retained control of the situation throughout and that he had, on his own initiative directed Mr. Gunawardene to call for and receive the money if forthcoming, at a very early date at a time and place which was to be notified to the appellant.

It has been brought to our notice that the arguments for the appellant on this issue receive support from an unreported decision pronounced by another learned Commissioner at the Kandy Assizes on 26th May 1954—*R. vs. Jayawardene* S.C. 27/M.C. Polonnaruwa 11993. The reasons set out in our judgment sufficiently explain why we find ourselves unable to adopt the view expressed on that occasion.

We dismiss the appellant's appeal and refuse his application. The conviction is affirmed.

Present : de Silva, J. and Sinnetamby, J.

JAYAH vs. SAHEEDA

S.C. 277—D.C. Colombo No. 29068/M

Argued on : 7th, 9th and 12th November, 1956.
Decided on : 14th June, 1957.

Muslim Law—Marriage—Money given by plaintiff's father to defendant husband on the occasion of the registration of marriage—Amount entered as "stridanum" in the marriage certificate—Claim by plaintiff of the money as "stridanum"—Defendant's contention money that paid was a personal gift—Principle of construction to be followed—Intention of parties to prevail over the designation of the donation.

Where a sum of money was given by the father of the plaintiff wife to the defendant husband on the occasion of the registration of the marriage, and the amount was entered as "stridanum" in the marriage certificate,

Held : (1) That the plaintiff could recover the money from the defendant as there was evidence to justify the trial judge's finding that the money was intended by the parties to be a marriage settlement in favour of the plaintiff and not a personal gift to the defendant.

(2) That where there is a conflict between the designation of the donation and the intention of the parties making the donation, the intention should prevail.

Per de Silva, J.—"But I am unable to agree with the learned District Judge when he stated. "It will be a contradiction in terms to describe a gift given to a man as "Stridanum". By this dictum if he meant that in no circumstances could a gift described as "Stridanum" be construed as a gift to the bridegroom it is too wide a proposition and finds no support for the recent decisions of this Court."

Cases referred to : *Meera Saibo vs. Meera Saibo* 2 Ceylon Weekly Reports 263.
Zainanbu Natchia vs. Usuf Mohamadu 38 N. L. R. 37.

M. Rafeek, for the defendant-appellant.

M. I. M. Haniffa, with *S. H. Mohamed*, for the plaintiff-respondent.

De Silva, J.

The marriage of the plaintiff and the defendant who are Malays by race and Muslims by religion was registered on August 23, 1951—vide marriage certificate P1. On that occasion the plaintiff's father handed over to the defendant the husband a sum of Rs. 2,000/-. This amount has been entered in the marriage certificate against the item " amount of stridanum ". The " thali " ceremony took place on September 29, 1951 and soon after that the defendant conducted his wife to a house at Fountain House Lane, Maradana, where he, his mother and married sister resided. The plaintiff began to complain that her mother-in-law and sister-in-law were harassing her. In January, 1952 she went to reside with her parents at Padukka. Thereafter she instituted an action against the defendant to recover maintenance and obtained an order in her favour. In January 1953, the defendant divorced the plaintiff by the pronouncement of " Talak " according to Muslim law. The plaintiff instituted this action in June, 1953 to recover from the defendant (*a*) certain articles of jewellery, clothes and furniture or their value (*b*) a sum of Rs. 300/- as Mahar (*c*) Rs. 151/- as lying-in-expenses incurred when her child was born and (*d*) a sum of Rs. 2,000/- paid by her father to the defendant as " stridanum " at the time of their marriage. The defendant filed answer admitting his liability to pay a sum of Rs. 300/- as Mahar. He also admitted that certain articles of furniture belonging to the plaintiff were in his house and he expressed his willingness to return them to her. He denied the rest of the plaintiff's claim. He also stated that the sum of Rs. 2,000/- was paid to him for his own use in connection with the marriage expenses and for the purchase of presents for the bride and denied his liability to return the same to the plaintiff.

At the trial the defendant admitted that the plaintiff was entitled to recover the sum of Rs. 151/- as lying-in-expenses. The learned District Judge rejected the plaintiff's claim in respect of the articles of jewellery, clothes and furniture but held that the plaintiff was entitled to recover the sum of Rs. 2,000/- given to the defendant as " stridanum ". The defendant has appealed from that judgment.

In the marriage certificate this sum of Rs. 2,000/- has been described as " stridanum ". Although there is no provision in Muslim law requiring the parents of a Muslim bride to provide a dowry yet there is nothing to prevent them from doing so, if they so desire. Indeed it is customary among the Muslims of this country to give dowries to their daughters. The dowry so given falls under one of those categories, namely, Kaikuli and Stridanum. Kaikuli, properly speaking, is a marriage gift made to the bride by her parents, and is handed to and remains in the charge of the husband under his control and management during the subsistence of the marriage and may be claimed from him by the wife of her heirs. Stridanum which is a word of Sanskrit origin means the " woman's wealth " or gift to a woman. Strictly speaking, the wife has the full control and management of the property which forms her " Stridanum " and the husband has no rights whatsoever over it. But as it was pointed out by de Sampayo, J. in *Meera Saibo vs. Meera Saibo* 2 C.W.R. 263 " Kaikuli " and " Stridanum " being words taken over by Muslims from other systems of law are often used by them in a sense different from their original connotation. In the case referred to, de Sampayo, J. observed " Whatever the intrinsic meaning of the words may be, we have to take account of the meaning which the parties themselves attached to them in this particular deed. " The relevant part of the deed which came up for consideration in that case is in the following terms :—" We (the defendants) on account of the marriage that had taken place between M. A. C. M. Meera Saibo and wife M. M. Asiatumuna of the same place and for the sum of Rs. 750/-, Kaikuli or dowry money agreed to be given to Meera Saibo, and for dowry, do hereby give grant and set over to them both the property herein described as dowry ". That deed was drawn up in Tamil and the word which has been translated as " dowry " is " Seethanam " which is the Tamil derivative of the Sanskrit word " Stridanum ". It was contended by the plaintiff's in that case who were the parents of Asiatumuna who had in the meantime died without issue, that no rights passed on the deed to Meera Saibo on the ground that the lands conveyed formed " Kaikuli " and " Stridanum " property. This contention was rejected by de Sampayo, J. who was associated with Wood Renton, C.J. on two grounds. In the first place he said that the terms " Kaikuli " and " Seethanam " were not used in their literary sense but in entire ignorance of their true meaning. As

the terms of the deed indicated a general intention to make a gift to the husband and wife it was held that Meera Saibo, the husband, became entitled to a half share of the property conveyed on that deed. In the second place it was held that a grant to two persons cannot under any circumstance be construed as a grant to only one person. The Ordinance No. 7 of 1840 and the law of evidence were regarded as being decisive on that point. This case was cited with approval by Macdonell, C.J. in *Zainanbu Natchia vs. Usuf Mohamadu* 38_2 N.L.R. 37 which is a case decided by a bench of 4 Judges. In that case two deeds of transfer executed by the parents of a Muslim bride in favour of the bridegroom, for payment of "Kaikuli" agreed upon, came up for consideration. It was contended on behalf of the wife that the lands conveyed on these deeds formed "Kaikuli" property and that her husband held them in trust for her. This argument was rejected on the ground that the operative part of each deed clearly conveyed an unqualified dominium in the property to the transferee even if it was conceded that the recitals indicated an intention to create a trust. A principle deducible from these decisions appears to be that where there is a conflict between the designation of the donation and the intention of the parties making the donation the intention should prevail. So that even though the property gifted is described as "Kaikuli" or "Stridanum" yet if it is otherwise clear that the real intention of the donor was to make an absolute gift to the bridegroom that intention must be given effect to. However in assessing the evidence of intention the fact that the donation has been designated "Kaikuli" or "Stridanum" cannot be ignored, because these are terms widely in use and the majority of Muslims, I take it, know what they connote. But I am unable to agree with the learned District Judge when he stated "It will be a contradiction in terms to describe a gift given to a man as "Stridanum". By this dictum if he meant that in no circumstances could a gift described as "Stridanum" be construed as a gift to the bridegroom it is too wide a proposition and finds no support from the recent decisions of this Court. In appropriate cases, as I observed earlier, if it is clear that the intention of the donor was to make an absolute gift to the bridegroom the use of the word "Stridanum" to describe the gift is no bar to holding it to be a gift to the bridegroom.

In the instant case the learned District Judge after considering the evidence definitely held that the sum of Rs. 2,000/- was intended by the parties to be a marriage settlement in favour the plaintiff. He also refused to accept the evidence led on behalf of the defendant that this amount was intended as a personal gift to the defendant. I am unable to say that these findings are wrong; on the contrary there is ample evidence to support them. Accordingly I dismiss the appeal with costs.

Sinnetamby, J.
I agree

Appeal dismissed with costs.

Present : Gunasekera, J. and Sinnetamby, J.

E. NALLATHAMBY vs. Mrs. G. M. LETAN

S. C. No. (*F*) 156/*M* 1955—*D. C. Gampaha Case No.* 3151/*M*

Argued on : 9th August, 1956
Decided on : 25th September, 1956

Landlord and tenant—Tenancy agreement letting dwelling house and coconut garden—House and garden subsequently assessed as separate units—Action by plaintiff-tenant to recover excess rent—Landlord's plea of letting house and garden separately—Applicability of Rent Restriction Act—Meaning of the term "premises"—English Law.

Under a written agreement in 1946 the plaintiff took on rent a house and a coconut garden, bearing one assessment number. In December, 1951, the house and the coconut garden were divided and separately assessed. The plaintiff filed action for the recovery of excess rent paid by him for a period anterior to December, 1951. It is not disputed that the rents received would be excessive if the premises let under the agreement were regarded as one unit.

The District Court dismissed the action on the ground that there was no over-payment of rent as the subject matter of the agreement related to two separate units : the house and its immediate adjuncts, and the coconut garden to which the Rent Restriction Act did not apply.

Held : (1) That the terms of the agreement established that the parties regarded the contract as a letting of a house with a garden as an adjunct and that the rent charged was in excess of the legal rent.

(2) That where land and a house are let as one unit, the subsequent division into two will not make the original letting as divisible into two separate units, the Rent Restriction Act being applicable only to the house, and not to the land.

Per SINNETAMBY, J.—" It seems to me that where a house has been let together with land what one has to ascertain is whether the house is an adjunct of the land or the land an adjunct of the house. It is a question of fact..... If the land is considered to be an adjunct of the house, in my view, the Rent Restriction Act will apply, but if the converse is the case the Act will not apply. In order to decide this it seems to me the simple test to apply is to consider how the parties regarded the transaction."

Cases cited : *Pakiadasan vs. Marshall Appu* 52 N. L. R. 335.
Nicholas Hamy vs. James Appu 52 N. L. R. 137.
Langford Property Co. Ltd. vs. Batten 1950 2 A. E. R. 1079.

Rent Restriction Ordinance No. 60 of 1942.
Rent Restriction Act No. 29 of 1948.
1950 2 A. E. R. 1082.
Megarry 7th Ed. p. 92.

H. W. Jayawardene, Q.C., with *M. Somasundaram* and *S. Sharvananda*, for plaintiff-appellant.

Walter Jayawardene, with *Neville Wijeratne*, for defendant-respondent.

SINNETAMBY, J.

In this case the plaintiff who was a tenant under Agreement D2 of 30-9-46 of the premises described therein as bearing Assessment No. 245, Sea Street, Negombo, sued his landlord, the defendant, for the recovery of excess rent over and above the standard rent of the premises for the period 1st August, 1949 to 31st December, 1951, aggregating to Rs. 1544·25. According to the evidence the property let is about 2½ or 3 acres in extent with a dwelling house standing on a site of about one rood in extent. The rest of the land is planted in coconuts. At the commencement of the tenancy the entire premises were let as one unit and bore Assessment No. 245 which in 1948 was changed to No. 156. The premises were described in the Assissment Register P1 as " Tiled house and garden ". In December, 1951 the premises were divided by the Municipality at the instance of the defendant into two parts and given two separate assessment numbers. The house described in P1 as " tiled house " was given No. 154 and the garden described in P1 as " garden " was given No. 156 as a separate entity, the Annual Value of Rs. 849/- being apportioned between them as follows : Rs. 589/- for the tiled house and Rs. 268/- for the garden. By agreement of the parties defendant took over possession of the garden bearing Assessment No. 156 and the plaintiff continued in possession of the dwelling house.

The evidence discloses that the annual value in 1941 was Rs. 289/- and it is not disputed that on this basis the standard rent would be Rs. 36·75 but the defendant has recovered at the rate of Rs. 90/- per mensem : Rs. 53·25 per month represents the excess rent paid. The defendant however contends that the premises let consists of two parts represented now by the two portions bearing the assessment numbers 154 and 156 ; that there has been an apportionment of the rent between them ; and that it is only the portion where the house stands which is subject to the provisions of the Rent Restriction Act and not the other. The arguement in the trial Court proceeded on the basis that if the house and its immediate adjuncts are to be considered as a separate unit subject to the provisions of the Rent Restriction Acts and the garden another unit not subject to the Act in respect of which the landlord could recover any rent he pleases there would be no over-payment, and it is on this basis that the learned trial judge based his decision. It is against this finding that the present appeal has been preferred.

Ordinance No. 60 of 1942 by which rent restriction was first introduced applied to all " premises " within certain proclaimed areas and the word is repeated in the Act of 1948. There is no definition given to the word " premises " in either of the enactments and it has been left to the Courts to evolve a definition which would give effect to the entention of the legislature. This Court has held in *Pakiadasan vs. Marshall Appu* (52 N.L.R. 335) that the term does not apply to a bare land and for the Act to be applicable there must be a building on the land : the expression used is " a building with the land appurtenant thereto devoted to residential or business purposes. " For the purpose of that decision it was only necessary to hold that land without any building on it does not come within the ambit of the Ordinance. The Court was obviously confining its comments to the facts of that particular case. I do not think this decision

specifically defines " premises as something which must be limited to the building *and the land appurtenant thereto*, in the sense that if the property let contains a building and more land than can be regarded as strictly " appurtenant " thereto, it must be regarded as " premises ". If so it would raise problems of a difficult nature and it would be contrary to the view taken in the earlier decision of *Nicholas Hamy vs. James Appu* by a Bench of two judges reported in 52 N.L.R. 137 where the word is defined as " building " or "building on a land ". This earlier decision was not cited at the subsequent hearing of *Pakiadasan vs. Marshall Appu* when the Bench consisted of a single judge sitting alone. In *Nicholas Hamy vs. James Appu* the word " premises " was held to include not only the building and the land on which it stands but even the machinery and tools in the building which was being used as a workshop. Each case must be decided on the facts and circumstances established by the evidence given in the course of the trial and comments made in connection with facts established in one case may be wholly inappropriate in another case where the facts are entirely different.

If the definition is to be confined to the " building and land appurtenant thereto " a difficulty with which one is immediately confronted is the difficulty of deciding what extent of land can be regarded as appurtenant to a building. It will become a variable and an uncertain quantity and a fruitful source of much litigation. What one may regard as appurtenant to a building in the countryside will not be so regarded in a busy section of the built up portion of the City etc. It was suggested that to come within that term the land might be limited to 1/3 rd the area of the actual site on which the building stands in view of the provisions of the Housing and Town Improvements Ordinance, where presumably for health reasons, it is provided that no building should cover more than 2/3 rd the area of the land on which it stands. This is an express provision in that particular Ordinance which cannot be willy nilly be imported into another merely because it may provide a satisfactory solution to a difficult question.

No assistance can be derived from a consideration of the English Acts where the word " premises " is not used. The original Act of 1915 was introduced in the United Kingdom immediately after the commencement of the first World War and was applicable to

> " A house or part of a house let as a separate dwelling where such letting does not include any land other than the site of the dwelling house and a garden other premises within the curtilage of the dwelling house." (1950 2 A.E.R. 1082)

The word " site " has been held to mean the portion of land upon which the four walls of the house stands. " Curtilage " is defined in the Concise Oxford Dictionary to mean " area attached to a dwelling house ". This provision was found to be unsatisfactory and was superceded by the Act of 1920 which provided as follows in Section 12 (2) :

> " For the purpose of this Act any land or premises let with a house shall, if the rateable value of the land or premises let separately would be less than the rateable value of the house, be treated as part of the house, but, subject to this provision, this Act shall not apply to a house let together with land other than the site of the house." (1950 2 A.E.R. 1082).

It will thus be seen that if the rateable value of the land when let to a hypothetical tenant exceeds $\frac{1}{4}$ the rateable value of the house alone the Acts would not apply : something more definite and more readily ascertainable than the vague term " curtilage " was brought into force. It is important to note that to be treated as part of the house the land should have been let together with the house and in considering whether this was so the English Courts have held that it is important to consider whether the two lettings were treated *by the parties* as one (Megarry 7th Ed. p. 92) and this far outweighed the circumstance that the house was on a weekly tenancy and the land on a lease (Megarry 7th Ed. p. 92 where reference is made to decided cases). The Act of 1939 amended these provisions further and provided that

> " any land or premises let together with the dwelling house shall unless the land or premises consist or consists of agricultural land exceeding 2 acres in extent be treated as part of the dwelling house."

It will be seen that the English Acts from time to time extended the scope of the Rent Acts. In 1915 it covered only the site and the curtilage ; the 1920 Act extended the meaning of the term " dwelling house " to include not only the curtilage but also land let with the house provided its rateable value was not more than $\frac{1}{4}$ the rateable value of the house. The Act of 1939 widened the protection given to tenants still further and included within the scope of the Acts any land however large let with the dwelling house subject to the condition that if it was agricultural land it did not exceed two acres

provided of course the rateable value of the entire unit did not exceed the figures mentioned in the Act : the term " agricultural land " was defined. The learned trial judge was mistaken in regard to the scope and effects of the English Acts when he observed :

> " Even under the English Law where a house is let with land other than the site of the house the letting ceased to be protected by the Rent Act."

At no stage in the development of the Rent Acts was this the law in England. The learned trial judge was perhaps influenced by this erroneous impression he had of the law prevailing in England under the Rent Acts. He purported to follow *Pakiadasan vs. Marshall* in which the observations of the Appeal Judge must be regarded as " obiter ". He did not consider, presumably because it was not brought to his notice, the case of *Nicholas Hamy vs. James Appu.*

The Ceylon Ordinance and the subsequent Acts afford no guidance as to what is meant by the term " premises " and no attempts have been made except, as far as I can gather by the decisions already referred to, to define it. It seems to me that where a house been let together with land what one has to ascertain is whether the house is an adjunct of the land or the land an adjunct of the house. It is a pure question of fact but this aspect of the matter has not been considered by the learned trial judge. If the land is considered to be an adjunct of the house, in my view, the Rent Restriction Act will apply but if the converse is the case the Act will not apply. In order to decide this it seems to me the simple test to apply is to consider how the parties regarded the transaction. Did they regard it as the letting of a house with a garden attached in which event it will come within the purview of the Rent Restriction Act or did they regard it as a lease of a land in which there happens to be a house or hut in which event the rent paid cannot be regarded as coming within the control of the Rent Restriction Act. Applying this test it is abundantly clear that the parties regarded the contract in question as a letting of a house with a garden as an adjunct. This is quite manifest on an examination of the contract D2. Para 5 provides that the tenant shall on 30-9-47 deliver peaceful possession of the premises as the landlord *requires the same for his and his family's occupation* —a contingency which did not eventually arise. It is only a house that can be occupied. Para6 provides that the landlord will not attend to any repairs of the premises during the tenancy, and para 7 provides that if the landlord requires the house before the termination of the said period he will give three months notice to the tenant. What was uppermost in the minds of the parties was the house and not the garden. " Repairs " is a term used in connection with a building and there are no covenants which one associates with a plantation in this agreement. Learned Counsel for the respondent, however, argued, if I understood him aright, that where the value of a house as a house has been increased by the existence of a garden then the Rent Restriction Act would not apply. No doubt, where the land is fairly large in extent and is planted with coconuts, the land apart from the house would have an appreciable income value but I cannot conceive of a case where the value of any building would not appreciate in value at least to the tenant by the existence of a garden however small in size or in productivity. The test suggested by learned Counsel would be too vague and uncertain.

The mere fact that what was origianally one unit has since been separated into two would not in my opinion make any difference. Learned Counsel relied on the case of Langford Property Counsel relied on the case of *Langford Property Co. Ltd,. vs. Batten* (1950 2 A.E.R. 1079) in support of this argument. In that case two separate units which were originally separately let were subsequently let together as one unit and it was held that the premises subsequently let formed an entity different to the house alone which was originally let to the tenant for the purpose of the Rent Restriction Act, and that therefore the standard rent of the new unit was not the standard rent of the house alone. With this statement of the law one cannot possibly disagree, but it does not mean that the converse proposition is necessarily correct, viz. that where land and a house are let as one unit its subsequent division into two will make it legitimate to regard the original letting as divisible into two separate units and that the Rent Act will apply only to that portion on which the house stands, the standard rent being the rent at which it could in 1941 be let to a hypothetical tenant and not to the bare land which can be let at any rent. To subscribe to such a proposition would have the effect of depriving the tenants of the protection which our Rent Act gives them, for an unscrupulous landlord can always subdivide or claim that he can subdivide his property into a portion containing the house and a portion not containing the house and so contend that he can charge what rent he pleases for the bare land. The result would be that the Rent Act cannot be

applied to any house which has appurtenant to it a plot of land however small over and above the site on which the house stands. If the house and its surroundings are let as one unit it must remain one unit and neither in common sense nor in law can it be regarded as two units merely because it is capable of being subdivided later into two.

In my view the only rational test to apply is to ascertain whether it was the house that was let with the garden as an adjunct or whether it was the garden that was let with the house as an adjunct. In deciding this question great importance must be attached to the intention of the parties. If the intention is clear and unmistakable there is in my view no need to go beyond it. Applying this test to the facts of the present case the only conclusion possible is that it was the house that was let to the plaintiff. The Rent Act would in consequence apply to the letting. The plaintiff, having paid more than the standard rent is entitled to recover the overpayment. I would accordingly set aside the judgement of the learned District Judge and enter judgement for plaintiff as prayed for with costs in both Courts.

GUNASEKERA, J.
I agree,

Puisne Justice

Present : L. W. de SILVA, A.J.

WILLIAM SINGHO *et al* vs. EDWIN SINGHO

S. C. 200—1956—*C. R. Avissawella* 600

Argued on : 18th July, 1957.
Decided on : 31st July, 1957.

Jurisdiction—Action in Court of Requests for recovery of Rs. 125/- *—After trial judgment for Rs.* 66/- *—Failure to take plea of exclusive jurisdiction of Rural Court—Is such judgment valid—Sections* 11 *and* 12 *of the Rural Courts Ordinance No.* 12 *of* 1945 *as amended by No.* 13 *of* 1945*—Section* 636 *of the Civil Procedure Code.*

The plaintiff instituted this action in the Court of Requests claiming Rs. 125/- from the defendant, being the former's share of the timber sold and appropriated by the latter. After trial judgment was entered in favour of the plaintiff in a sum of Rs. 66. The defendant appealed.

Held : (1) That the learned Commissioner of Requests had no jurisdiction to enter the said judgment inasmuch as by sections 11 and 12 of the Rural Courts Ordinance No. 12 of 1945 (as amended by Ordinance No. 13 of 1945) Rural Courts are vested with exclusive jurisdiction in respect of claims of this value.

(2) That notwithstanding the failure on the part of the defendant to raise the issue of want of jurisdiction on this ground at the trial the Court is bound to dismiss the action in view of the imperative provision, section 636 of the Civil Procedure Code.

Cases referred to : *Loku Banda et al vs. Yahapela Veda et al* 15 N. L. R. 487.
Carolis and another vs. Siyadoris and others 2 C. W. R. 181.
Komale vs. Petha et al 23 N. L. R. 251.

G. T. Samerawickrame, for the defendants-appellants.

N. Samarakoon, with *S. Sharvananda*, for the plaintiff-respondent.

L. W. de Silva, A. J.

The only point taken at the hearing of this appeal is that the debt due to the plaintiff-respondent from the defendants-appellants fell within the exclusive jurisdiction of the Rural Court, and the Court of Requests had no jurisdiction to hear and determine this case. The action was for the recovery of a sum of Rs. 125/- alleged to be the respondent's share of the value of timber sold and appropriated by the appellants. After trial, the learned Commissioner of Requests en-

tered judgment in a sum of Rs. 66/- in favour of the respondent.

Learned counsel for the appellants relied on section 636 of the Civil Procedure Code and sections 11 and 12 of the Rural Courts Ordinance No. 12 of 1945 and contended that the Commissioner should have dismissed the action or referred the parties to the Rural Court since the case came within its exclusive jurisdiction. Learned counsel for the respondent, however, maintained that the Commissioner had jurisdiction and was not obliged to transfer the trial to the Rural Court since the respondent had made his claim bona fide and without any intention of evading the jurisdiction of the Rural Court. In support of this argument, learned counsel for the respondent referred me to the following decisions : *Loku Banda et al. vs. Yahapela Veda et al.* 15 N. L. R. 487 *Carolis and another vs. Siyadoris and others* 2 C. W. R. 181 and *Komale vs. Petha et al* 23 N. L. R. 251. The provisions of section 636 of the Civil Procedure Code do not appear to have been considered in these cases. Learned counsel for the appellants argued that the decisions relied on by the respondent have no application to the Rural Courts Ordinance now in force, and I have no difficuly in agreeing with him.

In *Loku Banda's case* which was followed in the two later cases, Lascelles C. J. considered the construction of sections 28 and 34 of "The Village Communities Ordinance, 1889." Section 28 assigned to the Village Tribunal all cases in which the debt, damage, or demand shall not exceed twenty rupees. Section 34, after declaring that the jurisdiction conferred on Village Tribunals is exclusive, and shall not be exercised by any other tribunal on any plea or pretext whatsoever, enacted :—

> "And, *in order to prevent the jurisdiction of these tribunals being evaded*, it shall be the duty of any Court, civil or criminal, whenever it shall appear to them that any case brought before them is one properly cognizable by the Village Tribunal established in any place (and it shall be competent to a Commissioner of Requests or Police Magistrate to examine the parties at any stage of the case in order to ascertain this), to stop the further progress of such case, and to refer the parties to the Village Tribunals, and to condemn the parties in costs as to such court shall seem fit."

Lascelles C. J. held that, where a plaintiff *bona fide* and without any intention of evading the jurisdiction of the Village Tribunal, claims more than Rs. 20/- in the Court of Requests, but is able to make good his claim to a part only of his demand, the Commissioner is not bound to transfer the case to the Village Tribunal. He enunciated this as the principle on which two other cases of this Court had been decided. Ennis J. who agreed with the Chief Justice, stated, however, that "the facts of the case show that it did not fall exclusively within the jurisdiction of the Village Tribunal."

The conclusion reached by Lascelles C. J. was influenced by the language of section 34— "*and in order to prevent the jurisdiction of these tribunals being evaded*" etc. This was interpreted to mean that there was a *duty imposed on the Commissioner to prevent the jurisdiction of the Village Tribunal being evaded by intentionally increasing the amount of the debt, damage, or demand*, 15 N.L.R. at 489. In *Komale vs. Petha et al.* 23 N. L. R. 251 Shaw J. felt that he ought not to depart from the rulings of the Court, but said "*it certainly appears somewhat startling that the intention of the plaintiff can affect the jurisdiction of the Court.*" It is unnecessary to say any more about those rulings since they have no bearing on the provisions of the Rural Courts Ordinance No. 12 of 1945.

Section 11 of the Rural Courts Ordinance No. 12 of 1945 which, together with section 12, governs this appeal, declares that the jurisdiction conferred by this Ordinance on Rural Courts shall be exclusive, and cases within that jurisdiction shall not be entertained, tried or determined by any Court established under the provisions of the Courts Ordinance. Section 12 is as follows :—

> "Where is any case, whether civil or criminal, instituted before any Court established under the Courts Ordinance, it appears to such Court at any stage of the proceedings that the case is one within the exclusive jurisdiction of a Rural Court, the Court shall stop the further progress of the case and refer the parties to such Rural Court, and, where such case is a civil case, may make such order as to costs as may seem just."

The proviso to this section is not material to this appeal. It is to be noted that the provisions of the Rural Courts Ordinance have no reference whatever to an evasion, intentional or otherwise, of the jurisdiction of the Court. The provisions of sections 11 and 12 of the Rural Courts Ordinance are plainly more stringent than those of section 34 of the Village Communities Ordinance.

The want of jurisdiction seems to have escaped the notice of the learned Commissioner probably

because the matter was not raised at the trial. But the problem has to be considered also in the light of the imperative requirements of section 636 of the Civil Procedure Code (Cap. 86) :—

> " When the want of jurisdiction is caused by reason of the exclusive jurisdiction of any Village Tribunal, the averment in the plaint made in pursuance of section 45 shall be considered as traversed, whether the defendant in his answer is silent in reference to it or not ; and it shall be the duty of the court to dismiss the action on this preliminary issue in bar at the earliest stage of the action whereat, by the admission of the parties or other evidence, it appears to the court that such Village Tribunal has exclusive jurisdeiction."

By Ordinance No. 12 of 1945, existing Village Tribunals have been declared to be Rural Courts. Section 9(1) (a), read in the context of sections 11 and 12, makes it clear that all actions in which the debt, damage or demand does not exceed one hundred rupees come within the exclusive jurisdiction of a Rural Court. It was thus incumbent on the learned Commissioner to take into consideration the provisions of section 636 of the Civil Procedure Code and sections 11 and 12 of the Rural Courts Ordinance No. 12 of 1945 in view of his finding that the amount due to the respondent was only Rs. 66. Since he has acted without jurisdiction in entering judgment for the respondent, I set aside the judgment and decree and dismiss the plaintiff-respondent's action. Each party must bear the costs of the trial in the Court below. The appellants are entitled to the costs of appeal.

Allowed.

Present : Basnayake, C.J. and Sinnetamby, J.

BABUNONA vs. ARIASENA

S. C. No. 122—*D. C. Matara No. P.* 810

Argued and decided on : 28th February, 1957

Civil Procedure Code, section 59—*Service of Summons.*

The requirement of section 59 of the Civil Procedure Code is satisfied only if the summons is delivered or tendered to the defendant personally. The provisions of the section are imperative and should be strictly observed.

R. A. Kannangara with *A. S. Vanigasooriyar*, for the defendant-appellant.
N. E. Weerasooriya, Q.C., with *D. E. V. Dissanayake*, for the plaintiffs-respondents.

Basnayake, C.J.

The defendant-appellant sought unsuccessfully to have the interlocutory decree in this case set aside on the ground that she had not been served with summons. The process server, who was called as a witness, admits that he did not serve the summons on the defendant herself. He states that he delivered the summons to her husband, and that the defendant was in the house at the time. The defendant denied that she was in her husband's house on the date on which the Fiscal stated that he delivered the summons to her husband and pleaded that she had not been served with summons in the manner prescribed by the Civil Procedure Code. Section 59 of the Civil Procedure Code requires that service of summons shall be made " by delivering or tendering to the defendant personally a duplicate thereof. " The requirement of the section is satisfied only if the summons is delivered or tendered to the defendant personally. The provisions of the section are imperative and should be strictly observed. Clearly in the instant case, the statutory requirement has not been complied with. The defendant is therefore entitled to the relief she seeks. We therefore set aside the order of the learned District Judge refusing to vacate the interlocutory decree and direct that the interlocutory decree be vacated and that the appellant be allowed to file answer and defend the action. The appellant is entitled to the costs of this appeal.

Sinnetamby, J.
I agree.

Set aside.

Present : BASNAYAKE, C.J., GUNASEKARA, J., PULLE, J., DE SILVA, J., AND SANSONI, J.

SILVERLINE BUS CO., LTD., AND OTHERS *vs.* KANDY OMNIBUS CO., LTD. AND OTHERS.

Application for Conditional Leave to Appeal to the Privy Council from the Judgment of the Supreme Court in S.C. Application No. 596/1952

Argued on : 31st May, 1st, 7th, 8th, 11th, 12th, 13th and 14th June, 1956.
Decided on : 14th December, 1956.

Privy Council—Conditional leave to appeal to—Writ of certiorari allowed by Supreme Court quashing order of Tribunal of Appeal under Motor Traffic Act No. 14 *of* 1951*—Right of appeal to Privy Council—Is it a " civil suit or action " within the meaning of section* 3 *of the Appeals (Privy Council) Ordinance (Cap.* 85*)—Nature and scope of writ of certiorari—Meaning of " action "—Civil Procedure Code, section* 6.

The respondent, a holder of route licences, complained to the Commissioner of Motor Transport that the applicants were picking and setting down passengers in violation of its rights under the route licences. The Commissioner after inquiry ordered the applicants not to do so, whereupon the applicants appealed to the Tribunal of Appeal constituted under the Motor Car Ordinance No. 45 of 1938. The Tribunal set aside the Commissioner's order. The respondent then applied for a mandate in the nature of a writ of certiorari from the Supreme Court, which was granted on the ground that the Tribunal had acted without jurisdiction.

The applicants petitioned for leave to appeal to the Privy Council from the order of the Supreme Court.

Held (Sansoni, J. dissenting) : (1) That there was no right of appeal to the Privy Council under the Appeals (Privy Council) Ordinance as an application for a writ of certiorari is not " a civil suit or action " within the meaning of section 3 of the Ordinance.

(2) That the words " civil suit or action " should be construed in their ordinary sense of a proceeding in which one party sues or claims something from another in regular civil proceedings.

Per BASNAYAKE, C.J.—The dicta I have cited go to show that proceedings in certiorari do not fall within the category of proceedings known as suits or actions. In certiorari the Court exercises its supervisory functions in order to determine whether the inferior tribunal has exceeded its jurisdiction or committed an error of law apparent on the face of the proceedings, and is not called upon to pronounce judgment on the merits of the dispute between the parties before the inferior tribunal.

Authorities referred to : *In re Goonesinha* (1942) 44 N.L.R. 75.
Subramaniam Chetty vs. Sousa (1923) 25 N.L.R. 344.
Kodakan Pillai vs. Mudanayake (1951) 54 N.L.R. 350.
R. vs. The London County Council, ex parte, The Entertainments Protection Association Ltd. (1931) 2 K.B. 215 at 233.
R. vs. Nat Bell Liquors Ltd. (1922) 2 A.C. 128 at 154-155.
R. vs. Northumberland Compensation Appeal Tribunale Exparte Shaw (1952) I.A.E.R. 122 at 127.
Abbott vs. Sullivan and others (1952) 1 A.E.R. 226.
Lee vs. Showmen's Guild of Great Britain (1952) 1 A.E.R. 1175.
O'Conor vs. Isaacs and others (1956) 2 W.L.R. 585.
Re Lord Bishop of Natal (1864) 3 Moo. (N.S.) 115 at 152.
The Falkland Islands Co. vs. The Queen (1863) 1 Moo. (N.S.) 299 at 312.
In re Abraham Mallory Dillet (Brit. Hond.) (1887) 12 A.C. 459 at 466.
Therberge vs. Laudry (Quebec) (1876) 2 A.C. 102 at 106.
Queen vs. Alloo Paroo (1847) 5 Moo. P.C. 296 at 303.
Nadan vs. The King (1926) A.C. 482 at 491.
Gillingham vs. Transvaalsche Koelkamers, Beperkt (1908) Transvaal Law Reports Supreme Court 964.
Collier vs. Redler and another (1923) A.D. 640 at 649.
Collett vs. Priest (1931) A.D. 290.
Solomon vs. Law Society of the Cape of Good Hope (1934) A.D. 401.
In re Ledward (1859) 3 Lorenz 234.
Keppel Jones & Co. (1877) Ramanathan 379.
H. W. de Vos (1899) 2 Browne 331.
Section 781 *of the Civil Procedure* (Repealed by Ordinance No. 31 of 1909).
Sockalingam Chetty vs. Manikam et al (1930) 32 N.L.R. 65.
Soertsz vs. Colombo Municipal Council (1930) 32 N.L.R. 62.
RM. AR. AR. RM. vs. The Commissioner of Income Tax (1935) 37 N.L.R. 447.
Settlement Officer vs. van der Poorten et al (1942) 43 N.L.R. 436.

van der Poorten vs. The Settlement Officer (1946) 47 N.L.R. 217.
In re Goonesinha (1942) 44 N.L.R. 75.
Subramaniam Chetty vs. Soysa (1923) 25 N.L.R. 344.
Controller of Textiles vs. Mohamed Miya (1948) 49 N.L.R. 105.
Kodakan Pillai vs. Mudanayake (1951) 54 N.L.R. 350.
Attorney-General vs. Ramaswami Iyengar (1954) 55 N.L.R. 572.
Commissioner of Stamps, Straits Settlements vs. Oei Tjong Swan (1933) A.C. 378.
Rangoon Botatoung Company Ltd. vs. The Collector, Rangoon (1912) 39 L.R. I.A. 197.
Bradlaugh vs. Clarke (1883) 8 A.C. 354.
Secretary of State for India vs. Chelikani Rama Rao (1916) 43 L.R. I.A. 192.
Rangoon Botatoung Company Ltd. vs. The Collector of Rangoon (1912) 39 L.R. I.A. 197.
Tata Iron and Steel Co., Ltd. vs. Chief Revenue Authority of Bombay (1923) A.I.R. P.C. 148.
R. vs. Edmundsbury (1947) 2 A.E.R. 170.
Walsalls Overseers vs. L. & N. W. Ry. Co. (1879) 4 A.C. 30 at 39.

H. W. Jayewardena, Q.C., with *G. T. Samerawickrema. D, R. P. Goonetilleke*, and *N. R. M. Daluwatte*, for the petitioner.

H. V. Perera, Q.C., with *C. G. Weeramantry* and *G. Barr Kumarakulasinghe*, for the 1st respondent.

E. F. N. Gratiaen, Q.C., Attorney-General, with *V. S. A. Pullenayegum, Crown Counsel*, for the Crown (with permission).

BASNAYAKE, C.J.

This is an application for leave to appeal to the Privy Council under the Appeals (Privy Council) Ordinance (hereinafter referred to as the Ordinance) from an order made by a single Judge of this Court granting a mandate in the nature of a writ of certiorari under section 42 of the Courts Ordinance quashing the decision of a Tribunal of Appeal constituted under the Motor Traffic Act, No. 14 of 1951.

The application is opposed on the ground that the proceedings in which the mandate was granted do not fall within the ambit of the expression " civil suit or action " in section 3 of the Ordinance. The matter was first argued before my brother Weerasooriya and myself and as we failed to agree on the order that should be made it was set down for hearing before a Bench of five Judges constituted under section 51 of the Courts Ordinance.

The Attorney-General appeared at the present hearing and asked that he be permitted to make his submissions on the questions involved as our decision might affect certain Crown appeals pending before the Privy Council although those appeals are not appeals from decisions on applications for writ of certiorari.

It will be convenient if I were to state, as briefly as possible, the facts which led to the application, for a mandate in the nature of a writ of certiorari, by the respondent to the present application for leave to appeal, the Kandy Omnibus Company Limited (hereinafter referred to as the respondent).

The respondent was the holder of eight route licences granted under the Omnibus Service Licensing Ordinance, No. 47 of 1942, all operative within the town of Kandy. In the year 1945 it complained to the Commissioner of Motor Transport that the Silverline Bus Company Limited, the P.S. Bus Company Limited, the Singhe Bus Company Limited, the United Bus Company Limited, the Parakrama Bus Company Limited, the W.H. Bus Company Limited, the Sri Lanka Omnibus Company Limited, and the Madhyama Lanka Bus Company Limited (hereinafter collectively referred to as the applicants) who had route licences to ply for hire between Kandy town and places outside it were picking up passengers and setting them down within the limits of Kandy town to its prejudice and in violation of its rights under its route licence.

On 29th September, 1950, the Commissioner of Motor Transport after notifying and hearing the other Companies made order that they should not pick up and set down passengers within the limits of Kandy town. The applicants appealed to the Tribunal of Appeal constituted under the Motor Car Ordinance, No. 45 of 1938, against the Commissioner's order, but one of them—the Madhyama Lanka Bus Company Limited—withdrew its appeal at the hearing. The appeals were heard on 18th November, 1950 and 9th and 15th December, 1950, by a Tribunal consisting of Messrs. S. J. C. Kadirgamar, S. Pararajasingham and T. W. Roberts, but the hearing remained unfinished on 1st September, 1951, when the Motor Traffic Act, No. 14 of 1951, which repealed the Motor Car Ordinance, No. 45 of 1938, was brought into operation.

On 26th August, 1952, the Minister of Transport and Works made the following order :—

"Motor Car Ordinance, No. 45 of 1938,

AND

Motor Traffic Act, No. 14 of 1951

It is hereby notified that the Honourable the Minister for Transport and Works has been pleased, under section 4 of the Motor Car Ordinance, No. 45 of 1938, read with paragraph (*c*) of the proviso to section 243 (1) and section 246 (4) (*a*) of the Motor Traffic Act, No. 14 of 1951, to appoint the following to form a panel from which Tribunals of Appeal shall be constituted for the purpose of disposing of the appeals which have been duly preferred under the Motor Car Ordinance, No. 45 of 1938, and the Omnibus Service Licensing Ordinance, No. 47 of 1942 :—

1. Mr. T. W. Roberts.
2. Mr. S. Pararajasingham.
3. Mr. S. J. C. Kadirgamar, J.P.
4. Mr. P. C. Villavarayan.
5. Mr. Fred J. de Saram.
6. Mr. M. Shums Cassim, M.B.E.
7. Mr. J. L. M. Fernando.
8. Mr. A. E. Christoffelsz, C.M.G.
9. Mr. S. P. Wickramasinha.
10. Mr. E. W. Kannangara, C.B.E.

(Sgd.) J. N. Arumugam,
Permanent Secretary,
Ministry of Transport and Works.
Colombo, August 26, 1952."

Of the above-named the first three members, who heard the appeal under the repealed law, continued the hearing purporting to do so by virtue of the above order, and on 10th October, 1952, made order setting aside the order of the Commissioner of Motor Transport. The respondent thereupon applied for a mandate in the nature of a writ of certiorari to quash the order of the Tribunal, on the ground that the members of the Tribunal who continued the hearing of the appeal under the old law had no jurisdiction to do so. After a hearing which lasted a number of days the order of the Tribunal was quashed on the ground that it had acted without jurisdiction. Thereupon the present application for leave to appeal to the Privy Council was lodged.

As stated at the very outset of this judgment, this application is opposed on the ground that certiorari proceedings do not fall within the ambit of the expression " civil suit or action " in section 3 of the Ordinance.

In order to ascertain whether a writ of certiorari can aptly fall within the ambit of the expression " civil suit or action ", it is necessary first to ascertain the nature and scope of the writ which in our law is in the form of a mandate and in England, since the abolition of the prerogative writ by section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, is in the form of an " order ".

According to Bacon's Abridgment, Volume II, page 9, a certiorari is—

" . . . an original writ issuing out of Chancery, or the *King's Bench*, directed in the King's name, to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end the party may have the more sure and speedy justice before him, or such other justices as he shall assign to determine the cause."

Though the 1938 statute abolished the writs, nevertheless the nature and scope of the orders which took their place remained unchanged. In the words of Scrutton, L.J., in *R. vs. The London County Council, Ex parte The Entertainments Protection Association Ltd.*, (1931) 2 K.B. 215 at 233—the writ of certiorari is—

" . . . a very old and high prerogative writ drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior Courts and to make it certain that they shall not exceed their jurisdiction ; and therefore the writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior Court."

It is a writ which can be availed of both in civil and in criminal proceedings. As was observed by Lord Sumner in *R. vs. Nat Bell Liquors Ltd.* (1922) 2 A.C. 128 at 154-155—

" The object is to examine the proceedings in the inferior Court to see whether its order has been made within its jurisdiction. If that is the whole object, there can be no difference for this purpose between civil orders and criminal convictions, except in so far as differences in the form of the record of the inferior Court's determination or in the statute law relating to the matter may give an opportunity for detecting error on the record in one case, which in another would not have been apparent to the superior Court, and therefore would not have been available as a reason for quashing the proceedings."

The certiorari jurisdiction, if I may so call it for the sake of convenience, of the High Court in England and indeed of this Court in this country is, again in the words of Lord Sumner (page 156)—

" . . . to see that the inferior Court has not exceeded its own (jurisdiction), and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn,

transgress the limits within which its own jurisdiction of supervision, *not of review*, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise."

These principles have recently been re-stated by Denning, L.J., in *R. vs. Northumberland Compensation Appeal Tribunal, Ex parte Shaw* (1952) A.E.R. 122 at 127—

". . . the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal. as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the King's Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had."

In support of the contention that certiorari falls within the scope of the expression "civil suit or action" learned counsel relied on the cases of *Abbott vs. Sullivan and others* (1952) 1 A.E.R. 226, *Lee vs. Showmen's Guild of Great Britain* (1952) 1 A.E.R. 1175, and *O'Conor vs. Isaacs and others* (1956) 2 W.L.R. 585.

The first of these cases was an action for damages by the plaintiff, a corn porter employed in the London docks, who was a member of a committee formed to protect the interests of corn porters. On account of an incident in which the plaintiff was involved his name was removed from the register of corn porters by the committee. The plaintiff's action for damages was against two members of the committee for wrongfully removing him from the register and against another for procuring his removal. It was held that the resolution by which the plaintiff's removal was decided was *ultra vires* of the committee, and was invalid; but as the defendants were not actuated by malice or wrong motive the majority of the Court did not award damages.

The second case was an action by a member of the Showmen's Guild of Great Britain against the Guild for a declaration that the decisions of the Committee—

(*a*) that the plaintiff was guilty of "unfair competition", and

(*b*) imposing a fine on him, and

(*c*) that he had ceased to be a member as he did not pay the fine,

were *ultra vires* and void. The Court held that the Committee had acted *ultra vires* and that their decision to expel the plaintiff was void.

In the third case the plaintiff sued the Justices of the Peace of the Petty Sessional Division of Kingston-upon-Thames, Surrey, fourteen in number, claiming damages for false imprisonment and for acts done by them without jurisdiction while sitting as Justices of the Peace.

All these three cases were regular actions and not proceedings in certiorari. There can be no doubt that these cases would fall within the ambit of our expression "civil suit or action". But the fact that an action for trespass lies, where a Magistrate or any Judge of an inferior Court assumes jurisdiction, where he has no jurisdiction, as a result of a mistake of law does not afford ground for holding that proceedings in certiorari to have the illegal assumption of jurisdiction examined by the High Court are an action against the Magistrate or Judge.

In the cases cited above the aggrieved parties sought the remedy for the wrong done by suing the wrong doers. If, instead of suing them, they chose to take preceedings in certiorari it should not be correct to say that the aggrieved parties sought the remedy for the wrong done. But it would be correct to say that they invoked the aid of the High Court to have the errors committed by the authorities concerned corrected. The above cases therefore afford no authority for saying that proceedings in certiorari come within the ambit of the expression "civil suit or action".

I shall now proceed to examine the meaning and content of the expression "Civil Suit or Action" in section 52 of the Charter of 1833 and in section 3 of the Ordinance. But before I do so I shall briefly refer to the origin and scope of our legislation on the subject of appeals to the Privy Council.

The right of establishing Courts is a branch of the prerogative of the Crown *Re Lord Bishop of Natal*, (1864) 3 Moo. (N.S.) 115 at 152. The Sovereign has the right, by virtue of the prerogative, to review the decisions of all the Courts outside England, except where such right has been expressly parted with *The Falkland Islands Co. vs. The Queen*, (1863) 1 Moo. (N.S.) 299 at 312. *In re Abraham Mallory Dillet* (*Brit. Hond.*), (1887)

12 A.C. 459 at 466 ; *Therberge vs. Laudry (Quebec)*, (1876) 2 A.C. 102 at 106.

It is open to the Crown to part with its prerogative right to receive appeals either altogether or in respect of certain matters only. It may also regulate the right of appeal by conferring on the local courts the right to grant leave to appeal to the Sovereign in certain classes of cases. It may even grant a statutory right of appeal and regulate the exercise of that by express enactment. In the case of *Queen vs. Allco Parco* (1847) 5 Moo. P.C. 296 at 303, Lord Brougham observed :

> " It might be reasonably contended that the Crown may point out the manner in which the general common-law right of appeal to it from colonial sentences shall be exercised, by a particular mode of enactment in the Charter. It may say, there is a right to appeal to the Crown generally. That appeal shall be in civil cases at all times, but that appeal shall be in criminal cases only in a certain manner and form, and I shall delegate to my judges below, the right (the Crown may say) to refuse or to grant it, as they see fit."

No reference to the development of the jurisdiction of the Privy Council would be complete without a citation from the judgment of Viscount Cave, L.C., in *Nadan vs. The King* (1926) A.C. 482 at 491 wherein the matter is admirably set out :

> " The practice of invoking the exercise of the royal prerogative by way of appeal from any Court in His Majesty's Dominions has long obtained throughout the British Empire. In its origin such an application may have been no more than a petitory appeal to the Sovereign as the fountain of justice for protection against an unjust administration of the law ; but if so, the practice has long since ripened into a privilege belonging to every subject of the King. In the United Kingdom the appeal was made to the King in Parliament, and was the foundation of the appellate jurisdiction of the House of Lords ; but in His Majesty's Dominions beyond the seas the method of appeal to the King in Council has prevailed and is open to all the King's subjects in those Dominions. The right extends (apart from legislation) to judgments in criminal as well as in civil cases : see *Reg. vs. Bertrand* (L.R. 1 P.C. 520). It has been recognized and regulated in a series of statutes, of which it is sufficient to mention two—namely, the Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41), and the Judicial Committee Act, 1844 (7 & 8 Vict., c. 69). The Act of 1833 recites that " from the decisions of various courts of judicature in the East Indies and in the Plantations, Colonies and other Dominions of His Majesty abroad, an appeal lies to His Majesty in Council ', and proceeds to regulate the manner of such appeal ; and the Act of 1844, after reciting that ' the Judicial Committee, acting under the authority of the said Acts (the Act of 1833 and an amending Act) hath been found to answer well the purposes for which it was so established by Parliament, but it is found necessary to improve its proceedings in some respects for the better despatch of business and expedient also to extend its jurisdiction and powers ', enacts (in s. 1) that it shall be competent to Her Majesty by general or special Order-in-Council to ' provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments, sentences, decrees or orders of any Court of justice within any British Colony or Possession abroad '. These Acts, and other later statutes by which the constitution of the Judicial Committee has from time to time been amended, give legislative sanction to the jurisdiction which had previously existed."

In the case of Ceylon, South Africa, and some other countries, the right of appeal to the Sovereign in civil cases was expressly granted and regulated by Charter. The first Ceylon Charter was in 1801. It established a Court of Record called " The Supreme Court of Judicature in the Island of Ceylon " and defined its powers and jurisdiction, and granted a right of appeal to the Privy Council to any person—

> " . . . aggrieved by any interlocutory Sentence, or Determination having the Effect of a Definitive Sentence, or by any Definitive Sentence, of the said Supreme Court of Judicature in the Island of Ceylon, in any Civil Cause, Matter, or Thing whatsoever ",

where the matter in dispute exceeds five hundred Pounds. After the annexation of the Kandyan Provinces the Charter of 1801 was replaced by the Charter of 1833, a more comprehensive instrument. It established a Supreme Court and District Courts. The latter were empowered to hear and determine—

> " . . . all Pleas Suits and Actions in which the Party or Parties Defendant shall be resident within the District in which any such Suit or Action shall be brought or in which the Act Matter or Thing in respect of which any such Suit or Action shall be brought shall have been done or performed within such District."

The Supreme Court was given an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the respective District Courts. By section 52 a conditional right of appeal to the Privy Council was also granted to—

> " . . . a Party or Parties to any Civil Suit or Action depending in the said Supreme Court . . . against any final Judgment, Decree or Sentence or against any Rule or Order made in any such Civil Suit or Action, and having the effect of a final or definitive Sentence."

The conditions are almost the same as those in force today except for the fact that the decision had to be brought up in review before a Collective Court before the application for leave. It is clear from the Charter itself that the right of appeal

granted thereby does not exhaust the Sovereign's right to admit appeals, for, section 53 reserves the right to admit any appeal, " from any Judgment, Decree, Sentence, or Order " of the Supreme Court subject to such conditions as may be imposed by the Sovereign. The succeeding legislation did not materially alter the right of appeal granted by the Charter of 1833. In 1889 the Courts Ordinance and the Civil Procedure Code made provision for appeals to the Privy Council. The former Ordinance made the following provision which was repealed in 1909 when the Appeals (Privy Council) Ordinance was enacted—

" Nothing herein contained shall be held to affect the appeal to Her Majesty in Her Privy Council, graciously granted by the Royal Charter of 1833 to any person or persons being a party or parties to any civil suit or action depending in the Supreme Court, against any final judgment, decree, or sentence, or against any rule or order made in any such civil suit or action, and having the effect of a final or definitive sentence, and which said appeal shall continue to be subject to the rules and limitations by the said Charter prescribed and hereinafter set out, as follows : . . . ."

Chapter LXIII of the Civil Procedure Code (sections 779 to 789), also repealed by the Ordinance, while declaring that it shall be lawful for any party or parties to a civil suit or action, to appeal to the Privy Council against any final judgment, decree or sentence or against any rule or order made in any such civil suit or action, prescribed the procedure to be followed in bringing a judgment in review before the collective court prior to obtaining leave to appeal to the Privy Council.

The expression " civil suit or action " is one that occurs in the instruments granting a similar right of appeal from the decisions of the Courts of other countries which were under the sovereignty of the British Crown. One such country is South Africa, where the very question has been decided. It will be helpful to examine the view taken by the Courts of that country in dealing with this matter. The first reported decision is *Gillingham vs. Transvaalsche Koelkamers, Beperkt* (1908) Transvaal Law Reports Supreme Court 964. In that case the applicant's estate had been finally sequestered by order of a Judge in Chambers. From that order he appealed to the Supreme Court, which dismissed the appeal. He then applied for leave to appeal to the Privy Council. It was argued for the applicant that a decree in insolvency was a final and definitive sentence given in a civil suit or action. Innes, C.J., in dealing with the matter says at page 966 :

" Our jurisdiction in regard to the present petition is contained in section 39 of Proclamation 14 of 1902, and we cannot grant leave unless we are empowered to do so by its terms. The section says that it shall be lawful for any person or persons, being a party or parties to any civil suit or action depending in the court, to appeal to His Majesty the King in His Privy Council ' against any final judgment, decree or sentence of the said court, or against any rule or order made in any such civil suit or action having the effect of a final or definite sentence '. Clearly, therefore, the only persons to whom this Court can grant leave to appeal are those who are ' parties to a civil suit or action ' here depending. The sequestration proceedings were not an ' action ', and ' suit ' seems to me to be synonymous, or nearly so, with ' action '. ' To sue ' is to bring an action, to demand something—either a declaration of rights or an order that the opposing party shall do something or give something to the plaintiff. The order against which leave to appeal is now sought is not an order in a suit or action."

In the same case Solomon, J. said :

" I agree that there should be no order, on the simple ground that the applicant was not ' a party to any *civil suit or action* ' depending in this Court. We must give those words their ordinary meaning, and if we do it is clear that sequestration proceedings are not a civil suit or action."

The same view was taken by Kotze, J.A. in the subsequent case of *Collier vs. Redler and another* (1923) A.D. 640 at 649, where he says :

" It follows, as I mentioned at the outset, that in order to arrive at the meaning of the words ' any suit or action ', occurring in section 50 of the Charter of Justice, we must consider not merely the usual and ordinary meaning of the words in question, but go a step further and inquire into the nature of the subject-matter and the object of the Charter as well. The nature of the Charter is easily ascertainable from a perusal of its various provisions, while two of its main objects are to establish a Supreme Court of Justice for the Colony of the Cape of Good Hope, and to provide for an appeal to the King-in-Council. In section 50 of the Charter such an appeal is allowed, not in every case or instance, but only in certain instances, namely, from any final judgment or sentence, or from any rule or order having the effect of a final definite sentence, in any civil suit or action above the value of £500. An appeal is here given as of right, provided the final judgment or order has been made in a civil suit or action of the prescribed value. There is nothing in this section, nor in the context contained in other sections, to show that we are to construe the words ' suit or action ' in a sense different from their usual ordinary meaning, as denoting instances where the proceedings commence with the issue of a writ of summons. The section does not speak of every case or proceeding, but only of any suit or action ; and there appears to be no further provision of the Charter indicating that we are here to depart from the recognized rule of construction and are not to assign the ordinary and common meaning to the words employed, in order to arrive at their intention. I find nothing in the Charter, nor in its object, leading to such a conclusion. On the contrary, the object of the Charter is evidently to limit the right

of appeal, not merely as to the amount involved in the suit or action, but also in regard to the nature of the cause or dispute. It is clear there is to be no appeal in simple interlocutory or provisional proceedings; and similarly, I do not think that any right to appeal is intended in any matter brought before the Supreme Court by way of motion, petition or application, or in any other manner than by means of a suit or action, however final or definite an order made therein may be. If the intention had been otherwise, it is by no means unreasonable to suppose that language clearly manifesting such an intention would have been used. If we refer to section 51 of the Charter, we find other and wider language employed than in section 50. While section 50 limits the right of appeal to *any civil suit or action*, section 51 reserves the right of the Sovereign in His Privy Council to give leave of appeal to any one '*aggrieved by any judgment or determination* of the said Supreme Court'. It is difficult to hold that the right here reserved is likewise limited to a judgment or determination in a civil suit or action, and has not a wider meaning.

"At the time of the granting of the Charter (1832), the ordinary distinction between a suit or action, that is the procedure commenced by writ of summons, as opposed to matters commenced by motion, application or petition, was well recognized in England, as it still is at the present day, and also prevails in our practice, as we may ascertain from the various Rules of Court, which have been framed by the judges and promulgated under the power conferred by section 46 of the Charter, and subsequent Acts, and also from the statute law itself."

Later on, in the course of the same judgment, Kotze, J.A., says:

"No doubt the word petition may, like the term suit or action, have more than one meaning, and the word suit, again, may be used in a sense different from an action at law. Thus we could, with propriety, speak of a suit in chancery, where the procedure was by means of a bill, and of a suit in the Matrimonial Court, where the proceedings take place by means of a petition. But that is not the case in the present instance. The word suit occurring in section 50 of the Charter is synonymous with the word action, and excludes an application by means of a petition."

In the latter case of *Collett vs. Priest* (1931) A.D. 290 in which this very same question came up for consideration, De Villers, C.J., after reviewing the previous decisions says at page 298:

"And we are therefore of opinion that the Cape Provincial Division, while freely giving its reasons for holding a different view, should have followed the *ratio decidendi* of *Collier vs. Redler*, *The Master vs. van Aardt* and *Bulawayo Municipality vs. Roberts*, namely, that the essential feature of a 'suit or action' under section 50 of the Charter of Justice or under section 39 of Transvaal Proclamation 14 of 1902, or of a 'suit' under section 24 of Cape Act 35 of 1896, is that it is a proceeding in which one party sues for or claims something from another, and that no proceeding which lacks this feature, such as sequestration proceedings, an application for winding up of a company, etc., can be properly described as a 'suit or action' or as a 'suit' under any of these sections."

This matter was further considered in *Solomon vs. Law Society of the Cape of Good Hope* (1934) A.D. 401, where the question whether an application by the Law Society to have an attorney struck off the roll was a civil suit or action came up for decision and Wessels, C.J., held that it was not. He said at page 408:

"It is difficult to see what the civil suit or action is, in the case of an application by the Law Society which sets before the Court certain facts and asks the Court to strike the Attorney off the roll. The fact that by section 3 of Act 20 of 1916 the Court may order that any question of fact shall be tried by pleadings cannot make the application a civil suit or action. The pleadings are only a means to define the question of fact to be tried by the Court."

As the South African Reports are not available in most of our law libraries I have cited more extensively than I would otherwise have done.

It is clear from the South African decisions I have examined that in that country the words "civil suit or action", in a context such as the one we have here, have been consistently understood in their ordinary meaning, viz., a proceeding in which one party sues for or claims something from another.

I shall now examine our decisions on the point. In the earliest of our cases, *In re Ledward* (1859) 3 Lorenz 234, a decision of the collective Court, it was held that section 52 of the Charter of Justice gave no right of appeal to the Privy Council against a judgment of this Court affirming a judgment of the District Judge that an insolvent had not committed a fraudulent preference within the meaning of section 58 of the Insolvency Ordinance. It was argued in that case that the proceedings in which the matter was decided was a regular "suit" between a creditor and the assignees of the debtor; and that though the matter was discussed in insolvency proceedings it was none the less a "civil suit or action" within the meaning of those words in the Charter of 1833. It was also urged that there was a regular dispute between the two parties regarding certain property, in which evidence was heard, and a judgment given thereon, as in any ordinary suit. In the course of the argument Rowe, C.J., observed:

"The only question is whether this is a 'matter' or a 'suit or action'. The 52nd section of the Charter limits the appeal to 'suits or actions' only."

The application for leave was rejected on the ground that the Charter gave no right of appeal in a case such as that before the Court.

This decision was followed in the case of *Keppel Jones & Co.* (1877) Ramanathan 379. That was also a decision of the collective Court in proceedings under the Insolvency Ordinance in which this Court affirmed an order of the District Court in which the assignee was directed to deliver one half of certain goods found in possession of the insolvent.

Next we have the case of *H. W. de Vos* (1899) 2 Browne 331. In that case the District Judge refused to grant a certificate of insolvency on the ground that the insolvent had not made a full disclosure of his affairs, and that judgment having been affirmed by this Court the insolvent sought to appeal to the Privy Council. He asked for a certificate under section 781 of the Civil Procedure Code (Repealed by Ordinance No. 31 of 1909) that the case fulfilled the requirements of section 42 of the Courts Ordinance. The certificate was refused by the two Judges who heard the case ;

Laurie, J. based his decision on the ground that the matter at issue was not of the value of Rs. 5,000/-, and Brown, A.J. on the ground that no case had been submitted to the Court in which the right of appeal to the Privy Council had been recognised in the matter of the refusal of a certificate of conformity.

The next case that is relevant is *Sockalingam Chetty vs. Manikam et al* (1930) 32 N.L.R. 65. That was also a case under the Insolvency Ordinance. This Court held following the previous decisions I have cited above that there was no right of appeal. Drieberg, J. observed :

> " Section 52 of the Charter of 1833 gives a right of appeal against any final judgment, decree, sentence, rule or order in any civil suit or action, and it has been held by the Collective Court in appeal that an insolvency proceeding is not a civil suit or action and that there is no right of appeal against the judgment or order of the Supreme Court made in it."

Next in order of time is the case of *Soertsz vs. Colombo Municipal Council* (1930) 32 N.L.R. 62. The question was whether there was an appeal to the Privy Council as of right from the decision of the Supreme Court on a case stated under section 92 (now 94) of the Housing and Town Improvement Ordinance. After referring to the relevant provisions of the Charter of 1833, and the Courts Ordinance, Fisher, C.J. went on to say :

> " In dealing with the matter under consideration the Supreme Court was not acting in exercise of the appellate jurisdiction vested in it by the Courts Ordinance, 1889, nor was the District Court acting in exercise of any jurisdiction vested in it by that Ordinance. The District Court was not in fact acting as a Court of law at all but was performing a function vested in it because the alternative tribunal under section 83 of Ordinance No. 19 of 1915 has not been brought into existence, and in the performance of that function it is a final tribunal except when a question of law is involved and the provisions of section 92 (now 94) are put into operation.
>
> " In my opinion, therefore, our decision on the point of law submitted to us was not a judgment or order in ' a civil suit or action '."

In the case of *RM. AR. AR. RM. vs. The Commissioner of Income Tax* (1935) 37 N.L.R. 447, it was argued that a case stated under the Income Tax Ordinance was " a civil suit or action " within the meaning of that expression in section 3 of the Ordinance. But that argument was not upheld by this Court. In the case of *Settlement Officer vs. van der Poorten et al* (1942) 43 N.L.R. 436, it was held that proceedings under the Waste Lands Ordinance did not fall within the Ambit of the words " civil suit or action " in section 3 of the Ordinance. The earlier view that civil suits or actions that fell within the ambit of section 3 were only those civil suits or actions which the District Court had jurisdiction to hear and determine, when exercising the jurisdiction conferred on it by the Courts Ordinance, was upheld. Although in *van der Poorten vs. The Settlement Officer* (1946) 47 N.L.R. 217, the Privy Council set aside the decision of this Court, that an appeal did not lie from the District Court against a dismissal of a petition under section 20 of the Waste Lands Ordinance, No. 1 of 1897, it did not hold that such a proceeding was a " civil suit or action " within the meaning of that expression in the Ordinance.

As against this long line of decisions of this Court which hold that section 3 applies only to civil suits or actions properly so called, we have the decision of *In re Goonesinka* (1942) 44 N.L.R. 75 which takes a different view. It was there held that an application for a mandate in the nature of a writ of certiorari constituted an action and therefore came within the ambit of section 3. In that case this Court refused to grant a mandate in the nature of a writ of certiorari to bring up before it the proceedings taken before an election Judge. Moseley, J. While conceding that the word " suit " implies the existence of two parties went on to hold that the same cannot be said of an action and based his decision on

section 6 of the Civil Procedure Code which reads :

> " 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."

He summed up his decision thus :

> " I have little difficulty in arriving at the conclusion that an application for a writ of certiorari, being an application for relief or remedy obtainable through the Court's power or authority, constitutes an action, and therefore comes within the compass of section 3 of Cap. 85."

With great respect I find myself unable to agree with the conclusion of the learned Judge. A writ of certiorari is not a means of obtaining any relief or remedy through the Court's power or authority. It is a purely supervisory function of the Court, while section 6 of the Civil Procedure Code contemplates an entirely different function. In my view it would be wrong to read section 6 by itself without reference to the other provisions of the Civil Procedure Code. To my mind section 6 when read with the other sections of the Civil Procedure Code leaves no room for the view that a writ of certiorari falls within the definition of action in the Code. Moseley, J. relied on the case of *Subramaniam Chetty vs. Soysa* (1923) 25 N.L.R. 344. That was a case in which this Court allowed an appeal from an order of the District Judge under section 282 (2) of the Civil Procedure Code refusing to set aside a sale in execution on the ground of a material irregularity in conducting the sale. That section provides that the purchaser at an execution sale shall be made respondent to the petition filed by the applicant under sub-section (2) thereof seeking to have the sale set aside. It is clear from the section that the proceeding thereunder is an application to the District Court for relief or remedy obtainable through the exercise of the Court's power or authority, and section 6 declares that such an application constitutes an action. When an application for leave to appeal to the Privy Council was made it was contended that the proceeding was not a civil suit or action and that there was no final judgment. Bertram, C.J. in dealing with the objections stated :

> " Was this proceeding a suit or action? In determining that question, we must have regard to the nature of Ordinance No. 31 of 1909. It is intended to supplement our Code of Civil Procedure. 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 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.
>
> " Now, in our Code of Civil Procedure, a very wide meaning is given to the word ' action '. In section 5 an action is defined as a proceeding for the prevention or redress of a wrong. In section 6 it is said that 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. It seems clear to me, therefore, that this application to the Court to set aside the sale instituted by a petition to the Court was an action within the meaning of section 4."

In my opinion *Subramaniam Chetty vs. Soysa* (*supra*) is not an authority which supports the view that a writ of certiorari is a civil suit or action. In the case of *Controller of Textiles vs. Mohamed Miya* (1948) 49 N.L.R. 105 an application for leave to appeal to the Privy Council was granted by this Court from an order quashing the decision of the Controller of Textiles who had revoked the licences granted to Mohamed Miya. In that case, however, the question whether the proceeding in which the writ was granted was a civil suit or action did not arise for decision. But the question was raised in the subsequent case of *Kodakan Pillai vs. Mudanayake* (1951) 54 N.L.R. 350. In that case Nagalingam, J. rested his decision on the following definitions of the term " action " in Justinian and Bracton :

> " *Actio autem nihil aliud est, quam jus persequendi in judicio, quod sibi debetur.*"—An action is nothing else than the right of suing before a Judge for that which is due to us.
>
> " *Actio nihil aliud est quam jus prosequendi in judicio quod aliquo debetur.*"—An action is nothing else than the right of suing in a Court of justice for that which is due to someone."

After citing these definitions he proceeded to say :

> " ' That which is due to us or someone ' is wide enough to include the case of a declaration of status.
>
> " Even on the basis of these general concepts of the term ' action ' the order made upon the application for a writ of certiorari cannot but be regarded as one relating to an action."

With great respect I am unable to agree with the learned Judge's conclusion or reasoning. When this Court granted a mandate in the nature of a writ of certiorari quashing the order of the

Revising Officer it did not make a declaration of status. The conclusion of Nagalingam, J. that proceedings for the grant of a writ of certiorari are an action is based on the wrong assumption that it did make such a declaration.

It is clear from what has been said above that the one thing a petitioner does not do in a petition for a mandate in the nature of a writ of certiorari is to ask " for that which is due to him ". On a close reading of the decision of Nagalingam, J., I am unable to regard his judgment as holding that an applicant for a writ of certiorari is a party to a civil suit or action. He does not go beyond holding that the order made upon the application for a writ of certiorari can be regarded as one *relating* to an action.

I now come to the decision of Gratiaen, J. in *Attorney-General vs. Ramaswami Iyengar* (1954) 55 N.L.R. 572. It is of little assistance to the petitioner in the instant case. That was a decision under the Estate Duty Ordinance wherein under section 34 an appeal lies to the District Court from an assessment to estate duty. Section 40 provides that—

> " Upon the filing of the petition of appeal and the service of a copy thereof on the Attorney-General, the appeal shall be deemed to be and may be proceeded with as an action between the appellant as plaintiff and the Crown as defendant, and the provisions of the Civil Procedure Code and of the Stamp Ordinance, shall, save as hereinafter provided, apply accordingly.
>
> " Provided that no pleading other than the petition of the appellant shall be filed in any action unless the court by order made in that action otherwise directs ;
>
> " Provided further, that the decree entered in any action shall specify the amount, if any, which the appellant is liable to pay as estate duty under this Ordinance."

It is evident from the section I have quoted that an appeal to the District Court is not an action, for, if it were, it would be unnecessary to declare by statute that it shall be deemed to be and proceeded with as an action between the appellant as plaintiff and the Crown as defendant.

The Privy Council case of *Commissioner of Stamps, Straits Settlements vs. Oei Tjong Swan* (1933) A.C. 378 relied on by Gratiaen, J. as a decision in point cannot be regarded as an authority on the question arising in the case, not only because the matter was not fully argued as the Privy Council granted special leave to appeal, but also because the expression which the Privy Council was called upon to interpret was " civil cause " and not " civil suit or action ". On this point this is what Lord MacMillan who delivered the judgment of the Board says at page 392 :

> " Passing to what has been designated the procedure appeal, their Lordships have to consider whether it was within the competency of the Court of Appeal to grant leave in this case to appeal to His Majesty in Council. In holding the contrary, the learned Chief Justice stated that he did so ' reluctantly and against his own opinion ' in deference to a previous decision of his Court in a case of *The King on the Prosecution of the Income Tax Commissioner vs. The Firms of A.R.A.M. and P.A.* in 1922, which he felt himself constrained ' from courtesy rather than conviction ' to follow. Thorne, J. shared the reluctance of the Chief Justice, while Sproule, S.P.J. alone championed the soundness of the authority so manifestly distasteful to his colleagues.
>
> " Their Lordships did not have the advantage of a full argument on the question, as the respondents, not having any interest in the matter, in view of the special leave to appeal granted by order of His Majesty in Council, did not feel called upon to contest the appellant's submission. The whole ground, however, is adequately explored in the judgment of the learned Chief Justice, whose convincing argument against the decision which he reluctantly reached appears to their Lordships really unanswerable. It is true that the Ordinance in section 80 which deals with appeals from decisions of the Commissioner does not confer a right of appeal to His Majesty in Council. But the Colonial Charter of 1855 provides for leave to appeal being granted by the Court of the Colony from ' all judgments, decrees, or determinations made by the said Court of Judicature in any civil cause '. And section 1154 of the Civil Procedure Code provides that subject to certain conditions ' an appeal shall lie from the Court of Appeal to His Majesty in Council—(*a*) from any final judgment or order.' Wider language it would be difficult to imagine. Their Lordships do not think it necessary to repeat the reasons adduced by the Chief Justice against excluding the decision of the Appeal Court in the present instance from the scope of these provisions and content themselves with expressing their agreement. The decision against which the Commissioner sought to obtain leave to appeal was in their Lordships' view not a mere award of an administrative character but a judgment or determination made by the Court in a civil cause within the meaning of the Charter and a final judgment or order within the meaning of section 1154 of the Civil Procedure Code, and as such the Court could competently have granted leave to appeal from it to His Majesty in Council."

It would appear from the decisions of this Court referred to above that for over a hundred years this Court had consistently interpreted the words " civil suit or action " in section 3 of the Ordinance in their ordinary sense of a proceeding in which one party sues for or claims something from another. The current of authority in South Africa where similar words in enactments such as our Charter of Justice were interpreted has been the same as in Ceylon till 1942. Even where the proceedings were in the nature of an action the Privy Council in the *Rangoon Botatoung*

Company Ltd. vs. The Collector, Rangoon (1912) 39 L.R. I.A. 197 refused to give leave to appeal because the proceedings were in the nature of an arbitration and lacked the characteristics of an action as ordinarily understood.

In my opinion the correct approach to the interpretation of the expression " civil suit or action " is to be found in the decisions of this Court prior to *Goonesinha's* case. It is a rule of construction of statutes that the meaning which is to be given to an expression in any particular enactment will depend upon such circumstances as the occasion or purpose for which it is used, the nature of the subject matter, the context of the enactment in which it occurs, and the like. The word " action " has been used by different writers commencing with Justinian down to the present day in so many different senses that it would be unsafe to consider the words " civil suit or action " in the abstract. The meaning given to it in Roman Law or by early Roman, Roman-Dutch, and English writers cannot be applied without regard to the intention of the legislature and the object for which the statute was enacted together with, in the instant case, the previous history of legislation on the subject.

Goonesinha's case not only goes against the current of decisions of this Court from the time of the Royal Charter of 1833, but also goes against the well-known rules of interpretation of statutes. The words " civil suit or action " have been used in legislation regulating appeals to the Privy Council since the earliest times here as well as elsewhere, and by 1907 the year in which the Ordinance was enacted their meaning was well established by judicial interpretation. It is a rule of construction of statutes that when words in an earlier enactment which have been judicially interpreted are used in a subsequent enactment *in pari materia* it must be presumed that they have been used in the sense in which they have been judicially interpreted. There is nothing in the Ordinance which rebuts that presumption. Besides, where the meaning of a word in an earlier legislative instrument has been well established by judicial interpretation, I do not think that it would be correct to extend it by reference to a definition of that same word in a later enactment not *in pari materia*.

I have stated above why I am unable to agree with *Goonesinha's* case and the subsequent case of *Kodakan Pillai*. I make no mention here of *Mohamed Miya's* case because it does not deal with the particular matter under consideration.

I think I should not omit to refer to the case of *Bradlaugh vs. Clarke* (1883) 8 A.C. 354 especially as Nagalingam, J. has relied upon it in his judgment in the case of *Kodakan Pillai*. In that case the Court had to interpret the word " action " in section 5 of the Parliamentary Oaths Act, 1866 (29 & 30 Vict. c.19) in the context " to be recovered by action in one of Her Majesty's Superior Courts at Westminster ". The plaintiff as a common informer claimed that he was entitled to sue for the penalty. His action was opposed on the ground that all penalties imposed by statute belong to the Crown alone unless given in precise terms to an individual. In dealing with this argument Lord Selborne after referring to the authorities stated at page 361 :

> " These authorities appear to me to prove that a suit to recover such a penalty as that incurred by the appellant might, in and after 1866, have been brought by the Crown in any one of the Superior Courts at Westminster, and consequently that the option given to sue in any one of those Courts cannot be a sufficient reason for letting in a common informer under a statute by which a right of action is not otherwise given to him. I am also satisfied after full consideration that the word ' action ' is (as Lord Justice Lush said) a generic term, inclusive, in its proper legal sense, of suits by the Crown, and, therefore, not furnishing any sufficient ground for implying a right of action in a common informer. That it is used as " nomen generalissimum " *in this particular statute* seems probable, from the fact that it stands there alone, without having superadded to it a number of other technical terms, which are usually found associated with it in earlier statutes."

The words I have underlined clearly indicate that the meaning given to the word " action " in that case was meant for the particular context in which it occurred. The learned Law Lord did not attempt to lay down a definition for all purposes. In fact the judgment of Lord Blackburn recognises that the word " action " has more than one meaning depending on the context in which it occurs and that in its ordinary sense an action denotes a mode of procedure commenced by writ of summons.

The learned Attorney-General argued that each application for certiorari should be examined, and if it has the characteristics of a civil suit or action, an appeal would lie ; if it has not, there would be no appeal. He also invited our attention to the cases of *Secretary of State for India vs. Chelikani Rama Rao* (1916) 43 L.R. I.A. 192, *Rangoon Botatoung Company Ltd. vs. The Collector of Rangoon* (1912) 39 L.R. I.A. 197 and *Tata Iron and Steel Co., Ltd. vs. Chief Revenue Authority of Bombay* (1923) A.I.R. P.C. 148.

The first of these cases deals with claims to land by two Zamindars under the Madras Forest Act (V of 1882). The claim was rejected by the Forest Settlement Officer. The Zamindars appealed to the High Court which remanded the appeal to the District Judge to determine whether the Crown had a subsisting title at the date of the notification. On the finding of the District Judge the High Court allowed the appeals and decrees were passed excluding the lands from the reserved forest area. The Secretary of State for India then appealed to the Privy Council. Objection was taken to the appeal being entertained by the Privy Council. That objection was overruled. The reason is thus stated by Lord Shaw at page 197 :

> " It was contended on behalf of the appellant that all further proceedings in Courts in India or by way of appeal were incompetent, these being excluded by the terms of the statute just quoted. In their Lordships' opinion this objection is not well founded. Their view is that when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders, and decrees the ordinary rules of the Civil Procedure Code apply. This is in full accord with the decision of the Full Bench in *Kamaraju vs. Secretary of State for India in Council* (I.L.R. 11 Madras 309), a decision which was given in 1888 and has been acted on in Madras ever since."

Referring to the *Rangoon Botatoung Company* case which the respondents relied on, Lord Shaw said at page 198 :

> " The merits of the present dispute are essentially different in character. The claim was the assertion of a legal right to possession of and property in land ; and if the ordinary Courts of the country are seised of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation."

I have already referred to the *Botatoung* case and shall therefore make no further reference to it. The *Tata Iron and Steel Company* case is of some assistance. There it was held that an appeal to the Privy Council does not lie under Clause 39 of the Letters Patent of the Bombay High Court from a decision of the High Court upon a case stated and referred to the Court by the Chief Revenue Authority under section 51 of the Indian Income Tax Act, 1918.

Lord Atkinson who delivered the judgment of the Board dealt with the matter in this wise at page 150 :

> " In order therefore that the appeal in this case should be held to be competent, the decision and order of the High Court under section 51 of the Income Tax Act must come within Clause 39 of the Letters Patent. It must be either a final judgment or a final decree or a final order. Now what is a final judgment as understood in English litigation ? (In *Ex parte Moore* (1885) 14 Q.B.D. 627, 632), Lord Selborne laid down that to constitute an order a final judgment, nothing more is necessary than that there should be a proper *litis contestatio* and a final adjudication between the parties to it on the merits.
>
> " In *Onslow vs. Commissioners of Inland Revenue* (1890) 25 Q.B.D. 465, it was determined on high authority what it is that amounts to a final judgment . . . .
>
> " Lord Esher delivered the judgment of the Court. After quoting the opinions of several authorities, which as the judgment is printed it is not easy to distinguish from portions of his own judgment, he refers particularly to opinions expressed by Cotton, L.J. in *Ex parte Chinery*—(1884) 12 Q.B.D. 342—with which Bowen and Kay, L.JJ. had concurred. He said :
>
> ' I think we ought to give to the words " final judgment " in this sub-section their strict and proper meaning, *i.e.* a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained and established, unless there is something to show an intention to use the words in a more extended sense.'
>
> He proceeds—
>
> ' Brown, L.J. says there is an inherent distinction between judgments and orders, and that the words " final judgment " have a professional meaning, by which expression I think he meant to say as Cotton, L.J. had previously said, that a judgment is a decision obtained in an action, and if that was his meaning, both these learned Lords Justices gave judgment to the same effect, and Fry, L.J. agreed with him. A " judgment ", therefore, is a decision obtained in an action, and any other decision is an order . . . . That in my opinion is a proper distinction, and, therefore in the present case the decision is an order and not a judgment, and the appeal should have been brought within 21 days. Under the circumstances, however, we will, as an indulgence, extend the time for appealing.'
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> " This decision clearly establishes that the decision and an order made by the Court under the 51st S. of the Income Tax Act cannot be held to be a ' final judgment ' within the meaning of the 39th clause of the Letters Patent, since there is nothing to show an intention in the year 1862 to use those words in a sense more extended than their legal sense."

The above decisions of the Privy Council confirm me in the opinion I have formed that the words " civil suit or action " in section 3 of the Ordinance should be construed in their ordinary sense of a proceeding in which one party sues for or claims something from another in regular civil proceedings and that an application for a writ of certiorari does not fall within the ambit of those words in the context in which they occur.

The objection therefore succeeds and the application is refused with costs.

Gunasekara, J.
I agree.

Pulle, J.
I agree.

(See Separate Judgment)

de Silva, J.
I agree.

Sansoni, J.

(See Judgment attached)

Pulle, J.

I agree that the application for leave to appeal to the Privy Council should be refused. At one stage of the argument I was inclined to accept as correct the decision of a bench of two judges in *In re Goonesinha* (1942) 44 N.L.R. 75 that an application for a writ of certiorari constitutes an action which falls within the ambit of section 3 of the Appeals (Privy Council) Ordinance. This case was followed by a single judge in *Kodakan Pillai vs. Mudanayake* (1953) 54 N.L.R. 350. Upon further consideration of the nature of a writ of certiorari and the decisions from South Africa cited by my Lord, the Chief Justice, I am convinced that the proceedings taken to quash by certiorari the order of the Tribunal of Appeal dated the 10th October, 1952, do not constitute a civil suit or action within the meaning of section 3 of the Ordinance. In my opinion section 3 cannot be read to include a right of appeal to the Privy Council from every judgment or order of the Supreme Court in what may be described as a civil cause or matter satisfying the requirements in Rule 1 of the Schedule to the Ordinance.

There are undoubtedly features in common between a " civil suit or action " and proceedings in certiorari. It may happen, in certain instances, that a decision given on an application for certiorari would finally dispose of the litigation before the tribunal whose jurisdiction is challenged. But that is not a result that flows necessarily from the exercise of the jurisdiction of the court to grant a writ of certiorari. In its essence this jurisdiction is of a limited character the exercise of which does not in the least diminish or take away from an inferior tribunal the power to adjudicate on a matter within its proper jurisdiction.

I fully concur in the observations made by my Lord on *Subramaniam Chetty vs. Soysa* (1923) 25 N.L.R. 344, *Abbott vs. Sullivan* (1952) 1 All E.R. 226, *Lee vs. Showmen's Guild of Great Britain* (1952) 1 All E.R. 1175 and *O'Connor vs. Isaacs and others* (1956) 2 W.L.R. 585.

Sansoni, J.

I should have preferred to wait until I had seen the judgments of the other members of the Court, for such a course may have rendered it unnecessary for me to write a separate judgment. But as I shall be going away on long leave in a few days I am compelled to state my views without delay, and I shall do so very briefly.

Mr. Perera's submission was that no application for a writ of certiorari can ever be a suit or action because on such an application the Court does not adjudicate on the legal rights of parties and it does not therefore decide whether a legal right has been infringed and a wrong committed. He stressed that the petitioner for the writ did not claim that it had a legal right solely to pick up and set down passengers within the Municipal limits of Kandy. He submitted that the only matter which the petitioner had to establish in order to obtain the writ was that it had an interest which went beyond the interests of the public in general, in that it had suffered damage, and that the tribunal had exceeded the limits of its jurisdiction. The Attorney-General submitted that each application for a writ of certiorari must be examined in order to ascertain whether it was a civil suit or action, and he pointed out that a stranger who applies for the writ on the ground that a Court had exceeded its jurisdiction would not be in the same position as a party aggrieved in the sense of one who has suffered some damage from the usurpation of jurisdiction.

Mr. Jayawardene submitted that the infliction of damage (which Mr. Perera's client had complained about) coupled with the usurpation of jurisdiction by the tribunal, which were the two elements on which the application for the writ was based, constituted a wrong done to the party complaining. In this case these two elements

were the basis of the petitioner's application and the proceeding fell within the phrase " civil suit or action ".

An action in the narrowest sense is a proceeding, founded upon a legal right, brought by one person against another for the enforcement of that right. But in a broader sense an action may be defined as a proceeding instituted by a person in order to obtain the intervention of a court of law, when such person is seeking relief through that court. It is in this sense that I would include this certiorari application within the term action. I think that an *ultra vires* decision of a statutory tribunal which tries something which it has no jurisdiction to try, or again a decision made by such a tribunal in contravention of the principles of natural justice, where such a decision causes damage to a person, constitutes a wrong for which that person can seek his remedy.

It matters not whether the remedy is sought by injunction or by a declatory action or by writ of certiorari : each proceeding would be an action. In this matter the petitioner expressly claims to be a party who has suffered loss through an usurpation of jurisdiction by the tribunal, and that is enough to give a court jurisdiction to hear his complaint and give relief.

I therefore take the view that an application for certiorari falls within the meaning of the word " action " provided such application is made by a party aggrieved who has suffered damage by an unwarranted exercise of jurisdiction. In Volume 2 of Wood Renton's Encyclopaedia of the Laws of England (Second Edition) at page 619 there appears the following passage in the article on certiorari : " Though the writ of certiorari is *a means of preventing the infliction or continuance of any wrong by an unwarranted assumption of jurisdiction*, the granting of the writ at the instance of a private person is a matter of discretion, and not *ex debito justitiae*." In *Abbott vs. Sullivan* (1952) 1 A.E.R. 226, Denning, L.J., said " In the case of statutory tribunals which depend for their jurisdiction on a statute, it is an actionable wrong for them to usurp more than the statute gives them ". After citing certain cases the learned Lord Justice said : " These cases all show that *an invalid usurpation of jurisdiction which causes damage is itself a wrong* ". See also *R. vs. Edmundsbury* (1947) 2 A.E.R. 170 where the allied writ of prohibition was considered and it was referred to as a remedy for the injury of encroachment of jurisdiction.

It would therefore seem that damage combined with excess of jurisdiction constitute a wrong for which the remedy lies in certiorari, and it is not necessary in a case where such damage has been caused that there should also have been a previously existing legal right which has been infringed.

It is true that in an application for certiorari there are not two or more adversaries involved in a dispute over their legal rights such as one finds in a regular action. In certiorari, one may find that the only parties are the petitioner and the tribunal whose jurisdiction is in question, though other persons whose interests are involved may be added (as Mr. Jayawardene's clients were added). The substantial question to be answered in deciding whether it is an action or not remains the same.

Even if an action be regarded as " a proceeding in which one party sues for or claims something from another " a petitioner in certiorari claims as against the tribunal a declaration that it has exceeded its jurisdiction and that its order should be quashed. The object of the writ is to demolish the order made without, or in excess of, jurisdiction. It is put out of the way " as one which should not be used to the detriment of any of the subjects of Her Majesty " per Lord Cairns, L.C., *Walsalls Overseers V. L. & N. W. Ry. C.* (1879) 4 A.C. 30 at 39.

As I think it is essential that in an action the plaintiff or petitioner must seek some relief and should be in the position of a person who has a grievance I consider that an application for certiorari by a person who is not a party grieved is not a suit or action, because in such a case the applicant cannot be said to be claiming any relief for himself. If the petitioner in this matter had not been a party who was adversely affected by the tribunal's order, in my opinion it would not have been a party to a civil suit or action.

Mr. Perera submitted that an action needs a cause of action. I think in this case the cause of action comprised the damage suffered by the petitioner taken together with the alleged unlawful exercise of jurisdiction, and it is the combination of these two things which constitute the wrong for the relief of which the petitioner came into Court.

I would therefore grant this application for leave to appeal, with costs.

Refused.

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

SINNATHAMBY SUBRAMANIAM *vs.* KANAPATHIPILLAI THANGAVADIVELU AND OTHERS

S. C. (Inty.) 138 *of* 1956—*D. C. Point Pedro* 5294

Argued on : 26th February, 1957.
Decided on : 12th April, 1957.

Partition Act, No. 16 *of* 1951, *sections* 8 *and* 10 (1)—*Date fixed by Court to deposit survey fees—Has the Court discretion to extend such time.*

Held : That the Court has the discretion to alter the time originally fixed for the deposit of survey fees under section 8 of the Partition Act, No. 16 of 1951, provided that such alteration is made before the expiration of that time.

Per H. N. G. FERNANDO, J.—" We do not have in this appeal to decide the question whether the Court has a discretion to extend the time for the deposit of the fees *after* the date originally fixed, but the reasons which I have given in this judgment should not be construed to be an answer in the negative to that question.

C. Chellapah, for the 5th defendant-appellant.

S. Sharvananda, for the plaintiff-respondents.

H. N. G. FERNANDO, J.

This case involves what might be an important question of procedure under the new Partition Act (No. 16 of 1951), if it is decided in favour of the appellant. The plaint was accepted on 13th January, 1956, by the District Judge, who then ordered Rs. 75/- for preliminary survey fees to be deposited by the plaintiff on 22nd February, 1956. On the latter date, the Judge ordered the fees to be deposited on 29th February, 1956, by which date the fees were actually deposited. Summons then issued on the defendants, and one of them, the present appellant, filed proxy and moved that the action be dismissed on the ground of the failure of the plaintiff to deposit the fees on the date originally fixed, that is on the 22nd February, 1956. This motion was refused by the District Judge and the present appeal is against his order of refusal.

Section 8 of the Act requires the Court to fix a date on or before which the preliminary survey fees shall be deposited, and section 10 (1) provides as follows :—

> " 10 (1) Where the plaintiff in a partition action fails to deposit, on or before the date fixed for the purpose, such estimated costs of the preliminary survey as are determined by the court under section 8, the court shall dismiss such action."

The argument for the appellant is that the provisions of section 10 (1) are peremptory, and that the Court is bound to dismiss the action if the fees are not deposited on or before the date fixed in the original order under section 8. The appellant also points to section 9, in which, *by contrast*, the Court has express power to extend the time for the payment of *balance* survey fees.

I do not disagree with the argument that failure to deposit the preliminary survey fees within the time fixed by the Court by order under section 8 will involve a dismissal of the action ; indeed the Court would be bound to enter an order of dismissal *ex mere motu* in the event of such a failure, because the clear intention is that a partition action cannot be proceeded with unless there is a preliminary survey, the cost of which must in the first instance be defrayed by the plaintiff. But the question is whether the fixation of a date is no " final " an order that the Court thereafter lacks the discretion to extend the time originally allowed.

It is important to note that the order under section 8 (*b*) is one made *ex parte*, and that the defendants will not even be brought into the action by issue of summons until the fees are deposited. The proceedings, therefore, are at a stage during which only the Court and the plaintiff are concerned, *and no other* person. In the present case, the Court had ordered the survey fees to be deposited " for 22nd February ", and it was open to the plaintiff to deposit the fees during office hours on that day. But before the close of office hours, the Court, presumably upon an application made in that behalf, in effect " amended " its original order by specifying 29th February as the date on or before which the fees should be deposited. In principle, the case is no different from one in which the Court alters

its original order under section 8 (*b*) *on the day after it is made*, in order to allow a longer period for the deposit of the fees. Considering that the date is originally fixed in its discretion, and that only the Court and the plaintiff are concerned at this stage of the proceedings, the alteration of the time originally fixed, if that alteration is made before the expiration of that time, is merely tantamount to an original fixation of the later date. The very fact that section 10 (1) penalizes a plaintiff by rendering abortive the expenditure incurred by him in having a plaint filed, lends support to the view that the Legislature did not intend in section 8 (*b*) to curtail the discretion of the Court, in appropriate cases, to grant extensions of time prior to the expiration of the time originally allowed. We do not have in this appeal to decide the question whether the Court has a discretion to extend the time for the deposit of the fees *after* the date originally fixed, but the reasons which I have given in this judgment should not be construed to be an answer in the negative to that question.

The appeal is dismissed with costs.

T. S. FERNANDO, J.

I agree.

Dismissed.

Present : WEERASOORIYA, J.

VEYANGODA POLICE *vs.* THOMAS SINGHO

S. C. No. 1317—*M. C. Gampaha No.* 29929

Argued and Decided on : 12th March, 1957

Excise Ordinance, Sections 12 *and* 43 (*a*)—*Charge under—Failure to state correct notification in charge—Is it fatal to a conviction.*

Held : That where in a charge under section 12 of the Excise Ordinance, the relevant notification was not correctly referred to, a conviction could not be sustained.

Per WEERASOORIYA, J.—" The offence is alleged to have been committed on the 5th of May, 1956, and almost a year would have elapsed before a second trial can take place. Moreover, the accused is in no way responsible for the situation that has arisen, and I do not think that in the circumstances I should order a second trial. The accused is acquitted.

Srimath B. Lekamge, for the accused-appellant.

A. G. de Silva, Q.C., for the Attorney-General.

WEERASOORIYA, J.

The accused-appellant was charged with having transported in breach of section 12 of the Excise Ordinance a quantity of 60 drams of fermented toddy without a permit from the proper authority and with having thereby committed an offence punishable under section 43 (*a*) of the Excise Ordinance. Section 12 of the Ordinance provides that no excisable article exceeding such quantity as may be prescribed by notification shall be imported, exported or transported, except under the authority of a pass issued under section 13. While there is a notification under section 12 prescribing such quantity as 8 drams (and that notification bears No. 416 and is published in Government Gazette No. 10256 of the 8th June, 1951) the notification referred to in the charge as the relevant notification was wrongly given as bearing No. 417 and published in Government Gazette No. 10266 of the 5th July, 1951. It is conceded by learned Crown Counsel that the latter notification has no application at all to the case. The error affects the validity of the conviction of the accused in two ways : Firstly, the prosecution has failed to establish a vital link in the case against the accused, namely, that his possession of any quantity of toddy in excess of 8 drams was unlawful (and I do not think that the omission can be made good in appeal merely by referring this Court to the correct notification). Secondly, the charge as framed does not disclose the commission of any offence known to law. It is obvious, therefore, that the conviction of the accused and the sentence passed on him cannot stand, and the only question that remains is whether he should be subjected to a retrial on a proper charge. The offence is alleged to have been committed on the 5th of May, 1956, and almost a year would have elapsed before a second trial can take place. Moreover, the accused is in no way responsible for the situation that has arisen, and I do not think that in the circumstances I should order a second trial. The accused is acquitted.

Accused acquitted.

Present : H. N. G. FERNANDO, J.

D. H. S. GUNAWARDENA *vs.* S. C. PATRICK

S. C. 4 *of* 1956—*M. C. Gampola* 16048

Argued on : 10th October, 1956.
Decided on : 12th April, 1957.

Urban Councils Ordinance, No. 61 *of* 1939 (*Chap.* 199)—*Sections* 76, 196 (41)—*Closing Order, under Housing and Town Improvement Ordinance* (*Chap.* 199) *who should make the application.*

Held : (i) That the officer empowered by section 76 of the Urban Councils Ordinance (Chapter 199) to apply to a Magistrate for a closing order is the Chairman of the Local Authority.

(ii) That where an Urban Council has been dissolved and a Special Commissioner appointed to administer the affairs of the Council, the latter is entitled to make the application by virtue of sub-section 41 of section 196 of Ordinance No. 61 of 1939.

(iii) That where the Secretary of the Council made such application without proof that he had been delegated for the purpose, the Magistrate had no jurisdiction to entertain the application.

B. Jayasuriya, for the accused-appellant.

D. S. Jayawickrema, Q.C., with *J. V. M. Fernando*, for the complainant-respondent.

H. N. G. FERNANDO, J.

The appellant has been convicted of inhabiting a dwelling-house in breach of a closing order made under the Housing and Towns Improvement Ordinance (Cap. 199)—an offence punishable under section 81 of that Chapter. Several objections were taken at the argument to the validity of the closing order.

The premises in question form part of a building owned by the Urban Council of Nawalapitiya, and it is argued that the procedure of prohibiting habitation by means of a closing order has been adopted as a device to eject the appellant in evasion of the provisions of the Rent Restriction Act. Even if there be any truth in this allegation, it is not one which I can entertain at this stage. Any representation that the application was being made in bad faith and not on the ground of the " unfitness " of the premises should have been made to the Magistrate, and thereafter have been made the subject of an appeal against the closing order.

The officer who is empowered by section 76 of Chapter 199 to apply to a Magistrate for a closing order is the Chairman of the local authority—in the present instance the Chairman of the Nawalapitiya Urban Council. During the relevant period, however, the Urban Council had been dissolved under section 196 of the Urban Councils' Ordinance of 1939, and a Special Commissioner had been appointed to administer the affairs of the town. In this situation, it is contended for the appellant that the powers conferred on the Chairman by section 76 of Chapter 199 could not have been availed of, because there was no " Chairman " in office at the time. I think the answer is to be found in sub-section (41) of section 196 of the 1939 Ordinance which provides that " all the powers vested in the Urban Council shall be deemed to be vested in the Special Commissioner ". No doubt there is here no *express* transfer of powers vested *in the Chairman*, but the express vesting of the powers *of the Council* is in my opinion wide enough to include all statutory powers which are conferred on a person in his capacity as Chairman of a Council. The intention of the Legislature in enacting section 196 was manifestly to secure that the Urban Council area would be administered as before, *but by a Commissioner instead of a Council* or its Chairman.

I have just pointed out that the power conferred by section 76 on the Chairman could have been exercised by the Special Commissioner. But the application to the Magistrate for the mandatory order was in this case made, not by the Commissioner, *but by the Secretary of the Council.* While it may well be that the Council, when it was in office, had authorised the Secretary to take action under section 76, and while such a delegation might well be effective despite the dissolution, the difficulty I encounter here is that the record does not contain any reference to any such delegation, and my notice has not been drawn to any such act of delegation even if it be in existence. In the circumstances, I am

constrained to hold that the Magistrate has purported to act without jurisdiction, in that he entertained an application which was made by an officer who was not shown to have the right to make the application, and to hold accordingly that the closing order was invalid.

In the exercise of the powers of this Court in revision I set aside the " closing order " of 28th December, 1954, and the order and sentence passed by the Magistrate on 16th December, 1955, and acquit the accused.

Set aside.

Present : K. D. de Silva, J. and L. W. de Silva, A.J.

PINENCIHAMY *et al vs.* WILSON *et al*

S. C. 170 *of* 1956—*D. C.* (*Inty.*) 192/*L Tangalla*

Argued on : 28th June, 1957.
Decided on : 3rd July, 1957.

Costs—Value of action increased by claim in reconvention—Dismissal of claim in reconvention—Order for costs in favour of plaintiff—Should they be taxed in the class in which action was brought—Civil Procedure Code, Second Schedule, Part I.

The plaintiff succeeded, in an action which he valued at Rs. 500/- The defendant made a claim in reconvention in a sum of Rs. 500/- which was dismissed An order for costs was made in favour of the plaintiff.

Held : That the costs should be taxed according to Class III in the Second Schedule (Part I) of the Civil Procedure Code and not according to Class II in which the action was brought, as the increase in value resulting from the claim in reconvention was for all purposes.

Cases referred to : *Ramalingam vs. Ramalingam et al*, 35 N.L.R. 174 at 179.

A. L. Jayasuriya, for the plaintiffs-appellants.
W. D. Gunasekera, for the defendants-respondents.

L. W. de Silva, A.J.

This appeal raises the question in what class the plaintiffs' proctor's costs should be taxed. The plaintiffs-appellants instituted this action for a declaration of title to certain immovable property, valuing the subject matter at Rs. 500/- inclusive of damages. The 1st defendant-respondent in his answer prayed for a dismissal of the action and made a claim in reconvention in a sum of Rs. 500/-. The value of the subject matter of the action was thus enhanced to Rs. 1,000/-. In the result, there was an increase in the stamp duty payable on processes. The stamp duty on other matters was not affected by the enhancement of the class of the case. The plaintiffs succeeded in the action and the defendant's claim in reconvention was dismissed. The decree ordered the defendants to pay " half the stamps and proctor's costs to the plaintiffs." Their proctor thereupon filed the bill of costs according to the enhanced value of the action but the defendants objected to the taxation of the proctor's costs in the enhanced Class iii, alleging that these should be in Class ii in which the action was instituted. After an inquiry, the learned District Judge made an order upholding the defendants' objection and ruled that the plaintiffs' proctor's costs should be taxed according to Class ii and not Class iii.

The matter is governed by the Second Schedule (Part 1) to the Civil Procedure Code (Cap. 86) which sets out the scale of costs and charges to be paid to proctors in the District Courts as well between party and party as between proctor and client. It is quite clear from this Schedule that the Class is determined by the cause of action, title to and or property, value of estate *or subject matter of the action.* Since the *value of the subject matter* was raised from Rs. 500/- to Rs. 1,000/- and thus came within Class iii, it is quite impossible to reconcile the learned District Judge's order with the plain requirement of the Code. The increase in the value was an increase for all purposes and did not have the effect of confining the plaintiffs' costs to the Class in which the action was brought. In *Ramalingam vs. Ramalingam et al* 35 N.L.R. 174 at 179 where a similar question arose, this Court held that the

unsuccessful defendant must pay all the additional costs incurred by the successful parties as a result of the enhanced claim.

We make an order that the plaintiffs-appellants' proctor is entitled to his costs according to Class iii of the Second Schedule of the Civil Procedure Code (Cap. 86) and not according to Class ii in which the action was instituted. The appeal is allowed and the order of the learned District Judge is set aside with costs both here and in the Court below.

K. D. de Silva, J.
I agree.

Appeal allowed.

Present : T. S. Fernando, J.

S. M. D. B. SAMARAKOONE vs. (1) THE COMMISSIONER OF MOTOR TRAFFIC (2) K. A. D. JAMES APPUHAMY

S. C. No. 2 (*Motor Traffic Act*) *of* 1956

In the matter of an appeal under the Motor Traffic Act of 1951 *from the decision of the Transport Appeals Tribunal in Appeal No.* 702/*Application No. A* 5398

Argued on : 31st July, 1956
Decided on : 4th September, 1956

Motor Traffic Act No. 16 *of* 1956—*Sections* 86, 87 *and* 90—*Application for a public carrier's permit—Class of goods not specified in the application—Discretionary power of the Commissioner to issue permit.*

Where on the application by a person for a public carrier's permit specifiying certain kinds of goods he proposed to carry, the Commissioner of Motor Transport granted the permit authorising to carry a class of goods not specified in the application.

Held : That the Commissioner is not precluded from including in the permit authority to carry goods of a class or classes which have not been specified in the application.

C. D. S. Siriwardene, for the appellant.
Mervyn Fernando, Crown Counsel, for the 1st respondent.
O. S. M. Senevirgtne, for the 2nd respondent.

T. S. Fernando, J.

The 2nd respondent (hereafter referred to as the applicant) applied to the 1st respondent for a public carrier's permit and, in spite of certain objections raised by the appellant, was successful in obtaining a permit authorising him to carry, among other goods, green tea leaf. The appellant preferred an appeal to the Transport Appeals Tribunal against the grant of the permit, and that Tribunal by its order dated 6th March, 1956, dismissed the appeal. The appeal to this Court is from the order of the Transport Appeals Tribunal.

Counsel for the appellant formulates two questions as questions of law :—

(*a*) that the Commissioner in exercising the discretion vested in him by statute to grant a permit was bound to take into account the previous conduct of the applicant in the capacity of a carrier of goods ; and that in this case the Commissioner has failed to take the applicant's previous conduct into account ;

(*b*) that the Commissioner had no power to issue a permit to carry goods of a class not specified in the application made by the applicant.

In regard to question (*a*), it is sufficient to observe that when the appellant preferred his appeal from the Commissioner's decision to the Transport Appeals Tribunal no complaint was made that the Commissioner had failed to take into account the previous conduct of the applicant. The Tribunal therefore was not called upon to decide this question and, as the appeal before me is not from a decision of the Commissioner but of the Tribunal, I have no material before me upon which I can properly reach a decision on this

question of law. I am of opinion that the appellant not having raised this question in his appeal to the Tribunal is now precluded from raising it by way of appeal in this Court.

In regard to question (*b*), I can find no provision in the Act expressly limiting the power of the Commissioner to the granting of permits to carry only goods of a class specified in the application. It is true that unless every class of goods which the applicant desires to carry is mentioned in the application a person qualified to object may be prevented from raising an objection. The form provided by the Commissioner to be used in making an application for a public carrier's permit contains a cage which requires the applicant to specify the class or description of goods proposed to be carried. The appellant's complaint is that green tea leaf was not included in the application form of the applicant. As the proceedings show that the appellant made this objection before both the Commissioner and the Tribunal, in this case at any rate the objection was raised and considered. Whether green tea leaf should be permitted to be carried by the applicant was a matter which in my opinion had to be decided by the Commissioner. The Tribunal has treated the question as one of fact and refused to interfere with the decision of the Commissioner, and I think the Tribunal was right.

In regard to the question of law raised in this Court, in the absence of any express provision in the statute leading me to a different conclusion, I am inclined to think that the Commissioner is not precluded from including in a permit authority to carry goods of a class or classes which have not been specified in the application. Indeed, there may well be cases where the Commissioner has decided to grant a permit but wishes to impose in the public interest a condition that the permit-holder should carry one or more classes of goods other than those he wishes to carry.

For the reasons indicated above, I would dismiss this appeal. The appellant will pay to each of the respondents a sum of Rs. 105/- as costs of the appeal.

Appeal dismissed.

Present : WEERASOORIYA, J. AND SANSONI, J.

USOOF *et al vs.* NADARAJAN CHETTIAR *et al*

S.C. Application No. 183/*Conditional leave to appeal to the Privy Council in S.C. No.* 189—*D.C. Colombo No.* 24957.

Argued on : 28th February, 1957.

Delivered on : 22nd March, 1957.

Conditional leave to appeal to Privy Council—Application insufficiently stamped—Deficiency made good after thirty days—Rule 2 *of the Schedule to the appeals* (*Privy Council*) *Ordinance,* (*Chap.* 85).

An application was made for Conditional leave to appeal to the Privy Council but at the time the application was filed it was insufficiently stamped. The deficiency was made good after the expiry of thirty days, as provided in Rule 2 of the Schedule to the Appeals (Privy Council) Ordinance,

Held : That the petition of appeal was not duly stamped and should be rejected.

Cases referred to : *Subramaniam Chetty vs. Soysa* 25 N.L.R. 344.
British Ceylon Corporation Ltd. vs. The United Shipping Board 36 N.L.R. 225.
Hurst vs. Attorney-General 4 C.W.R. 265.
James vs. Karunaratne 37 N.L.R. 154.
Bilindi et al vs. Wellawa Attadassi Thero 47 N.L.R. 7.

Sir Lalitha Rajapakse, Q.C., with *M. Markhani*, for the petitioners-appellants.

C. Thiagalingam, Q.C., with *T. Parathalingam*, for the respondents.

WEERASOORIYA, J.

Two objections were taken by learned counsel for the respondents against this application being granted. One of them was that the judgment sought to be appealed from is not a " final judgment " within the meaning of Rule 1 (*a*) of the rules contained in the Schedule to The Appeals (Privy Council) Ordinance (Cap. 85).

The petitioners seek to appeal from the judgment of this Court dismissing an appeal from the order of the District Court refusing to set aside a sale of a land called Alawwa Estate belonging to the petitioners. The sale took place in execution of a decree which had been entered against them in the case.

The objection raised seems to be covered by the decision in *Subramaniam Chetty vs. Soysa* 25 N.L.R. 344 where this Court had reversed in appeal an order of the District Court disallowing an application made by an execution creditor to set aside (on the ground of material irregularity) a sale of certain property seized in execution of a writ in his favour. The matter subsequently came up again in the form of an application for leave to appeal to the Privy Council from the judgment of this Court, and the question arose whether that judgment was a final judgment. The majority of a bench of three Judges held it was. This decision is binding on us. The objection must, therefore, be overruled.

The other objection relates to a question of stamp duty. It is common ground that the application for conditional leave was insufficiently stamped when it was filed. The deficiency in stamp duty was subsequently made good by the applicants but after the expiry of the period of thirty days provided in Rule 2 of the Schedule referred to for the making of the application, although the application itself was filed in time. In these circumstances it is contended for the respondents that the application for leave to appeal must be rejected. This matter too appears to be covered by previous authority. It was held by a bench of two Judges in *British Ceylon Corporation Ltd. vs. The United Shipping Board* 36 N.L.R. 225 that where a petition of appeal to this Court from the District Court was insufficiently stamped the appeal should be rejected. The judgment in that case followed certain earlier decisions referred to therein, one of which is *Hurst vs. Attorney-General* 4 C.W.R. 265 also a decision of two Judges, where Ennis, J., in delivering the judgment of the Court dismissing an appeal on the ground that the petition of appeal was not correctly stamped, stated : " I would add that section 36 (now section 35) of the Stamp Ordinance prohibits the Court from acting upon the instrument, and there is no proviso or any provision in the Stamp Ordinance allowing the defect to be cured other than possibly section 43 ". These decisions were followed by another bench of two Judges in *James vs. Karunaratne* 37 N.L.R. 154.

Section 35 of the Stamp Ordinance (Cap. 189) provides as follows : " No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered, or authenticated by any such person or by any public officer, unless such instrument is duly stamped ". I respectfully agree with the observations of Ennis, J., in *Hurst vs. Attorney-General* (*supra*) that the effect of the latter part of this provision is to preclude a Court from acting on a petition of appeal unless it is properly stamped. These observations are equally applicable to the petition for leave to appeal in the present case.

Paragraph (*a*) of the proviso to section 35 contains provision for an instrument (other than one chargeable with a duty of six cents only or a bill of exchange or promissory note) being admitted in evidence on payment of the duty with which it is chargeable or, in the case of an instrument insufficiently stamped, of the amount required to make up the duty. Learned counsel for the petitioners did not contend that this provision covered the case but he urged that the objection under consideration should be overruled on the ground that no prejudice has been caused to the respondents, and he referred us to certain observations of Lord Goddard in delivering the judgment of the Judicial Committee of the Privy Council in *Bilindi et al vs. Wellawa Attadassi Thero* 47 N.L.R. 7 that " it would be an unfortunate and probably unintended result of the Stamp Ordinance if a litigant should be debarred from an appeal on a ground (of the insufficiency of the stamp) which is from a practical point of view capable of easy remedy without injustice to anyone ". It is clear, however, from what precedes those observations that he did not intend to give expression to a finding or an opinion on the question whether the appeal should be rejected or not on such a ground. Moreover, it does not appear that his attention had been drawn to section 35 of the Stamp Ordinance (Cap. 189).

The application for leave to appeal is rejected with costs.

SANSONI, J.

I agree.

Rejected.

Present : L. W. de SILVA, A.J.

WARLIS *vs.* SCOTT

S. C. 1380 *of* 1956—*M. C. Kurunegala* 25448

Argued on : 15th July, 1957.
Decided on : 19th July, 1957.

Charge—Driving recklessly or in a dangerous manner—Breach of section 153 (2) *Motor Traffic Act—Is the charge bad for duplicity—Sufficiency of particulars of charge—Criminal Procedure Code, Section* 169.

The accused was convicted on the following charge :—

The accused did " being the driver of bus No. IC. 2405 drive the same on a public road to wit: along Alawwa-Narammala Road recklessly or in a dangerous manner in breach of section 153 (2) of the Motor Traffic Act No. 14 of 1951 and thereby committed an offence punishable under section 219 (1) ".

In appeal it was contended on behalf of the accused that—
(*a*) The charge sets out two distinct offences in the alternative and is therefore bad for duplicity.
(*b*) The charge is bad in that it does not set out particulars of the manner in which the offence was committed.

Held : (1) That there is no uncertainty about the charge as driving recklessly or in a dangerous manner connotes the commission of one offence in alternative ways. The charge sets out the manner in which the accused drove his vehicle.

(2) That the manner in which the offence was committed is manifest in the charge and the nature of the case required no further particulars in the charge.

Distinguished : *Edwin Singho vs. S.I., Police, Kadawatte,* 57 N.L.R. 355.

Cases referred to : *Edwin Singho's case,* 57 N.L.R. 355.
R. vs. Wilmot, 24 Cr. App. R. 63.
R. vs. Surrey Justices, ex parte Witherick (1932) 1 K.B. 450.

T. B. Dissanayake, for the accused-appellant.

A. C. de Zoysa, Crown Counsel, for the Attorney-General.

L. W. de SILVA, A.J.

The appellant was tried on two charges framed under the Motor Traffic Act No. 14 of 1951 and was convicted on the first charge which has alleged that he did on 21-8-1956

" Being the driver of bus No. IC. 2405 drive the same on a public road to wit : along Alawwa-Narammala Road recklessly or in a dangerous manner in breach of section 153 (2) of the Motor Traffic Act No. 14 of 1951 and thereby committed an offence punishable under section 219 (1) "

of the said Act. Section 153 (2) is as follows :—

" No person shall drive a motor vehicle on a highway recklessly or in a dangerous manner or at a dangerous speed."

The two points taken on the appellant's behalf are as follows : (1) the charge sets out two distinct offences in the alternative and is therefore bad for duplicity ; (2) the charge is bad in that it does not set out particulars of the manner in which the offence was committed. Learned counsel for the appellant, relying on the judgment in *Edwin Singho vs. S.I. Police, Kadawatta* 57 N.L.R. 355, contended that the appellant was entitled to an acquittal. Learned Crown Counsel contended that that case was wrongly decided.

In that case, two charges had been framed under sections 153 (2) and 153 (3) of the Motor Traffic Act. The first charge, which alone has a bearing on this appeal, alleged that the accused drove a motor bus " recklessly or in a dangerous manner or at a dangerous speed in breach of section 153 (2)." It appears to have been assumed that the first charge was in respect of three different offences. The judgment makes it clear that no other point of view was put forward or considered, and Sansoni, J. citing a number of local and English decisions held that the charges framed in the alternative were bad for duplicity. He set aside the conviction taking

into account the important consideration that it would not be clear upon a conviction or an acquittal of what offence the accused had been found guilty or acquitted. He also held that the omission to set out the details of each offence in the charge as required by section 169 of the Criminal Procedure Code had occasioned a failure of justice.

The two English cases followed by Sansoni, J. in *Edwin Singho's case* (*supra*) are *R. vs. Wilmot* 24 Cr. App. R. 63 and *R. vs. Surrey Justices, ex parte Witherick* (1932) 1 K.B. 450. In *Wilmot's case* (*supra*), the charge, after setting out the date and place, alleged that the accused

> " Drove a motor car recklessly, or at a speed or in a manner which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which was actually at the time, or which might reasonably have been expected to be, on the said road."

The count was an exact copy of section 11 (1) of the Road Traffic Act, 1930, and it is not surprising that the charge was held bad for duplicity. In *Witherick's case* (*supra*), the information charged the accused with driving a motor vehicle on a road " without due care and attention or without reasonable consideration for other persons using the road contrary to section 12 of the Road Traffic Act, 1930 ". It was held that the conviction was bad for duplicity since the section created two separate offences.

I do not think the reasoning of Sansoni, J. and the cases cited by him apply to the facts of this case. The charge here is in two alternatives connoted by *recklessly or in a dangerous manner.* The charge in *Edwin Singho's case* (*supra*) alleged the accused drove his vehicle *recklessly or in a dangerous manner or at a dangerous speed.* It is thus apparent that the accused might have done one or two things without the other, and the view was taken that distinct offences were indicated. The present charge is not open to that objection. Driving recklessly or in a dangerous manner in my opinion connotes the commission of one offence in alternative ways. The charge sets out the *manner* in which the appellant drove his vehicle, and there is no uncertainty about it. I am of the opinion that the charge was correctly framed and the appellant was rightly convicted.

The second objection also fails. Section 169 of the Criminal Procedure Code states that when the nature of the case is such that the particulars mentioned in the last two preceding sections do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the *manner* in which the alleged offence was committed *as will be sufficient for that purpose.* There is nothing in the nature of this case which requires particulars of the manner in which the offence was committed. The manner is manifest in the charge. The Magistrate has found that the appellant drove the vehicle without any regard to the car which was moving in the opposite direction on the extreme left of the road and against which the appellant knocked his bus. The evidence further established that the appellant's bus had passed the point of impact and halted well on the left side of the road on the grass. The car was found almost in the drain after the impact. It is thus quite plain that one offence was committed and at one spot. In *Edwin Singho's case* (*supra*), there was evidence of three separate incidents at three different places on the highway, and Sansoni, J. observed that, in fairness to the accused, he should have been given particulars of the manner in which the alleged offences were committed as required by section 169 of the Criminal Procedure Code.

In view of the conclusion I have reached, there can be no question of what offence the appellant has been found guilty.

The appeal is dismissed.

Appeal dismissed.

Present : BASNAYAKE, A.C.J. AND WEERASOORIYA, J.

EDWIN vs. DIAS *et al*

S.C. 416—*D.C.* (*F*) *Kandy No.* 1720—*MB.*

Argued on : 28th October, 1955.
Delivered on : 24th April, 1956.

Hypothecary action—Mortgage of land to plaintiff—Death of mortgagor—Sale of hypothecated property by widow, 1st defendant to 2nd defendant, who retained part of purchase price to settle mortgage debt—Notice by 2nd defendant to plaintiff to accept principal and interest and cancel bond—Refusal by plaintiff—Action by 2nd defendant against plaintiff for cancellation of bond—Amount due deposited in Court—Before service of summons action filed by plaintiff on bond, against 1st defendant only—Plea by 1st defendant that property sold to 2nd defendant and action filed for cancellation of bond—At trial plaintiff's action dismissed of consent—No right reserved to bring fresh action—Withdrawal of 2nd defendants' action before summons served ex parte—*Plaintiff later consenting to accept money deposited by 2nd defendant—Refusal by Court on objection by 2nd defendant—Money deposited paid to 2nd defendant —Conveyance of mortgaged property to 3rd defendant.*

Second hypothecary action by plaintiff against 1st defendant as legal Representative of deceased mortgagor and 2nd and 3rd defendants—Plea by defendants that decree entered of consent in earlier action operated as res judicata—*Civil Procedure Code, sections* 406 *and* 408—*Mortgage Ordinance* (*Cap.*74) *Section* 16—*Mortgage Act No.* 6 *of* 1949, *section* 7.

D mortgaged a land with plaintiff in 1947. D died in 1948 leaving his widow, the 1st defendant and a daughter. 1st defendant transferred the land to the 2nd defendant, who retained in his hands the amount due on the mortgage and noticed the plaintiff to receive payment and discharge the bond. On plaintiff's refusal to accept payment the 2nd defendant filed case No. 3312 D.C., Kandy for cancellation of the bond and deposited the amount due on the bond in Court. Before summons was served, the plaintiff, filed D.C., Kandy 1364 M.B on the bond against the 1st defendant (personally and as legal representative of D) praying for hypothecary, decree without making the 2nd defendant a party and without reference to the transfer in favour of the 2nd defendant.

In her answer the 1st defendant pleaded inter alia the sale to the 2nd defendant and that the latter had already sued for the cancellation of the bond. At the trial (of D.C. 1364 M.B) the following order was made by Court " Of consent action dismissed, no costs ". Liberty to file fresh action was neither applied for nor reserved. The 2nd defendant, thereafter and before summons in D.C. 3312 was served, moved to withdraw his action with liberty to bring a fresh action and for permission to withdraw money deposited in Court, which was allowed *ex-parte*. Thereafter, the plaintiff through his proctor consented to accept the money and cancel the bond and moved to withdraw the money deposited (not yet withdrawn). 2nd defendant objected to this application which was refused. The amount in deposit was paid to the 2nd defendant.

After various other steps, the plaintiff filed this action for a hypothecary decree against the 1st defendant as the legal representative of the mortgagor, and the 2nd and 3rd defendants, (the last named being a donee of the property from the 2nd defendant) the defendants in their answers pleaded inter alia that the decree entered in the earlier mortgage action viz., D.C. 1364 M.B operated as *res judicata* between the plaintiff and the defendant and therefore the action was not maintainable. The learned District Judge held that the money was due on the bond, but dismissed the action on the ground that section 406 of the Civil Procedure Code precluded the plaintiff from maintaining the action. The plaintiff appealed.

Held : (1) That the provisions of section 7 (1) of the Mortgage Act, No. 6 of 1949 must be read subject to the provisions of sections 406 and 408 of the Civil Procedure Code.

(2) That whether one regards the dismissal of the previous action by the appellant as a withdrawal under section 406 or as an adjustment under section 408 of the Civil Procedure Code, the effect of the decree passed in that section is to preclude the appellant from bringing the same action, notwithstanding the provisions of section 7 (1) of the Mortgage Act No. 6 of 1949.

(3) That so far, at least, as it is sought to obtain a decree against the 1st defendant in her representative capacity for the payment due on the bond, the present action is " for the same matter " as the previous one.

(4) That since the mortgage is only accessory to the original obligation or debt, once the original obligation is extinguished by reason of the operation of the previous decree of Court, the appellant has no independent remedy against the 3rd defendant to have the mortgaged property sold for the debt.

(5) That the provisions of section 7 (1) of the Mortgage Act is satisfied if the mortgagor is sued as a defendant but no relief is claimed against him and they do not enable a second claim for the payment of money due on a mortgage being successfully maintained against the mortgagor or his estate when a previous action has been dismissed in circumstances in which the appellant's earlier action was decided.

Per WEERASOORIYA, J.—But with regard to the order made on the 15th December, 1949, it seems to me that generally speaking a Court should not grant a plaintiff permission in terms of S 406 (1) of the Civil Procedure Code without notice to all the persons whose names appear on the record as parties to the action even though summons may not yet have been served on some or all of them.

Cases referred to : *Slema Lebbe vs. Banda* 1 A. C. R. 72.
Savarimuttu vs. Annamah 39 N. L. R. 80.
Kumarappa Chettiar et al vs. Gunawathie et al 48 N. L. R. 34
Muheyadin vs. Thambiappah 51 N. L. R. 392.
Wille on Mortgage and Pledge in South Africa (1920 ed.) p. 265.

H. W. Jayawardene, Q.C., with *P. Ranasinghe*, for the plaintiff-appellant.

G. P. J. Kurukulasuriya, for the 1st defendant-respondent.

T. B. Dissanayake, for the 3rd defendant-respondent.

WEERASOORIYA, J.

This is a hypothecary action filed by the plaintiff-appellant for the recovery of the principal sum and interest due on a mortgage bond No. 3071, dated the 23rd December, 1947, granted in his favour by one John Michael Dias who died on the 25th September, 1948, leaving as his heirs his widow the 1st defendant-respondent and a daughter.

By deed No. 1871, dated the 23rd October, 1948, the property hypothecated on bond No. 3071 was sold and transferred by the 1st defendant-respondent to the 2nd defendant, who retained in his hands a certain part of his purchase price representing the principal and interest then due on the bond, and soon afterwards he made unsuccessful attempts to induce the appellant to receive payment on the bond and grant a discharge of it. The appellant, however, had certain other claims against the deceased mortgagor's estate, of which the only asset of any value seems to have been the mortgaged property, and he took up the position that the sale to the 2nd defendant was in fraud of the creditors of the estate and refused to recognise it or to accept payment. The 2nd defendant thereupon filed D.C. Kandy Case No. 3312 against the appellant on the 30th November, 1948, bringing into Court a sum of Rs. 666/- as the principal and interest due on the bond and asking for an order on the appellant to accept the same and grant a discharge of the bond. Before the appellant had been served with summons in that case he filed on the 11th January, 1949, D. C. Kandy Case No. 1364 (M.B.) against the 1st defendant-respondent (personally and also as the appointed legal representative of the estate of J. M. Dias) for the recovery of the principal and interest due on bond No. 3071 and for the usual hypothecary decree that in default of payment the property hypothecated be sold. It is not clear whether at the date of the filing of that action the 2nd defendant was a necessary party to it in terms of section 6 (2) of the Mortgage Ordinance (Cap. 74) which was the law governing the action. In any event he was not made a party to it. That action seems, however, to have been brought on the basis that the property hypothecated formed part of the estate of the deceased mortgagor notwithstanding the transfer by deed No. 1871, to which transaction no reference was made in the plaint. The 1st defendant-respondent filed answer in due course in which one of the defences pleaded was the sale by her to the 2nd defendant of the land hypothecated on the bond and that the latter had already sued the appellant for a cancellation of the bond having brought into Court the amount due thereon. This case was fixed for trial on the 28th September, 1949, on which date the following order was made by Court : " Of consent action is dismissed. No costs ". Decree in the case was accordingly entered in terms of this order. This dismissal of the appellant's action was without any permission supplied for by him or granted by Court to bring a fresh action in respect of the same subject matter as provided in section 406 (1) of the Civil Procedure Code. In a subsequent affidavit (D3) filed by the appellant in support of an application made by him to the Supreme Court to have the decree in that case set aside, he explained that he did not obtain such permission as the arrangement was that he should withdraw the sum deposited in Court in Case No. 3312 filed against him by the 2nd defendant and grant a cancellation of the mortgage bond. But the 2nd defendant, who was no party to that arrangement, proceeded thereafter to frus-

trate it by obtaining an order of Court in Case No. 3312 granting him permission to withdraw his action with liberty to file a fresh action if so advised, and also permission to withdraw the sum of Rs. 666/- being the amount brought into Court. This order was made *ex-parte* on the 15th December, 1949, summons even on that date not having been served on the appellant. There can be no doubt that had the appellant displayed even ordinary diligence he had ample opportunity after the date of the order entered of consent in Case No. 1364 (M.B.) of having himself represented in Case No. 3312 prior to the granting of the 2nd defendant's application to withdraw that action as well as the money brought into Court. This step he did not, however, take till the 20th December, 1949, when a proctor filed his proxy and stated that his client consented to accept the money and cancel the bond and moved for an order of payment of that money (which had not yet been withdrawn in terms of the permission granted on the 15th December, 1949), in his favour. This application appears to have been objected to by the 2nd defendant, and after inquiry into the matter the Court made order dismissing it on the ground that on the date on which the Court had granted the 2nd defendant's application to withdraw his action the appellant was " out of Court ". The attitude of the 2nd defendant in objecting to this application, though in strange contrast to his previous insistence that the appellant should accept the money and grant a discharge of the mortgage bond, seems to have been justified if one regards the order made by the Court on this occasion as a correct one. The question of the correctness of that order, however, or of the earlier *ex-parte* order dated the 15th December, 1949, does not arise in this appeal. But with regard to the order made on the 15th December, 1949, it seems to me that generally speaking a Court should not grant a plaintiff permission in terms of S 406 (1) of the Civil Procedure Code without notice to all the persons whose names appear on the record as parties to the action even though summons may not yet have been served on some or all of them. If this precaution had been taken by the Court in this particular instance the appellant would, without doubt, not have found himself in the predicament which has given rise to the action now under appeal.

After the dismissal of the appellant's application in Case No. 3312 the amount in deposit was paid out to the 2nd defendant less a sum due to his proctor as taxed costs.

Having been thus foiled in his attempt to realise the moneys due to him on the mortgage bond, the appellant resorted to various other steps to obtain relief. On the 7th February, 1950, he filed a motion through his proctor in Case No. 1364 (M.B) praying that the order dated the 28th September, 1949, entered of consent dismissing that action be vacated, but soon after he seems to have apprehended the futility of that application and he consented to it being dismissed. He then made an application by way of *restitutio in integrum* to this Court and it was in that connection that he filed the affidavit D3 to which I have already referred. This application met with th same fate as his previous efforts and was refused on the 20th November, 1950.

A little over a year later the present action was filed. To this action the 2nd defendant was made a party as a puisne encumbrancer by reason of the transfer of the mortgaged property to him by deed No. 1871 and so was the 3rd defendant-respondent (a son of the 2nd defendant) on the ground that the title to the land under mortgage had passed to him by virtue of a deed of gift No. 3422 dated the 20th August, 1949, executed in his favour by the 2nd defendant subject, however, to the mortgage. The 1st defendant has been joined in the action only as the duly appointed legal representative of the estate of the deceased mortgagor, and not in her personal capacity also (unlike in the previous mortgage bond action No. 1364). In the answer of the 1st defendant-respondent and the joint answer of the 2nd defendant and the 3rd defendant-respondent the substantial defence put forward was that the decree entered in the previous mortgage bond action operated as *res judicata* between the plaintiff and the defendants and that the present action is, therefore, not maintainable. After filing answer but before the trial the 2nd defendant died and the case went to trial as against the other two defendants on certain issues including issues based on the plea of *res judicata* taken in the answers. The learned District Judge, while holding that the sums claimed were due on the bond, dismissed the appellant's action with costs, one of the grounds for his order being that the bond was not enforceable in the view taken by him that section 406 of the Civil Procedure Code precluded the appellant from maintaining this action. This appeal has been filed by the appellant against the dismissal of his action.

At the date of the institution of the present action the Mortgage Ordinance (Cap. 74) had been repealed by the Mortgage Act, No. 6 of 1949. In deciding the questions arising in this appeal certain provisions of these two enactments have to be considered, particularly section

16 of the repealed Ordinance and the corresponding section 7 of the Mortgage Act.

It was held in *Slema Lebbe vs, Banda* 1 A.C.R. 72 that in the circumstances which existed at the time of the filing of Case No. 1364 (M.B) the only remedy available to a mortgagee against the mortgagor is the personal action for the recovery of the money and not the hypothecary remedy. That decision, which was prior to the Mortgage Ordinance (Cap. 74) would still appear to be good law and in my opinion neither section 16 of the Mortgage Ordinance nor section 7 of the Moergage Act would enable a mortgagee to bring a hypothecary action against a mortgagor who has parted with his interests in the mortgaged property. It was, of course, open to the appellant to have filed one section against the 1st defendant-respondent and the 2nd defendant praying for a decree against the former for the payment of the money and for a decree against the latter declaring the mortgaged property bound and executable in default of payment of the money. But this he did not do. The appellant in his evidence at the trial said that when he filed the earlier action he was aware of the transfer of the mortgaged property to the 2nd defendant on deed No. 1871, but he refrained from making him a party to that action. Notwithstanding the omission to do so, he could, under either of the two sections referred to, have brought a separate subsequent action against the 2nd defendant in respect of the hypothecary remedy had he succeeded in the earlier action in obtaining a decree against the 1st defendant-respondent as the legal representative of the deceased mortgagor's estate for the payment of the money due on the mortgage. The question is whether having consented to the dismissal of the earlier action he can now maintain the present action.

The learned trial Judge, in dismissing the appellant's present action, was principally influenced by the fact that the appellant's earlier action had been dismissed without any permission obtained by him under section 406 (1) of the Civil Procedure Code to bring a fresh action " for the subject matter " of that action and he held that, therefore, section 406 (2) was a bar to the present action. In considering this aspect of the case, however, the trial judge seems to have travelled outside the issues of *res judicata* since the bar contained in section 406 (2) is, strictly speaking, not based on the principal of *res judicata* though somewhat analogous to it. No issue was raised at the trial whether section 406 (2) operated as a bar to the present action, but despite this omission it cannot be said that the learned Judge should not have considered that question, being a pure question of law, and especially as it was the subject of argument in the addresses of counsel after the leading of evidence had been concluded. At the hearing of the appeal too the argument revolved chiefly on this point, and the issues of *res judicata* were not touched upon.

It will be seen that although section 16 (1) of the repealed Ordinance and section 7 (1) of the Mortgage Act expressly refer to section 34 of the Civil Procedure Code, they are silent in regard to the operation of any other bar to the maintainability of an action for the bringing of which provision is made under those sections. It was held in the case of *Savarimuttu vs. Annamah* 39 N.L.R. 80 that section 16 (1) does not entitle a plaintiff to succeed in an action which has already ceased to be maintainable under the Prescription Ordinance (Cap. 55). In *Kumarappa Chettiar et al vs. Gunawathie et al* 48 N.L.R. 34 the question arose only incidentally whether where a previous hypothecary action had been dismissed it was open to the mortgagee, under the provisions of section 16 of the Mortgage Ordinance, to bring a second hypothecary action in respect of the same matter, and Nagalingam, J. refrained from expressing an opinion that he could. In the case of *Muheyadin vs. Thambiappah* 51 N.L.R. 392 the same Judge took the view that section 16 (1) of that Ordinance allows a mortgagee to bring a second action in respect of the same remedy and cited as authority for this view the earlier case of *Savarimuttu vs. Annamah* (*supra*), but it is to be observed that in both those cases the previous hypothecary actions had not resulted in their dismissal and, instead, a hypothecary decree had been entered for the sale of the mortgaged land.

While these authorities deal with the construction of section 16 (1) of the repealed Mortgage Ordinance, the somewhat different language adopted in the corresponding section 7 (1) of the Mortgage Act does not seem to justify the view that the same *ratio decidendi* would not be applicable where the question that arises is as regards the rights of a mortgagee under the latter provision. Having considered these authorities I have come to the conclusion that the provisions of section 7 (1) of the Mortgage Act must be read subject to the provisions of section 406 and also section 408 of the Civil Procedure Code. In my opinion, whether one regards the dismissal of the previous action brought by the appellant as a withdrawal of it under section 406 or an adjustment under section 408, the effect of the decree passed in that action is to preclude the appellant from bringing the

same action again, notwithstanding the provisions of section 7 (1) of the Mortgage Act.

Under section 406 (2) of the Civil Procedure Code a plaintiff who withdraws from an action is denied the right to bring a fresh action " for the same matter " unless, prior to the withdrawal, he obtains the permission of Court to do so. Section 408 provides that an adjustment of an action by any lawful agreement or compromise shall be notified to the Court which is then required to enter a decree in accordance therewith and the decree shall be final so far as it relates to the subject matter of the action as dealt with by the agreement or compromise.

In the previous mortgage action brought by the appellant he joined a money claim on the bond against the 1st defendant, in her personal capacity and also as the legal representative of the estate of the deceased mortgagor, to the claim that in default of payment the mortgaged property be held bound and executable. It is clear, therefore, that his present action in so far, at least, as it is sought to obtain a decree against the 1st defendant in her representative capacity (and therefore binding on the deceased mortgagor's estate) for the payment of the money due on the bond is an action " for the same matter " as the previous one and is barred by section 406 (2) of the Civil Procedure Code. It is also barred by section 408.

Even if the appellant cannot succeed in his present action as against the deceased mortgagor's estate for the payment of the money due on the bond, is he entitled to maintain it for the limited purpose of obtaining a decree binding on the 3rd defendant-respondent declaring the mortgaged land bound and executable? In my opinion the answer to this must also be in the negative. " Since a mortgage is only accessory to the original obligation or debt, it follows that when that is discharged the mortgage is *ipso jure* extinguished ".—Wille on Mortgage and Pledge in South Africa (1920 ed) p. 265. The same result must necessarily follow, I think, where in consequence of a decree of a Court the right to sue for the debt is lost. All that the appellant could have enforced against the 3rd defendant-respondent was the sale of the mortgaged property so long as the obligation to pay the amount due on the bond remained undischarged and actionable. The appellant has no claim against the 3rd defendant-respondent for the payment of the mortgage debt, which remains the liability of the deceased mortgagor's estate; nor, once that liability has been discharged or extinguished by reason of the operation of a previous decree of a Court, has he any independent remedy against the 3rd defendant-respondent to have the mortgaged land declared bound and executable or to have it sold for the debt.

Learned counsel for the appellant in seeking to justify the present action against the 1st defendant-respondent also invoked the provisions of sections 7 (1) and 26 of the Mortgage Act, No. 6 of 1949. Section 7 (1) provides, inter alia that in every hypothecary action the mortgagor shall be sued as a defendant, and section 26 contains provision for a legal representative being appointed to represent the estate of a deceased mortgagor. The provisions of section 7 (1) would be satisfied if the mortgagor is sued as a defendant but no relief is claimed against him and, in my opinion, they do not enable a second claim for the payment of the money due on a mortgage being successfully maintained against the mortgagor or against the estate of a deceased mortgagor where a previous action in respect of the same claim has been dismissed in the circumstances in which Case No. 1364 (M.B) came to be dismissed.

In view of the conclusion which I have reached it is not necessary to consider to what extent, if any, the decree in Case No. 1364 (M.B) operates as *res judicata* in respect of the present action.

The appeal is dismissed with costs.

BASNAYAKE, C.J.
I agree

Appeal dismissed with costs.

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

MOHIDEEN AND OTHERS vs. SULAIMAN AND OTHERS

S.C. 340/*L*—1954—*D.C. Colombo* 6238/*F*

Argued on : 5th February and 12th March, 1957.
Decided on : 4th September, 1957.

Muslim Law—Donation subject to fidei commissum *under last will*—Fidei commissum *property partitioned by decree of Court—Property sold by fiduciary and* fidei commissaries—*Validity of sale—Does Roman-Dutch Law or Muslim Law govern sale? Extent of the applicability of Muslim Law in Ceylon.*

By last will one A.R. donated in equal shares a certain property to H and M subject to the condition that they shall not sell, mortgage, alienate or in any way encumber the said premises or the rents, profits on income arising thereof but shall only possess and enjoy the same during their natural lives and after their death the same shall devolve on their respective heirs and descendants ".

The property was subsequently partitioned under a decree of Court and M, his wife, and his two sons sold by deed to the 2nd defendant, the lot allotted to M under the decree. The plaintiffs, the grand children of M, contended that the sale was void as Muslim Law applied. It was not disputed that there was a valid *fidei commissum* under the last will.

Held : (1) That a contract of sale between Muslims is not governed by Muslim Law but by Roman-Dutch Law.

(2) That under the Roman-Dutch Law all those who have an interest in regard to the *fidei commissum* have a right to alienate the property and the sale in the present case was valid.

Per Basnayake, C.J.—It would appear therefore that in the case of Muslims their special laws govern the following matters :—Marriage, Divorce, Status and Mutual Rights and Obligations of the Parties to a Marriage or Divorce, Intestate Succession, and Donations of Immovable Property not involving *fidei commissa*, Usufructs and Trusts. It should be noted that the Legislature has not extended the application of Muslim Law to contracts of sale and that donations involving *fidei commissa* are excluded from the scope of the Muslim Law and the Roman-Dutch Law is declared applicable to them.

Authorities referred to : D.C. Colombo Case No. 29129, Vanderstraaten's Reports appendix B. P. xxxi.
Affefudeen vs. Periatamby 114 N. L. R. 295 at 299.
Voet Book xxxvi Title 1, section 62, 65.
De Vos : Mohammedan Law—p.2.

N. E. Weerasooriya, Q.C., with *A. C. Nadarajah* and *M. S. M. Nazeem*, for Plaintiff-Respondents.
A. C. Nadarajah, with *C. Chellappah*, for 1st defendant-respondent.
H. V. Perera, Q.C., with *Mrs. F. R. Dias*, for 2nd, 4th, 5th and 6th defendant-appellants.

Basnayake, C.J.

This is an action for partition of Lot B in Plan No. 2379 dated 5th February 1921 made by H. G. Dias, Licensed Surveyor.

It is common ground that one Abdul Rahman the original owner of premises bearing assessment No. 23 St. Sebastian Street, Colombo, by his Last Will dated 10th November 1899 (Exhibit P1) donated the land in equal shares to his brothers Sulaiman Lebbe Hamidu (hereinafter referred to as Hamidu) and Sulaiman Lebbe Mohideen (hereinafter referred to as Mohideen) subject to the condition that they " shall not sell, mortgage, alienate or in any way encumber the said premises or the rents, profits or income arising thereof but shall only possess and enjoy the same during their natural lives and after their death the same shall devolve on their respective heirs and descendants."

The land was on 2nd March 1920 partitioned in action No. 50879 in the District Court of Colombo, Hamidu being allotted Lot A in Plan No. 2379 dated 5-2-21 made by H. G. Dias, Surveyor, and Mohideen Lot B. Mohideen, his wife, and his two sons by deed No. 3190 of 5th March 1943 attested by N. M. Zaheed, Notary Public (Exhibit 2D1), sold Lot B to the 2nd defendant Who gifted an undivided 1/3 share of the lot to his wife Ayisha Umma the 4th defendant and the remaining undivided 2/3 to his two sons, the 5th and 6th defendants, subject to a life interest in favour of his wife. The 2nd defendant is the guardian *ad litem* of the 5th and 6th defendants. Mohideen died in August 1945 leaving two sons Mohamed Sulaiman and Mohamed Atha, the 1st defendant. Mohamed Sulaiman died in 1947 leaving two sons, the 1st and 2nd plaintiffs. The 3rd defendant is the tenant of the 2nd defendant, from whom he has obtained a lease of Lot B.

It is admitted by all the parties that the instrument P1 creates a good and valid *fidei commissum*. It is also not disputed that if the Roman-Dutch Law applies Mohideen, his wife and children were entitled to execute the transfer in favour of the 2nd defendant and thereby pass a title unfettered by the *fidei commissum*. But it was urged by the plaintiffs and the 1st defendant that the law that applies is the Muslim Law and that under that law the sale is void.

The learned trial Judge has upheld the contention that the only manner in which Mohideen and his sons could have transferred any right in Lot B during Mohideen's lifetime was by a sale under the Entail and Settlement Ordinance. He also held that in any event the deed executed by the two sons of Mohideen conveyed no title under the Muslim Law to the 2nd defendant.

Learned Counsel for the appellant contends that this is a contract of sale between Mohideen, his two sons, and the 2nd defendant and that the law which governs it is Roman-Dutch Law and that under that law it is open to all those who have an interest in regard to the *fidei commissum* to alienate the property whereupon the burden of *fidei commissum* is ended. (*See* Voet, Book XXXVI, Title I, sections 62 and 65.)

It is therefore necessary to ascertain in the first place whether the Muslim Law governs the sale of Lot B. In the absence of any express provision in the law to the contrary the common law of the land would ordinarily apply to the transaction. A person who claims that a law other than the common law applies must prove it. In the instant case admittedly the parties are Muslims. In certain matters the law provides that Muslims shall be governed by the special law applicable to them. Even during the time of the Dutch Government in matters of succession, inheritance, marriage and divorce they were governed by their special laws. These laws were collected in a volume entitled *Byzondere Wetten aangaande Mooren of Mohammedanen en andere inlandsche natien* (Special Laws relating to Moors or Mohammedans and other native races) —(see De Vos's Mohammedan Law, page 2). The application of these laws was saved by the Proclamation of 23rd September 1799 which provides as follows :—

> " Whereas it is His Majesty's gracious Command that for the present and during His Majesty's will and pleasure the temporary Administration of Justice and Police in the Settlements of the Island of Ceylon, now in His Majesty's Dominion, and in the Territories and Dependencies thereof, should, as nearly as circumstances will permit, be exercised by us, in comformity to the Laws and Institutions that subsisted under the ancient Government of the United Provinces, subject to such deviations in consequence of sudden and unforeseen emergencies, or to such expedients and useful alterations, as may render a departure therefrom, either absolutely necessary and unavoidable, or evidently beneficial and desirable.....
>
> " We, therefore, in obedience to His Majesty's Commands, do hereby publish and declare, that the Administration of Justice and Police in the said Settlements and Territories in the Island of Ceylon, with their Dependencies, shall be henceforth and during His Majesty's Pleasure exercised by all Courts of Judicature, Civil and Criminal ; Magistrates, and Ministerial Officers, according to the Laws and Institutions that subsisted under the ancient Government of the United Provinces, subject to such deviations and alterations by any of the respective powers and authorities hereinbefore mentioned, and to such other deviations and alterations as we shall by these presents, or by any future Proclamation, and in pursuance of the authorities confided to us, deem it proper and beneficial for the purposes of Justice to ordain and publish, or which shall or may hereafter be by lawful Authority ordained and published."

When the authority under which the Proclamation of 1799 was issued was repealed by the Royal Charter of 1801, Clause XXXII of that Charter continued the saving clause in respect of the customary laws of the Muslims and expressly extended it to the customary laws of the Sinhalese. The relevant clause reads :—

> " And provided also, that in the Cases of Cingalese or Mussulman Natives, their Inheritance and Succession to Lands, Rents, and Goods, and all Matters of Contract and Dealing between Party and Party, shall be determined in the Case of Cingalese, by the Laws and Usages of the Cingalese, or in the case of Mussulmans, by the Laws and Usages of the Mussulmans, and where one of the Parties shall be a Cingalese or Mussulman, by the Laws and Usages of the Defendant."

On 5th August 1806 the Chief Justice submitted to the Governor in Council a " Code of Mahomedan Laws observed by the Moors in the Province of Colombo, and acknowledge by the Head Moormen of the District to be adapted to the present usages of the Cast ". It was published by Order of the Governor. The Code was entitled " Special Laws Concerning Maurs or Mahomedans " arranged under two titles, the first entitled " Relating to Matters of Succession. Right of Inheritances, and other Incidents occasioned by Death " and the second " Concerning Matrimonial Affairs ". Although De Vos in his monograph on Mohammedan Laws says that the Code of 1806 is " no other than a translation, from the Dutch into English, of the Byzondere Wetten ", the statement appearing at the end of the Code seems to indicate that it was a compilation made independently. The statement runs thus :—

> " In this manner we the Marcair Arbitrators Priests and Inhabitants have according to our knowledge and having consulted with the learned High Priests, have stated the foregoing Articles as agreeable to the Laws and Customs for to be observed, and have confirmed the same with our Signatures at Colombo the 1st of August 1806."
>
> (Twenty names are appended)

The Code at first applied to the " Province of Colombo " only, but was later extended to the rest of the Island by section 10 of Ordinance No. 5 of 1852 which enacted as follows :—

> " The Code of Mohamedan Laws, entitled ' Special Laws concerning Maurs or Mahomedans' promulgated on the 5th day of August 1806, and ordered to be

observed throughout the whole of the province of Colombo, shall extend and be applied to the like cases, matters and things between Mahomedans residing within the Kandyan Provinces, and in other parts of this Colony, unless in any case other provision is or shall be made by any Ordinance now in force in this Colony or hereafter to be enacted."

In extending the Code to the rest of the Island this Ordinance gave it the force of an enactment of the Legislature. Thereafter the Code is dealt with as if it were a legislative instrument. Ordinance No. 8 of 1886 which provides for the registration of the Marriages of persons professing the Mohammedan faith expressly repealed a portion of the Code by enacting that " So much of the Code of Mohammedan Laws of 1806 as is inconsistent with this Ordinance is hereby repealed."

The Muslim Marriage and Divorce Registration Ordinance No. 27 of 1929, which replaced the Mohammedan Marriage Registration Ordinance No. 8 of 1886, by section 48 repealed the second title of the Code from section 64 to section 102 (first paragraph) inclusive, subject to the proviso in that section. The Ordinance of 1929 was itself repealed by the Muslim Marriage and Divorce Act No. 13 of 1951, which contains the following provision :—

" 99 (1). For the avoidance of doubt, it is hereby declared that the repeal of sections 64 to 101 and of the first paragraph of section 102 of the Mohammedan Code of 1806, by the Muslim Marriage and Divorce Registration Ordinance, 1929, or the repeal of that Ordinance by this Act, does not affect the Muslim Law of marriage and divorce, and the rights of Muslims thereunder.

" (2) It is hereby further declared that in all matters relating to any Muslim marriage or divorce, the status and the mutual rights and obligations of the parties shall be determined according to the Muslim law governing the sect to which the parties belong."

The whole of the " Muslim Law governing the sect to which the parties belong " in regard to " status and the mutual rights and obligations of the parties " is for the first time in the history of the legislation on this subject introduced by subsection (2) of section 99. What is Muslim Law and where is one to find it is not stated. Until the Act of 1951 there was no indication in the legislation that there was any Muslim Law obtaining in Ceylon outside the Code or the Ordinance governing Marriage Registration.

While the legislative measures I have referred to above dealt with inheritance and marriage it was not till 1931 that a comprehensive enactment providing for Muslim Testate and Intestate Succession and Donations, and Muslim Charitable Trusts or Wakfs was passed in the form of the Muslim Intestate Succession and Wakfs Ordinance, No. 10 of 1931. The sections of that Ordinance material to the present discussion are the following :—

" 2. It is hereby declared that the law applicable to the intestacy of any deceased Muslim who at the time of his death was domiciled in the Island or was the owner of any immovable property in the Island shall be the Muslim law governing the sect to which such deceased Muslim belonged.

" 3. For the purposes of avoiding and removing all doubts it is hereby declared that the law applicable to donations not involving *fidei commissa*, usufructs and trust, and made by Muslims domiciled in the Island or owning immovable property in the Island, shall be the Muslim law governing the sect to which the donor belongs.

" Provided that no deed of donation shall be deemed to be irrevocable unless it is so stated in the deed, and the delivery of the deed to the donee shall be accepted as evidence of delivery of possession of the movable or the immovable property donated by the deed.

" 4. It is hereby further declared that the principles of law prevaling in the maritime provinces shall apply to all donations, other than those to which the Muslim law is made applicable by section 3. "

It would appear therefore that in the case of Muslims their special laws govern the following matters :—Marriage, Divorce, Status and Mutual Rights and Obligations of the Parties to a Marriage or Divorce, Intestate Succession, and Donations of Immovable Property not involving *fidei commissa*, Usufructs and Trusts. It should be noted that the Legislature has not extended the application of Muslim Law to contracts of sale and that donations involving *fidei commissa* are excluded from the scope of the Muslim Law and the Roman-Dutch Law is declared applicable to them. A contract of sale of land between Muslims is therefore governed by the general law—the Roman-Dutch Law and the legislation applicable to such a transaction. The sale by Mohideen, his wife and two sons to the 2nd defendant, is therefore not a transaction to which the Muslim Law applies, but one which is governed by the Roman-Dutch Law. The appellant is therefore entitled to succeed.

I cannot leave this judgment without referring to D.C. Colombo Case No. 29129, Vanderstraaten's Reports, Appendix B, p. xxxi, which appears to be the sheet anchor of all the subsequent decisions on the subject of Muslim dona-

tions, as learned Counsel for the respondent called in aid those decisions. The decisions of this Court commencing with that case which hold that donations among Muslims are governed by Muslim Law proceed on the assumption that under the Dutch the Muslims were governed by their special laws in the matter of donations. I say with respect that I have not been able to find any justification for that assumption.

The Judgment of the District Judge Lawson in D.C. Colombo Case No. 29129 delivered in 1862, which according to Middleton, J. (see *Affefudeen vs. Periatamby*, 14 N.L.R. 295 at 299) received the imprimatur of this Court, does not cite any authority in support of the view that donations among Muslims during the time of the Dutch were governed by Muslim Law. Ordinance No. 5 of 1835, which is relied on by the District Judge, does not seem to me to support his view. That Ordinance is designed to save from repeal the laws preserved by the Proclamation of 23rd September 1799. The relevant saving words of that Ordinance are :—

> "The Administration of Justice and Police within the Settlements then under the British Dominion and known by the designation of the Maritime Provinces should be exercised by all Courts of Judicature, Civil and Criminal, according to the laws and institutions that subsisted under the ancient Government of the United Provinces; which laws and institutions it is hereby declared still are and shall henceforth continue to be binding and administered through the said Maritime Provinces and their Dependencies, subject nevertheless to such deviations and alterations as have been or shall hereafter be by lawful authority ordained."

I have examined the Judgment of this Court in the case but find therein nothing in support of the view that when the British succeeded the Dutch in the Island the Muslim Law of Donations prevailed. It would appear from the Judgment of this Court that the custom governing donations among Muslims was treated not as a matter of law but as a question of fact. The evidence taken after the case was remitted by this Court for the purpose of recording evidence of custom relating to donations among Muslims discloses a sharp conflict of opinion among the experts called on either side. Custom being a matter subject to change, the Dutch and after them the British acted wisely in collecting in the form of a Code the customary law then subsisting so that years afterwards there would be no difficulty in ascertaining the customary law governing the Muslims under the Dutch and at the time the British succeeded them. The enactments referred to in this Judgment gave the force of law not to the customs obtaining among the Muslims at any given time but only to those obtaining at the time of the British occupation. Customs which have since come into existence do not obtain force of law by virtue of the legislation referred to earlier in the Judgment. On the other hand it would appear from the introduction to the Byzondere Wetten which is translated in De Vos's Mohammedan Law that under the Dutch, Muslim Law applied only in regard to succession, inheritance, marriage, and divorce.

The question of the law applicable to donations among Muslims has now been set at rest by section 3 of the Muslim Intestate and Wakfs Ordinance, No. 10 of 1931. The decisions of this Court on the law applicable to donations among Muslims on which learned Counsel for the respondent relied afford no authority for the extension of the Muslim Law beyond the limits provided by statute.

I accordingly allow the appeal and set aside the judgment of the learned District Judge and make order dismissing the action of the plaintiffs with costs both here and in the Court below. The plaintiffs and the 1st defendant will pay the costs in equal shares to the 2nd, 4th, 5th and 6th defendants.

PULLE, J.

PULLE, J.

I agree with my Lord, the Chief Justice, that this appeal should be allowed with the consequences indicated by him.

The deed 2D1 is a conveyance on sale and I agree that the law by which the validity of this transaction should be judged is the Roman-Dutch Law and not the religious law governing Muslims. There is no material on which I can hold that a principle of a religious law, if any, which renders void the sale of a contingent interest must be given effect to by the Courts of this country, as having been received and accepted as part of our laws.

Appeal allowed.

END OF VOLUME LIV