The Ceylon Law Weekly

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

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VOLUME XXV

WITH A DIGEST

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The following question of law was referred by Moseley, J. under section 335 (1) of the Criminal Procedure Code and by virtue of section 21 of the Court of Criminal Appeal Ordinance:

"Whether, having regard to section 105 of the Evidence Ordinance and to the definition of 'proved' in section 3 thereof in a case in which any general or special exception in the Penal Code is pleaded by an accused person and the evidence relied upon by such accused person fails to satisfy the jury affirmatively of the existence of circumstances bringing the case within the exception pleaded, the accused is entitled to be acquitted if, upon the consideration of the evidence as a whole, reasonable doubt is created in the minds of the jury as to whether he is entitled to the benefit of the exception pleaded."

Held : (DE KRETSER, J. dissenting) (i) That the existence of circumstances bringing an accused within an exception is a fact in issue that must be proved by him.

(ii) That the jury is entitled to presume the absence of circumstances bringing an accused within any of the general or special exceptions of the Penal Code until the accused establishes to their satisfaction that he is entitled to the benefit of any particular exception.

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(ii) That if two persons conspire to commit falsification of accounts and criminal breach of trust, they are guilty of two conspiracies.

(iii) That where several persons conspire to commit several offences all of which are so connected with each other as to form one transaction, all the offences can be joined in one charge as being one conspiracy to commit the acts alleged.

Per HEARNE, J.: "Under the law in India the sections which correspond with sections 179 and 180 (1) of our law are 'mutually exclusive,' but this is not the case in Ceylon by reason of the additional words 'which said sections may be applied severally or in combination' which appear in section 178."

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(i) The accused's house was held to be a store within the meaning of that expression in regulation 6.

(ii) A forfeiture under section 5 of the Control of Prices Ordinance No. 39 of 1939 does not follow upon a conviction as a matter of course. The magistrate has to exercise a discretion and if he exercises his discretion in favour of forfeiture he must set out good reasons for the forfeiture so that the appellate tribunal may examine them.

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M and K who were jointly entitled to a land gifted it by P2 of 1897 to K's son Kirihamy, on whose death, the administrator executed a conveyance P3 of 1903 in favour of Kirihamy's two children P and D. P conveyed his half share to the plaintiff in 1916 on P4 which was registered in the same year.

Contesting defendants, who are the children of P, proved at the trial that, by 2D2 of 1904, M revoked P2 in respect of his half share and by 2D1 of 1904 gifted it to P subject to the following clause:

"And after the demise of both of us (namely Mudalihamy and his sister-in-law Kiri Etana) the said Punchirala shall possess the aforesaid lands and premises as long as possible and in the event of his having legitimate children, born of a wedded wife of his, that he may convey the said premises unto them; but in the event of his having no legitimate children, then and in such case, he shall possess the said premises during his lifetime; and thereafter the said lands and premises shall devolve on Madanwala Vidanalagedera Ukku Menika and Punchi Menika, the daughters of Kaluhamy Arachchi, deceased, who was the brother of mine the said Mudalihamy, and their respective descendants, and the said premise shall not devolve on any other person."

2D2 and 2D1 were unregistered deeds. The deed of gift P2 was executed with the object of "securing all necessary succour and assistance" and it was revoked as the donor received no succour or assistance.

Held: (i) That the deed P2 was revocable.

(ii) That the clause in 2D1 did not create *fidei commissary* rights in favour of P's children (the contesting defendants) as they were not the descendants of M and no burden was imposed on them.

(iii) That on the question of registration, the title, if any, of the contesting defendants is not defeated by the prior registration of P4.

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Land Acquisition Ordinance—Market value of land—Effect of laying down of street lines under section 19 (4) of the Housing and Town Improvement Ordinance on the market value of the land within the street line—Extent and effect of the restriction imposed by section 108 of the Housing and Town Improvement Ordinance.

The Municipal Council acquired a strip of land belonging to the defendant 1140 feet in length and varying in width between 28 and 32 feet comprising an area of 2 roods 37·20 perches. It lies on the extreme south of the premises bearing assessment Nos. 123 and 139 Bambalapitiya Road, a property of 11 acres, 1 rood and 12 perches in extent, and bounded on the west by another public street commonly known as the Colombo-Galle Road. This strip of land lay within a street line defined under section 19 (4) of the Housing and Town Improvement Ordinance. It was contended for the Municipal Council that the land acquired had no market value and only nominal compensation was payable as it could not be built on.

Held: (KEUNEMAN, J. *dissentiente*) (i) That there was no statutory restriction against building on the land.

(ii) That as the land was capable of incorporation in a scheme of building blocks so as to constitute and serve as appurtenances to the buildings erected on those blocks the land acquired must be

assessed with the rest of the land as land suitable for building, subject to such restrictions as really exist.

(iii) That the only express statutory restriction against an owner in the position of the defendant and the only restriction that has to be taken into account in assessing the value of the land in a case like this is that imposed by section 108 of the Housing and Town Improvement Ordinance.

(iv) That sections 19 (4) and 108 of the Housing and Town Improvement Ordinance should not be regarded as prohibiting the owner of a land in every case from building beyond a street line laid down on his land.

(v) That it would be fallacious in assessing the value of a building block to treat the portion of land on which the building will stand as more valuable that the rest of the block which is going to be the garden or courtyard.

(vi) That upon a proper interpretation of the law, there is no warning necessarily implied by the laying down of a street line that the land within it will be acquired without compensation.

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(ii) That where the proper authority has acted arbitrarily and not exercised the discretion vested in it, a mandamus will issue to compel it to exercise its discretion.

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(i) The plea of carrying out the instructions of the Director of Education cannot prevail against the plaintiff's claim for damages for breach of contract.

(ii) The plaintiff is not entitled to more than two months' salary by way of damages.

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See Prescription 97

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See Civil Procedure Code 33

An irregularity in procedure in the appointment of a next friend is not necessarily fatal to the proceedings in an action by a minor.

See Civil Procedure Code 33

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Held : (i) That each of the co-obligees is a creditor as to part only of the debt, but the mortgage is *in solidum.*

(ii) That the rights of 2nd and 3rd defendants were not extinguished by merger inasmuch as the debtor and creditor did not become united in one person both as regards the debt and its security.

(iii) That the 2nd and 3rd defendants were entitled to concurrence.

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Motor Car Ordinance No. 45 of 1938.

Where the accused drove a bus with a number of persons besides the driver and conductor in it on an unauthorized road which afforded the bus the only means of access to its garage, the accused was held to have contravened section 83 (2) of the Motor Car Ordinance No. 45 of 1938.

Per CANNON, J. : " In my view the words in the definition of hiring car 'used for the conveyance of passengers for fee or reward ' are not limited to the period of time during which the bus is actually carrying passengers for reward, and therefore the words ' for fee or reward ' cannot be added to the definition of ' passengers'."

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Omnibus Service Licencing Ordinance—Sections 4, 7, 6 (1) (e)

The Kelani Valley Motor Transit Company and the Colombo-Ratnapura Omnibus Company applied to the Commissioner of Motor Transport under section 3 of the Omnibus Service Licencing Ordinance for road service licences between Colombo and Ratnapura. The deciding factor of preference between the two applicants as required

by rule 1 (*ii*) in the 1st schedule was, who held the majority of licences. Between Colombo and Ratnapura the latter company had eleven licences and the former six. To points beyond Ratnapura, within the Ratnapura district each held seven licences. The former company, however, held six licences from Panadura to Badulla *via* Colombo and Ratnapura and four other licences from Panadura to points beyond Ratnapura in the Ratnapura district. The question, therefore, at issue was whether the said six licences from Panadura to Badulla should be reckoned as licences in respect of the same route or of routes which are substantially the same in order to determine the holders of a majority of licences. The Commissioner and the Tribunal of Appeal held that they should be taken into account, thereupon a case was stated for the opinion of the Supreme Court.

(i) A licence in respect of Colombo to Badulla is not an authority to use the omnibus on the Colombo-Ratnapura route, though it may use the highway between these points. The two licences are not identical. The word "route" does not mean "highway."

(ii) That on a case stated by the Tribunal of Appeal for the opinion of the Supreme Court under the Motor Car Ordinance No. 45 of 1938 the party successful in the Tribunal of Appeal should be heard by the Supreme Court.

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The plaintiffs brought this action to recover from the defendants a half share of the expenses incurred in successfully contesting a claim to property by one K. which resulted in benefit to the defendants. Defendants *inter alia* denied that plaintiffs could maintain the action in law.

Held : (i) That the plaintiffs were not entitled in law to maintain the action.

(ii) That our law does not recognize the management by one person of the litigation of another except to the extent allowed by the Civil Procedure Code.

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A court is bound to take judicial notice of the date on which an Ordinance has been brought into operation.

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(i) In partition cases courts should not deny to parties the right to intervene until the final decree is entered.

(ii) While granting such an application the court is empowered under section 18 of the Civil Procedure Code to impose such terms as may appear fair and equitable.

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(i) In a deed of transfer the words "together with all my right title and interest and all things belonging thereunto" are wide enough to convey the right to claim compensation for the improvements effected by the transferor.

(ii) Where the real owners of a property consented to and acquiesced in the making of improvements, the right to claim compensation cannot be denied to a *mala fide* improver or to his purchaser.

(iii) A claim for compensation for improvements only can be asserted in a partition action.

JASOHAMY & ANOTHER vs PODIHAMY & TWO OTHERS 100

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Sections 3 and 4.

(i) In the absence of any special agreement, for a pawnee or pledgee to sue to recover the amount lent by him on the security of a pawn or pledge, it is not a necessary condition that he should tender the pawn or the pledge.

(ii) The pawnee or pledgee may sue on the principal contract of loan disregarding the security he holds, for there is nothing in law to prevent a person waiving a benefit that he has.

(iii) The pawner's or pledgor's course of action must be to discharge his obligation on the principal contract, and then seek to recover what is due to him on the accessory contract or damages in default. He may do this *uno ictu* tendering the money due by him and asking for the return of the thing pledged or pawned or its value or damages.

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(ii) The expression "vendor" in section 11 (*b*) of the Petrol (Control of Supplies) Ordinance No. 52 of 1939 includes not only the actual vendor who is in charge of the retail depot but also the person who owns it even though the offence is committed in his absence and without his knowledge.

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(ii) That the fact that the party entitled to rights under the fraudulent deed happened to be a minor and did not assert his rights cannot affect the question of time limited for bringing the action.

(iii) That the court is entitled to examine the true nature of a transaction notwithstanding the form in which the transaction is described.

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Quantum Meruit

Where the auditors of a company who were requested by the directors to prepare a balance sheet failed to complete it owing to the default of the company the auditors are not entitled to any remuneration. They cannot base their claim on *quantum meruit* as the company did not get the benefit of any work done.

Servitude

(i) The right to thresh paddy on another's land is a servitude which can be acquired by prescriptive user.

(ii) What is acquired by prescriptive user is not the ground on which the paddy is threshed, but the incorporeal right of servitude.

Where a right of cartway of necessity is claimed over contiguous lands belonging to different persons it is open to the plaintiff to join the owners of all the lands over which he claims the cartway in the same action.

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Is the executor in such will entitled to follow such property for purposes of administration.

Held : (i) That a disposition by last will by a *bhikkhu* in respect of his *pudgalika* property does not amount to an alienation during his lifetime within the meaning of section 23 of the Buddhist Temporalities Ordinance.

(ii) That an executor appointed in such last will has no right to have recourse to such *pudgalika* property for purposes of administration.

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REX vs JAMES CHANDRASEKERA

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Decided on 21st December, 1942.

Court of Criminal Appeal—Case stated under section 355 (1) of the Criminal Procedure Code—Evidence Ordinance sections 3 and 105—Onus of proof of any general or special exception in the Penal Code.

The following question of law was referred by Moseley, J. under section 335 (1) of the Criminal Procedure Code and by virtue of section 21 of the Court of Criminal Appeal Ordinance :

" Whether, having regard to section 105 of the Evidence Ordinance and to the definition of 'proved' in section 3 thereof in a case in which any general or special exception in the Penal Code is pleaded by an accused person and the evidence relied upon by such accused person fails to satisfy the jury affirmatively of the existence of circumstances bringing the case within the exception pleaded, the accused is entitled to be acquitted if, upon the consideration of the evidence as a whole, a reasonable doubt is created in the minds of the jury as to whether he is entitled to the benefit of the exception pleaded."

Held : (DE KRETSER, J. dissenting) (i) That the existence of circumstances bringing an accused within an exception is a fact in issue that must be proved by him.

(ii) That the jury is entitled to presume the absence of circumstances bringing an accused within any of the general or special exceptions of the Penal Code until the accused establishes to their satisfaction that he is entitled to the benefit of any particular exception.

(iii) That the standard of proof of all exceptions including insanity is the same.

Cases referred to : *Woolmington vs Director of Public Prosecutions* (1935–A.C. 462)
Parbhoo vs Emperor (1941–A.I.R. Allahabad 402)
Emperor vs Damapala (1937–A.I.R. Ran. 83)
Rex vs Chhui Yi (5 Malayan Law Journal 177)
Lim Tong vs The Public Prosecutor, Johore (7 Malayan Law Journal p. 41)
Chia Chan Bah vs The King (7 Malayan Law Journal, p. 147)
Public Prosecutor vs Alang Mat Nasir Bin Anjang Talib and *Public Prosecutor vs Chan Lip* (7 Malayan Law Journal, p. 153)
Mohamed Isa Bin Leman vs Public Prosecutor (8 Malayan Law Journal, p. 160)
Sodeman vs Rex (1936– 2 A.E.R. 1138)
Rex vs Sterne (Surrey Sum. Ass. 1843-MS., Best on Ev. p. 82)
Attorney-General vs Rawther (25 N.L.R. 385)
Perera vs Marthelis Appu (21 N.L.R. 312)
Rex vs Abramovitch (1914–84 L.J.K.B. 397)
Nair vs Saundias (37 N.L.R. 439)
East Indian Railway Co. vs Kirkwood (1922–A.I.R. Privy Council 195)
Aiyar vs Goundan & Others (1920–A.I.R. Privy Council 67)
Seturatnum Aiyar vs Venkatachile Gounden (A.I.R. 1920– P.C. at p. 69)
(43 N.L.R. 474)

H. V. Perera, K.C., J. E. M. Obeyesekera, L. A. Rajapakse and *H. W. Jayawardene,* for the accused-appellant.

M. W. H. de Silva, K.C., Attorney-General, J. M. Fonseka, K.C., Solicitor-General, H. H. Basnayake, Crown Counsel and *E. W. P. S. Jayewardene, Crown Counsel,* for the Crown.

HOWARD, C.J., (President)

This case involves a question of law reserved and referred for the decision of this court by Moseley, J. under the provisions of section 355 (1) of the Criminal Procedure Code (Chapter 16). Under section 21 of the Court of Criminal Appeal Ordinance (No. 23 of 1938) all jurisdiction and authority vested in the Supreme Court under section 355 of the Criminal Procedure Code in relation to the questions of law arising in trials before a judge of the Supreme Court, shall be transferred to and shall vest in the Court of Criminal Appeal. The accused was tried on an indictment charging him with having committed murder by causing the death of Talpe Liyanage Francis, an offence punishable under section 296 of the Penal Code. By the unanimous verdict of the jury the accused was convicted of causing grievous hurt, an offence punishable under section 317 of the Penal Code and he was sentenced to nine months' rigorous imprisonment. At the trial the causing of death was common ground and the defence set up on behalf of the accused was that, in causing the death of the deceased, he was acting in the exercise of the right of private defence. The accused and one witness for the defence gave evidence detailing the circumstances in which they claimed that the right of private defence arose. No evidence of such circumstances emerged from the case for the prosecution. The learned judge took the view that, if the jury believed the evidence of the accused and his witness, he was entitled to an acquittal. The accused, however, having sought to excuse his offence under the provisions of section 89 of the Penal Code was faced with the burden of proof placed upon him by section 105 of the Evidence Ordinance. The learned judge was, however, invited to direct the jury in the words of Lord Sankey, L. C., as reported in the case of *Woolmington vs Director of Public Prosecutions* (1935–A.C. 462), that if they "are either satisfied with his (accused's) explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted." On this point the learned judge directed the jury as follows :

> "You have been told, gentlemen, what the onus is which lies upon the prosecution and that the case must be proved to you beyond all reasonable doubt. You may be confused, and I do not blame you if you are, as to the standard of proof which you are entitled to expect from an accused person. You were referred yesterday by counsel for the defence to a case which was decided in the House of Lords, a case which has now become famous and is constantly referred to in these courts, and the gist of the decision in that case is that if on the whole of the case the accused person raises a reasonable doubt in your minds as to his guilt he is entitled to the benefit of it. That, of course, gentlemen, is the English law, as stated in this decision in the case of Woolmington by the House of Lords, and I say with the most profound respect that that correctly states the English law, on this point. But, gentlemen, in my view, that is not the law of Ceylon, and on a point such as this gentlemen, you must take my direction as being correct. If it is incorrect I shall be put right by another tribunal. Just as you are the judges of fact in a case, so am I the authority on the law, and you will accept my direction on the law as being correct, knowing that if I am wrong I shall be put right.
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> Now, gentlemen, one or other, or perhaps both counsel referred you to section 105 of our Evidence Act. There is no provision in English law equivalent to this. This is how the section runs : 'When a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the general exceptions of the Penal Code.....' here you have the accused putting forward circumstances which he says, and which, if they are true, do bring his case within these general exceptions of the Penal Code which deals with the law of private defence 'or within any special exception or proviso contained in any other part of the same Code or any law defining the offence,' 'the burden of proving the existence of circumstances bringing the case within any of the general exceptions of the Penal Code is upon him,' that is upon the accused, 'and the court shall presume the absence of such circumstances.' So you see section 105 definitely places the burden of proving the existence of circumstances indicating that the accused was exercising the right of private defence upon the accused
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> Now you may ask yourselves, gentlemen, 'what does it mean to say that the burden of proof lies upon the accused person ?' The same Evidence Ordinance in another section says : 'A fact is said to be proved, when after considering the matters before it the court either believes it to exist, or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists.' You might perhaps, bear in mind the words: 'under the circumstances of the particular case.' That may mean that some cases require a higher degree of proof than others.
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> In a criminal case you are entitled to expect the prosecution to prove its case to you beyond reasonable doubt, and that seems very reasonable, when the life or liberty of a person is at stake. On the other hand, when an accused person has to prove something which may secure him his life or liberty the burden upon him is not so heavy, and you will allow him a little latitude, and you will not ask him to prove his case beyond reasonable doubt. The Evidence Ordinance says it must be proved in this way. So you will see there is, perhaps, some elasticity in this Ordinance as regards the amount of proof expected from an accused person.
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> You will remember, gentlemen,—some of you sat in this court last week, in a case in which the defence put up on behalf of the accused person was that at the time of the incident he was insane — I do not know how many of you did sit in that case but some of you must have done so — you will

remember that in that case I directed you that it was for the defence to prove that at the time of the incident the accused was in that condition, and I went on to tell you that it would be sufficient according to our law if that state of mind of the accused was proved by a preponderance or balance of evidence. That, of course, does not mean by any number of witnesses, because you will remember, in that insanity case, the accused called no evidence. So when we speak of preponderance or balance of evidence, what we mean is, is it more probable ? In that case was it more probable that he was insane than that he was sane ?

That seems to me the standard of proof which in a case like this where the right of private defence is set up, you should require from the accused person. That seems to me, gentlemen, to be our law on that subject."

Finally before asking the jury to consider their verdict the learned judge summed-up the position in the following way :

" The question which it seems to me you should put yourself is this : ' Has the accused satisfied you, in the way in which I have told you you must be satisfied, that is, by a preponderance of evidence, that he was acting in the exercise of the right of private defence ? ' If he has so satisfied you, why then he is not guilty of any offence. But if he has not satisfied you, by that preponderance of evidence, then he has failed in his defence and he is guilty of an offence in accordance with the intention which you are prepared to attribute to him."

The question reserved by the learned judge for decision by this court is " whether, having regard to section 105 of the Evidence Ordinance and to the definition of ' proved ' in section 3 thereof, in a case in which any general or special exception in the Penal Code is pleaded by an accused person and the evidence relied upon by such accused person fails to satisfy the jury affirmatively of the existence of circumstances bringing the case within the exception pleaded, the accused is entitled to be acquitted if, upon a consideration of the evidence as a whole, a reasonable doubt is created in the minds of the jury as to whether he is entitled to the benefit of the exception pleaded."

It has been contended by Mr. H. V. Perera, K.C., on behalf of the accused that the passage cited from the summing-up of the learned judge was not a correct statement of the law. The Attorney-General who appeared for the Crown has not submitted any contrary view. This is all the more remarkable having regard to the fact that the authors of the standard text books on the Law of Evidence do not support Mr. Perera's contention. Moreover, the opposite view was adopted by three of the judges out of the court of seven who heard the appeal in the case of *Parbhoo vs Emperor* (1941 ; A.I.R. Allahabad 402), the main authority for the contention put forward by both counsel. Our consideration of this case has, therefore, been more in the nature of a discussion than an argument. In contending that the law of England, as laid down by Lord Sankey, L.C., in the case of *Woolmington vs Director of Public Prosecutions* applies to Ceylon, Mr. Perera has invited our particular attention to section 100 of the Evidence Ordinance.

This provision is worded as follows :

" Whenever in a judicial proceeding a question of evidence arises not provided for by this Ordinance or by any other law in force in this Island, such question shall be determined in accordance with the English law of Evidence for the time being."

He maintains that the expression " burden of proof " referred to in section 105 of the Evidence Ordinance merely creates a duty on the person on whom the burden is imposed to prove all the evidence he can and that the expression " burden of proof " must be interpreted to mean merely " burden of introducing evidence." He further argues that once evidence has been introduced in support of an exception a fact in issue has been raised and the final words of the section, that is to say, the presumption, no longer applies. With regard to the definition of " proved " in section 3 of the Ordinance, Mr. Perera contends that this refers to the effect of evidence on the mind of the jury and can have no meaning until the jury has registered its verdict. For these reasons Mr. Perera maintains that no provision is made by Ceylon law for the *quantum* of evidence that must be submitted by a person who relies on bringing his case within any of the general exceptions in the Penal Code or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence. Therefore section 100 permits us to invoke in aid English law and apply the rule laid down by Lord Sankey' L.C., that if the jury " are either satisfied with the accused's explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted."

Even if the rule laid down in section 105 of the Evidence Ordinance is clear, unambiguous and unequivocal Mr. Perera maintains that it is merely a rule of procedure and not substantive law and the presumption therein formulated must give way to the presumption of innocence which is never rebutted, unless the prosecution has established its case on the whole of the evidence put before the jury.

The Attorney-General's argument was submitted on somewhat different lines. He embraced the contention of Mr. Perera that the Evidence Ordinance did not deal with *quantum* of evidence, that " burden of proof " in section 105 meant merely " the introduction of evi-

dence" and that the matter was governed by English Law. The principle of English law was that a juryman in coming to a conclusion as to whether a case against an accused person had been established should put himself in the position of a prudent man. If there was a reasonable doubt as to whether an accused person had brought himself within an exception, a prudent man would acquit him.

In support of their contention Mr. Perera and the Attorney General cited the Rangoon case of *Emperor vs Damapala* (1937–A.I.R. Ran. 83), and the Allahabad case of *Parbhoo vs Emperor* (*supra*) and several Malayan cases. Both Ceylon and Malaya have adopted the Indian Penal Code and the Indian Evidence Act. These cases are all therefore directly concerned with the question reserved for our decision. They no doubt constitute a formidable weight of authority in support of the view submitted on behalf of the accused, and as such, although not binding on this court, are entitled to our respect and careful consideration. In the Rangoon case there was as in the present case a plea of self-defence. In his judgment Roberts, C.J., after referring to the fact that in some quarters there had been much confusion as to the meaning of the words "burden of proof," stated as follows :

> "In many instances little or no evidence in favour of the accused will have transpired at the end of the case for the prosecution. When this is so, then in another and quite different sense the burden of proof is cast temporarily on the accused ; when sufficient proof of the commission of a crime has been adduced and the accused has been connected therewith as the guilty party, the burden of proof in the sense of introducing evidence in rebuttal of the case for the prosecution is laid down upon him. If evidence is then adduced for the defence which leaves the court in doubt as to whether the accused ought to be excused from criminal responsibility, or found guilty of a lesser offence than that with which he stands charged, then at the conclusion of all the evidence it must still be remembered that it is incumbent upon the prosecution to have proved their case. Put shortly, the test is not whether the accused has proved beyond all reasonable doubt that he comes within any exception to the Indian Penal Code, but whether in setting up his defence he has established a reasonable doubt in the case for the prosecution and has thereby earned his right to an acquittal."

Further on the learned Chief Justice states :

> "Passing on to the second question I hold that the decision in 1935 A.C. 462 (*Woolmington vs Director of Public Prosecutions*) is in no way inconsistent with the law in British India. Indeed the principles there laid down form a valuable guide to the correct interpretation of section 105, Evidence Act. It is unnecessary to decide any question relating to insanity in the present reference, and the effect of our decision in no way alters the existing law on the subject."

Dunkley, J. in his judgment, after referring to the fact that where the law of British India appears on examination to be the same as the law of England on any subject, a decision of the House of Lords on such a subject must be considered to be a paramount authority in India, stated the decision of the House of Lords in the Woolmington case was the latest and most authoritative exposition of the law of England on the subject of the duty which lies upon an accused person who, when the elements constituting a criminal offence have been proved against him by the prosecution, pleads in defence that owing to the existence of special circumstances his act or acts did not amount to an offence. The learned judge stated as follows :

> "The judgment of Viscount Sankey, L.C. in this case ought to be accepted as a binding authority by every Criminal Court in British India in so far as the law of British India on this subject, which is comprised within the terms of section 105, Indian Evidence Act, coincides with the law of England."

Dunkley, J. then stated that the true construction of section 105 depended upon the meaning to be assigned to the expression "burden of proof" and referred to the fact that the phrase is used in two distinct meanings in the law of evidence, namely, the burden of establishing a case, and the burden of introducing evidence. After considering the effect of section 101 and the definition of "proved" in section 3 he states as follows :

> "It is plain that in this section the term 'burden of proof' is used in the first of its meanings, namely the burden of establishing a case. In a criminal trial the burden of proving everything essential to the establishment of the charge against the accused lies upon the prosecution, and that burden never changes. But it would clearly impose an impossible task on the prosecution if the prosecution were required to anticipate every possible defence of the accused and to establish that each such defence could not be made out, and of this task the prosecution is relieved by the provisions of section 105 and its closely allied section, section 106. Section 105 enacts that the burden of proving the existence of circumstances bringing the case within any general or special exception in the Penal Code shall lie upon the accused, and the court shall presume absence of such circumetances. In this section the phrase 'burden of proof' is clearly used in its second sense, namely, the duty of introducing evidence. The major burden, that of establishing on the whole case the guilt of the accused beyond reasonable doubt, never shifts from the prosecution, The duty of the accused under section 105 is to introduce such evidence as will displace the presumption of the absence of circumstances bringing the case within an exception, and will suffice to satisfy the court that such circumstances may have existed. The burden of the issue as to the non-existence of such circumstances is then shifted to the prosecution, which has still to discharge the major burden of proving on the whole case the guilt of the accused

> beyond reasonable doubt. I should perhaps point out that the examination of the accused before the committing court is, under section 287, Criminal Procedure Code, evidence at the sessions trial, and that, under section 342 the examination of the accused at any trial 'may be taken into consideration' and is to this extent evidence at the trial."

The third member of the court, Leach, J., merely stated that he was in agreement with the views expressed in the judgment of Roberts, C.J. It will thus be seen that the court based its decision on the ground that an accused person who desires to bring himself within an exception satisfies the "burden of proof" imposed by section 105 by merely introducing evidence. If this is a correct statement of the law, the law of India and a *fortiori* that of Ceylon which possesses section 100 applying the English law of evidence can no doubt be reconciled with the Woolmington case. The interpretation thus given by the Rangoon judges to the words "burden of proving" in section 105 ignores the illustrations to this provision and the definition of "proved" in section 3. It will be noted that these illustrations place a plea by an accused person of insanity and one of deprivation of self-control by reason of grave and sudden provocation in the same category. The burden of proof according to these illustrations is on the accused. Moreover, no authority, other than the passage itself, from text-book writers can be discovered for the following passage from the judgment of Dunkley, J. :

> "The duty of the accused under section 105 is to introduce such evidence as will displace the presumption of the absence of circumstances bringing the case within an exception, and will suffice to satisfy the court that such circumstances may have existed. The burden of the issue as to the non-existence of such circumstances is then shifted to the prosecution which has still to discharge the major burden of proving on the whole case the guilt of the accused beyond reasonable doubt."

In Woodroffs and Ameer Ali's Law of Evidence as applied to British India and in Basu's Law of Evidence in British India these learned authors express the opinion that section 105 is an important qualification of the general rule and it is for those who raise the plea of private defence to prove it. The burden of the general issue rests upon the prosecution and never changes until a good *prima facie* case is made against the accused sufficient to justify his conviction and shifts the burden upon the accused to prove any special issue raised by him. It is sufficient for an accused person in such circumstances to establish a *prima facie* case for then the burden of proving such issue is shifted to the prosecution. Moreover, the fact that this principle is subject to the qualification I have mentioned is in one sense not inconsistent with the decision in the Woolmington case. In the course of his judgment in that case Lord Sankey, L.C. stated as follows :

> "Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception."

Lord Sankey, therefore, recognizes that defence of insanity and the statutory exception as qualifications of the principle that the burden on the prosecution never shifts. The defence, however, based on the existence of circumstances bringing persons within the general exceptions in the Penal Code are not statutory exceptions in English Law and hence arises the inconsistency between Ceylon and Indian Law on the one hand and English law on the other.

The Rangoon case was subsequently followed by the four majority judges in the case of *Parbhoo vs Emperor* (*supra*). Generally speaking, the reasoning of the Rangoon judges was adopted by the majority of judges in the Allahabad case. Thus Bajpai, J. held that in section 105 the expression "burden of proof" is used in the sense of burden of introducing evidence and not burden of establishing a case, for such a burden rests throughout the trial on the prosecution. The President of the court, Iqbal Ahmed, C.J. seemed to base his opinion on a belief that the framers of the Indian law could not have intended to depart from the English law on the subject under discussion. In this connexion it is relevant to point out that at the time when the Indian Evidence Act was framed the judgment of Lord Sankey had not been delivered and different views to those expressed in that judgment were accepted. No doubt it is, as stated by the learned Chief Justice, a fundamental principle of English law that criminality must never be presumed against an accused person but must be established by evidence such as to exclude to a moral certainty every reasonable doubt about his guilt. But even this fundamental principle of English law is qualified when pleas of insanity and statutory exceptions are raised by accused persons. One of the other majority judges, Mohammed Ismail, J., in adopting the views of the judges in the Rangoon case stated that the law of evidence regulates procedure only and has nothing to do with conviction or acquittal of an accused person. This view ignores the definition of "proved" as contained in section 3 and cannot be accepted. The remaining majority judge in the Allahabad case, Mulla, J., held that the purpose of section 105 was merely to relieve the

prosecution of the burden of establishing that the act with which the accused is charged does not fall within any one of the general exceptions in the Penal Code. If this view is correct, the illustrations to this section are singluarly inapt.

For the reasons I have given I find the reasoning and decisions of the majority judges in the Allahabad case as unacceptable as those of the court in the Rangoon case. I do not propose to make reference to the views of the three minority judges except to say with all respect that I find their reasoning unassailable.

I will diverge at this stage to a brief consideration of the Malayan cases to which our attention was invited by the Attorney-General. In the case of *Rex vs Chhui Yi* (5 Malayan Law Journal 177) it was held that it is the duty of the Crown to give evidence sufficient, if believed, to prove every ingredient of the offence of which they invite the jury to find the accused guilty but, once that onus is discharged, it remains for the accused to establish any facts which may show that what he did is, in his case and as an exception to the general law, not a criminal offence. There can be no legal obligation on the Crown, as a part of its case, to rebut, in advance, all possible grounds of defence. The following passages occur in the judgment of Whitley, Ag.C.J. :

> "The next question was that which was raised in the seventh ground of appeal, which alleged that certain parts of the summing-up of the learned trial judge constituted a misdirection because he had failed to direct the attention of the jury to the recent decision of the House of Lords in Woolmington's case which, it was alleged, has had an 'effect' on section 105 of our Evidence Ordinance. It was not very clearly explained how a decision even of the House of Lords could be said to 'effect' a statutory provision of our law, but probably what this was intended to mean was that section 105 of our Evidence Ordinance should now be construed in some way different from that in which it has hitherto been construed in our courts. We do not think the decision of *Rex vs Woolmington* can have any effect on our law.....
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> Now not only does section 105 provide such a statutory exception but our definition of murder, unlike that in England, is a statutory one. It is laid down, as we all know, in sections 299 and 300 of our Penal Code and these sections make it clear that the prosecution must always prove the existence, in the mind of the accused, of one of the intentions or of the knowledge therein described. We think that, with these sections before him, no judge of this Colony would ever have given to a jury a direction such as that which led to the quashing of the conviction in Woolmington's case.
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> Section 105 of our Evidence Ordinace in no way lessens the onus which always remains upon the prosecution. All that that section lays down is that,
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> 'When a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances,'
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> and illustration (*b*) to that section shows that, *inter alia*, the burden of proving sudden provocation (which would reduce the offence, in accordance with the terms of Exception 1 to section 300 of the Penal Code, to one of culpable homicide not amounting to murder) is a burden which is on the accused. This burden, however, can never arise unless the Crown has already produced evidence sufficient in law to satisfy the jury, in the absence of evidence from the defence, that the killing amounted to culpable homicide committed with one of the intentions or with the knowledge described in section 300 of the Penal Code."

In *Lim Tong vs The Public Prosecutor, Johore* (7 Malayan Law Journal, p. 41) a court constituted by Terrell, Ag.C.J. and Horne, J., followed the Rangoon case of *Emperor vs Damapala* (*supra*), and held that if the accused fails to discharge fully the burden of proving provocation, but by his evidence or arguments raises a reasonable doubt as to whether the prosecution has satisfied the assessors that such criminal intention as would justify a verdict of murder has been satisfactorily established, the accused is, therefore, entitled to the benefit of such doubt, and the offence would be reduced from murder to culpable homicide not amounting to murder. This decision was shortly followed by the case of *Chia Chan Bah vs The King* (7 Malayan Law Journal, p. 147) by a court composed of McElwains, C.J., Terrell, J. and Horne, J. when it was held that "in a trial for murder it is incumbent on the Crown to prove beyond reasonable doubt that the accused killed the deceased by an act which constituted murder within the meaning of section 300 of the Penal Code. Where the defence is insanity the onus is on the accused to prove that he was probably insane. This onus is placed upon him by section 106 of the Evidence Ordinance, but the law does not require an accused person setting up an exception such as insanity as a defence to prove that exception beyond reasonable doubt. It is sufficient if he induces in the mind of the jury a feeling that he was probably insane though the jury may have its doubt whether he really was insane." Soon afterwards in *Public Prosecutor vs Alang Mat Nasir Bin Anjang Talib* and *Public Prosecutor vs Chan Lip* (7 Malayan Law Journal, p. 153), a court constituted by Whitley, Ag.C.J. and Gordon-Smith, J. (Cussen, J. *dissentiente*) held that "while it is for the prosecution to prove its case beyond reasonable doubt, the burden of proving the existence of circumstances bringing the case within one of

the exceptions contained in section 84 of the Penal Code lies upon the accused. It is open to him to discharge that burden either by adducing evidence himself or by relying upon the evidence adduced by the prosecution or by both these means. The burden of proof cast upon an accused to prove insanity is not so onerous as that upon the prosecution to prove the facts which they allege and may fairly "be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings. *Held*, further that the trial judge having found in each case that the evidence did raise a reasonable doubt in his mind as to whether or not the accused was insane when committing the acts complained of and such a doubt being based as it was upon a very definite and weighty expert medical opinion, and having regard to the lesser degree of proof required in such a case, the accused had discharged the burden cast upon them by section 105 of the Evidence Enactment and brought themselves within the exception provided by section 4 of the Penal Code." The last Malayan case to which I need invite attention is that of *Mohamed Isa Bin Leman vs Public Prosecutor* (8 Malayan Law Journal, p. 160) in which it was held by Roger Hall, C.J., that the onus of proving insanity is upon the accused — section 105 of the Evidence Enactment. That onus is not a heavy one. The burden is no higher than that which rests upon a party to civil proceedings. The story of the decisions of the Malayan Courts may be summarized as follows: In 1936 it was held that the decision in Woolmington's case could have no effect on the law in the Straits Settlements and that the burden of proving sudden provocation by virtue of section 105 rests on the accused. In 1937 after the decision in the Rangoon case it was held that the law in Johore as regards the onus placed on the prosecution and the principles laid down in the Woolmington case should be applied. In 1938 it was even held that when the accused pleaded that he was insane, he had only to raise a reasonable doubt in the mind of the judge to discharge the burden cast upon him by section 105 and bring himself within the requisite exception provided by the Penal Code. I may remark that this finding is contrary to the decision in the English Courts in Macnaughten's case (1843–10 Ch. & F. 200) in which it was held that, if the accused person relied on insanity, he must clearly prove it. In two other cases in Malaya in 1938 it was held, following *Sodeman vs Rex* (1936–2 A.E.R. 1138) that the burden in cases in which an accused has to prove insanity may fairly be stated to be not higher than the burden which rests upon a plaintiff or defendant in civil proceedings. The Malayan cases are entertaining but not really helpful.

Having given the grounds which have led me to the conclusion that the decisions in the cases I have cited cannot be accepted, I propose to refer briefly to the various relevant sections of the Evidence Ordinance in order to see whether any gap or hiatus occurs with regard to the matter in dispute as would allow under section 100 recourse to English law. It is only in such circumstances that recourse can be had to such law. It will be observed that the heading of Part III of the Ordinance is not merely "Production of Evidence," but "Production and Effect of Evidence." Section 101 is worded as follows:

> "Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts, must prove that those facts exist.
>
> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

I would in particular refer to the second paragraph. Section 102 says:

> "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Section 103 enacts:

> "The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

Omitting section 104 which is not relevant and section 105 for the moment, section 106 says:

> "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

Section 103 seems to throw on the accused the burden of proving that he had acted in exercise of the right of private defence because it is he and not the prosecution who wishes the court to believe that he did so. The illustration to the section, which is worded as follows —

> "A prosecutes B for theft, and wishes the court to believe that B admitted the theft to C. A must prove the admission.
>
> B wishes the court to believe that, at the time in question, he was elsewhere. He must prove it."

bears out this contention. Section 103 does not, however, stand by itself for section 105 is in the following terms:

> "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances,"

It has been contended that "burden of proving" as used in this section has not the same meaning as "burden of proof." Any doubt as to the meaning is, as I have already observed, removed by the language of the illustration. I need only quote the first one which is as follows:

> "A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.
>
> The burden of proof is on A."

Obviously the legislature did not intend to apply different meanings to the terms "burden of proof" and "burden of proving." Moreover, no distinction is drawn either in the section or in the illustrations between the various general exceptions and the various special exceptions or between general and special exceptions. The same rule applies to them all and no distinction is made between the question of private defence and the question of unsoundness of mind. If the burden of proving unsoundness of mind is upon the accused, the burden of proving the right of private defence is upon him too. It may be conceded that one of the reasons why the final words of section 103, namely, "and the court shall presume the absence of such circumstances" may have been inserted so as to make it clear that the non-existence of such circumstances was not a matter to be established by the prosecution as under the old law. On the other hand the fact that such words have been inserted seems to manifest only too clearly the burden cast on the accused. In this connexion I would refer to the definition in section 3 of the term "Facts in Issue" which is as follows:

> "'Facts in issue' means and includes — any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows. Explanation: — Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any court records an issue of fact, the fact to be asserted or denied, in the answer to such issue, is a fact in issue."

The question of an accused being faced with the burden of proving a fact in issue such as grave and sudden provocation can only arise when the prosecution has established beyond all reasonable doubt facts which constitute an offence. Then only does the burden arise. The illustration to this definition which is as follows —

> "A is accused of the murder of B. At his trial the following facts may be in issue:
> That A caused B's death.
> That A intended to cause B's death.
> That A had received grave and sudden provocation from B.
> That A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature,"

indicates what facts may be in issue in a case of murder. The first two issues must be established by the Crown and then by section 105, the burden of proving the existence of the third or last fact in issue is upon the accused and the court shall presume until he has proved it that it does not exist. If, however, the provisions of section 105 of the Evidence Act mean only that the accused was bound to produce some evidence, as it has been contended, the following position would arise: After the production of that evidence, if the jury remained in doubt as to whether the accused had established the existence of circumstances bringing him within an exception, it would still go back to the original burden upon the prosecution and hold that the prosecution had failed to prove that the accused had not acted in exercise of the right of private defence and would, therefore, give him the benefit of the doubt. If such was the position, the jury who decided the case would have recorded in the same proceeding two contradictory findings upon a fact in issue in that proceeding. Having regard to the view I take of the section I have quoted I am of opinion that the existence of circumstances bringing an accused within an exception is a fact in issue that must be proved by him. I must now enquire as to whether the Ordinance states how that burden is discharged. In section 3 the expression "proved" is defined as follows:

> "A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

The expression "court" is defined earlier in the same section as follows:

> "'Court' includes all judges and magistrates, and all persons, except arbitrators legally authorized to take evidence."

These words would not seem to include a jury, but in view of the words "unless a contrary intention appears from the context" that appear in the opening words of section 3, I have no hesitation in holding that the expression "Court" does include a jury. In fact it has been so held in India (*vide* Monir, p. 10; Ameer Ali p. 109 and Basu p. 31). It has been contended that the definition does not come into existence until a jury has returned its verdict. I am unable to understand this argument. It seems to me that it is a direction to a jury and a court when functioning as a jury as to the manner in which it should come to a decision as to whether a fact is proved. The jury properly directed with regard to the onus of proof has to apply the directions contained in the definition of "proved,"

The fact that the definition contains the words "under the circumstances of the particular case" permits a "prudent man" to require a different standard of proof in criminal and civil cases. In this connexion I cannot do better than cite the *dictum* of Baron Parke in *Rex vs Sterne* (Surray Sum. Ass. 1843. MS., Best on Ev. p. 82) that in a criminal case owing to the serious consequences of an erroneous condemnation both to the accused and society, the persuasion of guilt amounts to such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt. Hence a prudent man in criminal proceedings when the burden of proof is on the prosecution requires the establishment of the case against an accused beyond all reasonable doubt. No doubt also this differentiation in the standard of proof required in criminal and civil cases is a legacy bequeathed by English law which was applied before the enactment of the Evidence Ordinance. In *Sodeman vs Rex* (*supra*), to which reference has already been made, it was held that the standard of proof required by an accused person who pleads insanity is no higher than that required by a plaintiff or defendant in a civil suit, that is to say a mere preponderance of probability. Or in other words the standard required by the definition of "proved" in section 3. The authority of Sodeman's case is accepted by both counsel but it has been contended that "insanity" stands in a particular class and that a prudent man would require a higher standard of proof to rebut the presumption of sanity than he would to rebut the presumption of the absence of circumstances, the existence of which would bring an accused person within an exception other than unsoundness of mind. No authority has been cited in support of the proposition. Moreover, it is contrary to the meaning of section 105 as interpreted by the illustrations which draw no distinction between insanity and other exceptions. Moreover, it is contrary to the judgment of Lord Sankey, L.C. in Woolmington's case in which insanity and statutory exceptions are excluded from the principle formulated therein. In considering what is the correct interpretation to be given to section 105 it appears to me that the legislature has made the matter perfectly clear when it has said that "the court shall presume the absence of such circumstances." The terms "shall presume" is defined in section 4 of the Ordinance as follows :

> "Whenever it is directed by this Ordinance that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved."

It seems to me perfectly clear that the jury shall regard the fact as proved that the accused did not exercise the right of private defence till it is satisfied that he did so or that it is so probable that he did so that a prudent man should act on that supposition.

I may conclude by referring briefly to some further points that have been raised in the course of the argument. In order to reinforce his contention that the court should adopt the standard of proof required by English law of an accused person who puts forward a plea of self-defence, the Attorney-General referred us to various cases in which the courts of Ceylon had adopted the English law as to what constitutes "criminal negligence." It is true that the courts in Ceylon have turned to English decisions for assistance as to what constitutes criminal negligence. As the Penal Code does not supply a definition as to what constitutes a negligent act, it is right and proper that the courts in Ceylon should consult other systems of law for guidance in such a matter. The fact that they do so cannot be said to be relevant in considering whether it is proper to do so on a matter for which provision is made by Ceylon law.

Reference was also made to the case of *Attorney-General vs Rawther* (25 N.L.R. 385) and *Perera vs Marthelis Appu* (21 N.L.R. 312) which dealt with the burden of proof imposed upon a person found in the recent possession of stolen goods. In both of these cases the courts adopted the principle laid down by Lord Reading, C.J. in *Rex vs Abramovitch* (1914–84 L.J.K.B. 397) as follows :

> "In a case such as the present where a charge is made against a person of receiving stolen goods well knowing the same to have been *stolen*, when the prosecution have proved that the person charged was in possession of the goods, and that they had been recently stolen, the jury should then be told that they may, not that they must, in the absence of any explanation which may reasonably be true, convict the prisoner. But if an explanation has been given by the accused, then it is for the jury to say whether on the whole of the evidence they are satisfied that the prisoner is guilty. If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the Crown would then have failed to discharge the burden imposed upon it by our law of satisfying the jury beyond reasonable doubt of the guilt of the prisoner. The onus of proof is never changed in these cases; it always remains on the prosecution. That is the law. In pronouncing it to be so, the court is not giving forth any new statement of the law, but is merely re-stating it; and it is hoped that this re-statement may be of assistance to those who have to try these cases."

The offence in both these cases and in *Rex vs Abramovitch* was one of dishonestly retaining stolen property. The prosecution had to establish beyond all reasonable doubt all the ingredients of such an offence. One of those ingredients

is guilty knowledge. If the accused gives an explanation as to his possession which may reasonably be true, it is obvious that a reasonable doubt must exist as to whether he has guilty knowledge or *mens rea*, one of the ingredients of the offence to be established by the Crown. It is in these circumstances difficult to understand what bearing these cases have on the matter now under consideration except once again to show that where Ceylon law is silent, assistance and guidance has been sought from English law.

We were also referred to the case of *Nair vs Saundias* (37 N.L.R. 439) in which a court constituted by three judges held that the burden was on the prosecution to prove that the owner did consent to the commission of the offence or that the offence was due to an act or omission on his part or that he did not take all reasonable precautions to prevent the offence. Section 80 (3) (*b*) of the Motor Car Ordinance does not cast upon the accused the burden of proving an exception within the meaning of section 105 of the Evidence Ordinance. This decision turned upon the question as to what ingredients the prosecution had to prove in order to constitute the offence. The legislature not having indicated that it intended to effect any changes in the general law governing the burden of proof, it was held that *mens rea* had not been established.

It was suggested that the question before us was affected, in some measure, by the provisions of section 5 of the Penal Code which are that every definition of an offence shall be understood subject to the exceptions contained in the chapter entitled "General Exceptions," though these exceptions are not repeated in such definition. In my judgment this provision does not affect the question in any way. It is sufficient for me to say that the section is not concerned with the burden of proof and cannot be held to overrule section 105 of the Evidence Ordinance. The section 5 has been inserted to facilitate brevity of expression so as to obviate the necessity of repeating in every section defining an offence that the definition is to be taken subject to the exceptions.

The point has also been taken with regard to the burden of proof and the interpretation of section 105 that presumptions disappear when an issue of fact has been raised as the result of evidence tendered on both sides. In this connection we were referred to the following passage from the judgment of Lord Sumner in *East Indian Railway Co. vs Kirkwood* (1922; A.I.R. Privy Council 195):

> "However important this question may be in the early stages of a case, after all the evidence is out on both sides, it must be looked at as a whole, and the truth of the occurrence must be inferred from it. The judgments in question have not sufficiently observed this."

I do not think that there is anything in this paragraph to dispute the proposition that where the burden of proof of a fact in issue lies on a particular person it remains on such person until discharged. Our attention was also invited to the following passage from the judgment of Sir Lawrence Jenkins in *Aiyar vs. Goundan & Others* (1920–A.I.R. Privy Council 67):

> "This proposition is open to the construction that the burden lay on the plaintiff not only to establish his title but also to negative the defendants' claim to permanency, and if this is what was meant it was wrong. But the sentence that immediately follows shows a truer perception of the position. The learned judges there say: 'We also held that even if that fact could be of any use to him the various circumstances proved unrebutted by anything in the plaintiff's favour, necessarily raise a presumption that the defendants have occupancy rights."
>
> The controversy had passed the stage at which discussion as to the burden of proof was pertinent. The relevant facts were before the court, and all that remained for decision was what inferences should be drawn from them.
>
> In the end the learned judges drew the inference—they speak of it as a presumption — in favour of the defendant's occupancy rights and, as finally expressed, their determination was unvitiated by any error as to the burden of proof."

I can find nothing in this passage to assist the argument of counsel for the accused. It merely states that the question at issue in the particular case was what inference was to be drawn from the relevant facts before the court.

It has been seriously maintained that the decision at which I have arrived will have the effect of limiting one of the fundamental principles that lies at the whole basis of British Criminal Jurisprudence, namely the presumption of innocence. If this is so, it is not a reason for importing into Ceylon law a principle of English law contrary to the clear, definite and unequivocal language employed in a Ceylon enactment. On the other hand, in my opinion the decision gives rise to no such limitation and, as I have already indicated, is in one sense consistent with the principle formulated in the Woolmington case. Moreover, I am unable to understand any logical necessity for imposing on an accused who raises a defence of insanity a greater burden than an accused who pleads that the existence of circumstances indicating that he was exercising the right of private defence or had lost the power of self-control by reason of grave and sudden provocation.

For the reasons I have given I am of opinion that the charge of the learned judge was in accordance with our law and the appeal should be dismissed.

SOERTSZ, J.

After careful consideration of the judgments delivered in the Rangoon, Allahabad, and Malayan cases, and of the arguments submitted to us from the Bar, I am confirmed in the view which commended itself to me, and to which I ventured to give expression, *obiter*, when a Divisional Bench of our court was called upon to deal with the question of the burden of proof resting upon a prisoner who pleads "insanity" in answer to a criminal charge. *The King vs Vidanelage Abraham Appu* (40 N.L.R. 505).

That view, shortly stated, is that in virtue of sections 103 and 105 read with section 2, 3, 4 of our Evidence Ordinance our law differs materially, on the question before us, from the English law as stated by Lord Sankey in his speech in *Woolmington vs The Director of Public Prosecutions*, and as explained by Lord Simon in the speech he made in the later case of *Mancini vs The Director of Public Prosecutions*. I should have been content to record, in this brief manner, my concurrence with the answer given to the question by My Lord, the President, but that my brother de Kretser has taken a different view, and the importance of the subject makes it desirable that I should state my reasons for agreeing with the majority.

The difficulty that attends the question before us seems to me to be due almost entirely to the fact that by the time our Evidence Ordinance came to be enacted, we had followed the English Law of Evidence, for nearly a century, and modes of thought and speech acquired during that long association have persisted in our courts even after we had received a code with a different orientation.

In these circumstances, I think, as Jackson, J. observed in the case of *Rex vs Ashutosh Chuckerbutty* (I.L.R. 4 (Cal.) 434):

> "Embarrassment and difficulty will be greatly lessened if, instead of assuming the English law of Evidence, and then inquiring what change the Evidence Act has made in it, we regard as, I think, we are bound to do, that act itself as containing the scheme of the law, the principle and the applications of those principles to the cases of most frequent occurrence."

But the judges in the Rangoon case of *Rex vs Dhamapala*, the majority of the judges in the case of *Parboo vs Emperor*, and the judges in Malaya in the cases referred to and quoted from by My Lord the Chief Justice, approached the question from the opposite direction. De Krester, J. has taken the same course. By way of illustration I would quote from the judgment of Iqbal Ahamed, C.J. in *Parboo vs Emperor*:

> "Even though the Evidence Act does, in certain respects, differ from the English law and supplies a distinct body of law, I decline to believe that the framers of the Indian law could or did intend to depart from the English law on the subject under discussion. There are certain fundamental principles which govern the trial and decision of criminal cases in England. According to the English law the onus of proving everything essential to the establishment of the charge against the accused lies upon the prosecutor.....It is on the basis of these principles that it is well settled in England that the evidence against the accused must exclude to a moral certainty every reasonable doubt about his guilt and if there be any reasonable doubt about his guilt he is entitled to be acquitted. The decision in 1935 A.C. 462 (*i.e.* the Woolmington case) does no more than push to its logical consequence the doctrines and principles just noticed. I find it impossible to hold that Sir James Fitz-James Stephen, in framing the Evidence Act, could have had the remotest intention of tampering with or modifying these fundamental principles which, I consider, are based on principles of Natural Justice. After all, there cannot be varying standards of proof about the guilt of an accused person in England and in this country. What holds good in England must hold good in India. I therefore, regard the decision of the House of Lords as the last word on the subject and, unless I am forced by express provisions contained in the Indian Evidence Act, to ignore that decision, I should, I consider, respectfully follow it."

I have quoted at this length because this passage, if I may say so, is typical of the reasoning by which the judges in Rangoon, Allahabad and Malaya reach their conclusions.

But I do not see what logical justification there could be for the learned Chief Justice of Allahabad *declining* "*to believe that the framers of the Indian law could or did intend to depart from the English law;*" or, for finding "*it impossible to hold that Sir James Fitz-James Stephen had the remote intention of tampering with or modifying these fundamental doctrines*"; or for saying "*there cannot be varying standards of proof about the guilt of an accused person in England and in this country;*" or, again, for saying "*what holds good in England must hold good in India.*"

Speaking with profound respect, this process of reasoning does not reveal an open mind in relation to the question under consideration. The learned Chief Justice appears to have addressed himself to it, fully equipped with prepossessions and assumptions, and in consequence, he adopts Procrustean measures for dealing with the problem. He does not make allowance for the full dimension of our law, but he reduces it drastically to make it fit into the frame of the English law. I would respectfully associate myself with the answers given by Collister, J., Allsop, J. and Braund, J. to the argument of the Chief Justice in the passage I have reproduced, and I would refer particularly

to that part of the judgment of Braund, J. in which he says :

> " As I have already said, I think it would have been an inversion of the proper order of things in India to have taken that English case of the highest authority (namely the Woolmington case) first, and then to have construed the Indian Statute in the light of the law.....that it lays down in England. What, with the greatest respect, I venture to think, is overlooked is that (Woolmington's case) while being unquestionably, the highest authority in England on the burden of proof in criminal law has no reference to India, where the law upon this matter has to be looked for in Indian Statutes and nowhere else, and when found, applied. Indeed, I think the very form of one of the questions propounded in the Rangoon case exposes the mistake. It was ' is the decision of the House of Lords....inconsistent with the law of British India ? ' . It was decided that it was not. But what, may I ask, would it have mattered if it was ? The law of England is one thing and the law of India is another. And, in the result, I am compelled to think that if we are to apply the principles (in the Woolmington case) to the one before us, the construction of an Indian Statute will have to be strained to conform to the law of England rather than that the Indian Statute will itself have been construed."

If, then, we shut our eyes to the English law of Evidence as, I think, we must, except so far as a *casus omissus* renders recourse to it necessary, and call to mind the provisions of our Ordinance to see if there are any that deal with the question before us, sections 103 and 105 read with sections 3 and 4 (2) occur to us at once.

Section 103 says :

> " The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. "

Sectiod 105 says :

> " When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances."

Section 3 says :

> " A fact is said to be proved, when after considering all the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."
>
> " A fact is said to be disproved when, after considering all the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist."
>
> " A fact is said not to be proved when it is neither proved nor disproved."

Section 4 (5) says :

> " Whenever it is directed by this Ordinance that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved."

As I understand these provisions, their effect is to establish *one* measure of proof, and to make that measure applicable, due regard being had to " the circumstances of the particular case," whenever a fact has to be proved " in all judicial proceedings in or before any court other than courts-martial ".... (section 2 (1)). Section 2 (2) intervenes to clinch the matter, and to prevent any doubt or ambiguity by declaring that, " all rules of evidence not contained in any writen law so far as such rules are " inconsistent with any of the provisions of this Ordinance are hereby repealed." This section, so to say, cuts the painter that held us to the English law of Evidence, except for the slender contact provided by section 100 which requires resort to the English law " whenever in a judicial proceeding a question of evidence arises not provided for by this Ordinance or by any law in force in this Island." Both counsel for the prisoner, and the Attorney-General, sought refuge in the somewhat shadowy amplitude of this section, and contended that the question now before us is such an instance. Their argument was that sections 100 to 106 of the Evidence Ordinance provide for the " burden of proof " in the sense of introducing evidence and that there are no provisions in the Ordinance dealing with the burden of proof in the sense of *establishing a case* and that, resort to the English law is necessary. I am unable to entertain that argument, for it seems quite clear to me that the sections I have already referred to and quoted deal with this very question, if they are but properly interpreted. Section 100 of our Ordinance does not occur in the Indian or the Malayan Evidence Acts, and yet, the majority of the Indian judges in the case of *Parboo vs Emperor* and the judges in Malaya in the cases referred to, were able to assert that, nevertheless the English law applied, while the argument I am dealing with proceeds on the footing that the English law applies in virtue of section 100. This is a bewildering result, for it means that for the view that the English law applies, section 100 *is* necessary and also that it is not necessary.

If section 105 is read in the light of sections 3 and 4, as it must be, it is not possible to sustain the submission made to us that sections 103 and 105 mean no more than that the accused has the burden of introducing evidence sufficient to raise, as a fact in issue, the existence of the circumstances relevant to the defence to set up, and that when there is some evidence for that purpose,

his burden is discharged, and that it is, then for the jury to say at the end of the trial, what their finding is in regard to the existence of the relevant circumstances : that if they believe its existence, or if they are left in a state of mind in which they are unable to say either that they believe or that they disbelieve its existence, they must acquit the accused because, in either of those events, the prosecution has not discharged its burden by eliminating reasonable doubt in relation to the whole case. This is a strained interpretation put upon section 105 in order to assert the English law. But, under our law, the Penal Code defines precisely the different offences penalized by it, and so do the other laws that create offences, and the *whole* burden that rests upon the prosecution, under our law is the burden to show that the elements that constitute the offence exist, and that the definition is satisfied. Sections 101, 102, and 103 of the Evidence Ordinance make it clear that that is the extent of the burden the prosecution carries. See the case of *Seturqtnum Aiyar vs Venkatachile Gounden* (A.I.R. 1920 (P.C. at p. 69). It was in view of this difficulty, that the learned counsel who appeared for the appellant in the case of *Parboo vs Emperor*, seized upon the Indian equivalent of section 5 of our Penal Code in order to contend that the prosecution does not prove its case and does not establish the offence charged unless and until it eliminates the exceptions which are contained in chapter 4 of the Penal Code, and which state the matters that exempt a person from culpability. But all the judges in that case, had no difficulty in rejecting that argument. That argument, if it were sound, can only apply, in any case, to matters dealt with by the *general* exceptions *alone* not to those dealt with by *special* exceptions and provisos. So that upon the hypothesis that that argument is sound, a distinction would have to be made between the *onus* on the prosecution in a case in which a defence to an offence is set up under a general exception, and that in a case in which a special exception is pleaded. An extremely anomalous state of things which would invest section 105 with a double meaning.

This argument of appellant's counsel in the Allahabad case was not adopted by counsel here, except in order to submit that that argument was based on what the law in India had been till the legislature enacted section 105, and that they could no longer endorse that argument since by the use of the words " the court shall presume the absence of such circumstances," a rebuttable presumption against the accused was created. That presumption was, however, displaced directly some evidence relevant to the issue raised by the particular exception was in. Thereafter — the argument proceeded — when all the evidence had been led, and the occasion arose for the tribunal to consider its decision, section 3 merely served to caution the tribunal that unless that evidence had persuaded it to the point of inducing belief in its mind, it should not hold that a fact has been proved unless there was such a high degree of the probability of the existence of that fact as to enable a prudent man to act upon the supposition that it exists. But section 3 does not define the *quantum* of proof necessary for the purpose. For that, a prudent man must look elsewhere. In Ceylon, he would, in view of section 100, look to the law of England. That was the argument. But the question arises should he look to the rule of " proof beyond reasonable doubt in relation to the whole case " as enunciated in the Woolmington case, or to the rule as previously understood on the authority of Sir Michael Foster. That was the rule commonly in force at the time our Ordinance was passed. So far as India and other countries governed by the Indian Evidence Act are concerned, in the absence of a section similar to our section 100, it would, I suppose, be open to the prudent man to range from China to Peru in order to select his rule. It is so improbable a hypothesis that in a Code of the Law of Evidence, presumably intended, to be as complete as possible, so important a matter as that of the *quantum* of proof was omitted or overlooked, that it must be rejected, particularly in view of the fact that Sir James Fitz-James Stephen who was so largely responsible for the Code, says in his great book on the Law of Evidence :

> " The law of evidence is that part of the law of procedure which, with a view to certain individual rights, and liabilities in particular cases, decides (1) what facts may and what may not be proved in such cases ; (2) what sort of evidence must be given of a fact which may be proved ; (3) by whom and, in what manner, the evidence must be produced by which any fact is to be proved."

It cannot, I think, reasonably be supposed that in the Code drafted under his supervision point (3) was omitted. The conclusion to which I find myself driven is that sections 103 and 105 read in the light of sections 3 and 4 provide not only for the " onus of proof " in the sense of the burden of introducing evidence, but also for the "onus of proof" in the sense of establishing the particular case.

As pointed out by my brother Hearne, it is not an adequate answer to this to say, as it was said, that if, the tribunal started with a presumption against the truth of the relevant circumstances it would require " mental revolution "

to find that, the circumstances are true. These "mental revolutions" are matters of daily experience in our court although they are more simply known as changes of view.

It is often possible to test the validity of an argument by carrying it to what would be its logical conclusion. If we take that course with the main argument submitted to us, the resulting position would be that, although section 105 requires the existence of circumstances bringing the case within an exception to be proved by the accused, he would satisfy the requirement even though the existence of those circumstances is left in doubt by him, that is to say is *not proved* by him, for section 3 says that "a fact is not proved when it is neither proved nor disproved." Such a conclusion appears to me to refute the argument.

The position is, however, different in cases in which, by involving the fact in issue in sufficient doubt, the accused *ipso facto*, involves in such doubt an element of the offence that the prosecution has to prove. That, for instance, would have been the position under our law in the Woolmington case, if on the charge of murder, on all the matters before them, the jury were in sufficient doubt as to whether the death of the deceased girl was the result of an accident or not, for, in that state of doubt the jury are necessarily as much in doubt whether the intention to cause death or to cause an injury sufficient in the ordinary course of nature to cause death, existed or not. In such a case, the proper view seems to me to be that the accused succeeds in avoiding the charge of murder, not because he has established his defence, but because, by involving the essential element of intention in doubt he has produced the result that the prosecution has not established a necessary part of its case.

Similarly in a case in which the accused's plea is simply that he is not guilty, or in a case in which he pleads an *alibi*, if he creates a sufficient doubt in the minds of the jury as to whether he was present or not, or as to whether he did the act or not, or as to whether he had the necessary *mens rea* or not the accused is entitled to be acquitted because, in such an event, the prosecution has not sufficiently proved its case.

But in the great majority of cases in which the defence calls in aid a general or special exception or proviso the position is different, and is on a footing similar to that under the English law in regard to pleas of "confession and avoidance" in which the burden of establishing the facts justifying avoidance is on the accused (Phipson on Evidence 8th Ed. at p. 31). In those cases when at the conclusion of the trial, the occasion arises for the jury to consider their verdict, on all the matters before them, they must needs consider the defence apart from the case for the prosecution, that is to say the defence arises for consideration on the assumption that on the fact established by the prosecution, "they will be warranted in convicting the accused of the offence with which he is charged," (Woolmington's case 1935 A.C. at page 478), or I would add, of some other offence. If, on the facts established, the jury would not be so warranted, the case fails *in limine*. There is no occasion, then, to consider the defence.

Let us suppose a case of killing in which the defence set up is that of "grave and sudden provocation." That, logically, means that the act resulting in death and the intention reasonably imputable to the person doing the act are granted. The prosecution has therefore, established the resulting offence. If the accused proves in the manner explained in section 3 of the Evidence Ordinance, that at the time he did the act, he had been deprived of the power of self control by grave and sudden provocation offered to him by the victim, he is acquitted of murder notwithstanding the fact that he did the act, and the imputable intention was murderous. But, if he does no more than create a doubt, in the minds of the jury, he fails because, in that event, he has not proved the circumstances *bringing* the case within the exception, and the case of the Crown *remains unaffected*. His defence has not been proved nor has the case for the prosecution been disproved, or even involved in doubt.

That appears to me to be our law in virtue of the sections of the Evidence Ordinance to which I have referred and that, in that respect, it differs from the common law of England, and occupies the exceptional position of "insanity-defence" cases under that law. In those cases the law of England, it is abundantly clear, is that the accused must "satisfy the jury," must "clearly prove" his insanity. If he does no more than involve it in doubt, he fails.

Counsel sought to surmount this difficulty by submitting that this departure from the general rule in those cases, is due to the fact that the experience of mankind is that the vast majority of men and women are sane and that, for that reason, strong proof of insanity is insisted upon. But that is hardly convincing. The sanity of the great majority of men and women is not to the point when an unfortunate wretch is pleading his own insanity, and when, in the nature of things, in order to advance such a plea

with some degree of plausibility, there must be some abnormality, some mental aberration, some hereditary taint that he can point to ; one would have thought that, if ever a plea amounting to confession and avoidance, deserved to be regarded with some latitude, "Insanity" is that plea. But the clear law in England is that there shall be no such latitude. To use the phrase familiar to English law, the plea of insanity must be established by the "prisoner" "beyond all reasonable doubt." So it has been laid down in numerous cases during a whole century. The case of *Rex vs Sodeman* does not, in my view, alter the law. But in so far as it appears to do so, it has been repeatedly commented upon. At any rate, in regard to the measure of proof in "insanity" cases, under our law, it is as stated in section 3.

Section 105 of the Evidence Ordinance, as I understand it, puts all the other general exceptions and the special exceptions or provisos in the Penal Code, and in any law defining the offence, where an offence other than under the Penal Code is charged, in one and the same category as "insanity", and provides one measure of proof for all of them that is the measure of section 3 and for my part, I do not see any occasion for the consternation indicated in some of the judgments in the Allahabad case, at this result. We are in no worse case than are "insanity-defence" cases under the common law of England, and so far as the statute law of that country is concerned, there are many instances — and they are growing apace — in which the burden is expressly put upon the person charged to prove, exemption, qualification, absence of fraudulent intent and similar matters.

In short, I find it impossible to read section 105 as if it contained a proviso to the effect that the burden of proof shall be deemed to be discharged if the court is satisfied that on all the evidence in the case there is reasonable doubt as to whether such circumstances exist or not.

That is what we are invited to do, but what, in my opinion, we have no right to do.

The conclusion to which I come, for the reasons I have given, is that the learned judge of Assize correctly directed the jury that the accused was not entitled to the benefit of the exception he invoked, if they found that the existence of the circumstances relevant to that exception was left in doubt, for my interpretation of sections 103, 105, 3 and 4 is that an accused brings himself within any of the exceptions and provisos referred to in section 105 only if, on all the matters before the jury in the case they are trying, they *believe* that the circumstances bringing the case within that exception exist or at least, consider that their existence is so probable that they ought to regard them as existing.

HEARNE, J.

The question we have to decide is "whether, having regard to section 105 of the Evidence Ordinance and to the definition of 'proved' in section 3 thereof, in a case in which any general or special exception in the Penal Code is pleaded by an accused person and the evidence relied upon by such accused person fails to satisfy the jury affirmatively of the existence of circumstances bringing the case within the exception pleaded, the accused is entitled to be acquitted if, upon a consideration of the evidence as a whole, a reasonable doubt is created in the minds of the jury as to whether he is entitled to the benefit of the exception pleaded."

The decision of the House of Lords in Woolmington's case unequivocally answers the question in the affirmative. Does an analysis of our law lead to a conclusion which is consistent with that decision or not ?

The arguments before us focussed attention on section 105 of the Evidence Ordinance. With these arguments I shall presently deal but I would prefer, at the outset, to discuss the effect of another section of the Ordinance, namely section 103.

This section refers to the burden of proof of a particular fact which lies on a person who wishes the court to believe in the existence of that fact, unless it is provided by law that proof of that fact shall lie on a particular person.

Let us take the case of an accused, charged with murder, who claims to have acted in exercise of the right of private defence. He puts in issue the fact that he had acted in good faith under a reasonable apprehension of death or grievous hurt, and that he had inflicted no more harm than was necessary, having paid, as far as he was able, due care and attention to the risk to which he was exposed and to the means he adopted to avoid that risk, means which he claims were adequate but not excessive.

In putting this fact in issue, he would also put in issue the physical facts from which the jury would be asked to infer the main fact which he asserts. I refer to such facts as that the deceased entered his house and attacked him with a lethal weapon.

It may be that prosecution witnesses are in a position to speak to the events which

preceded the causing of death and that their testimony is to the effect that the events are not as the accused would have the court believe. It may be that prosecution witnesses can only speak to facts from which the actual causing of death by the accused may be inferred and that they have no knowledge of the events which immediately preceded the causing of death. In the former case the prosecution has no desire to prove the facts alleged by the accused which it regards as false. In the latter the facts may possibly be within the knowledge of the accused and nobody else. But, in either event, who wishes the court to believe in the facts asserted by the accused ? The accused alone.

A consideration of section 103 leads me without any difficulty to the conclusion that the burden of proving the facts asserted by the accused is on the accused, and he must prove these facts at the least by showing that their existence is so probable that a prudent man, after considering all the matters which have been brought to his notice in evidence and under all the circumstances of the case, ought to act on the supposition that they existed, (section 3). It is not enough if the jury are left in a state of doubt as to whether they existed or not.

I now come to section 105. If one takes that section to mean that it casts upon an accused the burden of proving the circumstances which bring " the case within any of the exceptions " it is in complete harmony with section 103. In fact section 105 would, on that view of it, be but an application of the general provisions of section 103 to a particular case, the case of an accused claiming the benefit of one of the exceptions on the basis of circumstances or facts in the existence of which he " wishes the court to believe."

It was, however, argued both by counsel for the accused and the Attorney-General that this is not the correct view of section 105. It was argued that the section means that an accused who sets up a defence based upon a general or special exception is required " to introduce into the case evidence which, if believed, would show or tend to show that he was entitled to the benefit of the exception invoked by him " and no more than that. It was even said that the section was merely a precept or caution to the accused, in his own interests, to adduce some evidence which, if accepted by the jury, would operate in his favour.

The key to the meaning of section 105, it was argued by counsel, is to be found in the concluding words " and the court shall presume the absence of such circumstances." It was argued that " burden of proof " and "rebuttable presumptions " have essentially the same meaning in law : that the first and second parts of the section are, therefore, different ways of saying the same thing : that the converse of an absence of circumstances is the existence of circumstances irrespective of their truth : that the question of the truth of the circumstances alleged is considered by the jury at a later stage : and, finally, that the burden of proof contemplated by the section is discharged, and the presumption stated in the section is rebutted, once *some* evidence is before the jury whether that evidence was adduced by the accused or elicited by his counsel in cross examination.

One answer to this argument can, I think, be stated quite simply by saying that it makes the section an unnecessary and even absurd piece of legislation. If there is a complete absence of evidence of such circumstances as are referred to in section 105, the judge will take note of it and at the proper time will bring it to the notice of the jury, not because of the presumption contained in the section, but for the reason that in point of fact no evidence of any such circumstances has been given. What is the object of the presumption ? Surely it is not to lay down the proposition that if there is an absence of circumstances appearing in evidence at the trial, it must be presumed that there are no such circumstances appearing in evidence at the trial ? Is there any point in enacting that there is a presumption of absence against what is absent and known by everybody to be absent-Judge, Jury, counsel and accused alike ? Would this not reduce the section to a piece of legislative levity. ?

On the contrary is not the common sense of the matter that the words " existence " or " absence " of circumstances, as they occur in the section, refer respectively to the existence or absence of circumstances at the time of the commission of the offence with which the accused is charged ? The opening words of the section are " When a person is accused of an offence." The offence is alleged in the indictment to have been committed at some previous time. It is to the existence of circumstances at that time that the first part of the section must relate and the presumption must similarly relate to an absence of circumstances at that time. It was said that if the jury started with a presumption against the truth of circumstances, they would only arrive at a finding that the circumstances alleged were true by a process of thought that would amount to a " mental revolution." But is this in accordance with everyday experience ?

Cannot and do not jurymen, to take a few of the general exceptions, start an inquiry on the assumption that the accused is sane, or that he was not intoxicated or that his act was not accidental and yet on credible evidence being offered adopt the reverse of these assumptions as the truth ?

It was remarked that the word "court" and not jury is used in connexion with the words "shall presume." The word "Court" is used because it is not every court that sits with a jury, and a court or rather judge presiding at a jury trial will not only take note of a presumption but communicate it to the jury.

The meaning of section 105 is, I think, made clear by the illustration to the section. A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A — that is to say the burden of proving that he did not know the nature of the act. The force of that illustration was appreciated by counsel, but it was said that the defence of insanity is in a category by itself and that a different result is brought about in England when an accused proves insanity. But the law of England is beside the point. The point is that section 105 refers to general and special exceptions, that one of the general exceptions is that the accused's act is no offence if at the time of doing it he did not know the nature of the act, and the illustration makes it clear that he must prove, and not merely assert, that he did not know the nature of the act committed by him.

The third illustration which to my mind is just as illuminating is this : "A is charged with voluntarily causing grievous hurt under section 316. The burden of proving the circumstances bringing the case under section 326 lies on A." That does not mean the burden of merely giving evidence of circumstances. It must and can only mean what it says — the burden of proving the circumstances.

For the reasons I have given I am unable to adopt counsel's suggested interpretation of section 105. But I would point out that that interpretation, even if it is adopted, does not in itself, provide an answer to the question that has been referred to us. Even if section 105 considered by itself means no more than that the onus lies on an accused to "introduce" evidence, the facts he has put in issue by the evidence so introduced are facts which he "wishes the court to believe." What, then, is the position if he fails to satisfy the jury that the facts which he has put in issue and which he wishes should be believed ever existed ? (section 103). According to our law, regard being had to the definition of "proved," he has failed to prove those facts and he has also thereby failed to prove his defence which is conditioned by the supposition that those facts existed. But counsel's argument is that, although the accused has failed to carry conviction to the minds of the jury, the prosecution has failed to discharge its burden if he leaves the facts or circumstances which he has asserted in doubt. That, however, is not a deduction from the particular view of section 105 which he advanced. It is merely a statement of the law in England. It ignores section 103 and begs the question we have to decide.

In conclusion I would refer to the Attorney-General's argument that the Supreme Court has always directed juries that the case of the prosecution, meaning all the elements of the offence charged, had to be proved beyond reasonable doubt and that that direction was derived from the definition of proof in section 3 of the Evidence Ordinance. He argued that a prudent man would be content with proof by a balance of probability in a civil case, but would require a higher degree of proof in a criminal case. But the definition does not require him or even permit him to do so. The definition does not formulate different standards of proof which vary with the nature of the proceedings. On the contrary there is nothing in the section to justify the view that a prudent man may or should apply the yardstick of proof to the facts of a case with any regard to the nature of the proceedings and the consequences of his decision. He takes account of all the matters before him, all the circumstances of the case, and the probabilities — that is all.

In my opinion section 3 lays down one measure of proof — at a minimum proof by a preponderance of probability. It is the measure of proof required of a plaintiff in regard to his claim, of a defendant in regard to his defence, of an accused who sets up a defence based upon a special or general exception and of the prosecution in regard to its case.

It is true that judges of the Supreme Court have in the past instructed juries that they must be satisfied *beyond reasonable doubt* of the truth of the facts relied upon by the prosecution in order to establish the guilt of an accused that is to say, that they must be satisfied that the elements of the offence charged have been proved, apart from any defence available to and provable by the accused. This was in accordance with the pre-Woolmington view taken by judges in England of the law of England. It was a principle

of the common law which was stated, for instance, in *Rex vs Sterne* (Surrey Sum. Ass. 1843 MS. Best on Ev. p. 82). Judges in Ceylon have imported that principle into our law and the practice of the courts has sanctified it and in effect made it part of our law. But it is not a principle one can derive from section 3.

Proof beyond reasonable doubt of the case for the prosecution, as that expression was formerly understood in England and interpreted in Ceylon and in India, has of course been radically altered by the decision of the House of Lords in Woolmington's case. Even the frontiers of "the case of the prosecution" have been extended. But this alteration and extension cannot be justified by the law of Ceylon. In fact I am satisfied that, had there been in an English Act of Parliament sections similar to sections 103 and 105 of the Evidence Ordinance coupled with a definition of proof similar to that contained in section 3, the decision of the House of Lords in Woolmington's case would not have been possible without doing violence to the Statute Law.

I would answer the question referred to us in the negative.

DE KRETSER, J.

This matter comes before us on a case stated by Moseley, J. Counsel for the appellant and the Attorney-General agreed that the question propounded should be answered in the affirmative. The result was that the Bench did not listen to arguments on two sides but was forced into the position of being the opposition.

I do not propose to recapitulate the arguments used by counsel or those used in the cases cited before us. I have endeavoured to solve the question independently, but I have had in mind the various views advanced and have dealt with some of them incidentally and without reference to the particular person who advanced them. I do not desire to refer to the cases cited, some of which have not been available to me owing to the large demand for the available books. In so far as they deal with the law in England it is unnecessary to refer to them for we are required to state what the law in Ceylon is and not to be shackled by our habit of reliance on what the law in England is.

Having given the matter careful consideration, my view is that we should follow the rule laid down in the Woolmington case which is not only high authority embodying the English law but, if I may say so with all respect, is based on sound principles and is not in conflict with the procedure hitherto followed by the judges in Ceylon. We should follow that rule and are not forbidden to do so by the provisions of the Evidence Ordinance.

It is not correct to say that the codes of Civil and Criminal Procedure and not the Evidence Ordinance regulate the production of evidence, for it clearly does, and chapter IX is headed Production and Effect of Evidence. It must be remembered that the Evidence Ordinance was not drafted with reference to these codes and may refer to cases outside the provisions of these codes.

In civil cases the production of evidence depends on the issues framed and the onus that arises accordingly. In criminal cases the Criminal Procedure Code directs the procedure and the order in which evidence is produced. Where there is a conflict the code would govern. The Evidence Ordinance may be held to cover the production of evidence without there being any fallacy in reasoning. It is equally incorrect to say that when the burden of proof is laid on a party that burden entails no more than the production of evidence. The burden extends to the effect of the evidence produced. That effect would depend on a variety of circumstances.

In my view it is a fallacy to say that a criminal case may be judged in sections, except in the cases provided in the code itself. There is no provision of law justifying the process of saying either (*a*) that the prosecution has made out a *prima facie* case, whatever that means; or (*b*) that the prosecution has proved its case, and the defence must rebut it. There *is* a provision saying that if the evidence for the Crown, taken at its best, establishes no case, the defence shall not be called upon. It is fallacious to argue that before the defence is called upon the Crown must establish a case. All that is required is that there should be evidence which *may* establish a case, but the evidence is weighed only at the conclusion of the trial.

In a summary trial by a magistrate (Chapter XVIII) section 189 requires the magistrate to take the evidence both for the prosecution and the defence, and section 190 expressly states that it is after taking all the evidence that the magistrate makes his finding and records his verdict.

In an inquiry into a non-summary charge, where the magistrate plays the part of a prosecutor to some extent and is only concerned

to see whether there exists a case worth committing for trial, Chapter XVI applies. The magistrate records the evidence for the prosecution and gives the accused an opportunity of calling evidence. He then hears counsel for the accused and section 162 says that if the magistrate considers that the evidence against the accused is not sufficient to put him on trial he shall discharge him. If the magistrate considers the evidence sufficient, section 165 requires him to commit the accused for trial. Then comes section 164: where there is a conflict of evidence, disclosed presumably in the evidence called by the prosecution itself, and that evidence, if uncontradicted (presumably by the accused), insufficient to raise, not a presumption of guilt but a probable presumption of guilt, then the magistrate must commit him for trial unless for good reasons he deviates from this rule. At no stage, therefore, is there a presumption of guilt.

In a trial before a District Judge (Chapter XIX) the prosecution calls evidence and all statements made by the accused are read in evidence. Then section 210 provides for the case where the judge wholly discredits the evidence or thinks the evidence does not establish the commission of an offence by the accused. If, however he considers there are grounds for proceeding, (not that he makes any presumption of guilt or considers a *prima facie* case to be *established*) he calls upon the accused for his defence. It is only when the cases for the prosecution and the defence are concluded that he sums-up the evidence (section 215) and then records his finding. This means he has before him all the evidence and he considers all the evidence. The evidence for the prosecution may help the defence and the evidence for the defence may help the prosecution.

In trials before the Supreme Court (Chapter XX) the prosecution calls the evidence and reads the statements made by the accused (section 232). The jury have been told (section 231) that it is their duty to listen to the evidence and then make their finding, that is, they must listen to all the evidence.

Section 234 prescribes that if the judge considers that there is no evidence that the accused committed the offence, then he directs the jury to return a verdict of not guilty. If he considers there is some evidence he calls upon the accused. Hs is not the judge of facts and he cannot say what view the jury may take of the evidence. He does not therefore decide that there is a *prima facie* case but there is, on one view of the evidence, the possibility that the accused committed the offence. The jury is not called on to express, and does not express, any view at that stage. Trials by jury are not held in so many stages. Section 243 enacts that when the cases for the prosecution and defence are concluded and after counsel are heard the judge sums-up the evidence, laying down the law by which the jury are to be guided, and it is then and then only that the jury decide which view of the facts is true and return their verdict accordingly (section 245). They decide between the two views of the facts and not upon one set first and then the other. They have been guided as to how they should treat the evidence and then as prudent men of the world they make their decision. There is no provision requiring them to take the defence and if it fails to come up to a certain standard — though it does go rather far — then to put it away and forget it, but there is an express provision requiring them to decide which view is true. What if they cannot say either view is true. The Crown must fail. What if they say "we cannot say which view is true and we have a reasonable doubt both ways"? Then again the Crown fails.

If the accused calls no evidence, the evidence for the Crown is all that is left and the jury must decide on it and give the accused the benefit of a reasonable doubt. If the accused calls evidence and fails the position is the same, the only difference being that the accused may have furnished evidence supporting the case for the Crown. If the accused pleads an exception why should a different rule be applied. The presumption of innocence has been accepted by the majority in the Allahabad case and the dissenting minority do not reject it. It has not been questioned in the case stated nor was it questioned during the hearing. It is a natural presumption which requires no law to express it or confer it. It flows from the passion for freedom which characterizes all human beings and is recognized at every turn in the British Empire. It is as natural as the air we breathe. Chapter IX of the Evidence Ordinance is not inconsistent with it and section 101 recognizes it.

Section 3 of the Evidence Ordinance does not claim that its definitions are exhaustive. It rather explains than defines the expressions "proved," "disproved" and "not proved." It contemplates an intermediate position between "proved" and "disproved." It expressly does not lay down a rigid rule as to the *quantum* of evidence a court shall require. It requires all the matters before the court to be taken into consideration and all the circumstances of the particular case. It assumes these may vary and the *quantum* of proof may therefore vary. It

does not call for conviction alone but allows a prudent man to act on a supposition based on probability, and while a prudent man remains a prudent man and he is the standard, a prudent man's judgment must vary in different matters ; his approach to every matter is not the same.

Section 4 distinguishes " may presume " from "shall presume." These words have their ordinary meaning and " may presume " in the Ordinance is the same as " may presume " in ordinary life, and " shall presume " would have the same meaning if one did not import into the expression " disproved " a rule as to the *quantum* of evidence. The section gives directions and does not define. Does section 4 say more than that a presumption must be rebutted ? I do not think so. A presumption is only a taking for granted, a supposition created by law perhaps. That presumption may be rebutted by a conviction to the contrary or by a contrary supposition. The words " shall presume " do not postulate a blank but the *fictional* existence of evidence of facts. The explanation in section 3 of " proved " and " disproved " cannot be applied to this fiction. According to section 3 when a fact is proved it is proved once for all and it cannot be disproved. It seems therefore that the " proved " of the presumption is not the "proved" of section 3 but something less.

If then there is no conviction and a stage is reached when one cannot state whether the contrary supposition exists or not, it seems to me that one also reaches the stage when one cannot say whether the original supposition exists or not. Any argument to the contrary assumes that at that stage one's mind becomes a blank and therefore the original supposition exists, which is not the case. To my mind this is fallacious reasoning and is not founded on fact or common sense. Rules of evidence are not abstract propositions but must be given a practical application.

The question is what is the rule to be adopted in such a position ? It seems to me to make no practical difference whether one expresses oneself in terms of the defence or of the prosecution. I prefer to do the latter. A prudent man taking all the matters before him may say — " There is some reason to believe the defence may be true ; life and liberty are at stake, there is a presumption of innocence, and I warned regarding the case for the prosecution that it should be proved beyond a reasonable doubt, well, I ought to act on the supposition that the defence had been established and acquit the accused," or he may say — " I ought to say the prosecution has not proved its case beyond a reasonable doubt and, therefore, I acquit the accused." In the first case he takes the defence as " proved ; " in the second he decides that the prosecution is " disproved."

The case stated proceeded on the footing that the Crown must prove its case beyond a reasonable doubt, and my brother gave good reasons for the rule. It was not argued before us that the burden was less. Section 101 of the Evidence Ordinance leads to the same result. If the scales are evenly balanced, if the position reached is one of " not proved " — *i.e.* neither proved nor disproved ; then the party on whom the burden lay fails. The burden is not made any lighter when one remembers the strong presumption of innocence and that life and liberty are at stake. If that be the case when the scales are even, how much more favourable should be the position of an accused when the needle is quivering ?

In a civil case regarding title to land, for instance, the presumption based on possession must be read with section 102, and any doubt resolved in favour of the party who had been or was in possession. Why in a criminal case should section 102 be read only with section 105 and the presumption of innocence be lost sight of and even the provisions of section 101 ? It seems to me that section 102 gives the rules as to who should begin when two parties are making conflicting assertions and section 103 is applied, not to supplant section 102 but with reference to an individual fact incidentally asserted. It would apply to a plea of private defence but sections 101 on 102 still remain effective. In my opinion section 101 begins by asserting that a person must prove an affirmative and explains that that is what is meant by saying that the burden of proof lies on him. Accordingly the Crown must prove that the accused committed a crime and not the accused that he did not. It is noteworthy that the illustrations to section 102 refer to civil cases where conflicting assertions may be made and not to criminal cases where the prosecution asserts and the accused denies. Where the accused goes on to make in addition an assertion, then section 103 requires him to prove that assertion. Is it an accident that the illustrations to section 103 refer to criminal cases only, and not to civil cases already covered by section 102.

It is unfortunate perhaps to use the word " prove " in a colloquial sense when charging a jury but the jury ought to be charged in simple language and will have less difficulty in understanding the expressions " proof beyond a reasonable doubt " than in understanding the Evidence

Ordinance. If there is a reasonable doubt then there is no conviction of the mind, not even moral certainty. A prudent man can go no further than say "not proved," *i.e.* neither proved nor disproved.

It seems to me that if the Crown must take its case beyond a reasonable doubt, it follows that the accused need only go up to the point of inducing a reasonable doubt.

The defence of insanity is peculiar in that there is a natural presumption in favour of sanity and the consequences of proving a man to be of unsound mind entail serious consequences to him and affect even those connected with him. A prudent man may well adopt a different standard in such a case from that which he would adopt in a case of self-defence. But suppose his answer was "not proved," *i.e.* neither proved nor disproved, I do not see why he should then say the accused's sanity is proved. That would be a contradiction in terms. Is fictional evidence stronger than actual evidence, and is the fiction to be applied not only at the start of deliberations but also after a conclusion has been reached. ?

Section 105 gives me no difficulty. Clearly the legislator in that chapter is not acting logically throughout but is trying to lay down rules for the guidance of the court. If he were acting logically section 105 would be unnecessary in view of the earlier section. Also, section 105 is tautological to the extent of slovenliness, for if the accused must prove an exception it can only be because the court will not presume the existence of the circumstances constituting it : if the court must presume the absence of such circumstances, then clearly the accused who depends on them must prove them. Why does the legislator use both expressions ? To my mind the answer is given by the history of the criminal law in India where sometimes at least, it was assumed that section 5 of the Penal Code cast on the prosecution the burden of proving the non-existence of the circumstances. This was unreasonable and contrary to the common sense rule that a person must prove the existence of a fact and not be called upon to prove its absence or non-existence. The legislator therefore took the opportunity of removing this misconception as to the scope of section 5 of the Penal Code. This is evident from the fact that he specially mentions offences under the Penal Code. There are exceptions known to the civil law, as for example in cases of defamation, but he makes no special provision for them.

Again, he has already defined the word "*fact.*" He does not use this word but the word "*circumstances.*" If the absence of circumstances comes within the definition of "fact," equally so must the existence of circumstances, and yet he does not use the word "fact" in either part of section 105 though he had used it in earlier and later sections. If he had said "that court shall not presume the existence of such circumstances," I take it the explanation of "shall presume" in section 4 cannot be applied to "shall not presume." Does the phrase he uses amount to anything more than "shall not presume the existence of such circumstances" ?

In the explanation of "shall presume" it is required that the fact be *disproved.* The words therefore apply to the existence of a fact which is to be taken as proved and not to its absence. If one were to apply the explanation to section 105, then one must say that the contrary must be *proved* and one is not applying "shall presume" but paraphrasing it. One is saying merely that the circumstances are absent but that their existence is disproved.

It seems to me that the concluding words of section 105 do not mean that the court shall presume or take as proved anything, certainly not the guilt of the accused, but the court must start with its mind blank and call for proof of the required circumstances. How can a court take a fact as proved when the evidence for the prosecution itself may disprove it or raise a doubt about it ? How can the court take it as proved when the evidence leaves it in doubt as to whether the contrary has been proved or not ? But if all the phrase means is that the court starts with its mind a blank, then there is room for it to see that that blank is dispelled by the presence of a definite body of evidence, or of a considerable body of evidence lacking definiteness but nevertheless existing and dispelling the blank.

To ask a court to say that there is a void when there is a presence of some kind is not reasonable or logical. To ask a jury in particular to say that the prosecution has made out its case and then to call upon it to say whether the defence has rebutted that case is to place a very heavy burden on a jury of laymen. How can they say the prosecution made out its case and then decide that the defence has proved the defence ? Section 245 of the Criminal Procedure Code does not place such a burden on them. It only requires them to consider all the evidence and say which version of the facts is true. If the jury must decide first for the prosecution it would not only be manifestly unfair but only then comes the illogicality of their reversing their decision. But if they decide on all the evidence,

then there is only one decision and there is no going back involved.

The judge should not charge them in such a way as to leave them room to decide in sections. This court recently condemned such a process in the case of the Australian Soldier, Buckley, (43 N.L.R. 474). The judge should direct them as to the law and tell them to decide on all the evidence. If they consider the case for the prosecution not established, or disproved, they should acquit. If they are left in reasonable doubt they should acquit, in whatever way that doubt arises.

Section 105 does not say that the court shall presume the guilt of the accused or the presence of a *prima facie* case against the accused and call upon the defence. The matter of guilt it leaves to be decided by other considerations. To say the prosecution has established points A and B which constitute the crime and, unless the defence establishes C., points A and B remain, may appear to be logical but it is not logical in reality nor a practical proposition, for the prosecution establishes nothing before the defence is heard.

Let us take a concrete case: A kills B and says he acted in self-defence. There is no admission of the killing till A gives evidence. There may be evidence as to the killing but the jury has not yet decided on its value. Counsel may make suggestions but suggestions are not evidence. After the killing has been established will arise the question of intention. The case for the prosecution, if believed states facts showing that there was an intention to kill. The accused says his intention was to defend himself. The jury are left in doubt as to his intention to defend himself that is, they cannot say he did not intend to defend himself. How then can they say he had a murderous intention.?

But the defence may be that the accused acted in a panic, believing in good faith that he had to defend himself and not stopping to think what he was doing. The jury is told he ought to have had a reasonable apprehension of harm. They may say that that presupposes a reasonable man and a reasonable man would not have got into a state of panic, so the case for private defence breaks down *in limine*. But the jury say to themselves that the accused did in fact act in a panic and did in good faith believe he was called upon to defend himself. Must they say that because the right of private defence is not established a murderous intention is established? I do not think so.

That brings me to an argument of the Attorney-General, which was not urged with sufficient emphasis or clearness perhaps. He said that the proof of self-defence eliminated the idea of a murderous intention, for the prisoner's intention was to defend himself and not to kill. To appreciate this argument one must see the reason why the killing of a person is murder, and must distinguish between a person doing a thing deliberately and a person doing it with a certain intent. To *intend* is to fix the mind upon, as the object to be effected or attained. *Deliberately* means not hastily or rashly but after consideration. The English law requires malice for the offence of murder. We call it the intention of causing death. For a person to have a murderous intent he must be shown to have had the mind fixed upon killing; that is, there is the *wish* to kill; or, the mind fixed upon inflicting a wound the natural consequence of which must be death. Because he wished to inflict the wound he is presumed to have had the wish to kill. Where he knows a certain injury is likely to cause death and intentionally inflicts that injury, again he wishes to kill. Where he commits an act which will in all probability cause death, he either wishes to kill or does not mind killing. In all the cases there is no lawful object behind the killing. In all there is not only a deliberate act but there is the wish to kill in order to attain some object or to satisfy some motive. The law cannot and does not punish mere killing, for the killing may be justified; what it does punish is killing which is culpable, and the question is what was the mind fixed upon. The law speaks of a criminal intention as in section 73, and sometimes speaks of a deliberate intention, as in section 291 A of the Penal Code. But when a person is defending himself or another there is no wish to kill, real or presumed, and the mind is fixed upon defending, he is exercising a right which the law recognizes. He may kill deliberately but his primary wish or intention is to defend and the killing is only the means and is involved in and incidental to the defending. The plea of self-defence, therefore, goes to the very root of the intention which the law requires the Crown to prove. It is to be noted that section 93 does not speak of *intentionally* causing death but of *voluntarily* causing it.

If the chapter creating the General Exceptions be closely examined one will find that proof of an exception excludes a criminal intention. The hangman kills deliberately but has no wish to kill the particular person he hangs and his mind is fixed on doing his duty.

A person acting under threat of instant death is excused as for example in a case of theft, and theft needs intention ; he does not wish to steal, there is no theftuous intention, but he wishes to save his life. That plea should excuse him in cases of murder and offence against the State but for good reasons an exception is made as regards such offences. When the primary intention is thus removed by a provision in the law, what remains is the secondary intention, evidenced by his deliberate act.

In a case of self-defence, if the primary intention is disproved and so removed, then the secondary intention emerges. If the jury consider that it emerges sufficiently enough for them to be able to recognize it, then they can have no reasonable doubt. But if there is a doubt the secondary intention has its way blocked.

Section 59 of the Penal Code creates the exception but section 90 limits it and section 99 defines the limits. The second exception to section 294 seems to proceed on these lines; the person has exceeded the limit ; therefore the legal right does not exist and the primary intention is removed by the law; therefore, only the secondary intention exists and it should be murder, but we must make allowance for the man's good faith and since his act was culpable we shall reduce his offence. The illustration given indicates that the man did not act in a panic but deliberately killed when he might have disabled his opponent. The section does not deal with a reasonable doubt and assumes that that stage is passed.

The line of thought is original and I am afriad I was inclined to brush it aside during the argument but, on reflection, I think there is disclosed the germ of a fundamental notion. A judge may acquire certain habits of thought. He may be able at the end of the case for the prosecution to say that there is no case or that the witnesses are unreliable, and may decide not to proceed any further. He may be influenced in his decision by his knowledge of what the defence is going to be. It may also seem to him that at first sight the Crown has established the case and that he ought therefore to go on to hear the defence, but his impressions at first sight are not his final conclusions and these are reached only when he sums-up the evidence on both sides. Habits of thought may not always be proper or justified by any provision of the law but they probably cause no serious damage in the case of a trained judge. But it is impossible to employ the same process when one is dealing with jurymen and when one is confronted with the express provisions of the Criminal Procedure Code.

I have so far assumed that the absence of circumstances may be a fact, not in common parlance but as defined in section 3. In my opinion it does not come within the definition. In the first place one finds throughout the Evidence Ordinance that it is the existence of a fact which is to be proved and not its absence. The definition of " fact " relates to the existence of things which may be perceived by the senses or any mental condition of which a person is conscious. Facts are matters regarding which a witness can speak and not conclusions which are actually or presumptively reached. The illustrations relate to such facts as, for example that certain things are arranged in a certain order ; that a man heard or saw something ; that a man said certain words ; (these illustrations seem to relate to clause *a*) that a man holds a certain opinion, — a thing a witness may know from having heard him express it ; or had a certain intention,— again gathered in the same way. So also with regard to " good faith," " fraudulently," — inferred from what the witnesses heard or saw ; that a man has a certain reputation gathered from what others say of him, and so on. Illustration (*b*) relates to a person's mental condition of which the witness is conscious ; and illustration (*c*) only differs in that the witness is going on repute, on report, and not on his personal knowledge. Now, how is a void capable of being perceived by the senses ? The senses perceive as " thing or state of things or relation of things." A person is not conscious of a void for his mind is a blank and there is no consciousness. How is a void proved? How can a witnesss speak to another's mental condition as being a void ? But a person who is *judging* may start with his mind a blank as to the particular facts or circumstances. If then absence of circumstances is not a fact ; still less does the direction in section 4 regarding " shall presume " apply.

No mention was made during the argument of the definition of " facts in issue " in section 3 but I see some of the judges in India were troubled by it or rather the illustrations to it. Now, the expression " facts in issue " is used only in regard to the admissibility of evidence and not as regards the burden of proof nor as regards the *quantum* of proof required. " Facts in issue " means nothing more than *facts probanda*, and evidence is admitted only so far as it bears directly on the facts to be proved or is

relevant thereto. The expression does not mean that issues are impliedly framed and that the evidence on each issue is taken separately. Parties are not tied down to issues as in a civil case. The distinction between civil and criminal cases is well recognized In a criminal case the burden on the Crown never shifts and the final burden is on the Crown ; the broad issue in the final stage is " Has the prosecution proved its case."

Textbooks on Evidence are not authoritative. So far as they go they agree saying that an accused need not prove his case even when based on an exception — *beyond* a reasonable doubt which carries with it the implication that it will be sufficient for him to prove his case up to a reasonable doubt. They go on to say that he need prove only a *prima facie* case but they do not explain what they mean. One gathers their meaning from what they had just said, and then *prima facie* case means a case up to and not beyond a reasonable doubt. *prima facie* only means at first sight. The text book writers do not speak of a " preponderance of probabilities," a phrase which I have some difficulty in understanding. Civil and Criminal cases vary in many ways but in both classes one party has to prove his case. Civil cases depend on the issues framed and on the burden of proof and the actual evidence produced. When the evidence is such that an earlier decision cannot be reached by considering only one or more issues, then the whole case must be dealt with and one party proves his case because he had induced conviction or such a degree of probability that a prudent man will act on it. There cannot be two such degrees of probability existing on either side for both sides cannot prove their cases, but there may exist the possibility that both cases are true.

In my opinion the question propounded in the case stated should be answered in the affirmative.

Since drafting my judgment I have had the advantage of reading the draft judgment of the President. The main lines of my judgment still remain the same and I would only add that Lord Sankey's reference to statutory exceptions refers to statutory exceptions in England. We do not know what exactly he had in mind but there are statutory offences where in certain circumstances a presumption of guilt is raised and the burden is thrown on the accused to displace the presumption. Section 105 raises no presumption of guilt.

Keuneman, J.

I agree with the judgment of the Chief Justice, Soertsz & Hearne, J. J.

Wijeyewardene, J.

I agree that the charge of the trial judge (Moseley, J.) is in accordance with our law.

I agree that the question referred to this court be answered in the negative.

Jayatileke, J.

I agree with the judgments of the President and my brothers Soertsz & Hearne, J. J.

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

COLOMBO MUNICIPAL COUNCIL vs K. M. N. S. P. LETCHIMAN CHETTIAR

S. C. No. 69—*D. C. Colombo No.* 3092 *L.A.*
Argued on 29th & 30th October, 1942.
Decided on 17th December, 1942.

Land Acquisition Ordinance—Market value of land—Effect of laying down of street lines under section 19 (4) *of the Housing and Town Improvement Ordinance on the market value of the land within the street line—Extent and effect of the restriction imposed by section* 108 *of the Housing and Town Improvement Ordinance.*

The Municipal Council acquired a strip of land belonging to the defendant 1140 feet in length and varying in width between 28 and 32 feet comprising an area of 2 roods 37·20 perches. It lies on the extreme south of the premises bearing assessment Nos. 123 and 139 Bambalapitiya Road, a property of 11 acres, 1 rood and 12 perches in extent, and bounded on the west by another public street commonly known as the Colombo–Galle Road. This strip of land lay within a street line defined under section 19 (4) of the Housing and Town Improvement Ordinance. It was contended for the Municipal Council that the land acquired had no market value and only nominal compensation was payable as it could not be built on.

Held : (KEUNEMAN, J. *dissentiente*) (i) That there was no statutory restriction against building on the land.

(ii) That as the land was capable of incorporation in a scheme of building blocks so as to constitute and serve as appurtenances to the buildings erected on those blocks the land acquired must be assessed with the rest of the land as land suitable for building subject to such restrictions as really exist.

(iii) That the only express statutory restriction against an owner in the position of the defendant and the only restriction that has to be taken into account in assessing the value of the land in a case like this is that imposed by section 108 of the Housing and Town Improvement Ordinance.

(iv) That section 19 (4) and 108 of the Housing and Town Improvement Ordinance should not be regarded as prohibiting the owner of a land in every case from building beyond a street line laid down on his land.

(v) That it would be fallacious in assessing the value of a building block to treat the portion of land on which the building will stand as more valuable than the rest of the block which is going to be the garden or courtyard.

(vi) That upon a proper interpretation of the law, there is no warning necessarily implied by the laying down of a street line that the land within it will be acquired without compensation.

Per SOERTSZ, J. : " In my view, the purpose of section 19 is to ensure that every building has easy access to a street of certain dimensions and if anyone erecting a building has two streets adjacent to his building block, it is open to him to erect his building in relation to one of these streets and in that event, there is nothing to prevent him from erecting his building to the extreme limit of his land on the side of the other street, going beyond any street line that has been laid down on that side. The only way of escape to the Public Authority is to forestall him by compulsory acquisition of the piece of land belonging to him that lies within the street line on the usual terms of acquisition. Moreover, in a case like the present case where the defendant besides having two adjacent streets, one on the west, and the other on the south of his land, has a land some twelve acres in extent, it is open to him to construct suitable streets in conformity with the requirements of the Ordinance to serve buildings erected on the land, and in that case too, he may build right up to the extreme southern and western limits of his land, ignoring any street lines, unless the Public Authority concerned acquired the land involved, for despite the street lines the land continues to be his till it is acquired."

Cases referred to : *Government Agent, Kandy vs Marikar Saibo* (6 S.C.D. 36)
Government Agent, Western Province vs The Archbishop (16 N.L.R. 395)
Corrie vs MacDermott (1914–A.C. 1056)
Stabbings' Case (L.R. 6 Q.B. 37)
Newnham vs Gomis (35 N.L.R. 119)
Municipal Council vs Fonseka (38 N.L.R. 145)
Ujagar Lal vs The Secretary of State for India in Council (L.R. 33 Allahabad 633)

H. V. Perera, K.C., with *M. M. Kumarasingham*, for the defendant-appellant.
E. F. N. Gratiaen with *D. W. Fernando* and *S. J. C. Kadirgamar*, for the plaintiff-respondent.

Howard, C.J.

I have had the advantage in this case of reading the judgments of both my brother judges. In both of these judgments the facts are set out in detail. It is, therefore, only necessary for me to make reference to the law that should be applied. The general principle with regard to the valuation of land compulsorily acquired by the Government was laid down in *Government Agent, Kandy vs Marikar Saibo* (6 S.C.D. 36). In this case it was held that the proper course is to find the market value as near as it can be ascertained of the entire land and then to estimate the value of the portion of land taken at that rate. This case was followed by the court in *Government Agent, Western Province vs The Archbishop* (16 N.L.R. 395) where the same principle was followed. The test adopted in that case by the District Judge of ascertaining the market value of the particular portion of land acquired regardless of the rest of the land was described by Pereira, J. as fallacious. I would also refer to the words of Lord Dunedin in *Corrie vs MacDermott* (1914–A.C. 1056) that the value that has to be assessed is " the value to the old owner who parts with his property, not the value to the new owner who takes it over." In this connection the question arises as to any impairment in the value of the land by reason of restrictions, *vide Stabbings' Case* (L.R. 6 Q.B. 37), and no doubt, as was decided in *Newnham vs Gomis* (35 N.L.R. 119) any depreciation in value caused by the laying down of street lines may be taken into consideration. I agree, however, with my brother Soertsz, J.'s interpretation of section 19 of the Housing and Town Improvement Ordinance and am of opinion that judgment should be entered for Rs. 28,242/– in favour of the defendant. I also agree with the other members of the court with regard to the order as to costs.

Soertsz, J.

This appeal raises the question of the correct method of assessing the value of a piece of land which the Municipal Council of Colombo has acquired under the provisions of the Land Acquisition Ordinance, for the purpose of widening an adjacent public street called and known as Vajira Road.

This piece of land is shown on the plan P2 as the portion coloured pink — a ribbon varying in width between 28 and 32 feet, and 1,140 feet in length, and so comprising an area of 2 roods, 37·20 perches. It lies on the extreme south of the premises bearing assessment Nos. 123 and 139, Bambalapitiya Road, a property of 11 acres, 1 rood and 12 perches in extent, and bounded on the west by another public street commonly known as the Colombo–Galle Road.

This comparatively large land is situated in a residential area of a very popular surburb of the city and, it is agreed, that regarded as a whole, it is susceptible of profitable development as a building estate. In these circumstances, it is with some surprise that one finds that all that the Municipal Council is prepared to pay in respect of the soil of this three-quarter extent of land is the sum of five rupees, and that this sum is offered not as something justly due to the defendant, but as a purely gratuitous payment. To quote from the evidence given by the Municipal Assessor :

> " I would not say that five rupees was offered for this land ; we offered nothing for the land. But as we had to pay something in payment of the transfer of title, (in reality, of course, there is not in these cases, any deed of transfer of title) we offered five rupees."

This extraordinary result is ascribed to a street line laid down as far back as in the year 1919 in conformity with a resolution passed in that year by the Municipal Council under the provisions of section 18 (4) of Ordinance No. 19 of 1915, which was the Ordinance then in force, defining the northern limit of Vajira Road, at that time known as 11th lane, Bambalapitiya, in such a way as to take in the whole of the strip of land that has been acquired.

It is contended that the effect, in law, of the laying down of this street line, was to make it impossible for a building or any part of a building to be erected on the land within that line, and that, consequently, that piece of land ceased to have any market value at all, and had to lie sterile till such time as the Council should think fit to take it over as a gift or release it from this deadly incubus.

This view of the effect, in law, of the laying down of a street line, is sought to be supported by the judgments delivered by this court in the cases of *Newnham vs Gomis* (35 N.L.R. 119) and *Municipal Council vs Fonseka* (39 N.L.R. 145).

In the earlier case, the only question submitted for consideration or, at any rate, as would appear from the judgment, the only question considered was whether the laying down of a street line should be regarded as the first step in acquisition proceedings in a case in which the land is subsequently acquired under the Land Acquisition Ordinance. That submission was made, in that case, with a view to contending that, if that were the case, any depreciation in value consequent on the laying down of the street line, should not be counted against the

owner. This court rejected that contention. That question has not been raised in this case, and there is no occasion for us to consider it. That judgment has, therefore, no bearing on the question now arising, namely, whether the laying down of a street line necessarily renders the land within it sterile. In the second case referred to above, the question that arises here was considered incidentally. Koch, J. said in the course of his judgment:

> "Mr. Keuneman, on behalf of the Chairman, largely depends on the effect of section 18 (1) (*a*) of the Housing Ordinance.....The effect of this provision, he argues, is to effectually prevent a building to be erected within the street lines which have been validly laid, and to render the space within those lines sterile and unbuildable. I think the argument is sound."

It may well be that, in the circumstances of that case, such was the effect of the laying down of the street line; but if that statement was intended to be of universal application, I respectfully disagree. The effect of a street line would, in my opinion, depend on the facts of each case (see *Corrie vs MacDermott* (1914–A.C. at page 1062)).

It is, however, clear that the Council does not appear to have contemplated the good fortune that accrues to it from this interpretation of the law, in the latter case, if it is regarded as an interpretation of invariable application, with complete equanimity. The Municipal Assessor who was the sole witness called by the Council in this case, had declared, in the course of his evidence in the case of *Newnham vs Gomis* (*supra*) that he considered this mode of assessment as "grossly unfair," and in the course of his evidence in the present case, he went on to say:

> "This offer (that is the offer of five rupees) is liable to be misconstrued, because of the fact, that the land is within sanctioned street lines. We try to be as generous as possible with people whose lands are affected and, although the land had no market value, we gave Rs. 1,000/- odd for the trees and plants on the land. Our policy is to try to be as generous as possible consistent with our legal obligations as a Public Authority."

This offer of a "thousand rupees odd" for a land which, in his view, is worth nothing at all, is not the only instance of unscientific assessment that has resulted, in this case, from this attempt on the part of the Assessor to reconcile reason with emotion. We find that he has awarded Rs. 2,800/- "on account of a certain income the temple derives from stalls" which used to be built every other year on this strip of land, during the festival season. I fail to see how this award can be justified for the fundamental premise of the Assessor's case is that once the street line was laid down and that happened in 1919 — no stalls could have been put up on this land. That is not all. The Assessor awards Rs. 6,840/- on account of compensation for what he vividly describes as "a very old and dilapidated wall which will fall down at the first gust of wind," and which, he asserts, is not worth anything more than Rs. 4,456/-; a further sum of Rs. 2,750/- is awarded as compensation for three inconsiderable tenements that stood on this piece of land. These sums Rs. 5/-; Rs. 1,008/50; Rs. 2,800/-; Rs. 6,840/-; Rs. 2,700/- added together yield the total Rs. 13,353/50. The Assessor then adds ten per cent. to this total sum less the Rs. 2,800/- given as income from stalls, that is to say he adds Rs. 1,055/35 to the Rs. 13,353/50, in view of the compulsory nature of the acquisition. But still doubtful of the adequacy of his generosity, and in pursuit of "a round figure" he throws in Rs. 91.15 and offers the defendant Rs. 14,500/-.

It is obvious that this is an unsatisfactory method of assessment. It is whimsical.

The defendant refused to accept the amount offered, and when the question was referred to court, he filed answer and claimed Rs. 56,687/35 on the basis that the land acquired was marketable building land at the date of the acquisition. In the alternative he averred that, if it is found that it is not such land, the true amount of compensation due to him was not Rs. 14,500/- but Rs. 21,899/85.

After trial, the learned District Judge upheld the plaintiff's assessment. The Assessors, acting in an unusual manner and not as required by section 24 of the Land Acquisition Ordinance, delivered separate judgments. One of them agreed with the trial judge; the other held that the defendant was entitled to Rs. 47,811/50.

If I may say so, with due deference, the judgment of the trial judge affords us hardly any assistance. It is a reproduction of the law that the Assessor was allowed to lay down in the course of his evidence.

The appeal from this judgment came up, in the first instance, before my brother Keuneman and myself but, as we were unable to agree on the principle on which assessment should be made in this case, it became necessary for us to act under section 38 of the Courts Ordinance and, thereupon, My Lord the Chief Justice associated himself with us.

I have had the privilege of reading the judgment prepared by my brother Keuneman and I find that we are agreed that the value or, I should say, the absence of value put upon the soil of the portion of the land acquired, cannot be justified in any way at all.

But, we take different views in regard to what the correct method should be for assessing that value. My brother is of opinion that this is land on which buildings cannot be erected at all and that "a prospective purchaser would not be willing to give the same value for the strip in question as he would for land on which buildings can be erected." In this view of the matter, he has examined the evidence of Marikar, the witness called by the defendant and, upon that evidence, he has held that this strip of land "could be utilized for providing courtyards in front of the cottages (that is the hypothetical cottages shown in the scheme proposed by the witness) until the time of the acquisition by the Council," and calculating upon the basis of the difference in rent value between a cottage with a courtyard and one without such an appurtenance, and making a deduction on account of rates and repairs, and capitalizing the resulting sum at 15 years' purchase, he has arrived at the figure of Rs. 10,800/–. To this he has added Rs. 6,840/– as compensation for the wall, and ten per cent. on account of the compulsory nature of the acquisition and has awarded Rs. 19,360/– to the defendant.

For my part, I am unable to take the view that, in the circumstances of this case, the land acquired is land on which buildings cannot be erected. Alternatively, I am of opinion that even if the view I have just indicated is erroneous, nevertheless, in the circumstances of this case, this strip of land can be so incorporated in a scheme of building blocks as to constitute and serve as appurtenances to the buildings erected on those blocks and that, for that reason, the land acquired must be assessed with the rest of the land as land suitable for building subject to such restrictions as really exist.

In land acquisition proceedings, the correct mode of assessment is, I agree, that laid down in the case of *Government Agent, Kandy vs Saibo* (6 S.C.D. 36) and followed in *Government Agent, Western Province vs The Archbishop* (16 N.L.R. 395), namely, "to find the value of the entire land and then to estimate the value of the portion taken at that rate." The value that has to be assessed is, in the words of Lord Dunedin in *Corrie vs MacDermott* (*supra*), "the value to the old owner who parts with his property, not the value to the new owner who takes it over." But, of course, in applying these tests it is a necessary point of inquiry how far restrictions affect the value.

Taking this mode of speech, I cannot see my way to interpret section 19 of the Housing and Town Improvement Ordinance in the manner suggested by my brother Keuneman. In my view, the purpose of section 19 is to ensure that every building has easy access to a street of certain dimensions and if anyone erecting a building has two streets adjacent to his building block, it is open to him to erect his building in relation to one of these streets and, in that event there is nothing to prevent him from erecting his building to the extreme limit of his land on the side of the other street, going beyond any street line that has been laid down on that side. The only way of escape to the Public Authority is to forestall him by compulsory acquisition of the piece of land belonging to him that lies within the street line on the usual terms of acquisition. Moreover, in a case like the present case where the defendant besides having two adjacent streets, one on the west, and the other on the south of his land, has a land some twelve acres in extent, it is open to him to construct suitable streets in conformity with the requirements of the Ordinance to serve buildings erected on the land, and in that case too, he may build right up to the extreme southern and western limits of his land, ignoring any street lines, unless the Public Authority concerned acquired the land involved, for despite the street lines the land continues to be his till it is acquired.

Coming next to the matter of restrictions, the only definite prohibition against an owner in the position of the present defendant is that imposed by section 108 of the Housing and Town Improvement Ordinance which says that:

> "No person shall erect any masonry or boundary wall or gateway within the street lines of any street for which street lines have been laid down."

This is the only express statutory restriction, and the only restriction that has to be taken into account in assessing the value of the land in a case like this.

I do not think that an inference that an owner of a land is, in every case, prohibited from building beyond a street line laid down on his land can fairly be drawn from the existence of the restriction just mentioned or from the statement in the latter part of section 19 (4) that:

> "Where application is made to re-erect any building which projects beyond any street line so defined or to re-erect any part thereof which so projects, the Chairman may require that such building shall be set back to the street line."

I cannot understand how, with these facts as the premises, the conclusion could be said to be that "therefore, the Chairman may require that a building shall not be erected to project beyond a street line in every case."

It is said that this view of section 19 (4) and of section 108, leads to an anomalous state of things. I do not agree. But if it does, it

is for the legislature to intervene. We must interpret the law as it is, and in the case of an enactment such as this which imposes restraints and restrictions, we must interpret the words employed by the legislature as favourably to the citizen as can reasonably be done. It is possible that in view of the interpretation given in the earlier cases I have referred to of section 18 (4) of the old Ordinance, the legislature was content to frame the present section 19 in this way, or more probably, the legislature failed to contemplate and provide for a case like this where there are two adjacent streets in existence and the possibility of other streets being constructed. But this is speculation. I do, however, concede that where there is only one street serving a land and the land is not of a size or nature to lend itself to the construction by the owner of another suitable street to serve it, the owner must build either upon the line of the existing street or must have all the land between at least one face of his building and the street reserved for the use of the building. In such a case, there is, in effect, a prohibition against building beyond the street line.

In this view of the matter I hold that but for the acquisition the defendant would have been entitled to build on the land acquired if he :

(*a*) Divided and disposed of his land in such a manner as to relate all buildings that may be erected upon it to the existing street on the west of the land or,

(*b*) Constructed streets of his own to serve buildings that may be erected on the southern side of his land, that is to say, the side on which the street line in question was laid down.

But, in view of the fact that on the western limit of this land there are buildings in existence today abutting on the Colombo–Galle Road, which would have to be demolished in order to give direct access from the road on that side to buildings that may be erected on this land, and also in view of the fact that if buildings that may be erected on the southern side of this land—that is on the side of the acquisition—are going to be erected in such a way as to go beyond the street line, the defendant would have to use some other part of his land in order to construct a road to serve those buildings. I do not propose to assess the value of the land acquired as land on which buildings could have been erected despite the street line, because there is not sufficient material before us for such an assessment to be made.

But, as I have already observed, there is an alternative view. Assuming that, in law, the owner could not, once the street line had been laid down, put up buildings on the land within the line, or assuming that even if he could, it would not be economical for him so to build for the reason that he would either have to demolish buildings or to construct other streets, it was still open to him to reserve the portion of his land within the street line as part of the courtyard or garden attached to his building. In this city, particularly in areas like that in which this land is situated, there are hundreds of houses and bungalows with such courtyards and gardens attached to them, and it is indisputable that the more such open land there is attached to a building, the more valuable are the premises. Such a piece of land is as much and as valuable, a part of the premises as the part on which the building itself stands, and so far as the soil is concerned, it is due to be assessed in the same way, subject to any statutory restrictions or to any defects inherent in the land itself affecting its value.

In my view, it would be fallacious in assessing the value of a building block to treat the portion of land on which one intends one's buildings to stand as more valuable than the rest of the block which is going to be one's garden or courtyard. The whole block must be valued as a single unit. That, at any rate, is, I believe, the way in which purchasers value building blocks they desire to acquire.

What then are the restrictions and drawbacks in this case ? It is said that the value of this land is affected by the presence of the street line which is a warning that the land within it may sooner or later be acquired. I do not, however, regard that fact by itself as affecting the value of the land for, in my view, upon the acquisition, the owner is due to be fully compensated. The warning will, of course, affect the value of the land if it is a warning that it is liable to be acquired without any compensation being paid in respect of the soil, and that is the question that is begged by the Municipal Assessor from the beginning to the end of his assessment.

In my view, upon a proper interpretation of the law, there is no such warning necessarily implied by the laying down of a street line. The only restriction that, in this case, affects the value of this land is that imposed by section 108 of the Ordinance already referred to, but I do not consider that that restriction affects the value substantially. There are so many efficient substitutes for masonry boundary walls and gates. But, I suppose that some deduction may reasonably be claimed on this account. There is another matter referred to in the evidence of the Assessor as affecting the value of this land, in fact, namely, that there is a Hindu Temple on it, and a Buddhist Temple in its immediate vicinity. It is said, to use the Assessor's words " there are

daily disturbances from the temples" meaning that the tom-tomming and bell-ringing that take place everyday and, in an intensive manner, on festival days, will not attract the better class of building investors.

This is not an unreasonable objection and I think that a deduction should be made on that account too. Both these deductions must, in the nature of things, be largely conjectural, and it would not, therefore, serve any useful purpose to remit the case for further investigation on these points. We are, I think, in a position to make a rough estimate as to what those deductions should be.

Both sides were agreed for the purpose of this case, that the best building land in this neighbourhood, free from restrictions, defects and drawbacks would be worth Rs. 50,000/– an acre. I think it would be reasonable to deduct Rs. 10,000/– per acre owing to the presence of the two temples and the consequent depreciation in the value of the land. A further deduction of Rs. 5,000/– an acre owing to the restriction imposed by section 108 would be more than adequate. These deductions reduce the value of the land acquired to Rs. 35,000/– per acre. The extent acquired is 2 roods 37·20 perches, and its value, ignoring decimal points is Rs. 25,675/–. I would add ten per cent. for compulsory acquisition, and that yields the total Rs. 28.242/–, which, on the evidence in the case, I consider a fair value for the land acquired and everything on it.

I would, therefore, enter judgment for this amount in favour of the defendant. In regard to costs, I agree to make the order proposed by my brother Keuneman, although I should have been disposed to give the defendant half the taxed costs in the court below for the reason that, on my assessment he gets nearly half the amount he claimed. I would, therefore, set aside the judgment of the District Court and direct that judgment be entered in the manner I have stated.

KEUNEMAN, J.

This is a proceeding for the compulsory acquisition of land under Chapter 203. The land acquired is Lot 1 in P.P. No. A1197 of 2 roods 37·20 perches, forming part of premises bearing assessment Nos. 123 and 139 Bambalapitiya Road. This strip of land was acquired for widening Vajira Road. The plaintiff tendered compensation of Rs. 14,500/– but this was not accepted. In his answer the defendant claimed the sum of Rs. 51,788/50 as compensation.

The compensation tendered by the plaintiff was made up as follows ;—

Compensation for loss of income from certain tenements demolished ..	Rs.	2,700.00
Value of 1,140 feet of boundary wall	,,	6,840.00
Value of trees	,,	1,008.50
Compensation offered for sterile land	,,	5.00
10% for compulsory acquisition	,,	1,055.35
Compensation allowed in respect of temporary booths	,,	2,600.00
Total	Rs.	14,208.85

The plaintiff offered the round sum of Rs. 14,500/–.

It has been established in this case that the land acquired comes within street lines sanctioned by resolution of Council on the 8th of August, 1919, and subsequently approved by Council (*vide* Government Gazette 7053 of 19th September, 1919 — P4).

The contention of the plaintiff is that in consequence of the Housing and Town Improvement Ordinance (Chapter 199) the portion acquired could not be built upon before the acquisition, and that owing to the restriction on the user of this portion, it was of no value to any prospective purchaser. The compensation, therefore, was only given in respect of certain tenements demolished on this land, of the value of trees and a wall standing thereon, and of the loss of income from temporary booths erected on the occasion of an annual festival. It is to be noted that the main premises is the site of a Hindu Temple.

For the defendant, it was argued as the whole premises has two road frontages, *viz.* the line of the Galle Road, and the line laid down for Vajira Road, there was no prohibition contained in section 19 of the Housing and Town Improvement Ordinance against building beyond the street line of Vajira Road, as long as the line of the Galle Road was preserved intact.

The argument is based on the construction placed by appellant's counsel upon the words of section 19 of Chapter 199 (Housing and Town Improvement Ordinance). The material words relied upon are as follows :

> "Every building erected or re-erected:—
> (*a*) shall be erected either upon the line of an existing street not less than twenty feet in width, or upon the line of a new street defined or approved by the Chairman or otherwise authorized under this or any other Ordinance."

Counsel argued that the section was not drafted in the form of a prohibition against building

otherwise than on the line of an existing street or of a new street. He contended that there were two street " lines " in this case, the " line " of Galle Road ; and the " line " of Vajira Road, and urged that as long as the appellant had for his land the line of Galle Road, there was no prohibition against his building beyond the street line of Vajira Road. Counsel emphasized the fact that the word " street " was used in the singular, and stated that as long as any street line existed in respect of the appellant's land, the Chairman could not refuse permission to build on any other portion of the appellant's land, even although that portion fell within sanctioned street lines.

Appellant's counsel admitted that this interpretation would lead to a curious anomaly. Under section 19 (4), where the street line cuts through a building, if the owner applies for sanction to re-erect the building, he can be required by the Chairman to set back the building to the street line, subject to the payment of compensation. At the same time the Chairman was powerless to prevent any new building being erected within the sanctioned street line. Counsel contended that this latter element had been overlooked. I do not believe that such an important matter could have been forgotten, and I think it is incumbent upon us to look for an interpretation of the section that does not lead to so startling an anomaly. In my opinion such an interpretation can be obtained from the words of the section itself.

I do not think that when the legislature used the words the " line of the street " it had in contemplation the names or labels which for the purpose of convenience have been applied to the various streets in the city. All the streets even in the city do not run straight, they turn sometimes at an angel, and in the country where the land is hilly even at an acute angle. It is not an unknown experience for a land to be bounded on two sides by a street which bears the same name. In my opinion the " line of the street " here has relationship not to the streets as separately named, but has relationship to the land and although the land may have in popular language two or more road frontages, it may have only one line of street, which need not necessarily be a straight line.

I think the words of section 19 (1) (*b*) have a special significance in this connection, *viz.* " shall either abut upon the street or have all the land between at least one face of such buildings and the street reserved for the use of the building." No question arises when the building abuts upon the street, at whatever point of the compass the street may lie. But the later words, in my opinion, contemplate the possibility of the line of the street being on more than one " face " of the building. Where that state of things exists, all the land between one " face " of the building *only* and the street line must be reserved for the use of the building, while the land between the other faces of the building and the street need not be so reserved.

I think these words throw a light on the meaning of " street " and " line of the street," and that the word " street " has no relationship to the names applied to the various streets, and that the line of the street has relationship only to the particular land or buildings, and that the line of the street may be on more than one side of the land or building.

I may here refer to sections 20 and 21. Section 20 requires that any person wishing to lay out a new street should give notice to the Chairman of his intention. Section 21 (*b*) empowers the Chairman to give written directions with regard to " the line of the new street, so as to ensure that it forms a continuous street with any existing street or approved new street specified by the Chairman."

Now it is common experience that these " new streets " run at right angles to the existing street, but still they are to be regarded as *continuous* with the existing street.

I am therefore of opinion that the construction of section 19 suggested by appellant's counsel cannot be accepted, and that the Chairman has under section 5 neither the power nor the discretion to allow any building, inside a sanctioned street line. Although the portion within the street line remains the property of the owner, the street lines define the boundaries of the street, and all erections and re-erections of buildings must be on the line of the street as so defined.

Further, on the facts it is clear that the strip of land in question does not extend to the line of the Galle Road. There is a portion of land intervening, which has been previously acquired by the Municipality. Again the whole line of the Galle Road, immediately adajcent to the strip in question, is now occupied by a number of boutiques, and it has not been shown that it would be an economical proceeding to demolish these boutiques, so as to provide the strip in question with a value as building land.

I do not think that the decision in *The Government Agent, Western Province vs The Archbishop* (16 N.L.R. 395) compels me to value the strip acquired on a basis proportionate to the value per acre of the rest of the defendant's land.

I do not think that case went further than to decide that where the whole land is of the same character, the proper course is to find the market value as near as it can be ascertained, and then to estimate the value of the portion acquired at that rate. It would of course not be correct to value the strip as a separate entity, which on account of its shape and size may be of no value to a prospective purchaser. Pereira, J. himself drew attention to an important qualification of the rule. "It may be that a portion of a large extent of land may be so situated, that its real value may not be a proportionate share of the value of the entire land." If the situation or physical condition of the land can make this difference, I think it is equally true that where the strip in question has legal restrictions placed upon it, which do not apply to the rest of land, the real value of the strip will not be a proportionate value of the rate per acre of the rest of the land. No doubt it must be borne in mind that the strip in question in fact forms part of a large land, but the physical infirmities or legal restrictions attaching to the strip in question must be taken into account in determining the value of the strip.

This case must accordingly be decided on the basis that there was a prohibition against erecting buildings on the strip in question. See *Ujagar Lal vs The Secretary of State for India in Council* (L.R. 33 Allahabad 633).

Council for the appellant, however, argued that in spite of the prohibition against building on this strip, it could still be regarded of value as a building site. He pointed out the rule which required that in the case of domestic buildings, factories and workshops, the total area covered by all the buildings should not exceed two-thirds of the total area of the site (rule 2 in the schedule), and argued that the portion which could not be built upon may be allocated as the portion left free of buildings.

I do not think this argument can be accepted. Under rule 2 of the schedule, which deals with the reservation of a proportion of the site, the one-third portion not covered with buildings except of the kind allowed "shall belong exclusively to the domestic building, factory or workshop, and shall be retained as part and parcel thereof." Where street lines have been laid down, there is always the prospect of the portion within the street lines being acquired for the widening of the street, and it would not then be reasonable to expect that the owner will be in a position to retain that portion as part and parcel of his building. Besides I do not think the evidence called in the case supports the contention of appellant's counsel. The Municipal Assessor, who has had a wide experience, gave it as his opinion that the value would be seriously affected, in fact would be reduced to nothing at all. No witness for the defence contested the proposition that the value would be diminished, and I am of opinion that the prospective purchaser would not be willing to give the same value for this strip in question, as he would for land on which by law buildings can be erected. It is reasonable to conclude that the restriction on the user must be reflected in the value.

The defendant, however, led evidence to show that there were many other uses to which the strip of land could be put, other than its use for erecting buildings. I do not think I need deal with the argument that it could be used for the planting of fruits, vegetables and flowers, for the reason that even on this basis, the defendant has not succeeded in showing that he would be entitled to any increase in the compensation to be awarded.

There is, however, one manner of user of the premises which deserves more serious consideration. Mr. Marikar, Licensed Surveyor, called for the defence, produced a sketch plan in which by using the street line sanctioned for Vajira Road, twenty cottages could be erected on the land immediately adjacent to the strip in question. This witness contended that the strip in question could be utilized for the purpose of providing courtyards in front of the cottages, until the time of acquisition by the Council. He said that the cottages could each be rented with the compounds for Rs. 50/– to Rs. 70/– per month, and that if the compounds were acquired, the rent would be diminished by Rs. 7/50 for each cottage. Working on this potential rent of Rs. 7/50 per month in respect of each cottage, or Rs. 150/– per month for the whole strip, he arrived at the figures of Rs. 19,237/50 as being the value of the strip in question as bare land.

The Municipal Assessor, who was cross-examined on this point, denied that the cottages shown by Mr. Marikar, could command the rent of Rs. 50/– to Rs. 70/– a month, and gave it as his opinion, that not more than Rs. 15/– to Rs. 20/– each could be obtained for them per month. He added that people who occupy that type of house do not worry about a courtyard, and stated that the removal of the courtyard would result not in a depreciation, but in an appreciation of the rent. I am unable to follow this last opinion, and the Municipal Assessor has not fortified his opinion by giving reasons or providing instances. I think, it is more reasonable to accept the opinion of Mr. Marikar, that a tenant will pay an enhanced rent for a cottage with a little courtyard in front, rather than for one

which abuts directly on the street. But the question of value has still to be determined. In view of the unfavourable opinion formed by the District Judge of Mr. Marikar's evidence, I am reluctant to accept his estimated rent of Rs. 50/– to Rs. 70/– for the buildings with courtyards, and his estimate of the diminution in rent of Rs. 7/50 for each cottage when the courtyards are removed. At the same time I am not able to accept the opinion of the Municipal Assessor, that the removal of the courtyards will not result in a depreciation of the rent and in fact will bring about an appreciation of the rent. I do not think there is anything in the evidence, which can enable me to accept that opinion. The evidence is not very satisfactory as to the actual amount of depreciation in the rent, by the removal of the courtyards. For the purpose of this case, however, I do not think any useful purpose will be served by sending the case back for the recording of further evidence on the point for in my opinion it will be safe to fix the figure of Rs. 4/– as the amount of depreciation in the case of each cottage, caused by the removal of the courtyard. This would mean an annual income of Rs. 48/– per cottage, or Rs. 960/– in respect of all the cottages. From this, accepting Mr. Marikar's basis, a quarter, *i.e.* Rs. 240/–, must be deducted in respect of rates and repairs, leaving a balance of Rs. 720/–. Mr. Marikar capitalized this sum at 15 years' purchase. I do not find in this case any evidence which tends to show that Mr. Marikar is wrong. Accepting that basis, the value of the strip to the prospective purchaser would be Rs. 10,000/–. It is obvious that the defendant on this basis cannot claim for the loss of income from the stalls or for the buildings and trees on the strip. But the item of Rs. 6,800/– for the boundary wall which could have been utilized under the scheme must be added, bringing the grand total to Rs. 17,600/–. Adding 10% for compulsory purchase, the total value would be Rs. 19,360/–. I think the defendant is entitled to receive this amount. I enter judgment for that amount.

The appellant is entitled to the costs of this appeal. As regards costs in the District Court, the appellant had succeeded in obtaining a sum appreciably in excess of that awarded by the Chairman. At the same time, the appellant claimed in his answer a sum of Rs. 51,788/50. which is an extravagant claim, and cannot be supported on any basis spoken to in this case. In the circumstances the appellant will be entitled to receive 1/3 of his taxed costs in the District Court.

Set aside.

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

WANIGASEKERE ET AL vs LOUISZ ET AL

S. C. No. 369 *and* 110—*D. C. Matara No.* 11892.
Argued on 15th October, 1942.
Decided on 23rd October, 1942.

Dies non—*Service of notice of security for costs of appeal on public holiday—Is it valid—Holidays Ordinance* (*Chapter* 135)—*Section* 4—*Civil Procedure Code, section* 365.

Minor—Next friend—Ex parte *application for appointment of—Failure to file copy of plaint in support or to name defendants—Formal order allowing application—Subsequent acceptance of plaint by the judge—Is such defect fatal—Attainment of majority by minor when case partly heard—Motion to proceed in minor's own name allowed—Civil Procedure Code, sections* 486 *and* 487.

Held : (i) That a notice of security for costs of appeal served on a public holiday other than a Sunday, Good Friday or Christmas day is valid.

(ii) That an irregularity in procedure in the appointment of a next friend is not necessarily fatal to the proceedings.

(iii) That where a minor-plaintiff, who attains majority during the pendency of the action, is allowed by court to proceed with the action in his own name, any irregularity in the appointment of his next friend must be taken to have been cured.

Disapproved of : *Georgina vs Ensohamy* (7 N.L.R. 129)
Appa Cutty vs Aysa Umma (9 S.C.C. 121)

Approved : *Kulantavelupillai vs Marikar* (20 N.L.R. 471)

H. V. Perera, K.C., (with him *N. E. Weerasooriya, K.C.*, and *F. C. W. Van Geyzel*), for the plaintiffs-appellants.

L. A. Rajapakse, for the defendants-respondents.

HOWARD, C.J.

This is an appeal by the plaintiffs from a judgment of the District Judge of Matara dismissing the plaintiffs' action with costs. A preliminary objection to the hearing of the appeal has been taken by Mr. Rajapakse on behalf of the respondents on the ground that service of notice of security on the third defendant was not made in time. It appears that such notice was served personally on the proctor of the third defendant—Mr. C. A. Solomons—on May 12th 1941. It is conceded that service on the third defendant's proctor would be good if the latter was given notice forthwith on the petition of appeal being received by the District Court. It is maintained, however, that the service of notice of security was not made forthwith inasmuch as May 12th 1941, was a public holiday and service was therefore invalid. Subsequent service on the third defendant and Mr. Solomons, made not personally, but by being affixed to the front doors of their respective houses, was not good inasmuch as it was not made "forthwith."

In contending that service on a public holiday was invalid, Mr. Rajapakse relies on section 4 of the Holidays Ordinance (Chapter 135). This section is worded as follows :

"The several days mentioned in the second schedule (in this Ordinance referred to as 'public holidays') shall, in addition to Sundays, be *dies non*, and shall be kept (except as hereinafter provided) as holidays in Ceylon."

The 12th May, 1941, was the full moon day of the Sinhalese month Wesak and therefore a Public Holiday. The only question that arises whether the classification of May 12th 1941, as a Public Holiday, renders service on that day invalid. The phraseology of section 365 of the Civil Procedure Code (Chapter 86) suggests that service between the specified hours on any day except on Sunday, Good Friday or Christmas Day would be valid. This provision is worded as follows :

"Process in civil cases, whether at the suit of the Crown or individuals shall not be served or executed between the period of sunset and sunrise, nor on a Sunday, Good Friday, or Christmas Day, nor on any minister of religion while performing his functions in any place of public worship, nor upon any individual of any congregation during the performance of public worship at any such place."

Although the provision would seem to imply that service on a Public Holiday other than those specified therein would be valid, this court held in *Georgina vs Ensohamy** that, although section 365 of the Civil Procedure Code mentions only Sunday, Good Friday and Christmas Day, as days on which process in civil cases shall not be served or executed, its effect is not to render valid the execution of civil process on other public holidays declared *dies non* by section 4 of the Ordinance No. 4 of 1886. A sale in execution held by the Fiscal on a public holiday is bad. In coming to the conclusion, Wendt. J., following a decision of Clarence, J. in *Appa Cutty vs Aysa Umma*†, held that, although the matter might perhaps have been made clearer, the intention of the legislature must have been that the scheduled days should be days not available for service or execution of civil process, under section 30 of the Ordinance No. 4 of 1867. This section corresponded to section 365 of the Civil Procedure Code. In *Appa Cutty vs Aysa Umma* (*supra*) it was held that a valid arrest for execution against the person could not be made on a public holiday, that is to say, a day scheduled in the Holidays Ordinance. The decisions in the two cases on which counsel for the respondent relied are, however, in conflict with the law as formulated by Bertram, C.J. and De Sampayo, J. in *Kulantavelupillai vs Marikar*‡. In that case it was held that a judge may accept a plaint in a civil case in Chambers at his residence. This act was not rendered invalid by being performed on a Sunday. In the course of his judgment, Bertram, C.J. considered the effect of the declaration in the following passage :

> "The effect, therefore, in my opinion, of the declaration of a day as a public holiday and *dies non* by Ordinance No. 4 of 1886 is twofold. In the first place, it excuses judicial officers and their subordinate ministerial officers from the necessity of attending court, or of performing any judicial or ministerial acts, on that day ; in the second place, it protects any members of the public from being forced to attend court, or to attend any judicial proceeding held elsewhere than in court, on that day. It does not, in my opinion, affect any judicial act or proceeding which may be validly done or taken in the absence of a party, and which, consequently, does not involve his personal attendance. Further, it does not preclude a judicial officer, or any of his ministerial subordinates, from waiving his privileges if he so decides, and from doing any act or taking part in any judicial proceeding on a day declared to be a holiday. There is nothing either in the Ordinance or in the principles laid down by Voet, which declares null and void any judicial act which a judicial officer voluntarily elects to do, and which does not involve the compulsory attendance before him of any party affected."

The conclusions of the learned Chief Justice were based on the proposition that the question must be considered from the point of view of Roman-Dutch law. In this connexion, I might mention that the expression *dies non* is foreign to English law. Bertram, C.J. then proceeds to discuss the division of holidays by Voet into

* 7 N.L.R. 129 † 9 S.C.C. 121 ‡ 20 N.L.R. 471

two classes, *feriae divinae* and *feriae humanae* and arrives at the conclusion that the days mentioned in the schedule to the Holidays Ordinance must be all alike considered as holidays of human institution or *feriae humanae*, with regard to this class of holiday, the principle governing them was that no one shall be compelled to take part in litigation against his will. Voet does not declare that any judicial act done upon a holiday of human institution is *ipso facto* void. What he does say is that any judicial act by which it is sought to compel anyone to take part in litigation on such a holiday against his will is void. The service of a writ upon a person cannot be said to be compelling that person to take part in litigation. It is true that the passage cited by me from the judgment of Bertram, C.J. was *obiter*, but I am satisfied that it correctly formulates the significance that must be attached to the expression *dies non* and it is to be preferred to the decisions in *Appa Cutty vs Aysa Umma* (*supra*) and *Georgina vs Ensohamy* (*supra*), which are based on speculations as to the intentions of the legislature and contrary to the plain meaning of the phraseology employed in section 365 of the Civil Procedure Code. In these circumstances, the preliminary objection is overruled.

With regard to the appeal, the learned District Judge has found in favour of the plaintiffs except as to issue 6. With regard to this issue he found that the plaintiff's appointment as next friend of the minor, that is to say the third plaintiff, was bad in law, inasmuch as when application was made by the first and second plaintiffs for the appointment of the first plaintiff as next friend of the third plaintiff, no copy of the plaint was filed in support. In coming to this conclusion the learned District Judge relied on the case of *Fernando vs Fernando** In that case an application was made for the appointment of a next friend to institute an action on behalf of minors against the respondent. The latter resisted the application on the ground that administration of the estate should first be taken out. The court, constituted by Burnside, C.J. and Withers, J. held that it is contrary to practice to prosecute a claim on behalf of minors unless the libel itself is before the court in order that the court could exercise its own judgment as to whether it was to the interest of the minors that the action should be brought. The decision in *Fernando vs Fernando* (*supra*) seems to have no relevance to the facts of the present case. Formal order on the application for the appointment of the first plaintiff as next friend over the third plaintiff was made on June 21st 1937. It is true the application was made *ex parte* and was unaccompanied by a copy of the plaint. On June 25th 1937, however, the same judge accepted the plaint. It must be presumed that by such acceptance he deemed that the action was being instituted in the interest of the minor. A further objection relating to the validity of the appointment of the next friend was taken at the trial and in this court on the ground that the defendants were not named in the application nor the cause of action as against them set out therein.

It would appear that the respondents did not make objection to the acceptance of the plaint on the ground of any irregularity in the appointment of the next friend. If such an objection had been made at the time, it would have been the duty of the judge to have suspended the proceedings to give the plaintiffs an opportunity to rectify such irregularity, *vide Sinnapillai vs Sinnatangam*† Such irregularity would not be a ground for dismissal of the action. The commentary in Chitaley on Order 32, rule 2 of the Indian Civil Procedure Code, which provision is similar to section 478 of our Code, indicates that the Indian courts have adopted the same view; in this connexion, the following passage in Volume 3 of Chitaley (2nd Edition) of page 2297 is also in point:

> "A defect or irregularity in procedure in the appointment of a *guardian ad litem* is also only an irregularity and will not be a ground for setting aside the decree unless it had the effect of causing prejudice to the minor. In *Walian vs Banke Behari*‡ their Lordships of the Judicial Committee, after impressing upon the courts in India the importance of following strictly the rules laid down by the Code, proceeded to observe at page 1031: 'But it is quite another thing to say that a defect in following the rules is necessarily fatal to the proceedings'."

There is also a further point that is in my opinion fatal to the respondent's contention. Any irregularity in the appointment of the next friend was in respect of the omission to take certain steps to safeguard the interests of the minor. By virtue of section 486 of the Civil Procedure Code the minor could, on coming of age, elect whether he will proceed with the action. On February 12th whilst the action was partly heard, the minor, that is to say the third plaintiff, moved that he be added as third plaintiff and be allowed to proceed with the case in his own name. This motion was allowed and the caption amended as prescribed by section 487 of the Civil Procedure Code. Such action on the part of the minor must be taken to have cured any irregularity in the appointment of the next friend. For the reasons I have given I am of opinion that issue 6 should have been answered in favour of the plaintiffs. Counsel for

* 2 C.L.Rep. 82 † 2 C.W.R. 73 ‡ I L.R. 30 Cal. 1021

the respondents has also contended that the findings of the learned judge on the other issues should have been answered in favour of the respondents. There is no substance in this contention.

The appeal must be allowed. The order of the District Court is set aside and judgment entered for the plaintiffs as claimed, together with costs in this court and the District Court.

Appeal allowed.

Present: MOSELEY, A.C.J. & JAYATILEKE, J.

COMMISSIONER OF INCOME TAX vs BONAR & CO.

S. C. No. 108-*S*—*D. C.* (*Inty.*) *Income Tax.*
Argued on 25th and 26th February and 5th March, 1943.
Decided on 8th April, 1943.

Excess Profits Duty Ordinance No. 38 *of* 1941—*Section* 6 (3) *proviso—Employee of a firm starting a new business of his own in partnership with another—Can the employee claim that the salary in his pre-war employment is his pre-war standard of profits—Circumstances in which proviso to section* 6 (3) *will apply.*

Held : That the proviso to section 6 (3) of the Excess Profits Duty Ordinance applies only to a case in which there is complete identity between the personnel forming the old and the new businesses.

Cases referred to : *Emelie Ltd. vs Commissioner of Inland Revenue* (12 Reports of Tax Cases 73)

H. V. Perera, K.C., with *E. F. N. Gratiaen*, for the appellant.
H. H. Basnayake, Crown Counsel, for the Commissioner of Income Tax.

MOSELEY, A.C.J.

This is an appeal by way of case stated for the opinion of this court as provided by section 74 of the Income Tax Ordinance (Chapter 188) the provisions of which have been made applicable by section 13 of the Excess Profits Duty Ordinance (No. 38 of 1941), to an appeal against an assessment of excess profits duty under the latter Ordinance.

The duty is imposed by section 2 of the Ordinance upon the amount by which the profits arising from any business to which the Ordinance applies exceed, by more than three thousand rupees, the pre-war standard of profits. Section 6 (1) sets out the various formulae by which the pre-war standard of profits is determined, according to whether the business has been in existence for a period of three years or more, for a period less than three years but more than two years, or for a period less than two years but not less than one year. Section 6 (2) read with 6 (4) provides that when the pre-war standard of profits is less than ten per centum of the capital of the business (it is unnecessary to particularize further on this point) the pre-war standard of profits shall be taken to be the said percentage. Section 6 (3) provides for the case where there has not been one pre-war trade year, and since the decision of the question before us hinges upon the construction of the proviso thereto, it is convenient to set out the sub-section *in extenso* :

> "Where there has not been one pre-war trade year, the pre-war standard of profits shall be taken to be the percentage standard.
>
> Provided that where the business is an agency or business of a nature involving capital of a comparatively small amount, the pre-war standard of profits may, if the taxpayer so elects, be computed by reference to the profits arising from any trade, business, office, employment or profession of any sort, whether liable to excess profits duty or not, carried on by him before his new business commenced as if it was the same business ; but only to the extent to which the income from the former trade, business, office, employment or profession has been diminished."

Section 6 (5) (*a*) provides for an artificial pre-war standard of profits of four thousand rupees, in the case of a business of which the pre-war standard of profits as determined under the preceding provisions is less than four thousand rupees.

The appellants are in partnership and carry on the business of Engineers and Contractors. The partnership consists of two members *viz.* Mr. James Bonar and Mr. Harold Nightingale. Prior to their entry into partnership Mr. Bonar was employed by Messrs. Walker, Sons & Co., Ltd., while Mr. Nightingale was, and still is, a consulting engineer. The partnership commenced business on 1st June, 1939, and it is common ground that Mr. Bonar is the only working partner.

It will be observed that there had not been, as far as the partnership is concerned, one pre-war

trade year. The capital employed in the business is admittedly very small so that, the Assessor, to the advantage of the partnership, adopting the minimum provided for by section 6 (5) (*a*) assessed the pre-war profits at Rs. 4,000/–. The appellants, however, sought to bring their case under the proviso to sub-section (3), on the ground that each of the partners in the new business is a " taxpayer " for the purposes of the Ordinance and that the diminishment of the income from the former trade, business, office, employment or profession of each or either of them is a factor to be taken into account in computing the pre-war standard of profits of the business.

This view was rejected successively by the Commissioner and by the Board of Review to whom the partnership appealed. The Board before dismissing the appeal had considered the case of Mills from *Emelie Ltd. vs. Commissioners of Inland Revenue* (12 Reports of Tax Cases 73) which is not directly in point since in that case it was sought by the members of a new business to set up, as the pre-war standard of profits, the profits of a defunct business of which they had been employees. In the present case the appellants do not seek to take advantage of the pre-war profits made by Messrs. Walker, Sons & Co., Ltd. but only of the income drawn from the company by Mr. Bonar. This distinction should be borne in mind in considering the following observation of Rowlatt, J. at page 80 :

> " The rule (the counterpart of the proviso to section 6 (3)) means that, where a man leaves a business of his own to take up another business, also his own, then you may look at the amount which he has sacrificed by deserting the first business against the profit which he has made by setting up the new business."

If those words stood alone and full value were given to each word, disregarding the fact that they were uttered in a context which treated mainly of the profits of a business where the man referred to was merely an employee, there would be strong support for the position taken up by the successive authorities who considered the present case. But before giving utterance to those words Rowlatt, J. had said this :

> " It is said that the appellant company carried on trade before the new one. The appellant company only came into existence for the purposes of this new shop and, therefore, strictly, that certainly could not have been the case."

This remark taken with that previously quoted would seem to indicate that, irrespective of the actual question then in issue, the learned judge's view was that in order that the rule should be applicable the personnel forming the new business must be identical with that carrying on the former business. This was the attitude taken up by counsel for the Commissioner. The design of the Ordinance, he contended, is to impose a tax upon *businesses*, and the " taxpayer " referred to in the proviso to section 6 (3), as well as in section 2 (1) and section 6 (1) is the *business*. Counsel for the appellants preferred to regard the term as a figure of speech on the footing that, while the trade or business is the unit of assessment, the burden of payment may ultimately fall on either of the individual partners. This argument does not appeal very strongly, since it would normally only be upon failure to extract the tax from the business that recourse would be had to an individual member. The analogy which he drew between this tax on businesses and the more familiar taxes upon motor cars and dogs will not bear close examination although the unit of assessment in these cases is respectively the business, the motor car and the dog.

Mr. Perera also, and I think that this was his main argument, invoked the aid of the provision of the Interpretation Ordinance to the effect that words in the singular number include the plural, and contended that what the proviso to section 6 (3) means is that the pre-war standard of profits may, at the option of the taxpayer or taxpayers, as the case may be, be computed by reference to the profits arising from any trade, business, office, employment or profession carried on by him or them, or either of them, before his or their new business commenced.

It seems to me that this construction carries too far the meaning of that provision of the Interpretation Ordinance and that there is no justification for importing into the proviso the words " or either of them," although without them the paraphrase is unobjectionable, since the words " carried on by him or them," could only refer respectively to " taxpayer or taxpayers." It seems to me that the Excess Profits Duty Ordinance not only intended that there should be complete identity between the personnel forming the old and new businesses but has made that intention clear.

We were presented with a picture of the hardship that would fall upon two partners, who had been in separate businesses before, the sum of whose individual incomes was greater than the income of the subsequently formed partnership, and who would nevertheless be liable to pay this duty if the principle adopted here by the successive authorities is affirmed. That is a matter with which we cannot concern ourselves. Indeed, it may be that the legislature,

out of consideration for such a case, or similar cases which may result in hardships or anomalies, has thought fit to create the artificial minimum standard of pre-war profits of four thousand rupees.

The question which we are invited in the first place to decide is " whether, in terms of the proviso to section 6 (3) of the Excess Profits Duty Ordinance No. 38 of 1941, the appellant partnership (whose business is of a nature involving capital of a comparatively small amount) is entitled to elect that the pre-war standard of profits of the appellant's business be computed by reference to the profits arising from ' the trade, business, office, employment or profession' carried on by Mr. Bonar, the only working partner in the appellant partnership, before the partnership business commenced."

The answer to that question is in the negative. That being so, the supplementary questions do not arise. I would dismiss the appeal with costs.

JAYATILEKE, J.

I agree. *Appeal dismissed.*

Present: SOERTSZ, J. & HEARNE, J.

THE KING vs SUNDARAM & ANOTHER

S. C. Nos. 79-80—*D. C. (Crim.) Jaffna No.* 4230.
Argued on 3rd, 9th & 10th February, 1943.
Decided on 19th February, 1943.

Criminal Procedure—Indictment—Joinder of charges—Conspiracy to commit several offences—Can it be said there are several conspiracies—Offences extending over a period of twelve months—Several persons conspiring to commit several offences—Can they be charged together—Same transaction—Criminal Procedure Code—Sections 178, 179 *and* 180 (1) *of the Criminal Procedure Code.*

Held : (i) That agreement is the gist of the offence of conspiracy and one agreement to commit cheating (or forgery) does not become three agreements to commit cheating (or forgery) because three offences of cheating (or forgery) are committed in pursuance of the agreement.

(ii) That if two persons conspire to commit falsification of accounts and criminal breach of trust, they are guilty of two conspiracies.

(iii) That where several persons conspire to commit several offences all of which are so connected with each other as to form one transaction all the offences can be joined in one charge as being one conspiracy to commit the acts alleged.

Per HEARNE, J. : " Under the law in India the sections which correspond with sections 179 and 180 (1) of our law are ' mutually exclusive," but this is not the case in Ceylon by reason of the additional words ' which said sections may be applied severally or in combination ' which appear in section 178."

H. V. Perera, K.C., with *H. W. Thambiah* and *V. Arulambalam*, for the accused-appellants.

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

HEARNE, J.

The appellants, the 1st and 2nd accused, and the 3rd accused, who was acquitted, were tried in the District Court of Jaffna on an indictment which consisted of three charges :—

(1) That between May, 1936 and September, 1937, at Karanavai and other places in the district of Jaffna you did act together with a common purpose for committing one or more of the following offences, to wit, (*a*) cheating the Sun Life Assurance Co. of Canada, Colombo, by inducing the said company to deliver to you certain policies of life assurance in favour of one T. Chellappah (since deceased) presented by the 3rd accused, (*b*) cheating the said company by dishonestly inducing the said company to deliver to you a sum of Rs. 9,000/- falsely alleged to have been due on the said policies, (*c*) forgery of applications for the issue of the said policies of assurance on the life of the said T. Chellappah personated by the 3rd accused, and thereby committed the offence of conspiracy in consequence of which were committed the offences of cheating, attempting to cheat and forgery or any of them punishable under sections 113, 102, 402 and 457 of the Penal Code.

(2) That at the times and places aforesaid and in the course of the transaction set out in count (1) you did deceive the Sun Life Assurance Co. of Canada, by falsely representing to the said Company that the applicant for assurance in certain policies of Life Assurance was one T.

Chellappah (since deceased) and that 3rd accused was the said T. Chellappah, whereas in fact the applicant was not the said T. Chellappah nor was 3rd accused the said T. Chellappah, and thereby dishonestly induce the said company to accept the applications for assurance and to issue the said policies, to wit, Nos. 3240071 of 24th July, 1936, 3243162 of 12th September, 1936 and 3250422 of 20th May 1937 in favour of T. Chellappah in an aggregate sum of Rs. 9,000/–, which acts the said company would not but for the said deceit have done and which acts were likely to cause damage to the said company in the sum of Rs. 9,000/– or part thereof, and that you have thereby committed an offence punishable under section 403 of the Penal Code.

(3) That at the times and places aforesaid and in the course of the same transaction as aforesaid, you did with intent to commit fraud make a false document, to wit, an application for a policy of life assurance on the life of one T. Chellappah dated the 4th day of May, 1936 and purporting to have been made and signed by one T. Chellappah by whom you knew it was not made or signed and that you did thereby commit forgery, intending that the said false document shall be used for the purpose of cheating the Sun Life Assurance Co. of Canada, Colombo, an offence punishable under section 457 of the Penal Code.

The 1st and 2nd accused were found guilty on the 1st and 2nd charges and the former was also found guilty, on the 3rd, of an offence under section 459 of the Ceylon Penal Code.

The 2nd charge sets out three offences of cheating which, even if they were not committed in the course of the same transaction, would appear from the dates of the policies to have been committed within the space of twelve months. There is non-compliance with section 178 of the Criminal Procedure Code which lays down that for every distinct offence there shall be a separate charge, and distinct offences include offences committed on different occasions even though they may fall under the same section. This non-compliance, however, has reference merely to the " frame of the charge " and not to the " mode of trial." It is not governed by the decision of the Privy Council in *Subrahmania Ayyer's Case* (28 Ind. App. 257 (P.C.)) and is a curable irregularity. This does not mean that an irregularity of this kind should not be avoided; but, conceding that there was no more than an irregularity in the charge, counsel for the appellants did not press any objection to the 2nd charge.

The 3rd charge sets out one offence of forgery. It is clear that this offence was alleged to have been committed in the course of the same transaction as the offence of cheating which resulted in the issue of one of the Assurance Policies referred to in the 2nd charge. Under the law in India the sections which correspond with sections 179 and 180 (1) of our law are " mutually exclusive," but this is not the case in Ceylon by reason of the additional words " which said sections may be applied severally or in combination " which appear in section 178. It follows, therefore, that the offence contained in the 2nd charge may be tried with the offence of forgery alleged in the 3rd. This leaves the 1st charge alone for consideration.

From a perusal of the second charge it appears, counsel for the appellants argued, that on three separate occasions according to the case for the prosecution the Assurance Company was deceived and thereby dishonestly induced to issue three separate policies. Each of these policies which were in the name of Chellappah required in the first place of forged application in his name. The ultimate object of the appellants according to the prosecution was to commit the offence of cheating of Rs. 3,000/– in respect of each of the three policies. When, therefore, the indictment charged the appellants (*a*) with conspiracy to commit offences of cheating of one kind, (*b*) with conspiracy to commit offences of cheating of another kind and (*c*) with conspiracy to commit the offences of forgery they were charged with three conspiracies to commit cheating in (*a*), three conspiracies to commit cheating in (*b*) and three conspiracies to commit forgery in (*c*). With this I do not agree. The gist of the offence of conspiracy is agreement and one agreement to commit cheating (of forgery) does not become three agreements to commit cheating (or forgery) because, as it transpires, three offences of cheating (or forgery) are committed in pursuance of the agreement. If there is an agreement to commit one offence of cheating, or three, or as many as are found to be possible, it is one conspiracy.

The second argument of counsel is this: Under section 113 B of the Penal Code if two persons conspire to commit an offence, say falsification of accounts they are punishable as abettors of that offence; if they conspire to commit falsification and criminal breach of trust they are punishable as abettors of two distinct offences, *viz.* falsification and criminal breach of trust. It follows from this that in the latter case they are guilty of two conspiracies, one to commit falsification and one to commit criminal breach of trust. With this view of our law I am in agreement.

Applying this argument to the first charge counsel argued that it contained, assuming we are against him in regard to his first submission with which I have dealt, three charges of conspiracy — (1) to cheat in a particular way as in (*a*), (2) to cheat in another way as in (*b*) and (3) to commit the offence of forgery as in (*c*). These conspiracies, he went on, not being within the space of

twelve months, as stated in the charge, were not triable together unless they were committed in the same transaction *and* the charge alleged that they were.

It is claimed that A.I.R. (1938) P.C. 130 is an authority for the latter. I do not see that it is. 1 Bal. Notes of Cases 35 appears to be an authority to the contrary. 30 Bombay 49 (54) certainly is.

Were the conspiracies in the same transaction? if there was a conspiracy, to put the matter succinctly, to obtain one policy for Rs. 3,000/– and, the object having been attained except the actual receipt of the sum assured which was only payable on the death of Chellappah, the conspiracy, so to speak, spent itself, or more correctly was in abeyance till Chellappah died, whereupon there was another conspiracy, the whole process was begun again and, on its termination in the issue of a second policy or its suspension pending Chellappah's death, there was still another conspiracy to carry out the same process, the criminal activities of the appellants would have fallen into three water tight compartments corresponding with the three policies, each of them being independent of, and unrelated to, the other two. But it is not in this unrealistic way that the prosecution has looked at the matter or is obliged to look at it. In framing the indictment the draftsman, on the material available at the time, was justified in taking the view, as in the result he was also justified, that if there were three conspiracies (to cheat, again to cheat and to commit forgery) these conspiracies came into being as the starting point of one transaction of carefully planned fraud of the Assurance Company and co-existed throughout such transaction. The transaction did not come to an end when as the result of one offence of forgery, or, as was found, one offence of uttering a forged document, and one offence of cheating, the first policy was issued by the Company. That would be a confusion of transactions with offences. "The term transaction is not synonymous with the term offence. It cannot be said to be complete as soon as the offence is completed. It is clear that so long as the conspiracy continues, the transaction which began with the forming of the common intention continues." 42 Cal. 1153. There was in this case, in my opinion, one transaction and one only. It continued as long as the three conspiracies continued.

And what were these conspiracies? The conspiracy to commit forgery was to facilitate the commission of the offences of cheating (in respect of policies) which was the criminal object of the second conspiracy — I am now speaking chronologically — while the criminal object of the third conspiracy (cheating in respect of the same assured) could only be achieved if the offences, which formed the criminal object of the second conspiracy, were successfully committed and remained undetected. In fact these conspiracies were so inextricably bound up with each other as to form one conspiracy.

Mr. Weerasooriya for the Crown claimed that this was the view that was taken and that it was intended to charge the appellants with one conspiracy. I think that, following certain Indian models, this is what could have been done. It could have been made clear that one conspiracy was charged to commit offences of cheating *by means of* acts which themselves amounted to offences. But this was not done. In the first charge three conspiracies were clearly laid.

In this way there was non-compliance with section 178 of the Criminal Procedure Code involving, as I think, no prejudice to the appellants, but there was no misjoinder of charges. The appellants were properly charged with three conspiracies in one transaction and with the offence committed in pursuance of those conspiracies.

The evidence against the appellants was overwhelming and their appeals are dismissed.

SOERTSZ, J.

I agree. *Appeals dismissed.*

Present: De Kretser, J. & Wijeyewardene, J.

THURAISAMY vs THAIALPAGAR

S. C. No. 231—*D. C. Point Pedro No.* 1300/*P.*
Argued on 6th April, 1943.
Decided on 8th April, 1943.

Master and Servant—School teacher—Termination of service—Quantum *of damages for breach of contract.*

The plaintiff an uncertificated teacher in a vernacular school sued the manager for wrongful dismissal as his services had been discontinued. It was proved that the plaintiff's services were terminated on instructions from the Director of Education as the teacher in whose place the plaintiff had been employed had returned after undergoing a course of training.

Held : (i) That the plea of carrying out the instructions of the Director of Education cannot prevail against the plaintiff's claim for damages for breach of contract.

(ii) That the plaintiff is not entitled to more than two months' salary by way of damages.

L. A. Rajapakse with *V. F. Gunaratne*, for the defendant-appellant.
No appearance for the plaintiff-respondent.

Wijeyewardene, J.

The plaintiff, an uncertificated teacher, filed this action against the defendant, the manager of a school for the recovery of Rs. 2,000/– as damages sustained by him in consequence of the defendant discontinuing his services without notice and without reasonable cause.

The District Judge held that the discontinuance was wrongful and awarded the plaintiff Rs. 620/– and costs in that class. He assessed the damages on the following basis :—

1.	For six months' salary in lieu of notice	Rs.	120/00
2.	For opportunity lost by plaintiff	,,	300/00
3.	For the postponement of plaintiff's right to get increments in his salary caused by his dismissal	,,	200/00

The evidence shows clearly that the defendant was not actuated by any improper motive in discontinuing the plaintiff's services. The defendant was compelled to act as he did owing to the situation created by the Department of Education issuing to him somewhat inconsistent and irreconcilable instructions with regard to the appointment of the plaintiff and the subsequent discontinuance of his services. The defendant had to carry out the orders issued to him by the Department in 1940, as, otherwise, his school ran the risk of being deprived of the yearly grant from Government. The defendant made every effort to retain the services of the plaintiff and the plaintiff was aware of it. But these facts do not avail the defendant in resisting the plaintiff's claim. He has committed a breach of contract and he is answerable in damages. I shall, therefore, proceed to consider the question of damages.

The plaintiff was employed about October, 1936 on a salary of Rs. 35/– a month as an uncertificated teacher. He was willing to be employed for three years as he knew the defendant was taking him in place of another teacher, one Mr. Samundi, who had gone on study leave for a three years' course at a training school for teachers. As the Department of Education, however, was not prepared to approve of the appointment for a definite period of three years, the plaintiff was employed as a "permanent" member of the staff. After some time the plaintiff's salary was reduced to Rs. 20/– a month in accordance with the Departmental Regulations as the plaintiff continued to remain an uncertificated teacher. When Mr. Samundi concluded his three years' course, the Department of Education insisted on the defendant re-employing him at the school as from April, 21st 1940, and the defendant then gave notice to the plaintiff on March, 29th 1940 determining the plaintiff's employment as from April 21st 1940. Under the Roman-Dutch law which is applicable to the present case, an employee is entitled to a reasonable notice and what is reasonable notice will depend on the circumstances of each particular case (Nathan Vol. 2 page 902). Several decisions of this court were cited to us on the question of reasonable notice. But where a decision depends upon facts, a variation in facts deprives the alleged precedent of value, and it is useful only as an illustration of the way in which other judges considered a case of this kind. In the present case there is evidence to show that the plaintiff was willing to be employed as a teacher on an estate school or as a minor clerk in the Irrigation Department. I think that in

the circumstances of this case I am treating the plaintiff generously when I hold that he should have been given two months' notice. The plaintiff would, therefore be entitled to claim Rs. 40/- as two months' salary in lieu of notice.

I find it difficult to understand what was meant exactly by the District Judge when he awarded a sum of Rs. 300/- as damages for "the opportunity lost by the plaintiff." It is possible that the judge was thinking of the following piece of evidence given by the plaintiff:—

> "After teaching three years in a school, an uncertificated teacher is expected to go on study leave and qualify himself as a trained teacher at a training centre. As a result of my discontinuance, I have lost the chance of training myself. I have not lost the right to get myself trained. I have lost the opportunity of getting employment after being trained. A teacher going into training resumes his course in the school after the period of training is over."

Now, according to the plaintiff's evidence the only examination the plaintiff has passed is the Junior School Certificate examination. During the period of his employment under the defendant he sat for the Training College Entrance Examination but failed to secure a pass. He was therefore not qualified either to enter the Training College or a Training School, as under Regulation 25 of the Departmental Regulations (D8) only those who had a Senior School Certificate are eligible for admission to a training school. Apart from this, I do not think it right to take into consideration this so-called "lost opportunity" after the court had reached a decision on the question of reasonable notice. If the plaintiff had been given adequate notice, he could not have claimed damages on the ground of "lost opportunity." The period of notice is so calculated as to ensure the employee getting a reasonable opportunity of securing another employment. If the plaintiff found an employment as a teacher after getting reasonable notice, then there could have been no question of compensation for "lost opportunity," as he would have been then in a position to return to his new school after a course of training at a training school. If he failed to get a new employment after getting reasonable notice he could not have made a claim for damages for "lost opportunity." It would have meant that he was permitted to make a claim for damages as he failed to secure a new employment though he had been given notice. The position becomes clear when it is realized that the period of reasonable notice is calculated after taking all the relevant facts into consideration and that the period so fixed is sufficient in the view of the judge for the employee to get a suitable employment elsewhere.

The District Judge has awarded Rs. 200/- as damages on the third ground given by him. He has erred in doing so as the plaintiff being an uncertificated teacher was not entitled to any increments. If the District Judge had in view the increments which the plaintiff might get at a future date after the plaintiff had qualified himself for admission at a training school or the Training College and completed his three years' course of training successfully then clearly such increments are too remote to be taken into consideration.

On the above findings the plaintiff is entitled to Rs. 40/- and the costs which he would have got in a contested action in the Court of Requests for the recovery of Rs. 40/-. The defendant is entitled to the excess costs incurred by him in having to contest a claim for Rs. 2 000/- in the District Court. The plaintiff will have to pay the defendant in addition the costs of this appeal.

I set aside the decree of the District Court and order decree to be entered as directed above.

DE KRETSER, J.

I agree.

Decree set aside.

Present: SOERTSZ, S.P.J., WIJEYEWARDENE, J. & JAYATILEKE, J.

SIVASAMY vs RASIAH

S. C. No. 998—*M. C. Batticaloa No.* 5973.
Argued on 16th March, 1943.
Decided on 23rd March, 1943.

Maintenance Ordinance section 2—Is wife possessed of sufficient means entitled to maintenance.

Held : That a wife possessed of means is entitled to claim maintenance from her husband provided he has sufficient means himself.

Cases referred to : *Silva vs Senewiratne* (33 N.L.R. 90) (Over ruled)
Goonewardene vs Abeywickreme (17 N.L.R. 450)
Dean vs Green (8 P.D. 89)
Ukku vs Thambia (Ram 1863-1868 p. 71)
Cadera Umma vs Calendren (Ram 1863-1868 p. 141)

N. Nadarajah, K.C., with *V. K. Kandaswamy* and *M. D. H. Jayawardene*, for the applicant-appellant.

S. Nadesan with *T. K. Curtis* and *C. Chellappah*, for the defendant-respondent.

SOERTSZ, S.P.J.

This is an application made by a wife, under the provisions of the Maintenance Ordinance, for an order against her husband who, she complains, having sufficient means to support her refuses to fulfil that obligation.

The application is opposed by the husband on the ground that his wife has sufficient means of her own for her support and maintenance.

The learned magistrate found, on the evidence before him, that the applicant had resources from which she could contrive to supply her needs, and in view of this finding, he said that the ruling given by Macdonell, C.J. in the case of *Silva vs Senewiratne* (33 N.L.R. 90) left him no alternative but to dismiss the application inasmuch as the contrary view taken by Wood Renton, C.J. in the earlier case of *Goonewardene vs Abeywickreme* (17 N.L.R. 450) was taken *obiter* and had to yield to it.

In the former case, Macdonell, C.J. held that a married woman who is possessed of sufficient means to support herself is, by that fact alone, debarred from claiming maintenance from her husband under the Maintenance Ordinance. In the latter case Wood Renton, C.J. while disposing of the appeal on the ground that the applicant was not possessed of sufficient means to support herself, expressed the opinion, after careful consideration of all the authorities cited in the course of a full argument, that a married woman living apart from her husband, not of choice, and through no fault of hers, is not precluded from claiming maintenance by the fact that she has sufficient means of her own. Unfortunately, this case does not appear to have been cited to Macdonell, C.J. when he was dealing with the case of *Silva vs Senewiratne* (*supra*) and a conflict of views on an important question has thus resulted. Hence this reference to a Divisional Bench.

The first question that arises for consideration is whether, so far as wives are concerned, the Maintenance Ordinance provides a certain measure of relief to *indigent* wives *alone*, and it seems to me that there need be no difficulty in answering that question if we guide ourselves by the plain words of the relevant sections of that Ordinance.

Section 2 says :

> " If any person having sufficient means neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself..... the magistrate may order such person to make a monthly allowance for the maintenance of his wife or such child....."

These words, correctly interpreted, can only mean that while the right of children to maintenance depends on both their inability to maintain themselves and on the possession of sufficient means by the father, the right of the wife to maintenance is conditioned only on the possession of sufficient means by the husband and is not affected by the fact that she has sufficient means of her own. That conclusion emerges all the clearer when we read further down in the section the words of contrast providing for an order of maintenance for " *his* wife and for *such* child." The word "such" is used as an adjunct to the word "child," and not to the word "wife" in order to emphasize the fact that in the case of the child, inability to maintain itself is one of the conditions upon which the father's liability rests.

In the case of *Goonewardene vs Abeywickreme* (*supra*) as well as in this case, counsel for the husband sought to interpret the words "unable to maintain itself" as qualifying both the antecedent words "wife" and "child," and in support of that interpretation, they relied on Form 2 in the schedule of the Ordinance. Wood Renton, C.J. appears to have agreed that in that form "inability to maintain" was applicable to the wife also, but he disposed of the argument with the words of Lord Penzance in *Dean vs Green* (8 P.D. 89) that "it would be quite contrary to the recognized principle upon which Courts of Law have to construe Acts of Parliament to restrain the operation of an enactment by any reference to the words of a mere form given for convenience sake in a schedule." But, for my part, I am unable to agree that in the Form, "inability to maintain" is made applicable to the wife. What, in my opinion, the Form does is to change the neuter "itself" in section 2 into the masculine "himself" and the feminine "herself" to be applied in that way to the case of a male or female child respectively. Be that as it may, the words of the section are clear and they must govern the question. While the word "child," in its equivocation as to sex, makes the word "itself" the appropriate pronoun, to use that pronoun to refer to the antecedent "wife" would be to cast a thoroughly unwarranted aspersion on a perfectly unambiguous sex. The only instance that occurs to me in which such a disparagement was implied is that in which Virgil, regardless of obvious sex, spoke of "*varium et mutabile semper femina.*" But that was poetical licence indulged in to depict a mood of intense disappointment, and we are interpreting the stolid prose of legislators.

I read section 2 of the Ordinance as entitling a wife to claim maintenance in virtue of her wifehood alone and to obtain it by proof that her husband has sufficient means.

Sections 3 and 4 follow and state the only circumstances in which a husband although possessed of sufficient means, may repeal his wife's claim to maintenance. Except in those circumstances, there are no words in the Ordinance that debar a wife from asking for and obtaining maintenance, notwithstanding the fact that she is able to support herself.

But, it is contended that by the implication of section 10 of the Ordinance a wife must satisfy the court that she has no means of her own in order to obtain an order against her husband. I have scrutinized that section, but I cannot find that there is, necessarily, such an implication. Section 10 is as follows :

> "On the application of any *person receiving or* ordered to pay a monthly allowance.....and on *proof of a change in the circumstances of any person for whose benefit* or against whom an order..... has been made....the magistrate may either *cancel* such order or make such alteration in the allowance ordered as he deems fit".

The words on which the implication is contended for are the words I have underlined and, upon them, it is argued that, conceivably, the change of circumstances upon proof of which an order for maintenance *in favour* of a wife can be cancelled is that she has passed from a condition of incapacity to maintain herself to one of such capacity. But, that argument ignores the fact that an order made in favour of a wife may be cancelled upon proof of a change in the circumstances of the husband *against* whom an order has been made. Section 10, although compendiously framed, refers to all the relevant changes in circumstances upon proof of which an order for maintenance may be either cancelled or altered at the instance of either party. The section must, however, be construed not independently, but in the light of the other provisions of the Ordinance.

For these reasons, I am of opinion that, on a correct interpretation of the various provisions of the Ordinance itself, a wife possessed of means is entitled to claim maintenance from her husband provided he has sufficient means himself.

And that is as it should be, for, as observed in the judgment delivered by Creasy, C.J. and Thomson, J. in *Ukku vs Thambia* (Ram 1863-1868 p. 71) :

> "The husband, by the marriage contract, takes upon himself the duty of supporting and maintaining his wife so long as she remains faithful to the marriage vow."

That is the position as stated by such commentators on the Roman-Dutch law as Wessels, Nathan and Maasdorp, and I have not been able to find the source — if such exists—from which Middleton, A.C.J. derived the proposition advanced by him *obiter* that "a claim for maintenance, of course, implies that that claimant has no means of her own," 13 N.L.R. 22. As pointed out by Wood Renton, C.J. in the case already referred to, the only limitation placed upon the right of a wife to maintenance is, as stated by Maasdorp Vol. 1 pp. 30-31, that "maintenance may be withheld, as a matter of judicial discretion, where a wife is provided with ample means, *and the husband is not in a position to contribute to her support.*" That is the position under the Maintenance Ordinance too. The contrary view would lead to the appalling result that a fickle husband having enjoyed the consortium of a wife possessed of means, so long as it

pleased him, may on wearying of it, turn his wife adrift and free himself of all his obligations to her.

The judgment of Macdonell, C.J. in *Silva vs Senewiratne* (*supra*) proceeds upon the view that " the reason for allowing proceedings by a wife against a husband for maintenance is obviously lest the wife become a public charge," and the learned Chief Justice says that that is the *ratio decidendi* in *Cadera Umma vs Calendren* (Ram 18 63-1868 p.141.) But that was a case in which the husband was charged as a vagrant, the alleged vagrancy being based on the ground that he had failed to support his wife, and it was held that he was not liable to be punished as a vagrant when, in point of fact, the wife was, as in that case, supporting herself on money borrowed on the husband's credit. That case differs *toto caelo* from a case such as this which arises under the Maintenance Ordinance which is not concerned with questions of vagrants and vagrancy and has for its avowed purpose the provision of maintenance for wives and children.

For the reasons I have stated, I respectfully agree with the view of Wood Renton, C.J. and I am of opinion that the order made by the magistrate is wrong.

I would, therefore, remit the case to the magistrate so that he may fix such monthly allowance as he thinks fit, having regard to the means of the husband. The applicant is entitled to her costs.

WIJEYEWARDENE,J.
I agree.

JAYATILEKE, J.
I agree.

Appeal allowed.

Present: SOERTSZ, S.P.J.

JAYAKODY vs PAUL SILVA & ANOTHER

S. C. No. 159—*M. C. Negombo No.* 36586.
Argued on 29th March, 1943.
Decided on 21st April, 1943.

Petrol (Control of Supplies) Ordinance No. 52 of 1939—Scope of expression "vendor" in section 11 (b)—Evidence Ordinance section 57—Date on which an Ordinance comes into operation—Can court take judicial notice of such date.

Held : (i) That a court is bound to take judicial notice of the date on which an Ordinance has been brought into operation.

(ii) That the expression " vendor " in section 11 (*b*) of the Petrol (Control of Supplies) Ordinance No. 52 of 1939 includes not only the actual vendor who is in charge of the retail depot but also the person who owns it even though the offence is committed in his absence and without his knowledge.

Cases referred to : *De Zoysa vs Cumarasuriar* (23 C.L.W. 114)
Sivasampu vs Juwan Appu (38 N.L.R. 369)

G. E. Chitty, Crown Counsel, for the complainant-appellant.

H. V. Perera K.C., with *E. F. N. Gratiaen* and *H. W. Jayawardene* for the accused-respondents.

SOERTSZ, S.P.J.

The Attorney-General appeals against the order made in this case acquitting the two accused of a charge that alleged that they " did within the jurisdiction of this court at Negombo between 30.9.42 and 10.11.42 being the vendors in charge of the retail depot No. 2 ..... fail to make entries in respect of sales and delivery of petrol by them in Register in the form set out in the schedule to Ordinance No. 52 of 1939 in contravention of section 11 (*b*).....and had thereby committed an offence punishable under section 16 (1) of Ordinance No. 52 of 1939."

The ground upon which the magistrate based his order of acquittal was that the prosecution had not proved that the Governor had fixed a date for the Ordinance under which the charge was laid to come into operation, as was contemplated by section 4. In reaching the conclusion that such proof was essential the magistrate purported to follow the decision given by this court in the case of *De Zoysa vs Cumarasuriar* (23 C.L.W. 114).

On appeal, counsel for the accused-respondents supported this view of the magistrate and also contended that the order of acquittal was right in regard to both the accused

for the reason that the charge framed against them was bad for multiplicity, and that as far as the first accused was concerned, for the additional reason that he could not be said to be such a vendor as is contemplated by section 11 (*b*) for, admittedly, he was not present at any of the times at which the petrol, in respect of which the defaults were alleged, was sold and delivered.

To deal first with the reason the magistrate gave for acquitting the accused, I fail to see that the decision in the case cited by the magistrate has any application to the facts of this case. In that case, the accused was acquitted on the ground that although the Minister had proclaimed by notification in the Gazette that a partial blackout should be observed in the district concerned, there was no proof that the "competent authority" for that area had notified the public of the Minister's decision as was required by section 3 of Part II of the Lighting Restriction Order of 1940. In the case before me now, the charge is laid *under an Ordinance* enacted by the Governor as an Ordinance to come into operation on the Governor appointing a date for that purpose by proclamation in the Gazette. The moment that proclamation appeared, the Ordinance became law and the charge here is laid under sections 11 (*b*) and 16 of that law.

In virtue of section 57 of the Evidence Ordinance, the court was bound to take judicial notice of that *law* as part of our statute law. Similarly, the court is bound to take notice of "rules having the force of law" but in such cases it was held by a Divisional Bench in *Sivasampu vs Juwan Appu* (38 N.L.R. 369)* that there must at least be some reference in the charge to the relevant Gazette for, in the absence of such a reference, there would not be compliance with section 167 (4) of the Criminal Procedure Code which requires that the charge shall state "the law and section under which the offence said to have been committed is punishable." In the days in which we had no compilation of subsidiary legislation, a reference to the Gazette was the only way in which the accused could be informed of the law under which he is charged. Today, in most cases, that can be done by reference to the chapter and section of the different volumes of Subsidiary Legislation.

For these reasons, I do not agree with the view taken by the magistrate.

In regard to the second point, I do not consider that this is a case in which the accused have been charged in respect of each and every failure to make or cause to be made an entry as required by the Ordinance during the period covered by the terminal dates mentioned in the charge, but rather a case in which the substantial charge is that the accused failed to keep a Register in the manner required by the Ordinance. The dates are stated in the charge to give the accused sufficient particulars as required by section 168 of the Criminal Procedure Code.

So far as the third point is concerned, the 1st accused is clearly within the definition of "vendor" as stated in the Ordinance and I cannot see my way, in view of that definition, to hold as I was asked to do, that the person contemplated by section 11 (*b*) is the *actual vendor* or the person "for the time being in charge of any retail depot." The Statute seems to me to create an absolute liability and to involve in it "the person to whom petrol is sold or delivered by a supplier" (the first accused is that person in this instance), as well as "the person for the time being in charge of any retail depot" (the second accused is that person in this instance). If counsel's contention represents the correct interpretation of section 11 (*b*) it is difficult to understand why the legislature did not say "every person for the time being in charge of a retail depot" instead of saying "every vendor" I was addressed strongly in regard to the mitigating facts present so far as the 1st accused is concerned in order to drive home to me the hardship of his position if he is to be held criminally liable for something done in his absence and without his knowledge But that is a matter for the legislature or for the tribunal dealing with the case when it is considering the sentence.

I set aside the order of acquittal and enter conviction under the sections referred to and send the case back to the magistrate to pass such sentence as he thinks fit.

Order set aside.

Present: SOERTSZ, J., KEUNEMAN, J. & DE KRETSER, J.

BOTEJU vs PERERA

S. C. No. 16—*C. R. Colombo No.* 86506.
Argued on 30th March, 1943.
Decided on 5th April, 1943.

Principal and agent—Broker authorized to negotiate the sale of property—Is broker who finds a willing buyer entitled to his commission regardless of whether the vendor is willing to complete the sale or not, in the absence of express stipulation in that behalf.

Held : That in the absence of an express stipulation in that behalf a broker who is authorized to find a purchaser for any property is not entitled to remuneration unless the transaction is completed by the vendor.

Cases referred to : *Trollope & Sons vs Caplan* (1936–2 All England Reports 842)
Luxor Ltd. vs Cooper (1939–4 All England Reports 41)
Simpson & Co. vs Soysa (4 N.L.R. 90–1909)
Perera vs Soysa (13 N.L.R. 85–1910)
Dissanayake vs Rajapakse (20 N.L.R. 353–1918)
Fernando vs Perera Hamine (21 N.L.R. 79–1919)
Tudawe vs Kippitigale Rubber Estates Co. (30 N.L.R. 389–1921)
Cutter vs Powell
1941–1 All England Reports 33.

H. W. Jayawardene with *V. Wijeytunge*, for the defendant-appellant.
S. Subramaniam with *V. Thillianathan*, for the plaintiff-respondent.

SOERTSZ, J.

The question that has been reserved for our consideration is one that had been discussed here in several earlier cases and our law reports show that a substantially consistent view has been entertained about it. That view appears to be based on certain English cases. But there are other English cases in which a different view has been taken, and the law on the point seemed so unsettled that judges in England repeatedly commented on it. Quite recently, Sir Wilfrid Greene, M.R. in the course of his judgment in *Trollope & Sons vs Caplan* (1936–2 All England Reports 842) said that the case law with regard to this question was not in a very satisfactory condition and that it was desirable that the whole position should be reviewed if opportunity arose, in the House of Lords. Du Parcq, L.J. made a similar comment in the case of *Luxor Ltd. vs Cooper* (1939–4 All England Reports 41). Fortunately that case did the needful when it came to the House of Lords before Viscount Simon, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Romer. Those noble Lords in the speeches they delivered discussed the question in all its aspects, reviewing the old cases bearing on it, and reached a unanimous conclusion. (1941–1 All England Reports 33). That conclusion refutes the view that had obtained in our courts, and as the question appertains to the law of Principal and Agent for which we are under the Law of England, a reconsideration of it has become necessary.

That question in a few words, is whether a principal who has commissioned an agent to find a purchaser for a property of his, at a certain price, promising a remuneration to be paid on the completion of the sale is bound by law on such a purchaser being found to complete the sale or in default to pay the agent the promised remuneration or at least damages on the basis of a *quantum meruit.*

In a long line of cases, this court had answered this question substantially in the affirmative. To name a few of those cases, there are : *Simpson & Co. vs Soysa* (4 N.L.R. 90–1909), *Perera vs Soysa* (13 N.L.R. 85–1910), *Dissanayake vs Rajapakse* (20 N.L.R. 353–1918), *Fernando vs Perera Hamine* (21 N.L.R. 79–1919).

Then there is the case of *Tudawe vs Kippiti gale Rubber Estates Co.* (30 N.L.R. 389–1921) in which Akbar, J. (Lyall-Grant, J. agreeing) reviewed the earlier cases and also many English cases and came to the conclusion that the principle resulting from them was that in order to entitle an agent who has found the desired purchaser to the promised remuneration or to compensation on a *quantum meruit* the negotiations should have resulted in a binding contract between the principal and the proposed vendee or " there should be proof of default on the part of the proposed vendor." It would appear, therefore

that in this view of the matter the agent's claim was entertained despite the fact that the sale had not gone through. In some cases the court acted on the principle of a *quantum meruit* and in others on that of an implied term in the contract.

The House of Lords in the case of *Luxor Ltd. vs Cooper* (*supra*) dealt with both these pleas. In regard to the plea of a *quantum meruit* Lord Wright in the course of his speech made the following observations :

> " It has been said in some cases that the claim may be based on a *quantum meruit* on the principles expounded in the notes to *Cutter vs Powell* in Smith's leading cases according to which the special contract is treated as rescinded and the agent thereupon becomes entitled to claim a partial recompense for what he has done. Such a claim is in the nature of a quasi-contractual claim. It is properly made in cases of contract for work and labour and the like, when the employer who has got the benefit of part performance but before completion has repudiated the contract, may be sued either for damages for breach or for restitution in respect of the value of the part performance which he has received. Such cases are however, obviously different from the present case.....In the case of the commission agent to whom payment is dependent on completion or the like condition, the principal does not promise that he will complete the contract.....His only promise is that he will pay the commission if the contract is completed. There is no promise to pay a reasonable remuneration if the principal revokes the authority of the agent. Moreover it is a further objection to a claim on a *quantum meruit* that the employer has not obtained any benefit."

Going on to discuss the other view namely that there is an implied term in these contracts that the principal unless he has a reasonable cause for refusing to complete the contract was obliged to complete it or to pay the agent his commission, their Lordships declared that contracts of this nature are subject to no peculiar rules or principles of their own, and that the presumption is the general presumption that parties have expressed every material term that is to govern their agreement and that nothing will be read into it unless the law requires that to be done, or unless it is necessary so to do in order to give the transaction such business efficacy as the parties must have intended.

If, then, the theory of a *quantum meruit* is foreign to these contracts and if as the irresistible reasoning of the speeches delivered by their Lordships establishes there is no implied term in them, all that remains to be done is to ascertain and interpret the actual terms of the contract in question. In the case before us the contract is in writing and only a question of interpretation arises. The relevant terms of this contract are : " I.....have authorized B to negotiate the sale of my house and property.....for the sum of Rs. 11,500 *only*. I further promise to remunerate B with 2% on the amount realized." Except for the word " only " somewhat surprising in the context these are unambiguous words, and if I may adopt the words of Lord Russell I should say that " I cannot imagine.....a clearer case of the title to the commission being made wholly contingent on the sale being carried to completion and of the agent taking the risk of the sale falling through from any cause whatever." In other words the title to the commission is not made dependent on the agent finding a purchaser ready and able to purchase at the price but on the completion of the sale. The claim of the plaintiff here, however is based on the fact that he found a purchaser ready and able to buy the property at Rs. 11,500/- although there is not a word in the agreement to suggest a promise of remuneration in such an event.

The rule enunciated by the House of Lords which must now govern us may, I think. be stated thus : Each case must depend on the exact terms of the contract under consideration and upon the construction of those terms, and the right to commission will accrue only when the thing or event which, upon a correct construction of the agreement, the parties contemplated is done or has happened, and that in cases of this kind there is no obligation imposed by law on the principal to co-operate with the agent to enable him to earn his commission. The principal may for any reason at all, or for no reason whatever other than that he has changed his mind, refuse to sell except perhaps when in consequence of negotiations conducted by the agent a legally binding and enforceable agreement to sell and to buy has come into being between the principal and the proposed vendee.

If commission agents and brokers and others of that class are not disposed to do business on those terms it is for them to ask for and obtain, if they can, the terms they desire.

The application of this rule to the facts of this case results inevitably in the failure of the plaintiff's claim. The appeal must be allowed and the action dismissed. In view, however, of the fact that the plaintiff was within the old rule it will, in my opinion be sufficient to direct him to pay half the costs incurred here and below.

KEUNEMAN, J.

I agree.

DE KRETSER, J.

I agree.

Appeal allowed.

Present: WIJEYEWARDENE, J.

MOHAMMED CASSIM vs S. NATCHIA

S. C. No. 184—*A. C. R. Matara No.* 21474.
Argued on 4th April, 1943.
Decided on 6th April, 1943.

Prevention of Frauds Ordinance—Section 3 (1)*—Agreement to give paddy in lieu of interest on consideration for transfer of land whose possession could not be given owing to the existence of a prior lease—Should such agreement be notarially executed.*

In 1935 the defendant sold to the plaintiff two parcels of land subject to a lease which was to expire in March, 1938. As quiet possession of the lots could not be given during the period of the lease they entered into an agreement with the plaintiff in the following terms :

" That (the defendants) have agreed to deliver unto (the plaintiff) 10 amunams of paddy a year from the date hereof until the 1st day of March, 1938 for and in lieu of the produce obtainable from the property ....."

The plaintiff sued the defendants for the recovery of 20 amunams of paddy due for two years. The learned Commissioner dismissed the plaintiff's action on the ground that the agreement was not notarially executed and therefore was of no force or avail in law.

Held : That as the agreement merely contained a promise to give a certain quantity of paddy by way of interest on the money paid by plaintiff, it need not have been notarially executed.

Cases referred to : *Charles vs Baba* (22 N.L.R. 189)
Elias vs Joronis (7 Supreme Court Circular 71)
Meragalpedigedera Saytoo vs Owitigedera Kalinguwa (1887–8 Supreme Court Circular 67)
De Silva vs Thelenis (3 C.W.R. 130)

H. Wanigatunga with *A. Gnanapragasam*, for the plaintiff-appellant.
M. I. M. Haniffa, for the defendant-respondent.

WIJEYEWARDENE, J.

This appeal raises the question whether the plaintiff is prevented from enforcing his claim on the document P1, as it was not executed in terms of section 2 of Ordinance No. 7 of 1840.

The defendants sold to the plaintiff two parcels of land lots C and E — by deeds P2 and P3 of November 30th 1935, for Rs. 500/–. At the time of the transfer, lot C and 3/5th shares of lot E were subject to a lease in favour of one Martin up to March, 1938. As the defendants were unable to give quiet possession of the lots to the plaintiff during the period of the lease, they undertook to give him 10 amunams of paddy a year during that period " in lieu of interest " on the sum of Rs. 500/– as admitted by the defendants in paragraph 4 of their answer. The document P1 was executed by the defendants on December 4th 1935 embodying that agreement and it states :

" That (the defendants) have agreed to deliver unto (the plaintiff) 10 amunams of paddy a year from the date hereof until the 1st day of March 1938 for and in lieu of the produce obtainable from the property....."

In September, 1936 the plaintiff executed lease P5 in favour of Martin in respect of the 2/5th shares of lot E which were not subject to a lease at the time of the transfers in his favour. That lease was for a period of four years from March 1st 1937 at a yearly rental of Rs. 85/–.

The plaintiff filed this action stating that the defendants failed to give him 20 amunams of paddy for the two years ending December, 3rd 1937 and thus committed a breach of the agreement P1. He claimed Rs. 200/– as the value of that quantity of paddy. Relying on the decision in *Charles vs Baba* (22 N.L.R. 189) the Commissioner of Requests held that the document P1 was of " no force or avail in law," as it had not been duly attested by a Notary, and dismissed the plaintiff's action with costs.

The Commissioner erred in regarding *Charles vs Baba* (*supra*) as an authority for the proposition of law enunciated by him. The legislature enacted section 2 of Ordinance No. 7 of 1840 providing that agreements affecting an interest in lands, other than a lease at will or a lease for a period not exceeding one month, should be executed before a Notary. Thereafter, the view was expressed at one time that the Ordinance did not govern agreements for the cultivation of lands in *anda* as it was thought that the legislature could not have been intended to discourage agriculture and cause unnecessary hardship to villagers by requiring them to execute notarial documents in respect of such agreements (*vide Elias vs Joronis* 7 Supreme

Court Circular 71). That view was, however, finally rejected by the Full Court in *Meragalpedigedera Saytoo vs Owitigedera Kalinguwa* (1887 – 8 Supreme Court Circular 67) which decided that an agreement for the cultivation of land in *anda* was " an agreement for establishing an interest affecting land " within the meaning of section 2 of Ordinance No. 7 of 1840 and required notarial execution. Shortly afterwards, the legislature met the situation created by that decision by passing Ordinance No. 21 of 1871, as it thought — to cite the words of the preamble — " expedient to exempt certain contracts for the cultivation of paddy fields and chena land from the operation of Ordinance No. 7 of 1840." Section 1 of Ordinance No. 21 of 1871 reads :

> " The provisions of section 2 of the Ordinance No. 7 of 1840 shall not be taken to apply to any contract or agreement for the cultivation of paddy fields or chena lands for any period not exceeding twelve months, if the consideration for such contract or agreement shall be that the cultivator shall give to the owner of such fields or lands any share or shares of the crop or produce thereof."

That section with certain verbal amendments appears now as section 3 (1) of the Prevention of Frauds Ordinance. Subsequent to the passing of that Ordinance in 1887, this court had to consider in some cases the class of contracts which are thereby saved from the operation of section 2 of Ordinance No. 6 of 1840. These cases proceeded on the rule of construction that as the later Ordinance was in the nature of an exception to the general law laid down in section 2 of Ordinance No. 7 of 1840, the later Ordinance should be given a strict interpretation so as not to extend the class of agreements to which it was intended to apply (*Vide de Silva vs Thelenis* 3 Ceylon Weekly Reporter 130). The report of *Charles vs Baba* (*supra*) does not set out fully the facts of that case, but in view of the reference made in that case to *de Silva vs Thelenis* (*supra*) I think that Schneider, J. dealt with the nature of evidence necessary to establish an agreement for the cultivation of a paddy field where the consideration for the contract was an undertaking by the cultivator " to deliver 16 bags of paddy or their value, Rs. 80/–."

The facts of the present case are entirely different. This case does not involve an agreement for the cultivation of land or affect any interest in land. We have here merely a promise by the defendants to give a certain quantity of paddy by way of interest on the sum of Rs. 500/– paid by the plaintiff. I fail to see how the provisions of Ordinance No. 7 of 1840 could possibly apply to such a case.

The plaintiff is, therefore, entitled to claim from the defendants the sum of Rs. 200/– on P1 in view of the Commissioner's findings on facts. The plaintiff should, however, deduct from that amount the sum of Rs. 35/– obtained by him under P5 for the year ending March, 1938, as the defendants agreed to give him 10 amunams of paddy a year to make good the loss sustained by the plaintiff's failure to get possession of the entirety of the lots C and E.

I set aside the decree of the lower court and direct judgment to be entered for the plaintiff for Rs. 165/–. The plaintiff is entitled to costs here and in the Court of Requests.

Decree set aside.

Present: MOSELEY, A.C.J. & JAYATILEKE, J.

WALKER & GREIG LTD. vs MOHAMED

S. C. No. 120—*D. C.* (*Inty.*) *Colombo No.* 10586.
Argued on 3rd March, 1943.
Decided on 17th March, 1943.

Civil Procedure Code section 218 (*h*)—*Is a Kathi appointed under the Muslim Marriage and Divorce Registration Ordinance a " public officer or servant."*

Held : That a Kathi appointed under the Muslim Marriage and Divorce Registration Ordinance is a public officer or servant for the purposes of section 218 (*h*) of the Civil Procedure Code.

Cases referred to : *Bansi Lal & Others vs Mohammed Hafiz* (1939–A.I.R. Patna 77)
Goul vs Concecion (36 N.L.R. 73)

P. Navaratnarajah, for the defendant-appellant.
A. H. C. de Silva with *S. J. Kadirgamar*, for the plaintiff-respondent.

MOSELEY, A.C.J.

The respondent having a decree against the appellant obtained a prohibitory notice under section 229 of the Civil Procedure Code in respect of fees due to the appellant by virtue of his appointment as a Kathi under the Muslim Marriage and Divorce Ordinance (Chapter 99). The appellant applied to the District Court for recall of the notice on the ground that the said fees were exempt from seizure under section 218 (*h*) of the Civil Procedure Code. The learned District Judge held that appellant is a public servant but that the fees receivable by him do not come within the meaning of the word "salary" in the section, and are therefore not exempt from seizure.

The two points for decision are :

(1) Is the appellant a public servant ; and if so,
(2) Are his emoluments as such "salary" within the meaning of the aforesaid section.?

Section 5 of the Civil Procedure Code defines "public officer" as including "all officers or servants employed in this Colony by or under the Imperial Government or the Government of Ceylon." Is the appellant employed by the Government of Ceylon ? Under section 4 (1) of Chapter 99 his appointment as Kathi is made by the Governor ; his appointment is gazetted ; the Ordinance prescribes his duties and it is provided by regulation 43 of the regulations made under the Ordinance that he shall be paid fees at a certain rate. Added to this it appears to be accepted that he has an office, a clerk and fixed hours of work. All these elements seem to me to point irresistibly to the fact that he is a public servant. I arrive at this conclusion without having regard to the case of *Bansi Lal & Others vs Mohammed Hafiz* (1939–A.I.R. Patna 77). There it was held that an advocate who was engaged to conduct a case on behalf of Government was a public officer on the ground that he was remunerated by fees for the performance of a public duty and therefore came within the definition of "public officer" contained in section 2 of the Indian Civil Procedure Code. Since that definition differs from its counterpart in the Ceylon Code the case, in this respect, is not helpful. It is however, in my opinion unnecessary to look for authority outside the local definition which I have set out above, and which appears sufficiently comprehensive to embrace such an appointment. Counsel for the respondent contended that, inasmuch as the work done by the appellant was not of a continuous nature, he could not be regarded as a public servant. It may well be that in some districts a Kathi's work is of a desultory nature : in others it may be continuous. To draw a distinction between one Kathi and another would only be to complicate the matter further. In my view therefore, the learned District Judge was right in holding that appellant is a public officer.

The remaining question is whether the fees received by him are "salary" within the meaning of section 218 (*h*). The learned District Judge, in answering the question in the negative, relied upon a judgment of Garvin, S.P.J. in *Goul vs Concecion* (36 N.L.R. 73) in which the learned judge used these words :

> "As a mere matter of interpretation of this section it would seem that this word "salary" connotes that sum of money which a man receives regularly every month in respect of his fixed appointment."

The learned District Judge held himself bound to follow that authority. The case, however, was one in which the maker of a promissory note pleaded the benefit of the Public Servants' Liabilities Ordinance (Chaper 88), section 2 (2) of which takes out of the scope of the Ordinance a public officer who is in receipt of a salary in regard to his fixed appointment of more than three hundred rupees a month. The defendant in that case was in receipt of a salary of Rs. 3,500/– a year, but the plaintiff alleged that he received in addition certain allowances which brought his salary above Rs. 300/– a month. It does not seem to me very difficult to follow the reasoning of Garvin, S.P.J. which led him to hold that for the purpose of interpretation of section 2 (2) the word "salary" meant the sum of money which the man received regularly every month. The case to me is clearly distinguishable from the present one in which the only remuneration received by the appellant was the amount of fees received in respect of certain of his duties. In the course of his judgment in the Patna case to which reference has been made above, Mohamed Noor, J. after considering the definition of "salary" in Stroud's Judicial Dictionary, found nothing which restricted the word to an emolument which is paid monthly. It may be that in the present case there may be months in which the appellant receives no fees. In my view, nevertheless, for the months in which he is more fortunate the fees which he receives are the salary of his post. He is therefore entitled to the benefit of section 218 (*h*) of the Civil Procedure Code.

I would allow the appeal with costs here and in the District Court. The order of the District Court is set aside and the Fiscal is directed to recall the prohibitory notice in respect of the fees payable to the appellant.

JAYATILEKE, J.

I agree.

Appeal allowed.

Present: DE KRETSER, J. & WIJEYEWARDENE, J.

HOLLOWAY & ANOTHER vs KIRIHAMY & OTHERS

S. C. No. 135*L*—*D. C. Kandy No.* 455P.
Argued on 8th March, 1943.
Decided on 18th March, 1943.

Gift—Kandyan, for securing succour and assistance—Revocation of gift as no succour and assistance received—Subsequent gift subject to condition that property should devolve on certain named persons if donee had no legitimate children—Rights of purchaser of title under 1st gift contested by the legitimate children of 2nd donee—Rights of competing claimants—Registration—Fidei commissum.

M and K who were jointly entitled to a land gifted it by P2 of 1897 to K's son Kirihamy, on whose death, the administrator executed a conveyance P3 of 1903 in favour of Kirihamy's two children P and D. P conveyed his half share to the plaintiff in 1916 on P4 which was registered in the same year.

Contesting defendants, who are the children of P, proved at the trial that, by 2D2 of 1904, M revoked P2 in respect of his half share and by 2D1 of 1904 gifted it to P subject to the following clause :

" And after the demise of both of us (namely Mudalihamy and his sister-in-law Kiri Etana) the said Punchirala shall possess the aforesaid lands and premises as long as possible and in the event of his having legitimate children, born of a wedded wife of his, that he may convey the said premises unto them ; but in the event of his having no legitimate children, then and in such case, he shall possess the said premises during his lifetime ; and thereafter the said lands and premises shall devolve on Madanwala Vidanalagedera Ukku Menika and Punchi Menika, the daughters of Kaluhamy Arachchi deceased, who was the brother of mine the said Mudalihamy, and their respective descendants, and the said premise shall not devolve on any other person."

2D2 and 2D1 were unregistered deeds. The deed of gift P2 was executed with the object of " securing all necessary succour and assistance " and it was revoked as the donor received no succour or assistance.

Held : (i) That the deed P2 was revocable.

(ii) That the clause in 2D1 did not create *fidei commissary* rights in favour of P's children (the contesting defendants) as they were not the descendants of M and no burden was imposed on them.

(iii) That on the question of registration, the title, if any, of the contesting defendants is not defeated by the prior registration of P4.

Cases referred to : *Ahamadu Lebbe vs Sularigamma* (2 C.W.R. 208)
James vs Carolis (17 N.L.R. 76 at 69)
Bernard vs Fernando (16 N.L.R. 438)
1874–3 Grenier 24.

N. E. Weerasooriya, K.C., with *C. E. S. Perera* and *S. R. Wijetileke*, for the defendants-appellants.

L. A. Rajapakse, for the plaintiffs-respondents.

WIJEYEWARDENE, J.

This is an action for partition. A dispute has arisen between the plaintiff and the second to fourth defendants regarding the half share claimed by the plaintiff.

It is admitted by both the parties that Malhamy Vederala the original owner of the property, gifted it by P1 of 1867 to his two children Mudalihamy and Kaluhamy. Mudalihamy and Kaluhamy gifted the property to Kirihamy, the son of Kaluhamy by P2 of 1897. On the death of Kirihamy the administratrix of his intestate estate executed a conveyance P3 of 1903 in favour of Punchirala and Dingiri Amma, the two children of Kirihamy. The plaintiff claims Punchirala's half share by right of purchase under deed P4 of 1916 executed by Punchirala and registered on October 31st 1916. The contesting defendants have proved that Mudalihamy revoked the deed of gift P2 by 2D2 of September, 7th 1904 after the death of Kirihamy so far as his own share of the land was concerned and that Mudalihamy gifted that share by 2D1 of September, 7th 1904 to Punchirala subject to certain conditions. Punchirala died about 1939 leaving as his legitimate children the 2nd, 3rd and 4th defendants.

The various questions that have to be considered in this case are :

1. Had Mudalihamy the right to revoke the deed P 2.?
2. What were the rights of the contesting defendants under deed 2D1.?
3. Are the rights of the contesting defendants under 2D1 avoided by the due registration of P4 and the non-registration of 2D1 and 2D2.?

The deed of gift P2 was executed by Mudalihamy and Kaluhamy "with the object of securing all necessary succour and assistance" for them and Kiri Etana, the wife of Kaluhamy, during their lifetime. Mudalihamy executed deed 2D2 revoking his gift as he "received no assistance or succour." The deed P2 could, therefore, have been revoked and the declaratory clause in P2 that the donors or "their heirs, executors, administrators shall not at any time dispute or contest the donation" cannot have the effect of making the deed irrevocable so long as the conditions of the gift have not been fulfilled.

It is urged on behalf of the contesting defendants that the deed 2D1 created a *fidei commissum* in their favour. The relevant clause in the deed reads as follows :

> "And after the demise of both of us (namely Mudalihamy and his sister-in-law Kiri Etana) the said Punchirala shall possess the aforesaid lands and premises as long as possible and in the event of his having legitimate children, born of a wedded wife of his, that he may convey the said premises unto them ; but in the event of his having no legitimate children, then and in such case, he shall possess the said premises during his lifetime ; and thereafter the said lands and premises shall devolve on Madanwala Vidanalagedera Ukku Menika and Punchi Menika, the daughters of Kaluhamy Arachchi deceased, who was the brother of mine the said Mudalihamy, and their respective descendants, and the said premises shall not devolve on any other person."

That clause does not appear to me to designate with certainty the persons on whom the property should devolve on the death of Punchirala leaving legitimate children. The donor has, no doubt, stated that, if Punchirala died without legitimate children, the property should go to Ukku Menika and Punchi Menika. Does it, therefore, follow as a necessary consequence that, if Punchirala had legitimate children, the property should devolve on the legitimate children of Punchirala under the bond of *fidei commissum ?* I do not think such an inference could be drawn in this case, as the children of Punchirala were not the descendants of Mudalihamy and no burden was imposed on them.

The whole doctrine of *si sine liberis* is discussed by Roman-Dutch law jurists in connexion with testamentary *fidei commissa* only. *Ahamadu Lebbe vs Sularigamma* (2 Ceylon Weekly Reporter 208). Even where there is such an express provision in a testamentary *fidei commissum*, the better opinion of the jurists appears to be that a *fidei commissum* cannot be implied in favour of the children in the absence of special circumstances (see Lee on Roman-Dutch law, 1915 edition p. 317). In his Introduction to the Jurisprudence of Holland (Lee's Translation Vol. 1 page 153) Grotius expresses his views thus :

> "If any one says, 'I leave my property to John, and in case John dies without children I desire that it shall go to Paul' in such case it is understood that although John dies before the testator, his children shall be preferred before Paul ; but whether John succeeding as heir is understood to be burdened with the duty of letting the property go to his children is doubted. However, the generally accepted view is that this is not so unless the children were descendants of the testator or unless the children were found to be themselves charged with further gift over, or unless the last will contained some other indications from which a contrary intention might be inferred. (Grotious 2-20-5).

The same view is expressed thus by Van Leeuwen in his Commentaries (Kotze's Translation Vol. 1 page 383) :

> "If children are mentioned under a condition, as if I said.....I institute John my heir and, if he happen to die without children, Peter shall be my heir in his stead ; it is clearly understood that, on the predecease of John, his children are preferred to Peter. But are these children admitted to a *fidei commissary* inheritance and is John, having enjoyed the said inheritance, bound at his death to let it devolve upon his children ? A distinction must be drawn that under the testator's children, grandchildren are so held to be included, if from the circumstances it appears that such was the intention.
>
> But as regards the collateral line, or other strange heirs, this does not take place, because the condition has of itself no effect, nor can it be called an actual part of the testator's intention, but is only an addition subject to the intention, in which case the children mentioned under the condition are not considered further or otherwise than anything else made subject to a condition ; as if I said, I appoint John my heir, if at the time of my death he possesses a certain house or horse, it would be absurd to say that the inheritance must follow the house or horse."

I would, therefore, hold that the contesting defendants did not acquire any *fidei commissary* rights in the property by virtue of 2D1. The deed P4 was for that reason effectual to convey an absolute right to a half share of the property to the plaintiff and the contesting defendants can make no claim to that share.

The decision I have reached on the question of the rights of Punchirala and his children under 2D2 renders it unnecessary for me to decide the third point stated by me earlier. But, as it raises an important question of law and was fully argued before us, I would state my opinion upon it.

The plaintiff's claim is based on the deed of gift P2 of 1897 by Mudalihamy and the deed of transfer P4 of 1916 by Punchirala registered in 1916. The contesting defendants state that Mudalihamy revoked P2 in 1904 and have produced the deed of revocation 2D2 as evidence of such revocation. They base their claim on that deed and the deed of gift 2D1 of 1904

executed by Mudalihamy. The deeds 2D1 and 2D2 are not registered.

If the provisions of section 7 of the Registration of Documents Ordinance apply to the competing deeds, then clearly a claim based on P4 ought to prevail over an adverse claim based on 2D1, even if 2D1 created *fidei commissary* rights in favour of the contesting defendants, in view of the registration of P4 which is a "subsequent instrument" for "valuable consideration." But do the provisions of section 7 apply in this case? When Mudalihamy revoked P2 in 1904, that deed ceased to have any legal effect. That result was brought about by the mere fact of revocation and not by reason of any fact of registration. The position, therefore, that has to be considered in this case is different from that existing in the cases which usually arise for consideration under section 7 of the Registration of Documents Ordinance. The cases generally considered are of the following type :— A sells or gifts property to B in 1897 and B sells the property to C by a registered deed in 1916. The title of C is contested by X claiming on an unregistered deed executed by A in 1904. In such a case C gets better title. *Vide James vs Carolis* (17 New Law Reports 76 at 79). But there is clearly a difference between that case and the present case. In that case, the execution of the deed by A in favour of X in 1904 did not destroy or affect in any way the title conveyed to B and, in fact, X got no title under that deed at the time of its execution. B still had title to the land but he ran the risk of losing his title if he permitted X to register X's deed before him and thus gain priority under section 7. In the present case however, the deeds 2D1 and 2D2 effectually pushed P2 out of their way in 1904 the moment they were executed even if P2 was registered at the time. The position becomes still clearer if we accept as correct the law laid down in (1874–3 Grenier 24) and hold that, before the Kandyan Declaration and Amendment Ordinance No. 39 of 1938, a mere resumption of the land by the donor was sufficient to annul a deed of gift and it was not necessary to execute a deed of revocation in accordance with the provisions of Ordinance No. 7 of 1840. In such a case there would not be a deed which could be registered. The position that arises as a result of the revocation of a Kandyan deed of gift appears to be somewhat analogous to the position created by a partition decree and considered in *Bernard vs Fernando* (16 New Law Reports 438). In that case, a co-owner sold his undivided rights after a land had been partitioned under Ordinance No. 10 of 1863 and the purchaser having registered his conveyance claimed priority over all persons basing their rights on the unregistered partition decree. This court held that the question of title had to be considered independently of the law of Registration as the entering of the partition decree wiped out all previous rights. In the present case when Mudalihamy executed the deed of revocation 2D2 in 1904, the very foundation of the title of Punchirala based on P2 was destroyed and Punchirala had, therefore no right based on that deed which he could transmit to a vendee and enable such vendee to set up title against those claiming adverse interest under 2D2 and 2D1. I think that the title, if any, of the contesting defendants is not defeated by the prior registration of P4.

As I hold that under the deed 2D1, no *fidei commissary* rights devolved on the contesting defendants, I dismiss the appeal with costs.

DE KRETSER, J.

I agree.

Appeal dismissed.

Present: WIJEYEWARDENE, J.

CONDERLAG (Sub-Inspector of Police) vs GOONERATNE

S. C. No. 939—*M. C. Bandarawela No.* 15544.
Argued on 12th April, 1943.
Decided on 15th April, 1943.

Price Control—Control of Prices Ordinance No. 39 of 1939—Sale in excess of retail maximum price—Extent to which ignorance of traders regarding the alteration of prices may be taken into account in imposing sentence.

Held : That ignorance of traders regarding the alteration of maximum prices should be taken into account in imposing a sentence on a person convicted of the offence of selling a controlled article at a price in excess of the maximum price.

H. V. Perera, K.C., with *A. C. Nadarajah*, for the accused-appellant.
G. E. Chitty, Crown Counsel, for the Crown-respondent.

WIJEYEWARDENE, J.

The accused was found guilty of (*a*) having sold half a pound of garlic on September 25th 1942 at a price in excess of the retail maximum price fixed by an Order made under section 3 of the Control of Prices Ordinance No. 39 of 1939 and published in Gazette No. 9011 of September 19th, 1942 and of (*b*) having refused to issue a receipt as required by that Order. He was sentenced to a term of six weeks' rigorous imprisonment on each count, the sentences to run consecutively.

The Order referred to in the charge fixed the maximum price of garlic at 21½ cents a pound at Haputale. Before that Order came into operation on September 19th, the maximum price of garlic was 36½ cents a pound at Haputale. The Sanitary Assistant of Haputale who was called as a witness for the defence gave the following evidence with regard to the action taken by the authorities in the Province of Uva when an Order was made in Colombo and gazetted and that evidence has not been questioned :

> " I get the altered price lists sent to me by the Government Agent, Uva. On receipt of them I publish them on the notice board. It may be that until the new lists are published, the old lists are in operation. Until the new lists are given the old lists are used in the boutiques. It was on 25th September that I informed the traders of the change of prices. I informed them in the afternoon. Traders continue to be guided by the old lists until the new lists come out."

This evidence supports the accused when he states that at the time of the sale in question on September 25th he was unaware of the fact that the price of a pound of garlic has been reduced from 36½ cents to 26½ cents. It is, no doubt, true that the firm Cornelis & Sons under whom the accused was employed would have got their copy of the relative gazette about 20th September. That does not necessarily disprove the sworn testimony of the accused that he was unaware of the alteration in price at the time of sale. It has been proved that a constable whose duty it was to go to the boutiques regularly and examine the price lists did in fact go to the boutique of the accused on September 21st and initial as correct the price list giving the ruling maximum price of garlic as 36½ cents. If a member of the regular Police Force who was entrusted with such duties could have been ignorant on September 21st about the reduction of prices in spite of the fact that the Gazette had reached Haputale on September 20th, it is not at all unlikely that an illiterate salesman of a boutique would have remained ignorant of the change.

I shall now consider the evidence as regards the transaction itself. The main witnesses for the prosecution were Silva, the purchaser, and the Price Control Inspector. Silva who described himself as a student said that he went to the accused's boutique on the morning of 25th September and purchased a bottle of Malted Milk and half a pound of garlic. He said that he was charged Rs. 1/23 for the Malted Milk and 20 cents for garlic, and the accused refused to give him a receipt. He added, " I took the garlic in my handkerchief as the accused told me that he had no paper." He said that at the time of the sale he saw a stranger in the boutique who questioned him later about his purchase and took him to the Police Station. According to him it was only at this stage that he knew that the stranger was the Price Control Inspector. This statement contradicted the evidence of the Price Control Inspector that he knew Silva some days before the transaction and that, in fact, it was he who sent Silva as a decoy to purchase the articles in the accused's boutique. The Inspector supports Silva as regards the garlic being put into Silva's handkerchief. He said, " the garlic was put to the last witness's (Silva) handkerchief, as the accused said there was no paper."

On the other hand the accused stated that he sold the garlic for 18 cents and charged 2 cents more for the paper wrapper. He said further that he issued a receipt to Silva and pointed to the counterfoil P1 produced by the Police which gave particulars of the transaction as follows :

½ bottle Malted Milk	..	Rs. 1.23
½ lb. garlic ..	..	Cts. 18
Paper for wrapping	..	Cts. 02
		Rs. 1.43

It will be seen from the above summary that according to the prosecution the garlic was sold at 20 cents and not for 18 cents as stated by the accused. The accused's version receives substantial support from the statement in the written report submitted to court by the Sub-Inspector of Police on October 9th stating that the accused sold the half pound of garlic for 18 cents. The charge against the accused was framed on this report. It was only on November 3rd when the magistrate began to record the evidence that the Sub-Inspector of Police got the charge amended by the substitution of "20" in place of "18." An effort was made by the Sub-Inspector to explain this belated amendment by stating that he put down the sale price of the half pound of garlic as 18 cents in the report, relying on the statement in P1. It is certainly strange that this official should have permitted himself to be misled by a statement in a document of the accused which he would have naturally viewed with

suspicion and not acted on the definite statements made to him by the prosecution witnesses. Moreover, the Price Control Inspector himself said in his evidence that he informed the Sub-Inspector of Police on September 25th itself "that the accused put the garlic into the last witness's (Silva) handkerchief." This would have shown the Sub-Inspector that the item mentioning paper in P1 was a fictitious entry. The accused's counsel suggests that this variation from 18 cents to 20 cents is not without some significance. As indicated earlier in my judgment the traders of Haputale were under the impression, that the price of garlic was 36½ cents per pound on September 25th. It is suggested that those interested in the prosecution thought that under those circumstances the accused would not have committed an offence if he sold the half pound of garlic for 18 cents in spite of the Order referred to and that they thought it advisable to state that the garlic was sold for 20 cents.

After a careful consideration of the case, I feel that the evidence for the prosecution is open to grave suspicion and I do not think it safe to act on it when it comes in conflict with the evidence of the accused.

I shall, therefore, consider the question of the accused's guilt on the footing that he sold a half pound of garlic for 18 cents and that he gave a receipt to that effect to Silva. As the Order mentioned in the first charge came into operation on September 19th the accused would clearly be guilty on the first charge, but I think, the uncontradicted evidence given by the Sanitary Assistant as to the ignorance of the traders regarding the alteration of the prices should be taken into account in imposing a sentence on the accused.

I affirm the conviction of the accused on the first charge, and set aside the conviction on the second charge. I substitute for the sentence of six weeks' rigorous imprisonment passed by the magistrate on the first charge a fine of Rs. 25/-. In default of the payment of that fine the accused will undergo rigorous imprisonment for two weeks.

Conviction on 2nd charge set aside.

Present: JAYATILEKE, J.

WEERASINGHE vs PERERA ET AL

89—*C. R. Colombo* No. 75—140.
Decided on 7th July, 1942.

Servitude—Right to thresh paddy—Nature of right acquired by prescription.

Held : (i) That the right to thresh paddy on another's land is a servitude which can be acquired by prescriptive user.

(ii) That what is acquired by prescriptive user is not the ground on which the paddy is threshed, but the incorporeal right of servitude.

L. A. Rajapakse, for the plaintiff-appellant.

No appearance for the defendants-respondents.

JAYATILEKE, J.

This is an action for a declaration of title to lot X in Plan 2. The plaintiff claimed it as part of his field called Kiripellagaha Cumbura. The defendants claimed as part of their high land Kiripellagahawatta. The plaintiff alleged that when he purchased the field in the year 1905, there was a threshing floor on lot X and that he threshed his paddy there ever since his purchase. The defendants alleged that a small portion of lot X was used as a threshing floor by the owners of the field adjoining their land with the consent of their father and his predecessors in title.

The learned Commissioner has delivered a well-considered judgment in which he has held that lot X forms part of the defendants' land and that the plaintiff has acquired by prescription the right to thresh his paddy on a portion of it. I entirely agree with his findings on the facts.

Counsel for the plaintiff contends that, as the plaintiff had put lot X to the only use to which it could have been put, namely, to thresh paddy on it he is entitled to claim it by prescription. I do not think his contention is sound either on the law or on his facts.

The right to thresh paddy on another's land is a servitude which can be acquired by prescriptive user. See *Tikiri Appu vs Dingirirala.* (36 N.L.R. 267). What is prescribed for by long user is not the ground on which the paddy is threshed but the incorporeal right of servitude.

The evidence led by the defendants shows that the plaintiff was not the only person who threshed paddy on lot X and the Commissioner has found that a portion of lot X was possessed by the defendants' lessees. I dismiss the appeal.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present: SOERTSZ, S.P.J. (President), DE KRETSER, J. & WIJEYEWARDENE, J.

REX vs JOHN & SIX OTHERS

S. C. No. 104—*M.C. Galle No.* 35576—*1st Western Circuit* 1943. (*Holden at Colombo*)
Appeal No. 9 *of* 1943.
Applications Nos. 24–30 *of* 1943.

Argued on 3rd, 4th and 5th May, 1943.
Decided on 10th May, 1943.

Court of Criminal Appeal—Circumstantial evidence—Section 5 (1) *of the Court of Criminal Appeal Ordinance No.* 23 *of* 1938—*When may court give accused benefit of doubt as to accused's guilt.*

Held : That where the case against the accused is not proved with that certainty which is necessary in order to justify a verdict of guilty, the court will give the accused the benefit of the doubt which they have in their own mind in regard to his guilt and acquit the accused.

Per SOERTSZ, J. : "The conduct of the prisoner in driving off to Galle instead of going to his land when he knew that something had happened there, that is conduct that involves him in suspicion, but we do not think it leads necessarily to the conclusion that he acted in that manner because he had instigated the others to *murder* the deceased. On occasions like these it is notorious that men act on the impulse of the moment, and it would be dangerous and unfair to draw an adverse inference against a man merely because he did not act in a way that commends itself to us. It seems to us, therefore, that the fact that the 7th applicant drove off to Galle is too slender a reed to rely upon for inviting us to draw the inference that he had instigated murder."

N. M. de Silva, for the 1st to 6th applicants.
R. L. Pereira, K.C., H. V. Perera, K.C., U. A. Jayasundera, M. M. Kumarakulasingham and *C. Renganathan*, for the 7th applicant.
M. W. H. de Silva, K.C., and *T. S. Fernando, Crown Counsel*, for the Crown.

SOERTSZ, S.P.J. (President)

In this case there are before us seven applications for leave to appeal against the convictions entered against the seven applicants when the jury returned a unanimous verdict finding the 1st to the 6th applicants guilty of the offence of murder whilst being members of an unlawful assembly ; and the 7th applicant guilty of abetment of that offence. There is also an appeal by the 7th prisoner on grounds of law.

So far as the applications for leave to appeal against the convictions are concerned, it is well established in the Courts of Criminal Appeal in England and here that applications for leave to appeal will not be granted unless the grounds suggested would, if established in the end, sustain the appeals themselves, that is to say would show that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, or that there has been a miscarriage of justice.

We have therefore examined with great care and anxiety — and in that matter we had much assistance from the Bar — all the evidence and matters that were before the jury when they retired to consider their verdict.

It seems to us that a very material question, perhaps ultimately, the most important question to consider and answer is this : did the deceased, escorted by some followers of his invade the premises of the 7th applicant, and did the deceased meet his death there in the course of a transaction which resulted from his invasion ? or was he taken on to that land in order that he might be put to death there, and the defence set up that he was an aggressor and suffered the consequences to which his aggression made him liable ?

The verdict of the jury examined in the light of the directions they received from the trial judge puts it beyond doubt that they took the latter view. There was ample oral testimony which, if it were accepted, justified that view. We were however addressed in regard to the many infirmities of that evidence, such as the divergent accounts given by the witnesses concerning the manner in which such of the applicants as were said to have gone on to the deceased's land, went there ; what they did there ; how they took the deceased on to their land, and things like that. Our attention was also called to the contradictory statements made by those witnesses at different times ;

to attempts made by them to embellish and add to their evidence; and to more or less obvious falsehood indulged in by some of them on certain matters. There is no doubt that there is much force in that criticism of the evidence of these witnesses, and in the course of a very complete charge the learned judge repeatedly called the attention of the jurors to that aspect of the case. We have ourselves scrutinized the evidence. We find that the witnesses who spoke to the applicants entering the land of the deceased and leading him away spoke with definiteness on *that* point, although when it came to describing details, they gave different versions. This is a common experience in our courts even in the case of educated and intelligent witnesses, and of the witnesses impeached in this case, one was a little lad of ten, and two others illiterate and — to judge from the impression they appeared to have created in the mind of the trial judge — stupid villagers.

We have gone further, we have tested the oral evidence in the light of probability, and the more we look at it in that way, the more we are satisfied that the view the jury took was a view that, having regard to all the evidence and matters before them, could by no means be said to be unreasonable or unsupported.

Mr. de Silva next asked us to consider whether the case as against the 3rd and the 5th applicants should not be differentiated from that against the 1st, 2nd, 4th and 6th applicants inasmuch as, on the evidence before us, they appear not to have taken a very strong hand in the transaction that resulted in the death of the deceased. We see no good reason for such a differentiation. Once they were found members of an unlawful assembly, the extent of their participation is immaterial when we are considering their liability in law. In regard to that liability they also serve who only stand and wait.

Finally Mr. de Silva, although his clients had not appealed on any ground of law, submitted to us that the trial judge had not directed the jury adequately on the right of private defence and the law relating thereto, and that the convictions entered against the 1st to the 6th applicants ought not to be sustained for that reason.

It is true that the learned judge did not explain to the jury the whole law relating to the right of private defence, but he put to the jury the defence of the 1st to the 6th applicants and he told them that if they accepted that version they should acquit them. This direction was, in our view, unduly favourable to the defence for, it was open to the jury to accept the evidence put forward in support of the right of private defence and yet to find that some lessor offence had been committed inasmuch as according to that evidence the deceased had been disarmed and was helpless at the time the 1st applicant stabbed him.

In these circumstances, we have no alternative but to refuse the applications of the 1st to the 6th applicants.

We now come to the case of the 7th applicant who has also preferred an appeal on grounds of law. His case depending as it does almost entirely on circumstantial evidence, is one of some difficulty. There was some little evidence of a direct nature led by the Crown on the issue of the 7th applicant's instigation of the murder, for the witness Charles stated, in the course of his evidence at the magisterial inquiry on the night of the murder, that the 7th applicant when driving off in his car to the Police Station addressed his men saying "Whatever has to be done must be done today. I will spend my whole fortune." The learned judge drew the attention of the jury to the improbable nature of that evidence and it seems quite clear to us that he himself was not at all impressed by that evidence. We may therefore fairly assume that the jury either rejected that evidence or considered it so doubtful as not to take it into consideration. Be that as it may, for ourselves we prefer to consider the case of the 7th applicant disregarding that piece of evidence of the witness Charles as false or, to say the least, of a very doubtful character.

In order to sustain the conviction of the 7th applicant we must be satisfied beyond reasonable doubt that he instigated the other applicants to *murder* the deceased man, nothing less. In order to establish such instigation the Crown relied upon certain facts which may be briefly stated thus:

(*a*) The fact that the 7th applicant had a strong motive for desiring to be rid of the deceased.

(*b*) The fact that about a month before the day of murder the 7th applicant went to the Superintendent of Police, Galle and told him that "he must get rid of the deceased as he feared that the deceased might murder him if he continued to live there."

(*c*) The statement made by the 7th applicant at the Baddegama Police Station on the day of the murder and the manner in which that statement anticipated later events.

(*d*) The conduct of the 7th applicant in going off to Galle from the Baddegama Police Station instead of returning to his land when Simon Abeyawickrema's telephone message was received at the Police Station and a constable was sent to the land.

(*e*) The circumstances in which the 7th applicant went to Mr. Karunaratne, Proctor, and the statement he made to him.

It is from these facts that we are asked to infer that it was the instigation of the 7th applicant that set the 1st to the 6th applicants in motion and that the instigation was that they should put the deceased to death.

On all the evidence and matters before us, there can be no doubt that the deceased was a man of very dissolute character and that he had for some time been constantly harassing the 7th applicant and the sisters who lived with him. The fact that he was coming back to the outhouse to live there only a few yards away from the *mulgedera* in which the 7th applicant and his sisters lived must have filled them with apprehension and in that sense there was no doubt a motive for the 7th applicant desiring to be rid of the deceased. It is in that sense we think that the words he used according to the Superintendent of Police when he went to him namely that "he must get rid of the deceased" must be understood. He was extremely anxious to prevent the deceased coming there as his neighbour and the reasonable conclusion to which we are led by the facts (*a*) and (*b*) above is that the 7th applicant was very anxious even at the eleventh hour to find some means of preventing the deceased coming to live in the outhouse. They do not necessarily lead to the conclusion that he was prepared to go to the length of killing the deceased or causing him to be killed in order to prevent his coming to live in the outhouse. In this connexion, that is to say when we are examining the question of motive, we must not forget the fact that has been proved, namely that the 1st applicant himself had a motive of his own for being ill-disposed towards the deceased. Only a week before, that is to say on the 29th of September, 1942, he had made a complaint at the Police Station charging the deceased with having assaulted his mother and his little brother Jayanoris.

In regard to (*c*) namely the statement made by the 7th applicant at the Baddegama Police Station, that certainly appears to us to be an incriminating circumstance against the 7th applicant, for as we have already observed that statement anticipates events which had not yet happened with remarkable precision. But even so it does not in our view do any more than show that before the 7th applicant left for the Baddegama Police Station he had conferred with the 1st to the 6th applicants, and that he knew that *something* was going to happen and that it would be wise for him to take the precaution of trying to exculpate himself and also for helping the others with a defence in the event of a conflict between the deceased and them. We may even infer that the 7th applicant had instructed the 1st to the 6th applicants as to a course of action in the event of the deceased man becoming aggressive, but we do not think we can fairly infer that he had actually instigated them to kill the deceased and that is what the Crown must establish as part of its case.

So far as (*d*) is concerned the conduct of the prisoner in driving off to Galle instead of going to his land when he knew that something had happened there, that is conduct that involves him in suspicion, but we do not think it leads necessarily to the conclusion that he acted in that manner because he had instigated the others to *murder* the deceased. On occasions like these it is notorious that men act on the impulse of the moment, and it would be dangerous and unfair to draw an adverse inference against a man merely because he did not act in a way that commends itself to us. It seems to us therefore, that the fact that the 7th applicant drove off to Galle is too slender a reed to rely upon for inviting us to draw the inference that he had instigated murder. Similarly in regard to the statement made by the 7th applicant to Mr. Karunaratne at Galle to the effect that he had come to him in order that he might retain his services to defend him in the event of his being implicated and to the answer he gave Mr. Karunaratne when he asked "what is this I hear in regard to the death of Arthur?" "Yes I heard that after I came to Galle." We do not think we shall be justified in drawing the inference from this evidence that the 7th accused came to retain the services of Mr. Karunaratne because he was conscious of guilt. It may well be that as the 7th applicant himself says he realized that things having happened in the way they appeared to have happened he might himself be implicated by his brothers Henry and Simon who were not well disposed towards him although he had not been present on the land at the time of the conflict. In regard to the answer given by the 7th applicant according to Mr. Karunaratne that he had heard of the death of Arthur after he had come to Galle, it is suggested that he could not have heard from anyone of the death of the deceased before he went to Mr. Karunaratne, and that therefore that by answering as he did, the 7th applicant betrayed himself by showing that he knew of the death of the deceased when he could not have known of it except as the man who had arranged for it. Here again we think that while that is a possible view, it is not the only reasonably possible view. He may have heard of the

death of the deceased while he was on the green outside the Court-house for by then the Galle Police Station had been informed and news of this kind spreads like wild fire.

It is as we have already observed a point in favour of the 7th applicant, that while he had a motive for desiring to be rid of the deceased man, the 1st applicant himself had an independent motive against him and in those circumstances it may well be that assuming that the 7th applicant had instigated a certain course of action, the 1st applicant and those associated with him went beyond that instigation and acted in persuance of the 1st applicant's own motive believing that they would be promoting the interests of the 7th applicant himself.

Scrutinizing the evidence and matters before the jury in this way, we feel that they establish a case of strong suspicion against the 7th applicant but we are unable to say that they establish his guilt beyond reasonable doubt.

The learned judge directed the jury very fully in regard to the principles on which they should act when they were examining a case that depended on circumstantial evidence. He pointed out to them that in order to base a conviction on circumstantial evidence they must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence. We can, however, imagine how difficult it must be for a jury completely to assimilate all the principles governing circumstantial evidence in the course of a charge, however adequate it may be particularly, if that jury were dealing for the first time with a case of circumstantial evidence, and it is possible that despite the unexceptionable charge — if we may respectfully say so — of the learned trial judge in this case the jury may have been under the impression that if there was a case of strong suspicion against an accused person and he refrained from going into the witness-box it was open to them to convict him. But of course the charge said nothing of the kind for it was clearly to the effect that if all the facts and matters before the jury made out a *prima facie* case against an accused which case could, if at all, only be met by explanations from the accused and he appeared to be in a position to make his explanations if he was prepared to have them put to the test, and yet the accused offered no explanations, then a verdict of guilty was justifiable.

The 7th applicant put his character in issue and nothing has been proved against him. He is quite a young man who appears to have led a respectable life in very difficult surroundings and that too is a fact which we must pay some attention to when we are considering what inferences should be drawn from such facts as the Crown relied upon to establish its case. To put it in a few words our view is that the most that can be said against the 7th applicant is that there probably was some instigation forthcoming from him. But that will not do. We ought to be able to say if we are going to sustain the conviction, that the instigation that was forthcoming from him was an instigation to commit murder.

To conclude we are quite satisfied that despite many deplorable attempts to cloud the real issues in the case by innuendoes and suggestions for which there does not appear to be the least scintilla of justification, the learned trial judge saw to it that the case for the Crown and that for the defence were sufficiently before the jury and that he charged them, if we may say so with respect, completely and correctly on all the important questions that arose in the case, but nevertheless to use the words of Lord Hewart the conclusion at which we have arrived is that the case against the 7th applicant which we have carefully and anxiously considered and discussed was not proved " with that certainty which is necessary in order to justify a verdict of guilty."* We therefore are of opinion that this is a case which comes within the rule of section 5 (1) of the Court of Criminal Appeal Ordinance. We give the 7th applicant the benefit of the doubt which we have in regard to his guilt and set aside his conviction and acquit him.

Convictions of 1–6 *applicants affirmed.*
Conviction of 7th applicant set aside.

* (1942–28 Cr.A.R. 141)

Present: SOERTSZ, J. & KEUNEMAN, J.

PALANIAPPA CHETTIAR vs AMARASENA

S. C. No. 106—*D. C. Galle No.* 38927.
Argued on 15th April, 1943.
Decided on 21st April, 1943.

Pawnbroker and pledgor—Sections 3 and 4 Pawnbrokers Ordinance (chapter 75)—Should pawnee before suing for the recovery of the money lent tender the pawn to the pawner.

Held : (i) That in the absence of any special agreement, for a pawnee or pledgee to sue to recover the amount lent by him on the security of a pawn or pledge, it is not a necessary condition that he should tender the pawn or the pledge.

(ii) The pawnee or pledgee may sue on the principal contract of loan disregarding the security he holds, for there is nothing in law to prevent a person waiving a benefit that he has.

(iii) The pawner's or pledgor's course of action must be to discharge his obligation on the principal contract, and then seek to recover what is due to him on the accessory contract or damages in default. He may do this *uno ictu* tendering the money due by him and asking for the return of the thing pledged or pawned or its value or damages.

Cases referred to : *Seyadoe Ibrahim vs Gogan* (1857 Lorenz's Reports Pt. 11 p. 114)
Wapochie vs Marikar (1859 Joseph and Beven's Reports p. 31)
Santia Kaithan vs Assan Umma (3 S.C.C. 98; Burge Vol. 3 p. 588)

H. V. Perera, K.C., with *Ivor Misso*, for the plaintiff-appellant.
G. P. J. Kurukulasuriya with *U. A. Jayasundera*, for the defendant-respondent.

SOERTSZ, J.

The plaintiff, a licensed pawnbroker, says that, on the 21st of July, 1941, the defendant borrowed from him Rs. 850/–, giving him certain articles of jewellery in pawn, and that similarly, he borrowed Rs. 225/– on the 30th of August, 1941, and on both these transactions he seeks to recover from the defendant the amount stated in the plaint together with interest and costs.

The defendant's answer to this claim is threefold. He says :

(*a*) That he pawned the articles and received the sums of money claimed for and on behalf of one Suppiah ; that he delivered both sums to Suppiah ; and that the plaintiff has, therefore, no cause of action against him and should sue Suppiah. (The defendant does not, however, say that he, disclosed to the plaintiff or that the plaintiff knew, that the defendant was acting for Suppiah.)

(*b*) That the plaintiff being a licensed pawnbroker is limited to such relief as he may be able to obtain under the provisions of the Pawnbrokers Ordinance.

(*c*) That the plaintiff is not entitled to sue him "without tendering.....the articles in question as a condition precedent to his recalling the amounts.....or until the alleged thief is prosecuted to conviction and the articles pawned are by an order of court.....delivered to some claimant other than the plaintiff.

Regarding this last averment, it is undisputed that the articles pawned with the plaintiff have been taken from him by the Police and given to the custody of the court in connexion with a charge of theft made by one third party against another third party in respect of those articles.

The learned District Judge held with the defendant on the third point taken by him, and dismissed the plaintiff's action with costs.

On appeal, only questions (*b*) and (*c*) were discussed. Question (*a*) was obviously untenable, and so, in my opinion, is question (*b*) too, although it was pressed. In view of section 3 and 4 of the Pawnbrokers Ordinance*, the provisions of that Ordinance certainly cannot apply to the transaction of the 21st July 1941 which involved a sum over Rs. 500/–. So far as the later transaction is concerned, it is within that Ordinance, but it would be governed not solely by those provisions, but by them to the extent to which they modify the common law.

The only question, then, left for consideration is question (*c*), and that question is not dealt with by the Ordinance. The answer to it must be sought under the Roman-Dutch law as it commonly obtains here. An examination of that law, as expounded by the accepted authorities, and of such case law as we have in our reports, leads one clearly to the conclusion that in the absence of any special agreement, for a pawnee or pledgee to sue to recover the amount lent by

* Repealed by the Pawnbrokers Ordinance No. 13 of 1942 which was brought into operation on 24th April, 1942

him on the security of a pawn or pledge, it is not a necessary condition that he should tender the pawn or the pledge. In a transaction of that kind, there are, really, two contracts, one ancillary to the other. As Maasdorp says, on the authority of Voet 20-1-18 :

> " The contract of mortgage (or pledge) is in its very nature accessory only, and pre-supposes the existence of some other valid principal obligation, in security of which the mortgage (or pledge) contract is entered into and the mortgage (or pledge) itself granted, and without which neither of these latter can exist." (Book 2, 2nd Ed. p. 240).

It follows from this that the pawnee or pledgee may sue on the principal contract of loan disregarding the security he holds, for there is nothing in law to prevent a person waiving a benefit that he has. It is no answer to such a claim in the absence of a special agreement, that the pawnee or pledgee holds a pawn or pledge, in satisfaction of his claim. The pawner's or pledgor's course of action must be to discharge his obligation on the principal contract, and then seek to recover what is due to him on the accessory contract, or damages in default. He may, of course, do this *uno ictu*, tendering the money due by him and asking for the return of the thing pledged or pawned, or its value, or damages. The defendant has not taken that course, and his present defence fails completely.

There was much discussion in the course of the hearing of this appeal in regard to the liability of the plaintiff to the defendant in view of the admitted fact that the articles pledged or pawned have gone out of his possession. The law appears to be that a person in the position of the plaintiff, here, would be excused if the loss of possession of the articles is due to either *vis major*, or *casus fortuitus*, or robbery or theft without his being to blame in that regard. *Seyadoe Ibrahim vs Gogan* (1857 Lorenz's reports Pt. 11 p. 114); *Wapochie vs Marikar* (1859 Joseph and Beven's reports p 31); *Santia Kaithan vs Assan Umma* (3 S.C.C. 98 ; Burge Vol. 3 p. 588). The plaintiff's loss of possession was submitted to us as one coming under *vis major*. But it is a question whether a pawnbroker who in ignorance of his right to hold even stolen property pawned with him against the owner himself till he is paid the amount due to him (see Walter Pereira p. 293 based on Grotius 2. 3. 5 & 6), and in ignorance of the powers of the Police as limited by section 30 of the Pawnbrokers Ordinance, surrenders the pawn, is entitled to plead *vis major*. But that question does not arise here, for the defendant before us seeks to repel the claim made against him with the simple plea that he is not liable to pay or tender the money due because the articles pledged have not been tendered to him. That plea, as I have already observed, cannot succeed. The defendant's cause of action on the accessory contract arises only on his paying or tendering the amount due.

For these reasons, I would set aside the judgment of the learned District Judge and enter judgment for the plaintiff as prayed for with costs here and below.

Judgment set aside.

Present: WIJEYEWARDENE, J.

MOHAMED NOORDEEN vs THE CHAIRMAN, VILLAGE COMMITTEE, GODAPITIYA

No. 68—In the Matter of an Application for a Writ of Mandamus on the Chairman of the Village Committee of Godapitiya.

Argued on 12th April & 17th May, 1943.

Decided on 24th May, 1943.

Mandamus—Butchers' Licence—Butchers Ordinance sections 4, 6 and 7—In what circumstances may proper authority be compelled to issue licence.

Held : (i) That it is not open to the proper authority under the Butchers Ordinance to impose a condition that a licence under section 4 will not be issued to a person, who does not purchase at an auction held by the proper authority the right to obtain the licence.

(ii) That where the proper authority has acted arbitrarily and not exercised the discretion vested in it, a mandamus will issue to compel it to exercise its discretion.

Cases referred to : *Quinn vs Leatham* (1901–Appeal Cases 534)
Rustom Jamshad Irani vs Hartley Kennedy (I.L.R. 26 Bombay 396)

Seyed Ahmed, for the petitioner.

E. B. Wickramanayake with *H. Wanigatunge*, for the respondent.

WIJEYEWARDENE, J.

This is an application for the issue of a writ of mandamus to the respondent directing him to grant a butcher's licence to the petitioner.

The petitioner carried on the trade of a butcher at Godapitiya in 1941 and 1942 on licences issued by the Assistant Government Agent, Matara, who was then the "proper authority" under the Butchers Ordinance. The respondent was duly appointed in writing by the Assistant Government Agent under section 3 of that Ordinance as the "proper authority" for 1943 for the village area of Godapitiya. When the petitioner applied to the respondent for his licence for 1943, the respondent wrote to him on November 11th 1942, as follows :

> "The Committee (*i.e.* the Village Committee) has decided to open two meat stalls at Godapitiya and to sell them by public auction for next year. Two licences to slaughter cattle will be issued to those persons who purchase the meat stalls at the auction. The renewal of your licence will be considered after the day of auction."

It was further stated by the petitioner in his affidavit :

> (*a*) That no meat stalls were established by the Village Committee as undertaken in the respondent's letter.
>
> (*b*) That the respondent sold, in fact, what "he called the right to obtain a licence" to one Haniffa for Rs. 200/– and then issued licences to Haniffa.
>
> (*c*) That the petitioner's application for a licence was refused on the ground that "he did not buy the right to obtain a licence."

Showing cause against the *order nisi* served on him, the respondent filed an affidavit which was extremely vague and inconclusive in its character. On my directing him to file a further affidavit setting out definitely his position with regard to the various material allegations made in the petitioner's affidavit, the respondent submitted a second affidavit. In that affidavit the respondent has attempted to justify his action by reference to a resolution passed by the Village Committee to establish two meat stalls at Godapitiya to be sold "by public auction by means of tender" and to issue the Butchers' licences only to the "purchasers" of the meat stalls so established. He has, however, admitted that no meat stalls have, in fact, been established by the Village Committee at Godapitiya and has not denied that Haniffa to whom the licences were issued had paid Rs. 200/– in "purchasing" the non-existent meat stalls in order to qualify himself as an applicant for the licences. The respondent has also sought to justify the refusal of a licence to the petitioner on the ground that "the needs of the inhabitants of the village were sufficiently served" by the issue of licences to Haniffa.

One fact emerges clearly from these affidavits and it is that the respondent purporting to act on a resolution passed by the Village Committee refused to issue a Butcher's licence to the petitioner as he did not purchase at a "public auction by tender" what has been termed "a right to obtain a licence."

Now section 4 of the Butchers Ordinance requires every person carrying on the trade of a butcher to obtain an annual licence and section 9 fixes the fee for the licence at Rs. 5/–. Section 6 lays down that every such applicant for a license should enter into a bond in the Form B in the Schedule to the Ordinance. That Form shows that the conditions to be inserted in the bond should be "in accordance and conformity with the enactments and provisions of the (Butchers) Ordinance and of the by-laws made thereunder." The Ordinance proceeds to enact in section 7 that "it shall be lawful for the proper authority, in the exercise of his discretion, upon just and reasonable grounds to refuse to issue an annual licence."

The petitioner was carrying on a legitimate trade as a butcher from 1941. In the words of Lord Lindley in *Quinn vs Leatham* (1901–Appeal Cases 534) "he was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people." The only way in which this right of the petitioner has been curtailed by statute is by requiring him to obtain a Butcher's licence, subject to the conditions referred to in section 6 of the Butchers Ordinance. The provisions of that Ordinance indicate that the legislature recognized the right of a person to carry on the trade of a butcher but sought to control and regulate the trade by making it obligatory for a butcher to obtain a licence. The Ordinance sought to regulate the trade further by empowering the proper authority to refuse or withdraw a licence. It is, no doubt, true that section 7 vests the proper authority with a discretion in refusing or withdrawing a licence but that discretion has to be exercised on just and reasonable grounds. The conditions imposed by the respondent were not conditions "in accordance and conformity with" the Ordinance or the by-laws made under it. The condition that an applicant for a licence should first purchase "the right to obtain a licence" is a distinct negation of the basic principle of an Ordinance which recognizes a right in every person to apply for a licence. This court will grant a mandamus even in the case of a tribunal in which is vested a discretion of a judicial nature, if it lays down and acts on

arbitrary and unjust rules regulating the exercise of its discretion.

The resolution passed by the Village Committee is of no legal effect. The Village Communities Ordinance gives a Village Committee power to make rules but such rules do not become valid and effectual until they have been approved by the Governor and published in the Gazette. The counsel for the respondent admitted that there were no relevant rules on the subject of meat stalls made under the Village Communities Ordinance for the village area of Godapitiya.

There is no merit whatever in the reason urged in the affidavit that there was no necessity for a licence to the petitioner as "the needs of the inhabitants of Godapitiya are sufficiently served" by Haniffa. *Vide Rustom Jamshad Irani vs Hartley Kennedy* (I.L.R. 26 Bombay 396).

The rule for the mandamus asked for is made absolute and the petitioner is granted the costs of these proceedings.

Rule made absolute.

Present: KEUNEMAN, J.

PANDITHARATNE (Sub-Inspector of Police) vs KONSTZ

S. C. No. 42—*M. C. Colombo No.* 6130 *with application No.* 10.
Argued on 5th March, 1943.
Decided on 10th March, 1943.

Defence Regulations—Control of Prices—Meaning of "store" in regulation 6 *of the Defence (Control of Prices) (Supplementary Provisions) Regulations.*

The accused who claimed to be the printer of a paper called "The Trespasser" stocked in his house 476 reams of unglazed newsprint. The house was not a registered store nor had he furnished a return as required by regulation 6.

Held : (i) That the accused's house was a store within the meaning of that expression in regulation 6*.

(ii) That a forfeiture under section 5 of the Control of Prices Ordinance No. 39 of 1939 does not follow upon a conviction as a matter of course. The magistrate has to exercise a discretion and if he exercises his discretion in favour of forfeiture he must set out good reasons for the forfeiture so that the appellate tribunal may examine them.

J. E. M. Obeyesekere with *S. J. Kadirgamar*, for the accused-appellant.
G. E. Chitty, Crown Counsel, for the complainant-respondent.

KEUNEMAN, J.

In this case the accused was charged with keeping at "Epsom," Avondale Road, Maradana, which is not a registered store a stock of price controlled articles, to wit 476 reams unglazed newsprint, which is a controlled article (see Government Gazette No. 8957 of the 26th June, 1942) without furnishing to the Controller a return specifying such store or other place — in breach of Regulation 6 of the Control of Prices Regulations 1942 (see Government Gazette No. 9019 of October 8th 1942) and thereby having committed an offence under section 5 of the Control Prices Ordinance as amended by the Defence (Control of Prices Supplementary Provisions) Regulation No. 2 (2) (see Defence (Miscellaneous Regulations p. 203)).

The accused was convicted and a nominal fine of Rs. 25/– was imposed upon him, in view of the fact that the stock of paper worth nearly Rs. 6,000/– was forfeited. He now appeals both against the conviction and the forfeiture, and has also filed papers in revision.

Regulation 6 runs as follows :

"Every person who desires to keep any stock or quantity of any price-controlled article at any store or other place which is not a registered store, shall furnish to the Controller a return specifying such store or other place, and the Controller may in respect of such store or other place exercise the powers conferred on him by regulation 5."

---

* 6. Every person who desires to keep any stock or quantity of any price-controlled article at any store or other place which is not a registered store, shall furnish to the Controller a return specifying such store or other place, and the Controller may in respect of such store or other place exercise the powers conferred on him by regulation 5.

7. The Controller may at any time, by notice published in the Gazette and in at least one daily newspaper circulating in Ceylon require every person who has in his possession or under his control any quantity of any price-controlled article in excess of a quantity specified in the notice, to furnish to the Controller before a date so specified, a return setting out the quantity of such article in his possession or under his control and the premises at which such quantity is kept.

Counsel for the appellant argued that the "person" referred to in Regulation 6 is an importer or wholesale trader. He refers to Regulations 2, 3, 4 and 5 which specifically apply to importers or wholesale traders and contends that Regulation 6 must be regarded as applying to such persons. But I think that the failure to make any reference to importers or wholesale traders is significant and intentional and this view is supported by the language of Regulation 7, which clearly applies to all persons, whether importers and wholesale traders or not.

Counsel for the appellant further argued that unless a restrictive interpretation was applied to Regulation 6, every person who has a very small stock or quantity of a price-controlled article in his house would be guilty of an offence unless he furnished a return to the Controller. He contended that that was clearly not the intention of the Regulation. I agree with him that the Regulation was not intended to have this meaning for otherwise there would have been no need for Regulation 7. In my opinion the words " at any store or other place which is not a registered store " require emphasis. In the Shorter Oxford English Dictionary the word " store " bears many meanings, but there are only two meanings which may have relevance here. One is " a place where stores are kept, a warehouse, a storehouse. " The other is " a place where merchandise is kept for sale." But I note that this latter meaning of the word " store " arises chiefly in the United States and in the Colonies, although the plural form " stores " has obtained currency in Great Britain from about 1850. As an adjective the word " store " is used as " denoting a receptacle, repository, depot or transport for stores or supplies," as in the word " storehouse " or " storeroom."

What is meant by the words " or other places" ? Clearly this does not mean any kind of place, and Crown Counsel himself conceded that it meant " a place in the nature of a store." I think this interpretation is correct.

Admittedly the house " Epsom " in which the paper was kept was not a registered store, and the paper kept there was price-controlled and no return was furnished to the Controller. Can the house " Epsom " be regarded as a store or other place in the nature of a store ?

The evidence of the Police Sub-Inspector is that " Epsom " is the accused's house, which was searched on the 4th of December, 1942. On that occasion 476 reams of unglazed newsprint were found in that house. The accused described himself as a printer, and said that Mr. Andre was the proprietor of the Lorenz Press and of a paper called " The Trespasser," which is a registered paper. As a result of the war the circulation of the paper had to be cut, in order to economize in paper. Witness added that " the paper for the Lorenz Press is stocked in my house for the purpose of economizing our paper."

There are two factors of importance. One is the large quantity of paper kept at the accused's house. The other is the admission by the accused that his house was utilized for the stocking of the paper for economical reasons. I think there is sufficient evidence that the house " Epsom " can be regarded as a store or other place in the nature of a store. There can be no question that it is substantially used for storing paper.

I have come to the conclusion that the conviction in this case is correct, and the appeal in this respect is dismissed.

The question that remains relates to the forfeiture of the stock of paper. I have examined the reasons given by the magistrate for the forfeiture, and I am inclined to agree with the comment in the petition of appeal, that the magistrate acted upon the basis that an order of forfeiture should be made in every case, unless the defence satisfied him that such an order should not be made. It is true that the magistrate added that the evidence in the case disclosed good reasons justifying an order for forfeiture, but he has not stated what these good reasons are. The reasons examined by the magistrate are first the plea of the accused that he only committed a technical offence due to ignorance of the law. This the magistrate rejects. I agree that this is not a complete answer to the claim for forfeiture, but it is at least an element to be considered. The second reason considered by the magistrate is the gravity of the penalties imposed even in the case of a first offence. It does not however follow from this that forfeiture must follow almost as a matter of course. The magistrate has to exercise a discretion and if he exercises his discretion in favour of forfeiture he must set out good reasons for this which can be examined if necessary in appeal.

The only other reason, " incidentally " mentioned is that in the accused's premises sugar and flour were stocked for the use of a restaurant called Green's Cafe, belonging to Mr. Andre. But the position with regard to the sugar and flour is not clear, and these articles are not the subject of any charge. The accused said he had a permit for this sugar and flour, and that in his declaration at the time of purchase he declared the premises " Epsom " as the place where he would stock those articles. I

do not think this is a point which can fairly be brought against the accused.

I do not think any good reasons have been made out for the forfeiture. There is no suggestion in the case that the paper or in fact the other articles were brought to the house surreptitiously or with the object of concealing them. They may well have been placed there in the ordinary course of business, and may have been there even prior to the order for the control of prices.

Acting in revision, I set aside the order for forfeiture of the paper in question.

The fine imposed by the magistrate was only the nominal amount of Rs. 25/– in view of his further order of forfeiture. In this case I do not consider this a sufficient penalty. The fine in this case will be increased to Rs. 250/– in default six weeks' simple imprisonment.

Order of forfeiture set aside.
Sentence varied.

Present: WIJEYEWARDENE, J.

MARIKAR vs KAMALLA

S. C. No. 150—*C. R. Colombo No.* 68178.
Argued on 5th & 6th November, 1942.
Decided on 10th November, 1942.

Promissory Note—Can payee endorse a note paid by the maker so as to give the endorsee right to sue the maker.

Held : That the payee cannot endorse a promissory note paid by the maker so as to give the endorsee a right to sue the maker.

Cases referred to : *Jayawardene vs Rahiman Lebbe* (21 N.L.R. 178)
Muthu Caruppen Chetty vs Samaratunga (26 N.L.R. 381)
Glasscock vs Balls (24 Queens Bench Division 13)
Thamboo vs Phillippu Pillai (33 N.L.R. 35)
Vellasamy vs Mohideen (35 N.L.R. 239)

N. Nadarajah, K.C., with *H. W. Thambiah*, for the appellant.
No appearance for the respondent.

WIJEYEWARDENE, J.

This appeal has to be decided on a question of law as there has been no appeal on questions of fact although the plaintiff was granted the necessary leave to appeal on facts.

This is an action by the appellant as a holder in due course. The Commissioner found that the note was made by the first defendant in favour of his sister the 2nd defendant to secure a sum of Rs. 210/– promised by him as dowry to the 2nd defendant. The 1st defendant, later, invested the dowry on a usufructuary mortgage bond in March, 1939 for the benefit of the 2nd defendant, and thereby discharged his liability. The note was endorsed for value in August, 1940 to the plaintiff who took the note without any knowledge of the investment in March, 1939.

In *Jayawardene vs Rahiman Lebbe* (21 N.L.R. 178) it was held by a Bench of three judges that when a promissory note payable on demand was paid by the maker it could not be subsequently endorsed by the payee so as to give the endorsee a right to sue the maker on the note.

In *Muthu Caruppen Chetty vs Samaratunga* (26 N.L.R. 381), Jayawardene, A.J. expressed his doubts as to the correctness of the earlier decisions and referred to the English case of *Glasscock vs Balls* (24 Queens Bench Division 13) in support of his observations. In *Thamboo vs Phillippu Pillai* (33 N.L.R. 35), Garvin, A.C.J. and Maartensz, A.J. distinguished the facts of the case they were considering from the facts in *Jayawardene vs Rahiman Lebbe* (*supra*) and followed *Glasscock vs Balls* (*supra*). In *Vellasamy vs Mohideen* (35 N.L.R. 239), Dalton, A.C.J. (with whom Koch, A.J. agreed) reviewed all the earlier decisions of this court and the case of *Glasscock vs Balls* (*supra*) and distinguished the last case from the case of *Jayawardene vs Rahiman Lebbe* (*supra*). I am able to draw the same distinction between the present case and the English case. I am, therefore, bound by the decision of this court in *Jayawardene vs Rahiman Lebbe* (*supra*).

I dismiss the appeal.

Appeal dismissed.

Present: DE KRETSER, J.

THE KING vs MATARAGE EMANIS

64 Colombo 33253 (*3rd Western Circuit*)
Argued & Decided on 19th August, 1940.

Criminal Procedure Code sections 172 *and* 217*—Withdrawal of two counts from an indictment containing three counts relating to three separate offences—Does such withdrawal act as a bar against the accused being indicted in respect of the counts withdrawn.*

The accused was indicted on three separate counts, two of murder and the third of attempted murder. At the trial one of the counts of murder and the count of attempted murder were withdrawn on the ground that the interests of justice required that the accused should be tried separately on each count. Upon the accused being indicted in respect of the count of murder that was withdrawn, objection was taken by the counsel for the prisoner that it was not open to the Attorney-General to indict him in respect of that count.

Held : That the withdrawal of an indictment or a charge from an indictment under section 217 of the Criminal Procedure Code does not preclude the Attorney-General from indicting the prisoner subsequently in respect of the charge that was withdrawn.

Cases referred to : *Rex vs Davies* (1937–26 C.A.R. 95)

H. W. R. Weerasooriya, Crown Counsel, for the prosecution.
C. S. B. Kumarakulasingham, with *M. M. Kumarakulasingham* and *G. Thomas* instructed by *N. J. V. Cooray,* for the accused.

DE KRETSER, J.

Counsel for the defence objects to the indictment before the same is read to the prisoner on the ground that the prisoner had faced certain other proceedings, to which I shall now refer, and that in view of those proceedings the present indictment should be quashed.

It would appear that the prisoner was charged in case No. 92 of this court on 3 counts, namely, on count 1 with the murder of a man called Endoris, on count 2 with the murder of a woman called Lenahamy and on count 3 with the attempt to commit the murder of one Peter. When that case was taken up for trial Crown Counsel applied under section 217 of the Criminal Procedure Code to withdraw count 3 and this application was allowed, no objection being taken by the defence. Crown Counsel then moved to amend the indictment by deleting the first count, and he carefully explained that he was doing so, not because the Attorney-General proposed to drop that charge, but because the opinion had been expressed by the Court of Criminal Appeal in England that a person should not be tried on one indictment for two murders. He, therefore, stated that he wished the power reserved to have a further indictment presented.

Counsel for the defence had no objection naturally to the amendment, but he objected to any reservation being made, the effect of which would be to expose his client to a further trial. Mr. Justice Cannon allowed the amendment for the reason given by Crown Counsel, and although he did not, in express terms, leave it open to the Attorney-General to present another indictment, it is clear that he intended to do so. Even after the order had been made counsel for the defence attempted to canvass the matter but the judge stood by his order. The result was that count 1 was deleted and the accused stood his trial only with regard to count 2.

No attempt is made at present to invoke the doctrine of *autrefois acquit* or *convict* as the case may be, but it is argued that the Crown has not the power to present this fresh indictment, and that in any case it should not present it as that would amount to harrassing the accused. It is argued that section 172 of the Criminal Procedure Code under which Crown Counsel purported to act was intended to meet the case where a charge had been erroneously stated and that special provision was made for the substitution of one charge for another, or the addition of a new charge, but no provision was made for the deletion of a count.

Crown Counsel argues that the terms of the section are wide enough to admit of any alteration including the deletion of a count. If the section merely related to the charge and omitted the word "indictment" then, one sees at once, that the deletion of a charge would not be an alteration but it also refers to an indictment in which conceivably there may be more charges than one, and it provides for alteration of an

indictment. It might, therefore, be argued that deleting one charge out of many is necessarily an alteration of the indictment.

The point is not without some difficulty. I do not think it is necessary to stay to consider it, for I think the matter may be dealt with in another way. Counsel for the defence states that the court might have ordered separate trials, and in that case he would have had nothing to say. He says that the court has the power to order separate trials, and that this power comes from its own inherent jurisdiction. He quotes certain decisions of this court to that effect.

The position now is this : The Crown did not withdraw the charge under section 217 of the Criminal Procedure Code. In effect what the court did was to order separate trials, following the suggestion made by the Court of Criminal Appeal in *Rex vs Davies* (1937–26 Criminal Appeal Reports, page 95). The Lord Chief Justice said there that the proper course was to charge for each murder separately in a separate indictment. Mr. Justice Cannon feeling the force of that observation and seeing the Crown was pursuing a right course confined the trial to one charge, and it could be confined to one charge only by deleting the other. This procedure was adopted in the interests of the accused. Quite, clearly, therefore, the accused had not been convicted or acquitted on the first count ; the charge against him has not been withdrawn and he still remains liable to be tried for that offence. I, therefore, think that the objection cannot be upheld and the case must go to trial.

Objection overruled.

Present: Hearne, J.

ABEYTUNGE vs SIYADORIS & OTHERS

S. C. No. 113—*C. R. Galle No.* 21811.
Argued on 25th February, 1943.
Decided on 12th March, 1943.

Servitude—Cartway of necessity—Claim for—Where right of way claimed lies over contiguous lands belonging to different owners—Can all the owners be joined in one action—Misjoinder of parties and causes of action.

Held : That where a right of cartway of necessity is claimed over contiguous lands belonging to different persons it is open to the plaintiff to join the owners of all the lands over which he claims the cartway in the same action.

Cases referred to : *De Silva vs Nonohamy et al* 34 N.L.R. 113
Fernando et al vs Arnolis 32 N.L.R. 328
Perera vs Fernando 4 C.W.R. 148
Samsan & Dias vs Amarasinghe 4 C.W.R. 269

C. V. Ranawake, for the plaintiff-appellant.
E. F. N. Gratiaen with *Ivor Misso*, for the 4th, 5th & 16th defendants-respondents.

Hearne, J.

The plaintiff claimed a right of cartway of necessity to a road through a parcel of land of which the 16th defendant-respondent is amongst others a co-owner, then through a parcel of land of which the 4th and 5th defendants-respondents are amongst others co-owners and finally through a third parcel of land of which the 1st, 2nd and 3rd defendants-respondents are amongst others co-owners. The Commissioner acceded to the argument that there was misjoinder of causes of action and of parties and dismissed the suit.

In 34 N.L.R. 113, the plaintiff claimed to be entitled to a right of way which traversed a number of contiguous lands, and on being disturbed in his enjoyment of the right of way by the owner of one of the lands, he brought an action against the owner for a declaration of his right and damages.

It was held that in these circumstances it was not necessary for him to join as parties the owners of intermediate lands, that the action was properly constituted without their being joined and that the plaintiff was entitled to proceed against the particular owner referred to alone, even if it appeared in the course of the proceedings that another owner of an intervening land also denied the right of way which the plaintiff claimed. In this event the court could exercise its powers under section 18 of the Civil Procedure Code.

In 32 N.L.R. 328 Drieberg, J. said he was not sure if relief is sought against a defendant by declaration of a right of way over his land, the owner of an intervening land must also be joined as a party. But he indicated that in his opinion if the intervening owner also denied the right of way, the court in the hope of reaching finality in the matter should order that he be joined as a party. His actual words were: " I am not sure that the owner of an intervening land must in all cases be made a party to the action ; but where the right of way over an intervening land is denied by the owner of it, his presence before the court becomes necessary in order to enable the court effectively and completely to adjudicate and settle all questions involved in the action and to avoid further litigation."

In the order that was made the court (Lyall Grant, J. and Drieberg, J.) gave the respondents permission to bring a fresh action " making parties to it all the co-owners of Delgahawatta (over which the right of way was claimed) and the owner or owners of Ambalanduwakurundewatta (the intervening land)."

In 4 C.W.R. 148 Wood Renton, C.J. was of the opinion that where a right of way is claimed over two distinct lands, the one belonging to the 1st defendant and the other to the 2nd and 3rd defendants, the causes of action are distinct, and the owners should not have been sued in the same action.

In 34 N.L.R. 113, Macdonell, C.J. cited 4 C.W.R. 148 with approval but the purpose for which he cited it must be noted. The question before him was whether the owner of an intervening land *need* be joined and he cited 4 C.W.R. 148 in order to show that such owner need not be joined. But in adopting 4 C.W.R. 148 for the purpose of deciding the matter he was considering, it must not be taken for granted that he adopted all the implications of that decision ; Garvin S.P.J. did not cite it. Jayawardene, A.J. did, but only for the limited purpose I have mentioned.

I think that 4 C.W.R. 148 must be read with reference to the particular facts of that case. It was only the 1st defendant who interfered by an overt act with the right of way the plaintiff claimed and the case is little more than direct authority for saying that the 2nd and 3rd defendants who had up to the time of action not challenged the plaintiff's right of way, should not, in those circumstances have been made parties.

An examination of the authorities seems to lead to this result : If a plaintiff claims that he is entitled to an existing right of way in his favour, and one of the owners of several lands traversed by the right of way disturbs his enjoyment of it, he may file an action against such owner alone. It is unnecessary to make the owners of intervening parcels of land, who do not or have not challenged the plaintiff's right of way, parties. If, however, any owner of an intervening land also disputes the plaintiff's right of way he may and indeed should be made a party. In this event no misjoinder arises.

All these authorities deal with a right of way which the plaintiff asserted had previously existed. What is the position when he seeks to have a right of way (of necessity) which had not previously existed decreed in his favour ? It is argued by counsel for the respondents to this appeal that there is a separate and distinct cause of action in regard to each parcel of land over which the plaintiff seeks to exercise a right of way, and that these separate causes of action against different parties cannot be joined in one suit.

There is only one case that seems to have any bearing on the subject and it is claimed by the respondents to be in their favour. In that case (4 C.W.R. 269) De Sampayo, J. said : " It is no doubt true that the owner of land cannot establish a servitude of way over a land not adjoining his own unless he has a right over the intervening lands. But this case has a peculiarity of its own. The plaintiff does not claim a present right of way but he asks the court to grant him one of necessity. In that state of things I do not think it against principle for the court to give it by taking the lands separately. The plaintiff in this action may yet bring an action similar to this against the owners of the intervening lands and ask the court for a similar decree." I do not think the claim of the respondents is justified. The case decided that the plaintiff may proceed against owners of contiguous lands over all of which he claims a right of way of necessity one at a time. It does not decide that he cannot proceed against all together. Where, therefore, the right of way is one of necessity the particular problem that has to be decided in this case appears to be free of local authority. It must be decided on first principles.

Now, on what principles did the judges in 32 N.L.R. 328 permit the plaintiff to join as parties the co-owners of Delgahawatta (over which the right of way was claimed) and the owner or owners of Ambalanduwakurundewatta (the intervening land) who also disputed the right of way (*supra*)? On the principle, I take it, that the servitude is indivisible and that a cause of action being *inter alia*, the denial of a

right, each of the two sets of co-owners in denying to the plaintiff the right to proceed over a parcel of land owned in common, *ipso facto* denied to the plaintiff the exercise of an indivisible right and was thus liable to be sued in respect of the same cause of action. It is, I think, clear that this follows from the fact that if the right is interrupted at one point, it effectually brings the whole servitude to an end. No doubt a part is less than the whole. But in the case of a servitude the denial of a part *is* the denial of the whole.

I see no reason why the same principle should not apply when a right of way is claimed of necessity. It may be that the claim of the plaintiff is fantastic. But if necessity can be established the denial of a "right" based upon necessity by each set of co-owners is the denial of one entire right and gives rise to one and the same cause of action. Each set may have a different defence. The denial of necessity may be based on varying considerations. But this does not, in my opinion, mean that the causes of action are distinct. There is one denial possibly based on different grounds.

I allow the appeal with costs. The case will go back for trial in the ordinary way. All costs in the trial court will be in the discretion of that court.

Appeal allowed.

Present: JAYETILEKE, J.

JAMIS vs DOCHINONA

101—*C. R. Balapitya No.* 23011
Argued on 3rd September, 1942.
Decided on 7th September, 1942.

Court of Requests—Judgment by default—Later application by defendant to vacate judgment on the ground that no summons served—Refused as affidavit failed to show valid and sound defence—Civil Procedure Code section 823 (3).

Held : That section 823 (3) of the Civil Procedure Code is not applicable to a case where on the ground that he was not served with summons a defendant asks to vacate a judgment entered by default in the Court of Requests.

L. A. Rajapakse (with him *O. L. de Kretser* (*Jnr.*)), for the defendant-appellant.
R. C. Fonseka, for the plaintiff-respondent.

JAYETILEKE, J.

The plaintiff instituted this action against the appellant for a declaration of title to a land called Yatagalakanda Addara Delgahawatte and for damages. The Fiscal's Officer to whom the summons was entrusted for service reported to court that he served the summons on the appellant on being pointed out by the plaintiff. On the summons returnable date the appellant was absent and the learned Commissioner fixed the case for *ex parte* hearing on January 27th, 1942, on which date, after hearing the evidence of the plaintiff as to title and damages, he entered judgment in plaintiff's favour as prayed for in his plaint with Rs. 3/– a month as damages.

Three days later, the appellant moved to have the judgment vacated on the ground that he was not served with the summons. The learned Commissioner dismissed his application on the ground that under section 823 (3) of the Civil Procedure Code he had to satisfy him not only that he had not received sufficient notice of the proceedings, but also that he had a good and valid defence on the merits of the case. He pointed out that in the appellant's affidavit there was no indication as to what his defence was.

I do not think that the order of the learned Commissioner can be supported. Section 823 (3) applies when the defendant on being served with the summons fails to appear on the appointed date but appears later and asks the court to grant him the indulgence of defending the action.

The appellant does not ask for any indulgence under section 823 (3). He says that the summons was not served on him and that the court acted without jurisdiction in entering judgment against him under section 823 (2). I think he is right. Before entering judgment it was the duty of the court to have called for proof that the person on whom the summons was reported to have been served was the appellant.

I would set aside the order appealed from and all the proceedings subsequent to January 20th, 1942. The appellant is entitled to the costs of this appeal and the costs of the inquiry.

Appeal allowed.

Present: JAYETILEKE, J.

GANETI vs FONSEKA

S. C. No. 881 *of* 1942—*M. C. Badulla No.* 8004.
Argued on 5th February, 1943.
Decided on 12th February, 1943.

Criminal Procedure Code section 297—*Accused ordered to leave the Court while their witness gave evidence—Order illegal.*

Held : (i) That section 297 of the Criminal Procedure Code is an imperative provision and the accused is entitled as of right to be present when evidence is taken.

(ii) That it is not only irregular but also illegal for a Magistrate to order an accused to leave court while his witnesses are giving evidence.

Cases referred to : *Police Vidane, Kandana vs Amaris Appu* (25 N.L.R. 400)

N. E. Weerasooriya, K. C., with *D. W. Fernando*, for the first accused-appellant.
E. F. N. Gratiaen with *S. Kulatileke*, for the complainant-respondent.

JAYETILEKE, J.

The appellant and three others were charged under section 183 of the Penal Code with having obstructed the complainant, a Fiscal's process server, in the execution of his duties.

The appellant was convicted and sentenced to pay a fine of Rs. 25/- and the 2nd and 4th accused were acquitted. Summons was not served on the 3rd accused.

At the close of the case for the prosecution Mr. Wimot Perera, who appeared for all the accused, moved to call one Thomas as a witness. Mr. J. E. M. Obeyesekera, who appeared for the complainant, stated that if the accused were to be called they should be called first. Mr. Perera replied that he had not made up his mind whether he would call the accused to give evidence.

The magistrate thereupon made the following order : " As there is a possibility that the accused may be called as witnesses, I think it proper that they should not listen to the evidence of witnesses who will be called before them and I, therefore, order the accused to go out of court."

The accused then left the court and Thomas' evidence was recorded in their absence.

Learned counsel for the appellant contended that under section 297 of the Criminal Procedure Code all evidence should be taken in the presence of the accused and that the action of the magistrate was illegal. He cited in support of his contention the judgment of Bertram, C.J. in *Police Vidane, Kandana vs Amaris Appu* (25 N.L.R. 400) which appears to be on all fours with the present case.

Section 297 of the Criminal Procedure Code clearly lays down that all evidence shall be taken in the presence of the accused, or when his personal attendance is dispensed with, in the presence of his pleader. The words " all evidence " include both the evidence for the prosecution as well as for the defence. The language of the section is imperative and the accused is entitled as of right to be present when evidence is taken.

The procedure adopted by the magistrate is not only irregular but illegal and it is unnecessary for me to consider whether the accused has been prejudiced or not. In my opinion the trial that was held was not a legal one. The conviction cannot, therefore, stand.

I may mention that learned counsel for the respondent very frankly admitted that the procedure that was adopted by the magistrate was quite indefensible.

The only other question is whether I should order a fresh trial. The case has been strenuously fought on both sides and the trial has taken two days. The evidence of the complainant was that the appellant snatched a list that was in his hands, the 2nd accused pushed Banda who accompanied him, the 3rd accused seized him by the neck and pushed him out and the 4th accused threatened to kill him if he did not leave.

The magistrate has acquitted the 2nd and 4th accused because Banda has contradicted the complainant as to the part played by them. On the whole the evidence for the prosecution does not seem to be quite satisfactory.

In the circumstances I do not think I should put the appellant to the anxiety and expense of a fresh trial. I would set aside the conviction and sentence and acquit him.

Conviction set aside.

Present: HOWARD, C.J.

ASST. COLLECTOR OF CUSTOMS, TRINCO. vs SOMASUNDRAM & TWO OTHERS

S. C. Nos. 260–262—*M. C. Anuradhapura No.* 7117.
Argued & Decided on 21st May, 1942.

Customs Ordinance sections 127, 139*A and* 144—*Burden of proof.*

Held : (i) That section 144 of the Customs Ordinance does not impose on an accused person the burden of proving his innocence.

(ii) That the section applies to a case where goods have been seized for non-payment of duties and not to a criminal prosecution.

L. A. Rajapakse with *A. S. Ponnambalam*, for the accused-appellants.
H. A. Wijemanne, Crown Counsel, for the complainant-respondent.

HOWARD, C.J.

In this case the appellants were charged with a criminal offence under section 127 of the Customs Ordinance. That offence was that they were knowingly concerned in dealing with 17 bags of beedies, being goods liable to duties of Customs with intent to defraud the revenue of such duties, and did thereby become liable under section 127 of the Customs Ordinance to forfeit either treble the value of the said goods or the penalty of one thousand rupees at the election of the Collector of Customs and that they thereby committed an offence punishable under section 139A of the Customs Ordinance as amended by Customs (Amendment) Ordinance No. 3 of 1939. Being a criminal offence, the ordinary rules with regard to the proof of such an offence apply. The burden was on the Crown to prove the ingredients of the offence which it was alleged had been committed. The only evidence produced by the Crown was that of Inspector Van Rooyen, who stated that he stopped a car coming from Jaffna and that it contained these 17 bags of beedies. One of the accused was the driver of the car ; the other two were passengers. There was some evidence given by Inspector Van Rooyen as to whether beedi leaves and beedi tobacco are grown in Ceylon. His evidence on this point was of a vague and unsatisfactory character. In these circumstances there was no proof adduced by the Crown that the goods which were seized were liable to Customs duties. Quite apart from that, the other ingredient of this offence was not established, namely that the appellants were knowingly concerned in dealing with the bags with intent to defraud the revenue.

My attention has been directed to section 144 of the Customs Ordinance which states that " if any goods shall be seized for non-payment of duties or any other cause of forfeiture, and any dispute shall arise whether the duty has been paid for the same, or whether the same have been lawfully imported, or lawfully laden or exported, the proof thereof shall lie on the owner or the claimer of such goods and not on the Attorney-General or the officer who shall seize or stop the same." In my opinion that section does not impose on an accused person the burden of proving his innocence. It applies to a case where goods have been seized for non-payment of duties and not to a criminal case such as this.

For the reasons I have given, the appeals are allowed and the convictions set aside.

Convictions set aside.

Present: DE KRETSER, J.

DE SILVA vs THE MAGISTRATE, GAMPOLA

In the Matter of an Application for a Writ of Mandamus in No. 4421/M.C. Gampola.
S. C. No. 323/1942—M.C. Gampola No. 4421.
Argued on 28th June, 1943.
Decided on 7th July, 1943.

Criminal Procedure Code section 199—Report made by a police officer under section 148 (1) (b)—Is the injured person entitled to appear by pleader and conduct the prosecution.

Held : (i) That in a case tried summarily by a magistrate the injured person is entitled, in the absence of the Attorney-General, Solicitor-General, Crown Counsel or a pleader generally or specially authorized by the Attorney-General, to appear by pleader and conduct the prosecution and that a police officer is not entitled to conduct the prosecution.

(ii) That a police officer who has made a report under section 148 (1) (*b*) of the Criminal Procedure Code is not " the complainant " for the purposes of section 199 of the Criminal Procedure Code.

Cases referred to : *Grenier vs Edwin Perera* (42 N.L.R. 377)
Kulatunga vs Mudalihamy (42 N.L.R. 33)
Webb vs Catchlove (3 T.L.R. 159)
Duncan vs Toms (16 Cox 267)

H. V. Perera, K.C., with *S. P. Wijeyewickreme*, in support.
G. E. Chitty, Crown Counsel, as *amicus curiae*.

DE KRETSER, J.

The point raised in this application is said to arise rather frequently in recent times, and both the Attorney-General's Department and members of the legal profession are anxious that it should be authoritatively decided. I was inclined, therefore, to have the case sent up before a Divisional Bench, but when I saw that the trial of this summary offence had started so far back as the 25th May, 1942 and had been held up from July of that year by reason of this application, I decided that further delay was undesirable.

The question has been touched upon by Keuneman, J. in the case of *Grenier vs Edwin Perera* (42 N.L.R. 377) but his remarks were made *obiter* and the matter therefore has to be considered afresh.

In that case a Police Constable had been charged with causing grievous hurt with a club. Proceedings started with a written report under section 148 (1) (*b*) of the Criminal Procedure Code by Sub-Inspector Grenier. After a preliminary discussion the magistrate had allowed the Assistant Superintendent of Police to conduct the prosecution. The accused was acquitted and the injured party moved this court in revision. Objection was taken that he had no status and eventually the case seems to have been considered on its merits, but it is not clear whether this was done because he *had* a status. It was when considering the question of status that Keuneman, J. considered the terms of section 199 of the Code. He seemed to think that the injured person may be regarded as a complainant, that Sub-Inspector Grenier also may be regarded as a complainant, and that the Assistant Superintendent of Police came within the words " any officer of any Government Department " in that section, and that it was a matter for the magistrate to decide in his discretion as to who should conduct the prosecution. In other words, he seemed to think that more than one person might claim the right under that section and the magistrate would then decide between the conflicting claimants. He did not indicate on what lines the magistrate should exercise his discretion. To my mind it seems unlikely that the Code would have left the matter in such a doubtful position and that in most cases — if not in all cases — the decision of the magistrate would be arbitrary.

Section 2 of the Code defines the word " complaint " and the natural inference would be that the person making a complaint is the *complainant*. But I think it is necessary to distinguish between a person making a complaint and a person instituting proceedings under section 148 of the Code. If one analyses the definition of " complaint " it gives the word its ordinary meaning but restricts it to offences and to complaints made to a magistrate. It is not concerned with the method employed in bringing a complaint before a magistrate. A magistrate in the Code represents the first judicial officer who deals with an offence. He is not concerned with grievances which are not

offences and however much a person may have a grievance or complain to private parties proceedings in a court will not start except in one of the ways indicated in section 148 and not unless a grievance relates to an *offence*.

It is useful to examine the sections of the Code in which the words "complaint" or "complainant" occur and to understand the scheme of the Code.

Section 22 requires that every peace officer should forthwith communicate to the nearest magistrate or inquirer or to his own immediate superior any *information* he may obtain respecting the commission of any *offence*. "Peace Officer" is defined as including police officers and headmen appointed by a Government Agent in writing to perform police duties. Every Police Officer, therefore, is bound to report *any* offence in terms of section 22.

Section 33 requires a Peace Officer making an arrest without a warrant to send the person arrested before a magistrate. Section 38 casts the duty on officers in charge of police stations to report the cases of all persons arrested without warrant. Section 70 authorizes a magistrate to act upon information.

Section 81 and the following sections deal with security for keeping the peace and security for good behaviour and in sections 81, 82 and 83 the magistrate acts on *information*. In section 84 provision is made for his acting on the report of a peace officer. Section 105 also provides for a magistrate acting upon a report or other information. In none of these sections has the word "complaint" been used and if any allegation made in writing constituted a *complaint* it seems to me that the Code need not have used the word *information*.

Under section 121 *information* of a cognizable offence is given to an officer in charge of a Police Station or to an inquirer and the duty is cast on those two persons to forward a report to the magistrate forthwith and also to make an immediate investigation. Section 127 says that if upon investigation there are grounds for believing that the information is well founded the officer in charge of the Police Station "shall forward the accused under custody," or take bail when that is permitted. Note that he forwards the accused but is not required to make a complaint. What follows on his so forwarding the accused is laid down in section 151 (2). Section 127 goes on to say that "in such case the officer or inquirer shall require the *complainant*, if any, and the witnesses to execute a bond to appear before the Magistrate's Court. Of course there may be no complainant where the Police Officer is acting on information. But the important thing is that the existence of a *complainant* in the person of the injured man is recognized and the person reporting is regarded as somebody different. A *complainant* is regarded as being different from the *witnesses*.

The sections hitherto examined suggest that the magistrate is mainly responsible for the supervision of crime in his division and that it is the duty of all inquirers and peace officers to keep him informed of all offences committed or likely to be committed in his division. Section 22, unlike section 121, relates to *any* offence and not merely to a cognizable offence. An "offence" is defined in section 2 as meaning "any act or omission made punishable by any law for the time being in force in this Island."

We then pass on to sections 147 (2) and (3) which speak of the "complaint" of a court. Chapter XV takes us a step further and indicates how proceedings commence in a Magistrate's Court. The very first method contemplated is that of a complaint made by the party affected by an offence; that is to say, he is the obvious person to complain. Reports by the police or by inquirers are confined to cognizable offences (*vide* section 21); section 148 (1) (*a*) is not so restricted. It provides that the complaint if in writing shall be drawn by a pleader and signed by the complainant. The last case mentioned, (*f*), is that of a written complaint by a court. Having already defined the word "complaint" and having used the word in this very section, what is called for in the case of an inquirer or peace officer or public servant or servant of a local body is a *written report*. Where the offence alleged is an indictable one (section 150) the magistrate is authorized to examine the complainant or informant and the two sub-sections particularly referred to are 148 (1) (*a*) where the word "complainant" is used and 148 (1) (*b*) where the word "report" is used. A clear distinction seems to be drawn between the two cases. In the former one it is the *complainant* who is examined; in the latter the *informant*. A peace officer, therefore, seems to be an *informant*, not a complainant. It is useful to examine here the terms of section 388 which deals with one of the powers of the Attorney-General. The magistrate may be ordered to discharge the accused from the matter of the *complaint* (presumably under sections 148 (1) (*a*) and (*f*)), *information* (section 148 (1) (*b*)) or *charge* (148 (1) (*d*)).

Having indicated in what cases the magistrate would issue summons or warrant, the Code proceeds to deal in Chapter XVI with inquiries into indictable offences when the stage has been

reached of the accused being before the court. No provision is made in this chapter for any person appearing and conducting the inquiry. The general tenor of the chapter is to place on the magistrate the duty of conducting the inquiry and as we know when a magistrate proceeds to the scene of a murder he invariably calls upon those present who know anything about the matter to come forward and give evidence. Section 392 is clear and states that " No person other than the Attorney-General, the Solicitor-General, Crown Counsel or a pleader generally or specially authorized by the Attorney-General shall conduct the prosecution in any case into which the magistrate of a Magistrate's Court may be inquiring." " In the absence of the Attorney-General, the Solicitor-General, Crown Counsel and a pleader generally or specially authorized by the Attorney-General the magistrate shall conduct the prosecution but nothing in this section shall preclude the magistrate from availing himself, if he considers it so desirable, of the assistance of any pleader or public officer in the conduct of any inquiry."

Chapter XVIII deals with trials of summary cases. The Code seems to contemplate four possible situations :

(*a*) Where the trial proceeds

(*b*) Where the complainant is absent

(*c*) Where the complainant desires to withdraw the charge

(*d*) Where some other situation may arise.

Where then the trial proceeds, section 189 (3) uses the word " complainant " and says that he or his pleader shall be entitled to open his case. It says nothing about officers of government departments or local bodies. Perhaps the main purpose of the section is to outline the general procedure and not to indicate who should conduct the prosecution. It is useful, however, as indicating that the view is that the person affected would be the proper person to conduct the case.

Section 194 deals only with complaints under section 148 (1) (*a*). Reports by police officers are therefore excluded. The section says that if the complainant does not appear the magistrate may acquit the accused. The complainant is permitted to have the case re-opened on grounds entirely personal to him such as sickness or accident. There can be no ambiguity about the meaning of the term *complainant* in this section. Presumably the presence of his pleader and of all his witnesses will not save the situation. Section 195 provides for a complainant withdrawing a case. It seems to me that here too " complainant " must refer to the private individual affected by the offence.

The question naturally arises why a public servant should not be permitted to withdraw a case and why he should not be penalized for his absence. The only reason I can think of is that public servants are responsible officers of the Crown who are not expected to launch prosecutions lightly and that prosecutions launched by them affect the public and not merely private individuals and should not, therefore, be put on the same footing. In most cases the public servant would have the assistance of the Attorney-General's Department and the Attorney-General's powers are wide enough.

Section 196 seems to deal with the position of public servants. It excludes sub-heads (*a*), (*c*) and (*d*) of section 148 (1). Provision has already been made for cases falling under section 148 (1) (*a*). In cases falling under sub-heads (*c*) and (*d*) the magistrate has the control of the case from its very inception and is the person responsible for having instituted proceedings. In the remaining three cases the magistrate is empowered to stop proceedings at any stage but only with the previous sanction of the Attorney-General. This would cover cases of non-prosecution, cases where the prosecuting officer desires to withdraw the prosecution and cases which the magistrate thinks should be stopped for some other reason. It seems to me that the sanction of the Attorney-General is required because those cases affect public departments and local bodies. What would happen should the Attorney-General on being asked for sanction refuse to grant his sanction ? The magistrate might be faced with an impasse. Accordingly provision is made for intervention by the Attorney-General. The opportunity is seized to state by whom prosecution in summary cases should be conducted. Normally they would be conducted by the complainant or by a representative of the department or local body affected by the offence. It seems fairly clear that the word " interested " in section 99 does not refer to the kind of interest which the public may have in a case but is equivalent to saying that a person or a department is affected by the case.

Having stated quite emphatically the right of the Attorney-General to conduct the prosecution in any case the section goes on to state that in the absence of such appearance the *complainant* or any officer of the department or local body concerned may appear to prosecute. It is over this provision that the present dispute arises.

I do not think anything turns on the fact that in the first part of the section the words used are " shall be entitled to appear " and later " may

appear to prosecute." The two expressions mean the same thing. Perhaps the Attorney-General's right is the more emphatically stated.

The word " complainant " has up to this stage borne only one meaning and I do not think any different meaning is to be attributed to it here. If the person making a report under section 148 (1) (*b*) is also included in the term then the magistrate might be called upon to choose between two rival complainants. The difficulty is avoided if we distinguish the person forwarding the report by calling him " informant " as section 150 does. In prosecutions by government departments or local bodies no private individual is so closely affected by the offence as to be termed the *complainant*. It is the department or body which is affected. It seems to me that it is only in the case of the police that it has been claimed that a police officer is interested in every offence even though he may not be affected by the offence. The Attorney-General's Department, the Solicitor-General's Department, the Legal Secretary's Department and others would be equally so interested.

Under the Code the police are entrusted with the same duties as inquirers and police headmen. An inquirer or a police headman is not a government department in himself nor is he an officer of any government department as far as I am aware, and yet they also forward reports under section 148 (1) (*b*). Did the legislature contemplate that they were qualified to conduct prosecutions and even better qualified than the person affected or his lawyer ? That seems hardly likely. Is it more likely that the legislature intended at this stage to distinguish between them and police officers and considered that the latter would be covered by the expression " officer of a government department " ? The question is not " who has instituted proceedings " for both the private individuals and the police may do so. It appears to me that section 199 has reference back to section 148 (1). The *complainant* comes first and then the persons mentioned in sub-head (*b*) are provided for — except inquirers and police headmen. The question is whether the police also were not excluded and whether the police constitute a government department.

Chapter XLII of the Legislative Enactments establishes the Excise Department and refers to it as such. But when we turn to the police they are never referred to as a *department* but as a *force ; vide* also the Ceylon Naval Volunteer Force, the Ceylon Defence Force. In the Code a police officer is defined as being " a member of an established police force." What is more the Police Ordinance contemplated a general police force and police in rural districts. It provides for the establishment by proclamation of a police force in a town. Is then each such police force a separate department ? We know that there exists within the force a Criminal Investigation Department and there may be other departments also in it.

The Ordinance establishing the police having referred to it as a *force* and the Criminal Procedure Code also referring to it as a *force* it does not seem to me correct to interpret " government department " as referring to the police. It may be that the police are called a *department* for certain purposes but one never thinks of the police department being on parade or the police department being called out for any other purpose. There is a further difficulty if within the police force itself there are departments a contest may arise between an officer of such a department and an officer of the force considered as a larger department — if a purely theoretical situation be visualized.

If the police base their claim on the ground of their interest in bringing offenders to justice then they might intervene in any case brought by any other department such as the Customs or the Excise. It is impossible to believe that the legislature contemplated any such situations. The Code very carefully assigns to the police the part of *informants*, of persons assisting a court and nowhere else does it recognize them as entitled to conduct prosecutions. Section 148 (1) (*b*) distinguishes them from " public servants " and terms them " peace officers."

The remarks of My Lord the Chief Justice in *Kulatunga vs Mudalihamy* (42 N.L.R. 33) may appropriately be considered here. In that particular case the sergeant who conducted the prosecution was a material witness and while the remarks of His Lordship apply no doubt to that particular situation they have also a wider application, namely, that it is a bad practice to allow a policeman to act as an advocate before any tribunal. The duties of the police are set out in section 57 of the Police Ordinance (Cap. XLIII) and one of them is to detect and bring offenders to justice. It is hardly desirable that a force entrusted with detective work and likely in the course of such work (subconsciously perhaps) to develop the instincts of the sleuth-hound should do more than bring offenders to justice in the presence of the magistrate. The case of *Webb vs Catchlove** cited by the Chief Justice was decided in 1887 as also the case of *Duncan vs Toms* †. The framers of the Code might well have had in mind these judgments to support their own experience.

* 3 T.L.R. 159. † 16 Cox 267

It has to be borne in mind that the Evidence Ordinance indicates the belief that the police should not be trusted in the matter of confessions. The policy of the law in Ceylon is not in their favour. The Information Book is always available to guide a court. Lawyers are officers of court and are expected to perform their duties honestly and honourably. There is one advantage in police officers not conducting cases. They usually have their notes of investigations already made often not quite accurately or intelligently and are apt to lead a witness along the lines of their notes. A comparison of these notes during a trial with the magistrate's record often betrays a very close correspondence between them.

To sum up : In my opinion the person sending a written report to court is not a complainant but an informant. The departments referred to are departments which are closely affected by the offence alleged, whose representatives are termed " public servants " in section 148 (1) (*b*). The police are not given the position of being other than informants and assistants to a magistrate.

In my opinion, therefore, the Police Inspector in the present case was not justified in opposing the application of the proctor for the complainant. He will no doubt assist the court in such a way as is open to him. There used to be the closest co-operation between the police and complainants' lawyers and the police always welcomed legal assistance. The apparent rivalry is most deplorable.

Application allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: Moseley, A.C.J., (President), Keuneman, J. & Jayetileke, J.

REX vs DINGIRI APPUHAMY & WILLIAM

S. C. No. 43—*M.C. Mallakam No.* 20877.
Appeals Nos. 11–12 *of* 1943 *with Applications Nos.* 42-43 *of* 1943.
Appeals on the law and Applications for leave to appeal against convictions on matters other than law.
Argued on 21st & 22nd June, 1943.
Decided on 22nd June, 1943.

Court of Criminal Appeal—Two accused charged with murder—Absence of evidence of common intention—Circumstantial evidence—Unreasonable verdict of jury.

Where the only evidence led by the prosecution against two accused, who were indicted with murder, was that they had the opportunity of committing the offence either jointly or individually and that after the discovery of the body they absconded and were not apprehended until three years later the jury convicted them both,

Held : (i) That the verdict was unreasonable.

(ii) That in the absence of evidence of a common intention, the only footing upon which either could be convicted would be that there was evidence against that particular accused that he caused the death of the deceased.

M. M. Kumarakulasingham, for the appellants and applicants.
E. H. T. Gunasekera, Crown Counsel, for the Crown.

Moseley, A.C.J., (President)

The appellants were convicted of the murder of one Joseph Manuel, a Government pensioner, who lived at Panathrippu with his son who was at the time, that is to say on the 27th of October, 1939, a boy of seventeen. On that morning he was taken to school by the 1st accused and on returning in the evening he discovered the deceased in a well with his head below the surface of the water. It may be assumed that at that time the deceased was dead. He was certainly dead when he was taken from the water the following morning. I have said that the boy was taken to school by the 1st accused at about 8 o'clock. At that time the deceased was left alone with the 2nd accused. At 9 o'clock the 2nd accused according to his own story, left to go to the market and from that time until 9.45 a.m. when the 1st accused says that he returned to the premises, the deceased would, if the evidence is to be believed, have been alone. From 9-45 a.m. to 9-55 a.m. the 1st accused was alone and his account is that the deceased was not about. The 2nd accused returned from marketing at 9-55 a.m. It will be seen that

from 8 o'clock until about 10 o'clock there are distinct periods (1) when the 2nd accused was alone with the deceased, (2) when the 1st accused was alone with the deceased and (3) an intervening period when the deceased would be by himself. The story told by the two accused is that at about 11 o'clock the deceased was found in the well by the 1st accused. Now, it is not seriously contended that the case, which it must be conceded is somewhat wrapped in mystery, is one of either accident or suicide. The circumstances definitely point to foul play. The question is, therefore, whether the accused were the perpetrators of this deed or was either of them the perpetrator.

Now, it seems to us that there is nothing or very little to connect the accused with the commission of this offence except the fact that they had the opportunity of committing it either jointly or individually and that after the discovery of the body they absconded and were not apprehended until some three years later. We might go so far as to say that the verdict of the jury is unreasonable that there is not sufficient evidence to connect the accused with the commission of the crime. But assuming that one or other or both of them did perform this deed, they could only be convicted if it were found that they were acting in the furtherance of a common intention. The evidence is purely circumstantial, and there would appear to be no item of evidence from which a common intention can be inferred. Further, in the absence of a common intention the only footing upon which either could be convicted would be that there was evidence against that particular accused that he caused the death of the deceased. There is no such evidence.

For these reasons the appeals on the facts are allowed. The convictions are quashed, the sentences set aside and the accused acquitted.

Appeals allowed.

Present: Howard, C.J. & De Kretser, J.

MUTTURAMAN CHETTIAR & ANOTHER vs KUMARAPPA CHETTIAR & ANOTHER

S. C. No. 14—*D. C. Kurunegala No.* 17309.
Argued on 7th & 8th July, 1942.
Decided on 22nd July, 1942.

Mortgage action—Plaintiff and 2nd and 3rd defendants co-obligees, contributing to the sum lent—Agreement to sue jointly or separately—Also if proceeds of sale of security insufficient to share, proceeds pro rata*—Mortgagor's interests in mortgaged property sold in execution of money decree and purchased by 2nd and 3rd defendants—Action on bond by plaintiff alone—Are 2nd and 3rd defendants entitled to concurrence—Merger.*

Plaintiff and 2nd and 3rd defendants jointly lent Rs. 27,500/– on a mortgage bond to the 1st defendant. The bond authorized them to sue jointly or separately. It was further agreed (*a*) that in the event of the security being realized and the proceeds thereof being insufficient to satisfy the claims in full, they shall be entitled to claim *pro rata* only on such proceeds; (*b*) that nothing contained in the bond shall prevent the obligees from recovering the whole of any balance of their respective claims from the obligor.

The 1st defendant's rights in the mortgaged property were sold in execution of a money decree and purchased by the 2nd and 3rd defendants.

Plaintiff brought this action praying for a hypothecary decree for a sum of Rs. 15,125/– being the amount due to him with interest. 2nd and 3rd defendants claimed concurrence, and in the case of a deficiency to share rateably in the proceeds. The plaintiff opposed on the ground that the rights of the 2nd and 3rd defendants were lost by merger when they purchased the 1st defendant's rights and that they were not entitled to concurrence or to share rateably. The judgment in the District Court was against the 2nd and 3rd defendants who appealed.

Held : (i) That each of the co-obligees is a creditor as to part only of the debt, but the mortgage is *in solidum*.

(ii) That the rights of 2nd and 3rd defendants were not extinguished by merger inasmuch as the debtor and creditor did not become united in one person both as regards the debt and its security.

(iii) That the 2nd and 3rd defendants were entitled to concurrence.

H. V. Perera, K.C., and *N. Nadarajah, K.C.*, with *B. G. S. David*, for the 2nd & 3rd defendants-appellants.

N. E. Weerasooriya, K.C., with *L. A. Rajapakse*, for the plaintiff-respondent.

De Kretser, J.

Plaintiff and the 2nd and 3rd defendants lent the 1st defendant the sum of Rs. 27,500/– on a mortgage bond, plaintiff contributing Rs. 10,000/– and the 2nd and 3rd defendants Rs. 17,500/– The bond authorized the obligees to sue jointly or separately for the amounts due to them respectively, and then came the following clause : " And it is further agreed that in the event of the said security being realized and the proceeds of such realization not being sufficient to satisfy the claims in full of the said obligees and their respective aforewritten, they shall be entitled to claim *pro rata* only on such proceeds but nothing herein contained shall prevent the said obligees respectively or their respective aforewritten from recovering the whole of any balance of their respective claims from him the said obligor or his aforewritten." The 1st defendant's rights in the property mortgaged were sold by the Fiscal under a money decree and purchased by the 2nd and 3rd defendants. Plaintiff brings this action setting out the details of the bond and alleging that a sum of Rs. 15,125/– was due to him and praying for a mortgage decree accordingly.

The 2nd and 3rd defendants claim concurrence and, in case of deficiency, to share rateably in the proceeds to be obtained when the security is realized. Admittedly they have not been paid what they lent. Plaintiff denies their right to claim concurrence.

The relevant issues were :

3. Are the 2nd and 3rd defendants entitled to concurrence with the plaintiff in the event of a judicial sale of the mortgaged properties ?

4. Do the rights of the 2nd and 3rd defendants on the bond sued upon revive on a judicial sale ?

5. Can the 2nd and 3rd defendants claim concurrence or a revival of their rights on the mortgage bond inasmuch as they purchased the mortgaged properties at the Fiscal's sale on P1 while being co-mortgagees with plaintiff on the bond sued upon ?

6. Did the mortgaged rights of the 2nd and 3rd defendants under the bond sued upon become merged on their becoming purchasers on P1 ?

7. If so, did the mortgaged rights of the plaintiff also become merged ?

8. If so, do the mortgaged rights of the 2nd and 3rd defendants on the bond revive in the event of a judicial sale of the mortgaged properties at the instance of the plaintiff ?

The trial judge in a brief judgment held against the 2nd and 3rd defendants.

Three questions have been urged before us *viz:*

1. Were the rights of the 2nd and 3 rddefendants lost by merger ?

2. If so, do they revive now that plaintiff is seeking to sell the mortgaged property against them ?

3. Are the 2nd and 3rd defendants entitled to share rateably in view of the clause quoted above?

In my opinion the case can be decided on the clause alone. It clearly provided that in the event of the security being realized by one creditor, other creditors were to be entitled to concurrence. If both parties sued jointly the clause would not operate and it was clearly intended to cover the case of one of the obligees suing. The mortgage being one and indivisible, the whole security would be realized. That security was intended for both — and so both were entitled to claim such sums as were due to them respectively. As I shall shew presently, the clause was unnecessary for that would have been the legal result but it only served to make the position clearer. It must be remembered that the principal obligation was one of loan and that the mortgage was only accessory. The clause refers only to the satisfaction of the claims and imposes no condition that a claimant should continue to have in his favour the accessory obligation.

It must also be remembered that the agreement was between the obligees on the one side and the obligor on the other and was not an agreement between them also, since they had to be agreed between themselves before they could agree with the obligor. In fact the agreement to share concurrently affected them chiefly. As however, the obligor came in, the proviso protected them against any possible argument on his part that they had to share rateably in the event of a deficiency and could not proceed against him by personal action for any balance due.

It seems to me that it is not very important to decide whether when one obligee sues he should ask for a hypothecary decree for the full amount owing to the obligees or only for the amount due to him. There would be amounts due to each obligee respectively and the bond authorized them to sue jointly for the amount so due or separately for the amounts so due. The security was to be realized and the total amount ought to be claimed and this is what, in my opinion, the parties agreed to. Apart from agreement that is what is usually done when joint creditors are concerned. If all will not agree to unite, then one of them sues making the others defendants but he sues to recover the total amount due, restricting his own claim to such amount as is due to him. In this case the plaintiff was entitled to sue alone and need not have invited the defendants to join him but, in my opinion, he should have stated their claim as he was seeking to realize the whole security. Had no question of merger arisen undoubtedly he would have had to do this, for the 2nd and 3rd defendants could not sue to have the security

realized a second time on a bond on which the creditors stood on an equal footing.

Voet (XX. 4. 8) makes the position plain. He says that if at the same time one and the same thing has been mortgaged to several persons, a half share to one and a quarter to another and so on, or even when no mention has been made whether of the whole or of a share, each can sue for a share only whether contending among themselves or third-parties-possessors, and such share will be a half share if an equal sum was due to each or a rateable proportion if the debts were unequal in amount. If it has been mortgaged to them *singulis in solidum* (*i.e.* to each with an interest in every part of the whole), then each may sue a third-party-possessor *in solidum*. As among themselves, he says (I quote from Berwick's Translation): " To be more plain, if the same thing has been bound to each in its entirety, and if neither of the creditors has been paid, they take shares by *concursus ;* and so payment of the debt to each is to be made *pro rata* from the price realized by the sale of the pledge.....But when one of them has been settled with by payment or otherwise, without sale of the pledge, the entire pledge remains bound to the other for his debt."

Faced with this statement of the law Mr. Weerasooriya sought refuge in the word "otherwise" and argued that the mortgage having been extinguished by merger that statement was in his favour. That is not so. Merger does not settle a debt except in the case when a debtor and creditor become united in one person both as regards the debt and its security. There are more ways than one of settling a debt. It is the existence of the debt that is emphasized. What Voet is making plain beyond the possibility of a quibble is that when one creditor has been satisfied, *i.e.* regarding his debt, the other creditor still has a hypothec over the whole of the property hypothecated.

Passing on to consider the other points, the first question is whether there was a merger in the sense in which the Roman-Dutch law understood it. The material regarding merger is rather meagre. The commentators deal chiefly with the simple case of the debt being extinguished by the creditor and the debtor becoming one and the same person. The writers refer to the absurdity of a man selling his own property in order to pay himself. But there is no absurdity in a man letting his property be sold for the joint benefit of himself and another, more especially when he cannot help it being sold. In other words, before there can be a merger the persons claiming rights of ownership and of mortgage must be identical and their rights must be co-extensive. If A owned property as executor and had mortgage rights personally, clearly there could be no merger. If A, B and C as one entity owned mortgage rights and A owned the property, is the position similar, as Mr. Perera contended ? It would be different if there were two mortgages on the one bond. In the present case plaintiff does not allege merger of the security to the extent of about 17/27ths of the property and only seeks to make executable 10/27ths thereof.

Pothier at page 245 of his treatise deals with confusion or merger. He says :" By confusion is meant the concurrence of two qualities in the same subject which, mutually destroy each other " ; at page 428 : " In order to induce a confusion of the debt, the characters not only of debtor and creditor, *but of sole debtor and sole creditor*, must concur in the same person. If a person, who was only creditor for part, becomes sole heir of the debtor, it is evident that the confusion and extinction can only take place with respect to the part for which he is creditor....."

In the case before us each of the creditors is creditor as to part only of the debt but the mortgage is *in solidum*.

Pothier explains why the *debt* is extinguished. He is dealing with the case of the universal heir without benefit of inventory. In such a case the qualities of debtor and creditor become united in the same person and the debt itself is extinguished; a person cannot be his own creditor. We have the case of heirs dealt with in *Dias vs De Silva* (39 N.L.R. 358), and it was there held that there was no merger in the case of heirs in Ceylon.

Pothier says at page 426 : " The acceptance of a succession upon trust, to render a specific account, does not induce any confusion, for it is one of the effects of the *benefice d'inventaire* that the beneficiary heir and the succession are regarded as different persons, and their respective rights are not confounded."

On page 427 he says, dealing with the accessory obligation of suretyship, which would correspond to the security afforded by a mortgage: " The extinction of the accessory obligation of the surety by confusion does not induce an extinction of the principal obligation, the reason being that the existence of the principal obligation does not depend upon the subsistence of the accessory obligation." He is dealing with a simple case of merger. He points out that merger is not the same as payment.

Van Leeuwen in his commentary deals very briefly with merger and then only in relation

to servitudes. In chapter XIX section 6 and in chapter XXII section 1 he states the position that a person cannot be subject to a service to himself, and goes on to say: "If, however, a person becomes proprietor of two separate houses, one of which is subject to some service to the other, such service ceases as long as that person remains the proprietor thereof, but if such houses be afterwards again sold separately, each house again acquires its former service."

The Dutch commentators do not entirely omit reference to the principles governing a case like the present. Voet (XX. 5.10) (Berwick's Translation p. 446) treats of the anterior and the posterior mortgage. The anterior mortgagee has preference, and in his suing and having the property sold the purchaser obtains the property free of the posterior or secondary mortgage. Suppose, however, the primary mortgagee buys the property *privately*. His mortgage is merged in his rights as owner and the posterior mortgagee now seems to have his way clear. The line of reasoning, however, seems to be: That is far too easy a way of enriching yourself at another's expense; the law does not allow that to be done; you two creditors and the mortgagor stood in a certain relationship to one another, if you wish to treat the anterior mortgagee as a stranger who has purchased the property, then you must treat him as a stranger for all purposes; then his mortgage is still in existence and he has priority. This means that merger does not kill a mortgage but only obscures or submerges it in a greater right. Remove that greater right and you see the mortgage again: it is there to be enforced, if and when necessary. It is only when the debt is extinguished that there is true merger.

Voet expressly exempts purchases at public auction. In XX. 5.5 he had dealt with the mortgagee's rights when he desired to enforce his bond and has stated that he could enforce those rights only through the intervention of the court by means of a judicial sale on order of court. When such a sale takes place the purchaser even if he be the anterior mortgagee himself, gets absolute title and the posterior creditor can no longer follow the property. It is only when the mortgagee purchases privately that there is any room for argument. But it is also true that a sale by public authority generally conferred absolute title and so the posterior creditor could not pursue the property (*vide* Berwick; pages 287, 448).

I find filed in the record a copy of the judgment of this court in D. C. Chilaw No. 2966 (S.C.M. 17th Feb. 1905). The principle upon which that judgment proceeded is helpful. There E had a primary and a tertiary mortgage and K a secondary mortgage. E sued on the tertiary bond and bought the property. The hypothec on the primary bond was now merged. K then put his bond in suit and L bought the property. Thereafter E put his primary bond in suit and seized the property in execution of the decree in his favour. L claimed successfully and E brought an action to have the order realizing the property from seizure cancelled. Moncrieff, J. quoting Voet, held that E's rights on the primary bond had revived and that he was entitled to have the property sold. Layard, C.J. agreed for the same reason and called E's title by purchase in the first action a revocable title and said that his actual rights as mortgagee were in abeyance.

I do not think Mr. Weerasooriya was really serious when he argued that there could be no revival of the bond as such revival was by operation of law and Ordinance No. 7 of 1840 stood in the way of that happening. No new mortgage was being created but an existing one was being enforced in the existing circumstances. It seems to me that it is clear that the 2nd and 3rd defendants are entitled to concurrence.

I, therefore, allow the appeal and set aside the order made in the case. The 2nd and 3rd defendants will be declared entitled to concurrence, the amount due to them being calculated before decree is entered. They are entitled to the costs of appeal and of the trial in the District Court.

Appeal allowed.

Present: MOSELEY, A.C.J. & KEUNEMAN, J.

PUBLIC SERVICE MUTUAL PROVIDENT ASSOCIATION vs DE SILVA & 3 OTHERS

S. C. No. 238—*D. C. Final, Colombo No.* 12865.
Argued on 25th & 26th June, 1943.
Decided on 2nd July, 1943

Public Service Mutual Provident Association Ordinance section 3—*Meaning of expression "orphan."*

Held : That the word " orphans " in section 3 of the Public Service Mutual Provident Association Ordinance must be construed not in its ordinary sense but in a wider sense and includes even grandchildren of a deceased member.

Cases referred to : *Institute of Patent Agents vs Lockwood* (L.R. 1894 A.C. 347)
Minister of Health vs The King (L.R. 1931 A.C. 494)

N. K. Choksy with *R. A. Kannangara*, for the 1st defendant-appellant.
H. V. Perera, K.C., with *E. B. Wickramanayake*, for the 2nd, 3rd & 4th defendants-respondents.

KEUNEMAN, J.

This is an interpleader action brought by the plaintiff The Public Service Mutual Provident Association, now incorporated by chapter 207 of the Ordinance. The plaintiff alleged that C. A. de Silva was a member of the plaintiff Association, and died on the 9th of November, 1939. The plaintiff Association paid to the 1st defendant, the son of C. A. de Silva half the total sum payable on the death, but as the other half, to wit, a sum of Rs. 2,069/80 was in dispute between the 1st defendant on the one side and on the other the 2nd, 3rd and 4th defendants, the children of a son of C. A. de Silva who had predeceased him, the plaintiff brought that amount into court, and the present dispute is between the 1st defendant-appellant and the 2nd, 3rd and 4th defendants-respondents.

The appellant argued that the benefits payable by the Association are restricted to the widow and orphans of the deceased member. The deceased left no widow, and the appellant is the only surviving child of the deceased member, and the only person who can be regarded as his " orphan." The appellant denied that the grandchildren were entitled to any portion of the benefits.

The appellant depended upon section 3 of the Ordinance which sets out the general objects of the Association as follows :

> " To promote thrift, to give relief to the members in time of sickness or distress, to aid them when in pecuniary difficulties, and to make provision for their widows and orphans."

The appellant contended that under section 16 (1) there was no power given to make rules in order to extend the objects of the Association, for under section 16 (1) (*g*) it is restricted to " the accomplishment of its objects."

A good deal of the argument turned on the meaning of the word " orphan." The Shorter Oxford English Dictionary defines it as follows : " One deprived by death of father or mother, or of both ; a fatherless or motherless child." This is the strict meaning, but the District Judge has given instances, no doubt derived from America, where a somewhat wider meaning has been given to the term. I further think that, in popular speech, the word orphan denotes some degree of dependence on the parents, and the term is hardly used, where the person deprived of his parents is himself grown up and a bread winner, as is the appellant. Again in the case of this Association, if the word " orphan " is to be given the restricted meaning, the result would be that if the member had left no widow or surviving children, but had left grandchildren, there would be no one who could claim the benefits. This would hardly be in consonance with the other object of the Association *viz.* to promote thrift. I am, therefore, of opinion that the word " orphan " has not a precise and strict meaning and that further definition of the word was possible, and even desirable.

The respondents argued that under the rules of the Association there has been this further definition. The relevant rule reads as follows :

> " 8 (7) Upon the death of any member the amount to his credit....shall be paid to his widow and legitimate children (which expression shall mean and include the legitimate issue of any deceased legitimate child *per stirpes* or by representation)...."

The respondents further pointed out that this rule has been confirmed by the Governor, and notice of the confirmation has been published in the Government Gazette, and say that the rule must be regarded " as valid and effectual as

if it had been enacted " in the Ordinance itself, see section 16 (3).

The effect of these last words has been considered in the case of *Institute of Patent Agents vs Lockwood* (L.R. 1894 - A.C. 347) decided in the House of Lords — a considered judgment, but one which is no doubt *obiter* on this point. Lord Herschell, L.C. said on this matter :

> " They are to be 'of the same effect as if they were contained in the Act.' My Lords, I have asked in vain for any explanation of the meaning of these words or any suggestion as to the effect to be given to them if, notwithstanding that provision, the rules are open to review and consideration by the courts. The effect of an enactment is that it binds all subjects who are affected by it....But there is this difference between a rule and an enactment, that whereas apart from some such provision as we are considering, you may canvass a rule and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament."

The Lord Chancellor added :

> " No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment, and with regard to rules which are to be treated as if within the enactment. In that case probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it."

This matter was again considered by the House of Lords in *Minister of Health vs The King* (on the prosecution of Yaffe) (L.R. 1931 - A.C. 494). Viscount Dunedin there stated that " the real clue to the solution of the problem is to be found in the opinion of Herschell, L.C." in the passage I have already cited. He further referred to a point, also made in this appeal :

> " There is an obvious distinction between that case and this, because there Parliament itself was in control of the rules for forty days after they were passed, and could have annulled them if motion were made to that effect, whereas here there is no Parliamentary manner of dealing with the confirmation of the scheme by the Minister of Health. Yet I do not think that that distinction, obvious as it is, would avail to prevent the sanction given being an untouchable sanction."

Viscount Dunedin sums up the matter as follows :

> " What that comes to is this : The confirmation makes the scheme as if it were contained in an Act of Parliament, but the Act of Parliament in which it is contained is the Act which provides for the framing of the scheme, not a subsequent Act. If therefore the scheme, as made, conflicts with the Act, it will have to give way to the Act. The mere confirmation will not save it."

The majority of their Lordships are not in disagreement with the *dictum* of Lord Herschell, but they emphasize, (1) that the rule must be within the statutory authority, and (2) that the rules should not be inconsistent with the provisions of the Act.

In my opinion the true principle to be derived from these decisions in their application to the present case is that, where there is an Ordinance which gives power for the making of rules, and provides that the rules, if made in a particular manner, shall have the same effect as if they were made under the Ordinance, once the rules are made in the manner provided, the ordinary question of *intra vires* or *ultra vires* will not apply, but it will always be permissible for the courts to consider whether the rules so made are consistent with the provisions of the Ordinance, and to hold that the rules, if inconsistent with the provisions of the Ordinance, are bad. In the present case, we must treat the matter, not on the footing that the rule has to be canvassed as subordinate, because it has to be shown to be *intra vires*, but rather on the footing that both the original provisions of the Ordinance, and the present rule are contained in the same enactment. The question then arises whether the rule is inconsistent with the provisions of the Ordinance. As I have already pointed out, I do not consider that the word " orphan " has been used in its strict meaning, and I consider that the rule gives it a meaning which is not incompatible with the provisions of the Ordinance. In other words there is not such an inconsistency, that we must hold that the rule must give way to the provisions of the Ordinance as strictly interpreted.

One other point has been raised by the appellant. He contends that, if the rules are to be regarded as valid, he is the sole nominee of the deceased member. The rules as originally made had not provided for nomination, but by the Gazette of November 21st 1924 the power was given to a member, who desired the childrens' shares to be delivered in other than equal shares, to notify to the Association the shares he desired to be allotted to each child. It is to be noted that this rule did not give the member the right to exclude any child entirely from participating in the benefits. But by a late Gazette of July 5th 1929, the member was given the power to assign the benefits to any one or more children to the exclusion of the remainder. The evidence with regard to the alleged nomination of the appellant is as follows : A letter 1D1 of the 25th February, 1925, alleged to have been signed by the Secretary of the Association, and acknowledging a letter of the " 23rd inst." relating to the nomination of the appellant, was tendered,

but rightly rejected as not proved. The member's letter of the 23rd February, 1925 was not available. Another letter 1D2 of the 4th September, 1924, by the deceased member purporting to nominate the appellant was admitted. A copy of the nomination register of the Association was also put in, where the name of the nominee is given as the appellant, but the " date of appointment," (by which presumably is meant the date of nomination) is given as " September and 10th November, 1924." Clearly then the only acts of nomination proved were made before the date of the Gazette of November 21st 1924, and even if 1D1 can be said to have some effect, the nomination in question was before the Gazette of July 5th 1929, which for the first time gave to the member the right to exclude any of the possible beneficiaries. I hold that there has been no valid nomination by the member of the appellant as sole beneficiary.

The appeal is dismissed with costs.

MOSELEY, J.

I agree.

Appeal dismissed.

Present: DE KRETSER, J. & JAYETILEKE, J.

CHARLES & ANOTHER vs (LIQUIDATOR) TURRET MOTORS

S. C. No. 307—*D. C. Colombo No.* 13252.
Argued on 23rd & 24th June, 1943.
Decided on 2nd July, 1943.

Companies Ordinance—section 130—*Auditors appointed under—Duties of Auditors—Balance Sheet—Whose duty to prepare—Incomplete balance sheet prepared by auditors—Are they entitled to remuneration*—Quantum meruit.

Held : (i) That the preparation of the balance sheet of a company is a duty imposed on the directors of a company under section 121 of the Companies Ordinance and forms no part of the duty of the auditors.

(ii) That where there is no such balance sheet the only duty cast on the auditors by section 132 (1) is to report to the members on the accounts examined by them.

(iii) That where the auditors of a company who were requested by the directors to prepare a balance sheet failed to complete it owing to the default of the company, such auditors are not entitled to any remuneration.

(iv) That the auditors cannot base such claim for remuneration on *quantum meruit*, as the company did not get the benefit of any work done.

N. Nadarajah, K.C., with *N. Kumarasingham* and *H. W. Thambiah*, for the defendants-appellants.

G. Thomas, for the plaintiffs-respondents.

JAYETILEKE, J.

This is a claim by the plaintiffs, who carry on business in partnership as auditors and accountants against the defendant company represented by their liquidator one Sambamurti for the recovery of a sum of Rs. 550/– as fees for auditing their accounts for the year ended March 31st 1940.

At a general meeting of the defendants held on December 31st 1939 Sambamurti was appointed auditor but he declined to accept office owing to some disagreement about his fees. Thereupon the directors in May, 1940 in the exercise of the powers vested in them by section 130 (5) of the Companies Ordinance No. 51 of 1938 filled the vacancy by appointing the plaintiffs but did not fix the remuneration payable to them.

It must be noted that Sambamurti was paid Rs. 400/– for auditing the accounts in the previous year and that he declined to accept office because the directors proposed to reduce the fee for the year in question.

The duties of an auditor are laid down in section 132 (I) of the Ordinance. His primary function is to make a report to the members on the accounts examined by him and on every balance sheet laid before the company in general meeting during his tenure of office. He is required to state in his report whether or not he obtained all the information and explanations he wanted and whether in his opinion the balance sheet is properly drawn up so as to exhibit a true and correct view of the company's affairs according to the best of his information and the explanations given to him and as shown by the books of the company.

Under section 121 of the Ordinance it is the duty of the directors to cause to be made out in every calendar year and to be laid before the company in general meeting a balance sheet. To that balance sheet a report has to be attached by them with respect to the state of the company's affairs, the amount, if any, which they recommend should be paid by way of dividend and the amount, if any, which they propose to carry to the reserve fund.

The defendants' directors made default in carrying out the duty imposed upon them by this section and arranged with the plaintiffs to have a balance sheet prepared by them. This, in my opinion, cannot be regarded as a desirable arrangement in view of the duties imposed upon the plaintiffs by section 132 (I).

The plaintiffs say that they commenced their audit in May 1940 and that they spent a certain amount of time on it as shown in the Time Sheet P2.

On September 18th 1940, the plaintiffs wrote P3 to the directors asking for Rs. 300/- against their fees. On September 20th 1940 the directors replied by P4: "We shall thank you to expedite the auditing of our accounts as urgently as possible as it is long delayed. We shall certainly look into the payment of your fees in due course."

On November 25th 1940 the plaintiffs wrote P5 to the secretary of the defendants asking him for copies of all Insurance claims and the amounts received from the various Insurance Companies in respect of these claims. On November 30th 1940 they wrote to the secretary inviting attention to P5 requesting him to furnish them with a certified list of spare parts and cars. The secretary failed to comply with the plaintiffs' request.

In December, 1940 the defendants went into liquidation. The plaintiffs thereupon submitted to the liquidator their claim for Rs. 550/- for services rendered by them.

On January 22nd 1941 the liquidator wrote P10 requesting the plaintiffs to send him the balance sheet with their report. They replied by P11 that they could not "perfect the balance sheet" as the information asked for in P5 and P8 was not given to them and pressed for a settlement of their claim.

The liquidator refused to pay and the plaintiffs instituted this action for the recovery of the said amount. The liquidator filed answer alleging that the plaintiffs failed and neglected to perform their obligations and that the defendants did not have the benefit of any work done by them.

The learned District Judge held that the plaintiffs' failure to furnish a report was due to the neglect of the directors of the defendants and awarded the plaintiffs a sum of Rs. 400/- as remuneration.

It seems to me that the judgment cannot be supported either on the facts or on the law. The information and the documents which the plaintiffs called for by P5 and P8 were for the purpose of preparing the balance sheet which was no part of their duty. In the absence of a balance sheet the only duty which lay on the plaintiffs was to make a report to the members on the accounts examined by them. That they have failed to do.

It would, I think, be enough to say in the present case that the plaintiffs have failed to discharge the duty imposed upon them by section 132 (I) of the Ordinance and their claim for remuneration must therefore fail. The claim cannot be based on a *quantum meruit* as the defendants did not get the benefit of any work done by the plaintiffs.

I would set aside the decree appealed from and dismiss the plaintiffs' action with costs here and in the court below.

De Kretser, J.

I agree.

Decree set aside.

Present: MOSELEY, J. & JAYETILEKE, J.

SUMANA THERO vs RAMBUKWELLA

S. C. No. 165—*D. C. Colombo No.* 31/*X.*
Argued on 4th & 18th June, 1943.
Decided on 25th June, 1943.

Last will—Buddhist monk—Pudgalika *property—Buddhist Temporalities Ordinance (Chapter* 222)—*Does disposition by last will amount to alienation during lifetime of a deceased monk within the meaning of section* 23 *of the Ordinance.*

Is the executor in such will entitled to follow such property for purposes of administration.

Held : (i) That a disposition by last will by a bhikkhu in respect of his *pudgalika* property does not amount to an alienation during his lifetime within the meaning of section 23 of the Buddhist Temporalities Ordinance.

(ii) That an executor appointed in such last will has no right to have recourse to such *pudgalika* property for purposes of administration.

Cases referred to : *Holmes vs Holmes* (1 Russ. & M. 660)
Ashburnham vs Bradshaw (2 Atk. 36)
Doe d. Stevenson vs Glover (14 L.J. (N.S.) Com. Law 169)
Holmes vs Godson (8 De G.M. & G 152)

H. V. Perera, K.C., with *D. W. Fernando* and *S. W. Jayasuriya*, for the 1st defendant-appellant.

L. A. Rajapakse with *G. P. J. Kurukulasuriya* and *V. F. Gooneratne*, for the plaintiff-respondent.

MOSELEY, J.

The plaintiff-respondent who is the trustee of the Lankatilaka Vihare sued the appellant and another, claiming that he in his capacity as trustee is entitled to the *pudgalika* property of one Rambukwella Siddhartha Thero who died on 11th March, 1941. The deceased had made a last will whereby he appointed the appellant executor thereof, and disposed of all his *pudgalika* property. The question that arose for decision was whether or not that disposition amounted to an alienation during the lifetime of the deceased within the meaning of section 23 of the Buddhist Temporalities Ordinance (Chapter 222). The learned District Judge answered that question in the negative.

The section is as follows :

> "23. All *pudgalika* property that is acquired by any individual bhikkhu for his exclusive personal use, shall, if not alienated by such bhikkhu during his lifetime, be deemed to be the property of the temple to which such bhikkhu belonged unless such property had been inherited by such bhikkhu."

It is common ground that the property in question is *pudgalika.*

It is argued by counsel for the appellant that what the legislature contemplates is an *act* of a bhikkhu during his lifetime the effect of which may take place at a later date, not necessarily during that lifetime ; that the testator in this case had done everything that was necessary or of which he was capable to pass the property ; and that all that was necessary to complete the transaction was the death of the testator. There would appear, however another formality with which compliance is necessary before the property passes and that is the granting of probate which for a variety of reasons, may be refused. Moreover, as counsel for the respondent pointed out it was open to the testator at any time before his death to revoke the disposition. Or again, the property was available for execution in which case there might be a total failure. It could not, I think, be contended that any rights were conferred upon the devisee at the time of making the will. Counsel for the appellant cited a number of English authorities, none of which is helpful in regard to the real point in this case that is the meaning of the expression " alienation during lifetime." In *Holmes vs Holmes* (1 Russ. & M. 660) no more was decided than that the date of a will may be considered in arriving at the intention of a testator where doubt existed as it had in that case, as to the currency in which a legacy should be paid. Similarly in *Ashburnham vs Bradshaw* (2 Atk. 36) reference to the date of a will was made in order to ascertain whether it was before the passing of the new statute of Mortmain which would have rendered invalid a bequest had it been made subsequently to the passing of the Act. From *Doe d. Stevenson vs*

Glover (14 L.J. (N.S.) Com. Law 169) however, the following observation which hardly helps the case of the appellant is gleaned: "A will is ambulatory during the life of the person making it and does not operate as a disposing or putting away of any estate until after the death of the person making it....." None of these authorities, and this applies also to *Holmes vs Godson* (8 De G.M. & G 152) is of assistance in arriving at the meaning of "alienation." Counsel for the respondent was content to rely upon what he termed, and I think properly the plain meaning of the word. It is defined in Stroud as "to make a thing another man's; or to alter or put the possession of lands or other things from one man to another." In my view a disposition by will for the reasons which I have already indicated does not have the effect set out in that definition. For these reasons I am of opinion that the learned District Judge arrived at the right conclusion on this point.

Arising out of the judgment, however, there is another point for determination. It was held by the judge that the 1st defendant was entitled to follow the property into the hands of the plaintiff for the purposes of administration and the plaintiff's right to the property is declared in the decree to be subject to the 1st defendant's right to have recourse to the property for the purposes of paying "the funeral expenses, the debts, the testamentary expenses and estate duty." In regard to this point cross-objections have been filed by the respondent. In this respect I think that the respondent must succeed. The expression "shall be deemed to be the property of the temple" seems to me to leave no room, on the death of a bhikkhu for intrusion by his executors. Mr. Perera pointed out how such a construction would in certain cases, operate harshly upon a bhikkhu's creditors. There is force in the contention but that appears to be a matter for the consideration of the legislature.

The appeal is dismissed with costs subject to the deletion from the decree of that part reserving to the 1st defendant the right to have recourse to the said *pudgalika* property for the purposes of paying the funeral expenses, the debts, the testamentary expenses and estate duty. In regard to estate duty, in this case the question may not arise. In any case, it is a matter which does not at the moment call for a decision by us.

JAYETILEKE, J.

I agree.

Appeal dismissed.
Cross-appeal allowed.

Present: MACDONELL, C.J., GARVIN, S.P.J. & MAARTENSZ, J.

IN RE KANDIAH

In the matter of an Advocate of the Supreme Court and in the matter of section 19 of the Courts Ordinance No. 1 of 1889.

Argued on 1st & 2nd November, 1932.

Courts Ordinance section 17—Advocate guilty of an offence—Conviction for an offence under Ordinance No. 5 of 1910—Is Advocate so convicted unfit to remain on the roll of Advocates.

Held: (i) That an advocate who is convicted of an offence under section 8 of Ordinance No. 5 of 1910 is not fit to belong to the profession of Advocates.

(ii) That in hearing a rule against an Advocate on the ground of conviction of a criminal offence the Supreme Court will not allow a conviction which has been affirmed in appeal or against which there has been no appeal to be re-argued on the evidence on which that conviction was based.

L.M.D. de Silva, K.C., Solicitor-General with *M.F.S. Pulle, Crown Counsel*, in support.

Hayley, K.C., with *V. A. Kandiah*, instructed by *V. M. Saravanamuttu*, for the respondent.

MACDONELL, C.J.

The rule moved in this matter was expressed as follows: It called on the respondent to show cause why he should not be suspended from practice or removed from the roll of Advocates on the following grounds: That he, being an Advocate of the Supreme Court, was on a certain date found guilty and convicted by a competent court of an offence against section 8 of Ordinance No. 5 of 1910 and sentenced to a certain term of imprisonment which said conviction and sentence was afterwards affirmed on appeal in this court and which conviction was still in force

and effect. From this allegation of fact the court was asked to draw the conclusion that the respondent had been "guilty of some crime or offence" and to exercise the powers given it by section 19 of the Courts Ordinance accordingly.

It was argued however that the rule in its wording should have averred not that the respondent had been convicted of an offence against section 8 of Ordinance No. 5 of 1910 but that he had been guilty of it since if the respondent had been convicted as averred denial of the conviction would be impossible and he would, therefore, be debarred from matter of defence that might be available to him, whereas if the rule had averred, not that he had been convicted of the offence but that he had been guilty thereof, it would be open to him to defend himself by traversing his being guilty of the offence whereof he had been convicted. I apprehend, however, that the form and wording of the rule are correct.

When such a rule is moved under section 19 the person moving the Attorney-General or other puts before the court such matter as he considers will convince the court that the respondent has been guilty of some deceit, malpractice, crime or offence. If the deceit or malpractice be a non-punishable matter then the person moving the rule will lay before the court such matter other than a conviction as he thinks will induce the court to infer that respondent was guilty of the deceit or malpractice. If the matter be a crime or offence then the person moving the rule will probably aver a conviction for the same as the most convenient way of proving that the respondent was guilty of a crime or offence so as to justify the court in exercising the powers given it by section 19.

I apprehend that a rule so framed cannot bar a respondent from any defence properly open to him. If the conviction alleged be of full force and effect, that is, has been affirmed on appeal or has not been appealed against within the time allowed for appealing then doubtless this court will not allow that conviction to be re-argued before it on the evidence upon which that conviction was based; it will not re-hear a matter which has been heard and determined or allow argument that evidence which was believed by the court should not have been believed or that evidence disbelieved by it should have been accepted. But if the respondent has evidence besides that produced at the trial and conviction which evidence shows conclusively that he was not guilty of the crime or offence whereof he was then convicted, a rule so framed as the present one — which is the usual way of framing it — does not debar him from bringing forward that evidence. Thus to illustrate the matter with an extreme case, if respondent had been convicted of committing a crime in Colombo on a certain day and could now bring forward evidence which was not brought before the court convicting to prove conclusively that he was not in Colombo on that day, but at a distance from it, the rule so framed would not prevent this court from considering that evidence or from holding if satisfied with that evidence that the respondent was not guilty of that crime or offence whereof he had been convicted as stated in the rule. He would no doubt be debarred from traversing the conviction or from re-arguing the findings of fact on which the conviction was based but it would be open to him to confess and avoid, that is, to show by extra matter that, in spite of the conviction he yet was not guilty of the crime or offence whereof he had been convicted, whereby he would not be liable under section 19. *A fortiori* it would be possible for him on a rule so framed to bring up matter not amounting to an avoidance of guilt, that is, all matter in mitigation.

I would hold therefore, that the rule so framed is in accordance with precedent and right in principle since in this form it raises definitely the issue for decision under section 19 and leaves open to the respondent all matter in exculpation or in mitigation to which in law he seems to be entitled.

As to the case before us the respondent has not produced any new or extra matter that would justify any suspicion even that the conviction against him of contravening Ordinance 5 of 1910 was wrong or that he was other than guilty.

It was an offence committed by him when in a position of trust in regard to analogous matters *viz.* excisable articles. It was I am sorry to have to say, a thoroughly discreditable offence against a law which policy and sound ideas of social well-being require to be upheld. I am unwilling to dilate on this case or to make things worse for the respondent than they are but it seems to me self-evident that a person who has so misconducted himself is not fit to belong to the honourable profession of Advocates and I am of opinion that he should be removed from the roll of that profession accordingly.

GARVIN, J.

I agree.

MAARTENSZ, J.

I agree.

Name struck out from roll.

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

SAIBO vs MOHIDEEN

S. C. No. 303—*D. C. Colombo No.* 10724.
Argued on 16th & 17th September, 1942.
Decided on 13th November, 1942.

Surety—Bond guaranteeing payment for goods to be supplied to another to a certain amount—Letter to obligee by surety not to give further credit after some goods supplied—Is surety entitled to determine his liability by such notice.

Held : That a person, who furnishes security by bond guaranteeing payment for goods to be supplied to another up to a certain value, is entitled at any time to notify the obligee determining his liability.

Cases referred to : *Offord vs Davies* (1862–31 L.J. (C.P.) 319 ; 6 L.T. 579)
Coulthart vs Clementson (5 Q. B. D. 42)
Beckett & Co. vs Addyman (9 Q.B.D. 783)
Lloyds vs Harper (16 Ch. D. 290 at p. 319)

H. V. Perera, K.C., (with him *C. V. Ranawake, C. Thiagalingam, E. B. Wickramanayake* and *H. W. Jayawardene*,) for the second defendant-appellant.

N. Nadarajah, K.C., (with him *S. Subramaniam*), for the plaintiff-respondent.

DE KRETSER, J.

According to the evidence, the first defendant did a small business in Bristol Buildings in the Fort and was Liptons' sole agent for the sale of tea, biscuits and condensed milk in the Fort area. He was allowed credit facilities and had deposited a sum of money by way of security. In March, 1938, he was indebted to Liptons in the sum of Rs. 4,861/32, and he arranged with the second defendant, the appellant, that the appellant should give Liptons security in the form of mortgage and so release the money he had deposited, and Liptons agreeing to the arrangement the bond P5 was drawn up. About this time the first defendant seems to have tempted the appellant by offering to make him a partner in his business, and he went the length of informing the Registrar of Business Names that he was taking the appellant and one Haniffa, first defendant's brother, as partners. Once P5 was drawn up, however, the partnership deed was not executed and the partnership terminated.

It was agreed during the argument that the partnership had nothing to do with the present case, although plaintiff seems to have been most anxious to bring it in as colouring to his case. The bond P5 recited the existing arrangement between Liptons and the first defendant (the plural form "obligors" is used occasionally, presumably because the appellant was taking responsibility for the existing debt), and the bond continued that the obligors had requested the company to continue to supply the first defendant with such further goods as he may order in connection with his trade and to afford the obligors (plural) further pecuniary aid and assistance but always only at such times and to such extent as the manager of the company may think fit, provided the total value of goods already supplied and to be thereafter supplied did not exceed Rs. 7,500/– at any one time. The appellant was to give the security mentioned in the bond and each of the defendants undertook to pay to the company the Rs. 4,861/32 already due and all moneys falling due later. The bond specially provided that the company could decline to supply further goods to the first defendant without notice. Provision was made for the bond continuing to be effective even though at any particular time the full sum due may have been paid, and the appellant undertook to insure the premises mortgaged and also to pay all rates and taxes and empowered the company, in case of default, to pay them and charge the expense to the sum due on the bond.

Now, the recitals and terms of the bond make it clear that it was the first defendant with whom Liptons would be dealing and that the appellant furnished the security. It is true he was liable as principal debtor but not one of the parties could have failed to realize that he was really guaranteeing first defendant's credit with Liptons. The accepted evidence makes the position doubly plain. The trial judge thought the evidence of the plaintiff and the appellant equally unreliable but he seems to have had a better opinion of the evidence of the witness Mohammed Mohideen. The appellant seems to have shaped badly in the witness-box but a close examination of his evidence shows that it is intrinsically reliable in the main and that it is the plaintiff who is utterly unreliable.

However, accepting the trial judge's findings, what do we get ? In January 1938, at the first defendant's request, Mohammed Mohideen arranged with the appellant for a loan to the first defendant. First defendant alleged that he desired to have a partner and Mohideen arranged for appellant to be a partner. The two defendants and Mohideen saw Mr. Spurrier of Liptons about a month and a half before the bond P5 was executed. On February 20th the appellant refused to sign any bond unless he was admitted as a partner in writing, the first defendant having failed " to come to the scratch " (to use Mohideen's words). The first defendant then made application (2D58 of February 25th) for the alteration of the particulars in the Register of Business Names by bringing in the appellant and Haniffa as partners. On March 1st an agreement was signed by the defendants and it is alleged that the first defendant took the agreement to India to have it signed by his brother, Haniffa. The agreement was not produced at the trial. The plaintiff is closely related to the first defendant, who has failed to appear, and is interested in establishing a partnership but no document has been produced. Therefore, it must be that there was no such agreement though many details of it and the name of the attesting notary have been given or there was only an incomplete agreement, as appellant says. On the strength of the agreement apparently P5 was executed. Mohideen went into the first defendant's place of business as the representative of the appellant and he alleges that on April 9th, a little over a month from the execution of P5, he reported to appellant that he was dissatisfied with the way things were going. By 2D16 dated March 31st first defendant reported to the Registrar of Business Names that the partnership had terminated on March 31st and requested the deletion of the relevant items. On April 11th the first defendant left for India and returned on May 22nd. On April 11th the appellant informed Liptons by 2D2 that differences had arisen between first defendant and himself regarding certain accounts and he, therefore, requested them not to give him any more credit and he offered to see them and explain matters. A copy of this letter seems to have been sent to Messrs. F. J. & G. de Saram, Liptons' lawyers, on May 23rd. Liptons ignored this request and by letter dated April 12th stated that they had no objection to an interview. Mr. Mackie admits that the first defendant's liability at that date was Rs. 1,369/72. Liptons continued to give credit to first defendant and eventually the amount due by him rose to Rs. 4,038/67. Shortly after April 12th an interview took place and there is a divergence of evidence as to what transpired at it. Mackie, when giving evidence, originally was reticent regarding the interview and expressed reluctance to produce certain correspondence, and plaintiff's counsel closed his case reserving his right to re-examine this witness. On the trial being resumed counsel withdrew from this position and examined Mackie afresh. Mackie then said that another person had accompanied appellant at the interview but did not think he could identify the man and he had told the second defendant that he could do nothing until he had seen the first defendant. In re-examination later he alleged that the appellant had not asked him definitely to stop credit to first defendant and that he had explained that they had to carry on their business. Letter 2D2 had been definite enough and Mackie had refused to stop credit without consulting the first defendant. On May 20th appellant caused 2D3 to be sent by a proctor. This letter shows what took place at the interview and states that Mackie had said he would continue to deal with first defendant in spite of the appellant's protest. There was no written reply denying this allegation. The letter (2D3) warned Liptons of the position the appellant would be taking up with regard to liability after April 11th. The letter was drafted by plaintiff's counsel, who later changed sides. There are aspects of this case and of the trial which are unsatisfactory but I deliberately confine myself to a bare recital of the facts.

On receipt of 2D3 Liptons consulted their lawyers, who apparently got a copy of 2D2, and thereafter Liptons stopped giving credit to the first defendant. Their bill had by now risen to Rs. 4,038/67. On the first defendant's return to Ceylon an attempt seems to have been made to settle the differences between the parties. It is alleged that plaintiff took a leading part but this is denied by him. But if he took no part in the " arbitration proceedings " he certainly took an active part in financing first defendant's business. On quite inadequate grounds plaintiff was allowed to give evidence and to call witnesses after the defendant had closed his case. Plaintiff admitted he had made loans to first defendant and had helped him to borrow money from Chettiars, sums amounting to Rs. 1,000/- or Rs. 2,000/-. In August, plaintiff opened an account with the Indian Bank, being introduced by first defendant. He had no banking account before and seems to have been a man of small means. He says first defendant owed him money and could not pay and then told him about the bond P5 and plaintiff offered to take

an assignment of it, though first defendant had told him of his indebtedness to Liptons.

The first cheque issued by plaintiff on opening his bank account is P6. His banking career started on August 13th and ended on January 20th 1939, and during that time most of the cheques had been drawn in first defendant's favour.

Of course, if the first defendant had paid Liptons, there would be no further liability on appellant's part. It was suggested during the trial that the plaintiff's banking account and payment by him was only a devise to disguise a payment really made by the first defendant. The trial judge rejected this view and it was not mentioned in appeal.

One matter which might have re-paid investigation was why Liptons refrained from taking action. They stopped credit to first defendant and dealt with him on a cash basis. They knew he was a man of straw and appellant had given substantial security. There is not a word suggesting any desire on their part to take action. Mackie, for some reason, preferred not to say when the question of an assignment first arose and he was allowed to retain his preference, although he professed absolute disinterestedness in the case and said the firm only wanted to be paid and he left the matter to his lawyers. It seems a likely possibility that Liptons knew that their claim against the appellant for any sum beyond Rs. 1,369/72 was at least doubtful and that the intervening time was taken in negotiations carried on by his lawyers.

The trial judge rejected the evidence as to arbitration as almost absurd and I shall not disturb his view, but it seems to me that "arbitration" was only an interpreter's word and that all that was meant was that some friends had tried to settle matters. There is no question but that two of the alleged arbitrators are dead and there is nothing suspicious about that nor can appellant be blamed for their death, and in an effort of the kind indicated it is not likely that written evidence was taken or written awards made. In fact, it is not said that any award was made. The trial judge's view is not, therefore, free from criticism and it seems to me that unless some such negotiations were on foot the delay on Liptons' part to sue is inexplicable and Mackie's reluctance to produce correspondence, even more so.

During the trial, the appellant raised the question that he had not been given notice of the assignment before he received the letter of demand. That fact does not affect the case.

But I have rather anticipated matters. I should have said that on August 16th plaintiff issued cheque 6 in favour of Liptons for Rs. 4,038/67. He was not then in funds and alleges that he had arranged with Liptons' lawyers to present the cheque the next day. But the cheque was presented and dishonoured, and plaintiff paid the amount in cash next day. The arrangement was that on payment Liptons should assign their rights on bond P5. He got part of the cash by drawing a cheque for Rs. 3,000/– on the bank and it was the first defendant who cashed it. Liptons issued a receipt in favour of the first defendant and it was not till August 30th 1938, that the assignment was made, Liptons expressly stating that they would not warrant the assignment.

There was no argument at the trial that plaintiff was an innocent assignee but only that he was an assignee for value, and this was to meet appellant's contention that it was really the first defendant who was paying. It was not contended at the trial nor on appeal that plaintiff's rights on the assignment could be any greater than Liptons' rights on the bond and I do not see how they could have been greater. All the evidence clearly points to his knowledge of the relations between the parties to the bond, and he had been made aware that Liptons would not warrant the assignment and so put specially on his guard. What more could the appellant have done than what he did do? He gave notice to the only party then entitled to notice, *viz.* Liptons. On receiving notice of the assignment he promptly disclaimed liability. Even if plaintiff was not personally aware of the affairs of his close relative whose business he was financing (a most unlikely state of things). Messrs. de Saram knew the true position and it is scarcely likely they hoodwinked the plaintiff and kept him in ignorance. But it is really unnecessary to trouble on this score for counsel have not raised any argument on this point and they are not likely to have missed any available argument.

I have recited the facts at considerable length. On these facts two questions were argued :

(*a*) Was the bond discharged when Liptons gave their receipt and was it too late for them to assign it later ?

(*b*) In any case, is appellant liable beyond the sum due when he gave notice of repudiation, *viz.* Rs. 1,360/72 ?

With regard to (*a*) it is clear that it was understood between Liptons' lawyers and plaintiff that there should be an assignment

of the bond and plaintiff paid on that footing. The receipt was acknowledgment of the money paid but it did not discharge the bond in terms and it cannot be said it discharged it in fact. It is useful to remember that according to the terms of the bond payment did not discharge it.

With regard to (*b*), I think too much emphasis has been laid on the terms "surety" and "co-debtor," and that what really matters is the true nature of the transaction. A and B may deal with C and the agreement may be that C should supply A and that B should be surety, and B may renounce all privileges and make himself a principal debtor. A and B may also deal with C, and B may tell C to supply goods to A on his (B's) account, or that for the goods so supplied he would be liable, with A, *in solidum*. A and B may also take goods individually or together and each agree to be liable *in solidum* for the value of goods taken by both. There is a difference in form undoubtedly but is there any real difference in substance? As a matter of procedure C may sue B alone in each instance but C knows quite well that B is paying for what A owes and A knows that, and whether B is called a surety, a guarantor, a mandator, a principal debtor, or a co-debtor, the relations are the same.

The real question seems to me to be—is the contract so fixed and determined that B cannot withdraw, and that may depend on whether it is a single transaction or a series of possible contracts. Considerations proper to a single transaction obviously cannot apply to a running series of transactions. We are familiar with that in the case of prescription and have held that each item in a shop bill gets prescribed from the date of each separate contract of sale and not from the close of the running account.

If C has entered into a contract with A on the strength of B's mandate, both C and A cannot resile from it and it is only reasonable that B should not be allowed to do so, even though delivery under the contract may be deferred. But where no contract has been entered into, why should not B be free to resile on notice to C? The strangest results would otherwise ensue. If a man authorizes a shop to give his wife or child credit he would not be free to countermand his authority; In the present agreement Liptons were free agents, so was the first defendant. Was the appellant alone to be a slave to it? We repel agreements in restraint of trade and are strict in interpreting fetters placed on the free disposition of property, are we not to apply the same principle to a human being if it can be done regarding something not yet in being? Faced with this difficulty counsel for respondent could not only say that a man can terminate his obligation in a way known to the law, assuming calmly that he may not terminate it by giving notice, the very point we have to decide. According to him, if I understood him aright, appellant had to pay what was due in order to be free. But this is not true, for the bond provided that payment by itself did not put an end to the agreement. So then he really meant that Liptons had to agree to release appellant, which was exactly the position they took up until advised by their lawyers. They never asked for payment; appellant was solvent and had given ample security, he had not repudiated liability for the past. That was not the difficulty. Liptons imagined they could bind him for as long as they chose to deal with the first defendant.

The position regarding guarantors seems clear in the English law. In *Offord vs Davies* * it was held that a guarantee to secure moneys to be advanced to a third party on discount, to a certain extent, for the space of twelve calendar months, was countermandable within that time. The defendants pleaded that before plaintiff had discounted the bills and advanced the moneys they had countermanded the guarantee and requested plaintiff not to advance such moneys. The plaintiff alleged this was no defence and that defendants had no power to countermand without the assent of the person to whom the guarantee was given. The plaintiffs there took up exactly the position taken up by the plaintiff in this case.

The arguments of counsel and the comments of the judges are interesting. Many cases were cited and reliance was placed on an American work of great authority, Parsons on "Contracts," where it was said: "A promise of guarantee is always revocable, at the pleasure of the guarantor, by sufficient notice, unless it be made to cover some specific transaction which is not exhausted and unless it be founded upon a continuing transaction, the benefit of which the guarantor cannot or does not renounce. If the promise be to guarantee the payment of goods sold up to a certain amount and, after a part has been delivered, the guarantee is revoked, it would seem that the revocation is good....."

Erle, C.J., in giving the judgment of the court, said: "This promise by itself created no obligation. It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants or to the detriment of himself. But, until the condition has been at least in part fulfilled, the defendants have the power of revoking it. In the case of simple guarantee for a proposed loan, the right of

* 1862-31 L.J. (C.P.) 319; 6 L.T. 579

revocation before the proposal has been acted upon did not appear to be disputed. Then, are the rights of the parties affected either by the promise being expressed to be for twelve months or by the fact that some discounts had been made before that now in question, and repaid ? We think not. The promise to repay for twelve months creates no additional liability on the guarantor but, on the contrary, fixes a limit in time beyond which his liability cannot extend. And with respect to other discounts, which had been repaid, we consider each discount as a separate transaction, creating a liability on the defendant till it is repaid....."

In *Coulthart vs Clementson*,* it was held that the death of a guarantor, of which the creditor had incidental notice, terminated the guarantee with regard to future advances. Bowen, J. said : " In the case of such continuing guarantees as the present, it has long been understood that they are liable, in the absence of anything in the guarantee to the contrary, to be withdrawn on notice." He gave the explanation given in *Offord vs Davies* (*supra*) and said the proposition was established by authority and that " a limitation to that effect must be read into the contract." It must similarly be taken, he said, that parties contemplated the possible death of the guarantor and intended that it should terminate his obligation. Notice of the death was constructive notice, and it would be idle to insist on special forms of withdrawal of a guarantee which nobody has a right to continue.

In *Beckett & Co. vs Addyman* † a co-surety claimed that the death of the other surety terminated the whole obligation ; in other words, that the sureties, bound jointly and severally, were inseparable. Lord Coleridge, C.J. said that the co-surety was clearly still liable. It could not have been contemplated that the death of one surety would discharge the other ; and he added : " It is probable that the defendant could have terminated his liability by notice ; for it seems to be clear that in the case of a continuing guarantee for goods to be supplied or money to be advanced, it is in the power of the guarantor to determine his liability." Brett, L.J. said : " The defendant might have given notice to determine his liability.....At law the defendant is clearly liable until he has given notice."

In the case of *Lloyds vs Harper* ‡ Lush, L.J. said : " They are (*i.e.* instances of the more familiar class of guarantees) where a guarantee is given to secure the balance of a running account at a bankers, or a balance of a running account for goods supplied. There the consideration is supplied from time to time, and it is reasonable to hold, unless the guarantee stipulates to the contrary, that the guarantor may at any time terminate the guarantee. He remains answerable for all the advances made or all the goods supplied upon his guarantee before the advance made or all the goods supplied upon his guarantee before the notice to determine it is given ; but at any time he may say 'I put a stop to this : I do not intend to be answerable any further, therefore, do not make any more advances or supply any more goods upon my guarantee.' As at present advised, I think it is quite competent for a person to do that where, as I have said, the guarantee is for advances to be made or goods to be supplied, and when nothing is said in the guarantee about how long it is to endure. In that case, as at present advised I cannot entertain a doubt that the judgment of Mr. Justice Bowen in *Coulthart vs Clementson* (*supra*) is perfectly right, that notice of the death of the guarantor is a notice to terminate the guarantee and has the same effect as a notice given in the lifetime of the guarantor that he would put an end to it."

Offord vs Davies (*supra*) is the only authority most directly in point and still retains its authority and has often been referred to in other connections. As its reasoning commends itself even in the case of two co-debtors, I think we should follow it.

The Dutch writers do not deal with a similar case but only with the case of a single contract. In Pothier, however (Vol. I, P. 2, c. 6, s. 4 (2) para. 399), we have the following passage :

> " Lastly, a person may become surety not only for an obligation already contracted but for one to be contracted in future, so that the obligation resulting from this engagement shall only begin to arise from the time when the principal obligation is contracted ; for it is the essence of such obligation that it cannot subsist without a principal one. According to these principles, I may agree now to become surety to you for £ 1,000, which you propose to lend hereafter to Peter; but the obligation resulting from the engagement will only begin to have effect from the time when you actually lend the money ; so long as you have not yet lent it, and the thing is entire, I may change my intention, giving you notice not to lend the money to Peter, and that I no longer intend to be surety for him."

Vander Linden says that an indulgence granted by the creditor in delay of payment without the concurrence of the surety would not necessarily release the surety since, if he was unwilling to remain bound, he should have given notice to the creditor. The termination of an obligation by notice is therefore approved of.

* 5 Q.B.D. 42. † 9 Q.B.D. 783. ‡ 16 Ch. D. 290 at p. 319.

In my opinion, the decree entered in this case should be modified and decree should be entered only for Rs. 1,369/72 with legal interest thereon from date of action till date of decree and thereafter on the aggregate amount of the decree at 9 per cent. per annum. Both parties having succeeded to some extent, each party will bear his own costs both on appeal and in the court below.

Soertsz, J.

I agree.

Judgment varied.

Present: Jayetileke, J.

YOOSOOF vs FERNANDO & OTHERS

S. C. No. 95P of 1943—M. C. Nuwara Eliya No. 5903.

Argued on 17th May, 1943.

Decided on 25th May, 1943.

Rules of Criminal Procedure for Village Tribunals and Village Committees—Rule 6—Meaning of the words "in the presence of."

Held : That the expression "in the presence of" in rule 6 of the Rules of Criminal Procedure for Village Tribunals and Village Committees means no more than that the Police Officer must be bodily in such a position as to be able to see. Whether or not the offender noticed the presence of the Police Officer is immaterial.

E. L. W. Zoysa, Crown Counsel, for the complainant-appellant.

L. A. Rajapakse, for the 3rd accused-respondent.

Jayetileke, J.

This appeal raises a short point on the construction of the expression "in the presence of" in rule 6 of the Rules of Criminal Procedure for Village Tribunals and Village Committees.

The rule reads as follows :

> "Any Police Officer or Headman appointed by a Government Agent to perform police duties may, without an order from a President of a Village Tribunal or Chairman of a Village Committee and without a warrant, arrest any person, who in his presence, commits any offence, mentioned in schedule II hereto or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned."

The facts are that on receipt of information that there was gambling in the first accused's house four police officers went there to raid it. They reached the house at about midnight and found the doors closed and a light burning inside. They peeped through the plank shutters in front of the house and found the first, second and third accused and several others seated on a mat and playing the game of cards called "Baby" for stakes. On hearing the sound of the back door being opened they went to the back of the house and rushed inside to arrest the gamblers. They were thereupon obstructed and assaulted by the accused.

In the plaint that was filed against the accused there are six charges under sections 183, 220, 323, 315 and 380 of the Penal Code.

The magistrate was of opinion that the charges under section 315 and 380 were not proved and that the charges under the other sections could not be maintained as there was no evidence that the first, second and third accused gambled knowing that the police officers were watching.

The appeal is with the sanction of the Attorney-General from the acquittal on the first three charges. There can be no doubt that the magistrate has taken a mistaken view of the meaning of the expression "in the presence of." That expression means no more than that the police officer must be bodily in such a position as to be able to see. If a police officer sees a person committing an offence mentioned in schedule II he would have the right to arrest him under rule 6. Whether or not the offender noticed the presence of the police officer seems to me to be immaterial.

I would set aside the order of acquittal and direct the magistrate to convict all the accused under section 183 and the second, third and fifth accused under section 323 of the Penal Code and pass such sentences on them as he thinks fit.

Order set aside.

ABEYGUNAWARDENE (Inspector of Police) vs JACOB RODRIGO

S. C. No. 153—*M. C. Gampaha No.* 15554.
Argued on 10th & 11th June, 1943.
Decided on 11th June, 1943.

Motor Car Ordinance No. 45 *of* 1938—*Charge under section* 83 (2) *for driving a bus on an unauthorized road—Several persons in bus besides driver and conductor—It is necessary to prove that they were carried for fee or reward.*

Where the accused drove a bus with a number of persons besides the driver and conductor in it on an unauthorized road which afforded the bus the only means of access to its garage,

Held : That the accused contravened section 83 (2) of the Motor Car Ordinance No. 45 of 1938.

Per CANNON J. : " In my view the words in the definition of hiring car ' used for the conveyance of passengers for fee or reward ' are not limited to the period of time during which the bus is actually carrying passengers for reward, and therefore the words ' for fee or reward ' cannot be added to the definition of ' passengers'."

Cases referred to : *Hawkins vs Edward* (1901–2 K. B. 169)

Clement de Jong, for the accused-appellant.

G. E. Chitty, Crown Counsel, for the Attorney-General.

CANNON, J.

The appellant was charged on two counts, namely :

(1) Driving a bus on an unauthorized road contrary to section 83 (2) of the Motor Car Ordinance No. 45 of 1938 ; and

(2) At the same time and place driving the bus with passengers on this unauthorized road, which affords the bus the only means of access to the garage, contrary to regulation 6 (2) made under sections 82, 83 and 174 of the Motor Car Ordinance No. 45.

The regulation referred to in the second charge is an exception to the section referred to in the first charge. The exception permits a bus to go on an unauthorized road which is the only means of access to its garage, provided that the bus carries no passengers on that road. The defence was that although there were a number of people in the bus they were not passengers within the meaning of the Ordinance, because they were not being carried for reward. The magistrate dismissed the first charge and convicted on the second charge. The main ground of appeal is that there was not sufficient evidence to justify the magistrate's finding of fact that some of the people in the bus were being carried for reward and the question has arisen whether or not it was necessary to prove that they were, in fact, being carried for reward. The Ordinance in section 176 defines "passenger" as a person carried in a hiring car excluding the driver, or in the case of an omnibus, a conductor. An omnibus is defined as a hiring car having seating accommodation for more than seven passengers. A " hiring car " is defined as a motor car used for the conveyance of passengers for fee or reward.

It was submitted for the appellant that, taking the two definitions of " passenger " and " hiring car " together, no offence was being committed unless the passengers were being carried for fee or reward. For the respondent, Mr. Chitty points out that the definition of " passenger " makes no reference to fee or reward and submits that the character of the vehicle as an omnibus does not change according to whether the people being carried in it pay or do not pay. A finding to the contrary would defeat the purpose of the legal provisions mentioned in the charges, which are obviously made for the safety of the travelling public. In my view the words in the definition of hiring car " used for the conveyance of passengers for fee or reward " are not limited to the period of time during which the bus is actually carrying passengers for reward, and therefore the words " for fee or reward " cannot be added to the definition of " passengers." On the admitted evidence that a number of people were in the bus other than the driver and the conductor, the magistrate was therefore entitled to convict. The conviction should, however, have been on the first charge, the regulation forming the subject of the second charge being merely a permitted exception to the section in the first charge. It was an available defence for the accused, which defence would have failed when it was shewn that there were a number of people in the bus other than the driver and the conductor. The magistrate's decision must be amended so that the conviction will be recorded as being on the first, not on the second charge, the penalty remaining the same. Subject to this amendment the appeal is dismissed. A relevent English decision is *Hawkins vs Edward* (2 K.B. (1901) 169).

Appeal dismissed.

Present: MOSELEY, S.P.J. & WIJEYEWARDENE, J.

WIJESEKERA & THREE OTHERS vs WIJESURIYA

S. C. No. 31—*D. C. Tangalle* (*Inty.*) *No.* 4123.
Argued & Decided on 7th July, 1943.

Partition—Right of parties to intervene until final decree—Civil Procedure Code section 18.

Held : (i) That in partition cases courts should not deny to parties the right to intervene until the final decree is entered.

(ii) That while granting such an application the court is empowered under section 18 of the Civil Procedure Code to impose such terms as may appear fair and equitable.

Cases referred to : *Menika vs Mudiyanse* (4 Ceylon Weekly Reporter 429)
Abdul Rahiman Lebbe vs Ismail Lebbe Marikar (4 Leader Law Reports 126)

A. R. H. Canakaratne, K.C., with *E. D. Cosme*, for the intervenient-appellant.
C. V. Ranawake with *H. W. Jayawardene*, for the substituted plaintiffs-respondents.

WIJEYEWARDENE, J.

This is an appeal from an order rejecting the appellant's application to intervene in a partition action. The case was filed in 1936 and decree was entered in September, 1938 dismissing the action on the ground that the third defendant had acquired title to the entire land by prescriptive possession. In appeal, the finding on the question of prescriptive possession was set aside and the case was remitted to the District Court for trial "on the question of title and any other question that may arise in the case other than the points" decided by this court. At the conclusion of the second trial, the District Judge entered a preliminary decree for partition in March, 1941 declaring the original parties entitled to certain undivided shares. An appeal taken against that decree by the third defendant was dismissed in June, 1942. No final decree has been entered.

The appellant filed a statement in September, 1942 setting out her title to an undivided share of the land and moved to intervene in the action. That statement, I may add, raises a question which was raised unsuccessfully by the third defendant at the second trial. The substituted plaintiffs-respondents who received notice of the application objected to the intervention. The District Judge made the following order dismissing the application :

> "This case was instituted so far back as October, 1936. The intervenient gives no reason for this belated application. This application is only to delay a much delayed case. I refuse the application."

The learned judge did not give an opportunity to the appellant to explain her delay in filing her statement of claim. It is, no doubt, true that the appellant's intervention will have the effect of "delaying" the case, but that is a necessary result of all interventions and cannot be regarded as a good ground for the order made by the District Judge.

In view of the conclusive effect given to final decrees by section 9 of the Partition Ordinance courts should not deny to parties the right to intervene in a partition action, until the final decree is entered (*vide Menika vs Mudiyanse* 4 C.W.R. 429). On the other hand section 18 of the Civil Procedure Code empowers a court in an appropriate case to impose such terms as may appear fair and equitable while granting an application for intervention (*vide Abdul Rahiman Lebbe vs Ismail Lebbe Marikar* 4 Leader Law Reports 126). I think that this is a case in which such an order should be made.

I set aside the order against which this appeal is taken and direct the District Judge to admit the intervention, if the appellant deposits in court Rs. 150/- before August 31st 1943 as security for the costs that may be incurred by the substituted plaintiffs-respondents in consequence of the intervention. If the appellant fails to make such deposit, her application for intervention will stand dismissed.

The appellant is entitled to the costs of appeal as against the substituted plaintiffs-respondents.

MOSELEY, S.P.J.

I agree.

Order set aside.

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

RAJAH vs NADARAJAH & ANOTHER

S. C. No. 160 (*F*)—*D. C. Kandy No.* 141.
Argued on 14th July, 1943.
Decided on 23rd July, 1943.

Prescription—Fraudulent alienation—When cause of action arises—Can minority of alienee and his failure to assert rights affect the question of prescription—Can the court examine the true nature of a transaction notwithstanding the form given to it.

Held : (i) That where a deed of transfer is sought to be set aside on the ground of fraudulent alienation the cause of action arises on the execution of such transfer, if the party impugning such deed was aware of the fraud.

(ii) That the fact that the party entitled to rights under the fraudulent deed happened to be a minor and did not assert his rights cannot affect the question of time limited for bringing the action.

(iii) That the court is entitled to examine the true nature of a transaction notwithstanding the form in which the transaction is described.

Cases referred to : *Podisingho Appuhamy vs Lokusingho et al* (4 N.L.R. 81)
Fernando vs Peiris (33 N.L.R. 1)
Muttiah Chetty vs Mohamood Hadjiar (25 N.L.R. 185)
Petherpermal Chetty vs Muniandy Servai (35 I.A. 98 ; 35 Cal. 551)

N. E. Weerasooriya, K.C., with *L. A. Rajapakse* and *C. Renganathan*, for the plaintiff-appellant.

N. Nadarajah, K.C., with *C. E. S. Perera* and *P. Navaratnarajah*, for the 2nd defendant-respondent.

KEUNEMAN, J.

The plaintiff a minor, by his next friend, instituted this action to be declared entitled to one-third of the premises described in the schedule to the plaint. He claimed title on a transfer P3 of 1927 from his father, the original added defendant, and alleged that the 2nd defendant had entered into possession in 1932 and that the 1st defendant was the lessee of the 2nd defendant and was in occupation of the premises. The action was instituted in 1938 and the plaintiff claimed mesne profits for 3 years before that date. The 2nd defendant in his answer alleged that the deed P3 was null and void as it was executed in order to defraud creditors and that the added defendant had remained in possession of the property after the execution of P3. He added that P3, although in form a deed of transfer was in fact a donation, the plaintiff at the time being 7 or 8 years old, in fact he attained majority in 1939. He further stated that the added defendant in any case could not gift more than half of this to the plaintiff, as the premises in question were part of the *thediatetam* property.

The 2nd defendant claimed that he was entitled to the property by virtue of a Fiscal's transfer D31 of 1929 in his favour the property having been sold in execution against the added defendant.

A number of issues were framed of which the following may be mentioned:

4. Did any consideration pass from plaintiff to Ambalavanar (added-defendant) on P3 ?

5. Was P3 executed by Ambalavanar with intent to defraud his creditors ?

6. Did the said transfer render Ambalavanar unable to meet his creditors ?

8 (*a*) If issues 4, 5 and 6 or any of them is answered against the plaintiff is the 2nd defendant entitled to have the said deed set aside ?

8. (*b*) Does any title pass to the plaintiff on the said deed ?

12. If issue 4 is answered in the negative is the said deed P3 valid to convey title inasmuch as it has not been accepted by the plaintiff or on plaintiff's behalf ?

13. Is the 2nd defendant's claim to have P3 set aside barred by prescription ?

Further issues were also framed with regard to the alleged estoppel operating against the 2nd defendant.

The facts of the case, as held by the District Judge, are as follows :

The added defendant, Ambalavanar had carried on business for a very long period. At first the business prospered, but eventually it failed and his creditors began to sue about 1927. Added defendant desired to put his properties beyond the reach of his creditors in order to defraud them. He accordingly executed several deeds, transferring his lands in Gampola to his sons and his business there to his brother-in-law and transferring or mortgaging his lands in Jaffna

to his daughters. These deeds were executed at various times but were all part of one scheme of fraud. It is clear that the whole of this fraud was carried through on the advice and with the active co-operation of the 2nd defendant who was the son-in-law of added defendant and so the brother-in-law of plaintiff. After the transfers added defendant had no means whereby to pay his creditors.

Apparently at this stage the 2nd defendant heartily approved of the fraud but he later feared that the scheme might fail as against the creditors. The added defendant owed the 2nd defendant himself a sum of nearly Rs. 12,000/–, and a promissory note which was probably antedated was prepared for Rs. 12,000/– and the 2nd defendant sued on it, obtained judgment and proceeded to execution. As a result these premises were sold and purchased by the 2nd defendant. All through this period the added defendant and the 2nd defendant acted together in pursuance of an understanding whereby added defendant was to pay the amount due to 2nd defendant and in fact payments were made in accordance with this understanding. The 2nd defendant, however, appears to have gone into possession of these premises about the time of the sale to him.

The District Judge held in these circumstances that the 2nd defendant was entitled to have the deed P3 set aside and that prescription did not run against him. He, however, deprived the 2nd defendant of his costs because " he was the most untrustworthy among a pack of untrustworthy witnesses."

There can be no doubt that the stricture passed by the judge upon the 2nd defendant and the added defendant are thoroughly deserved and there can be no question that they were both deeply involved in a scheme, intended to defraud other creditors. That scheme appears to have succeeded.

There is one matter decided by the District Judge which is open to serious question—and that is his finding on prescription. He held that as long as the 2nd defendant was in possession of the land and appropriated the income from it there was no reason for him to challenge the deed in favour of the plaintiff. He added that the effect of the plaintiff's deed to defraud the 2nd defendant arose only when the plaintiff on the strength of that deed challenged the defendant's rights.

No authority has been cited by the District Judge or by counsel in support of this finding. As far as the defendant's possession is concerned it was no doubt open to him to plead that possession had given rise to a title by prescription in his favour. But in this case such a plea was not available because the possession did not extend to ten years and the plaintiff was a minor even at the date of action. In this case, however, we are not dealing with prescription as a means of acquiring title but in the sense of limitation of action and the question we have to consider is whether the action was brought within the time laid down. In *Podisingho Appuhamy vs Lokusingho et al* (4 N.L.R. 81), where the fraudulent transfer had comprised the whole of the debtor's property and where the plaintiff had knowledge of the fact, it was held by Bonsor, C.J. and Moncrieffe, J. that prescription began to run from that date. Prescription was complete within 3 years from that date. In *Fernando vs Peiris* (33 N.L.R. 1) Garvin, A.C.J. pointed out that a paulian action is prescribed in 3 years from the cause of action. The cause of action is the alienation which it is sought to impeach as being in fraud of creditors. In a case of concealed fraud, the cause of action arises where the fraud came to the knowledge of the party impugning the deed.

In this case not only was the 2nd defendant aware of the fraud at the time of the alienation but he was the architect and builder of the edifice of fraud. Even if we take the date on which he became a purchaser *viz.* in 1929 he was then in full possession of all the facts. Concealed fraud could neither be proved or alleged in this case. No act has been at any time done by the plaintiff which prevented the 2nd defendant from bringing an action to set aside deed P3 earlier and the principle laid down in *Muttiah Chetty vs Mohamood Hadjiar* (25 N.L.R. 185) does not apply. The most that can be urged is that the 2nd defendant did not choose to bring this action earlier because the plaintiff happened to be a minor and did not disturb his possession. I do not think that can effect the question of the time limited for bringing the action.

I hold that the decision of the District Judge on the question of prescription cannot be supported. In view of my finding on this point it is unnecessary to consider the further argument addressed to us that in consequence of the 2nd defendant's participation in the fraud no relief should be extended to him.

I find that the 2nd defendant's claim to have the deed P3 set aside is prescribed and must be dismissed. The ground on which the District Judge gave judgment for the 2nd defendant, therefore, fails.

It was however, argued for the 2nd defendant that the District Judge has wrongly decided issue 12. The argument is as follows : The deed

P3 cannot be regarded as a deed of sale and can at most be regarded as a donation. But it must fail as a donation because it has not been accepted by or on behalf of the plaintiff. The District Judge answered this argument as follows: P3 is not a deed of gift on the face of it. Therefore it is valid to convey title though there is no acceptance of it by the plaintiff. It was further argued before us that there has been delivery of the deed to the minor and that this constituted acceptance by the minor. It is true that in re-examination the plaintiff said: " Deed P3 was all along in the possession of my father till he handed it to me in 1936 or 1935. I have lost the original deed. I told father about the loss and he obtained for me this certified copy P3." The District Judge has not stated that he accepted this evidence, and it is not possible for us to accept it. The alleged loss of the original of P3 is not fully explained and it is doubtful that plaintiff even had the deed. The failure to produce the original deed tells against him. This evidence came at a point when the plaintiff had begun to realize the pinch of the case and was not given in examination-in-chief. Further the whole course of the transaction by the added defendant showed that he never regarded his son the plaintiff as the owner of the property, but had merely made fraudulent use of the plaintiff's name in order to defeat the creditors. Further the alleged date of the delivery of the deed was after the purchase by the 2nd defendant.

I think the District Judge has failed to appreciate the real inwardness of issue 12. What is contended is that P3 cannot be regarded as a sale to the plaintiff not only because there was no mutuality between the added defendant and the plaintiff; plaintiff never existed as a party to the contract. " In a contract of sale there must be complete agreement as regards the nature of the transaction, the thing sold and the price (*consensus res* or *merx et pretium*) Voet 18.1.1.....The parties must mutually agree that the one is to sell and the other is to buy.....It is not enough that the parties call the transaction a sale ; the circumstances must show that the parties in reality entered into a true contract of sale." (Wessels' Law of Contract in South Africa Vol. 2 page 1197). Now it is clear in the present case that there was no *consensus* between the plaintiff and the added defendant. The whole transaction must fail as a sale or a contract of sale for want of mutuality. Further the surrounding circumstances show that it was never intended by added defendant that the deed P3 was to become operative. The deed was merely a device for putting his property beyond the reach of his creditors. It was something very closely akin to the *benami* conveyance in *Petherpermal Chetty vs Muniandy Servai* (35 I.A. 98 ; 35 Cal. 551) and as Lord Atkinson said " A *benami* transaction is not intended to be an operative instrument."

The only ground therefore on which plaintiff can hope to give validity to the deed P3 is by contending that it was a donation by the father to the son. But even regarded as a donation the deed is inoperative as it has not been accepted by the plaintiff and there has been no delivery of the property to the plaintiff by the added defendant.

I accordingly hold that the form given to the transaction will not be the governing consideration. It is clear that as a sale P3 cannot be regarded as valid for the reasons I have mentioned and accordingly the fact that P3 was drafted in the form of a deed of sale cannot give it any validity which it would not otherwise have. It is possible, however, for us to examine what the true nature of the transaction was. The only contract which could validly have been intended was the contract of donation. But as a donation P3 must also fail for want of acceptance. I am, therefore, driven to the conclusion that P3 was invalid and did not convey title to the plaintiff.

The order I make in this case is as follows : I delete from the judgment and decree of the District Judge the words " the deed P3 is hereby set aside," but I affirm the order that the plaintiff's action is dismissed. The order of the District Judge as regards costs in the court below is affirmed, and the 2nd defendant is not entitled to costs of the action.

A great deal of time was taken up in appeal in discussing the question of the setting aside of deed P3, and the question of prescription relating to it. On this point the 2nd defendant has failed. Further the very unscrupulous manner in which the 2nd defendant has acted throughout should in my opinion also be taken into consideration. I do not think the 2nd defendant is entitled to the costs of appeal and the appeal will, therefore, be dismissed without costs, subject to the variations I have mentioned.

HOWARD, C.J.

I agree.

Appeal dismissed.

Present: MOSELEY, J. & KEUNEMAN, J.

JASOHAMY & ANOTHER vs PODIHAMY & TWO OTHERS

S. C. No. 274—*D. C. Tangalle No.* 4737.
Argued on 30th June & 1st July, 1943.
Decided on 9th July, 1943.

Partition action—Usufructuary—Construction of Citronella Distillery by—Transfer by usufructuary of distillery together with all his right, title and interest and all things belonging thereunto—Do these words include transferor's rights to claim compensation for improvements —Is a usufructuary entitled to claim such compensation—When is a mala fide improver or his purchaser entitled to compensation—Can a mere claim to compensation be asserted in a partition action

Held : (i) That in a deed of transfer the words " together with all my right title and interest and all things belonging thereunto " are wide enough to convey the right to claim compensation for the improvements effected by the transferor.

(ii) That where the real owners of a property consented to and acquiesced in the making of improvements, the right to claim compensation cannot be denied to a *mala fide* improver or to his purchaser.

(iii) That a claim for compensation for improvements only can be asserted in a partition action.

Cases referred to : *Mohamed Bhai et al vs Silva et al* (14 N.L.R. 193)
Livera vs Abeysinghe (18 N.L.R. 57)
Livera vs Abeysinghe (19 N.L.R. 492)
Dassanayake vs Tillekeratne (20 N.L.R. 89)
Brunsdon's Estate vs Brunsdon's Estate & Others (S.A.L.R. (1920) Cape P. Div. p. 159)
Rubin vs Botha (S.A.L.R. (1911) A.D. p. 568)
Fletcher & Fletcher vs Bulawayo Waterworks Co., Ltd. (S.A.L.R. (1915) A.D. p. 636 at 645)
Nugapitiya vs Joseph (28 N.L.R. 140)
De Silva vs De Silva (1 S.C.D. 70)
Silva vs Linohamy (2 Bal. Notes of Cases 19)
Johannes vs Podisingho (28 N.L.R. 283 at 285)

H. V. Perera, K.C., with *E. B. Wickramanayake*, for the plaintiffs-appellants.
U. A. Jayasundere, with *S. R. Wijayatileke*, for the 1st defendant-respondent.

KEUNEMAN, J.

This is a partition action in which the title to the soil shares was not in dispute. The only point of dispute was the ownership of the citronella distillery on the land sought to be partitioned. It was admitted that the distillery was about 35 years old.

The whole land at one time belonged to M. G. Babunappu who transferred it to his five children, including the 1st defendant, but reserved to himself the life-interest in it (see P7 or 1D1 of the 30th May 1913). It is in evidence that the distillery was erected after this date and the 1st plaintiff, another child of Babunappu, stated that her husband assisted Babunappu to erect the distillery, and that she thought Babunappu was erecting it for his children and that Babunappu possessed the distillery in his lifetime. By his deed 1D2 of the 24th January, 1934 Babunappu for the sum of Rs. 300/– sold the distillery to the 1st defendant who stated that she was in exclusive possession of it from that date till the death of Babunappu in 1941.

The learned District Judge held that the 1st defendant did not obtain title by virtue of deed 1D2 to the distillery which became vested in the five children of Babunappu. He further held that Babunappu had a claim for compensation in respect of the distillery and that by the deed 1D2 this right of compensation was conveyed to the 1st defendant and that the 1st defendant was entitled to claim compensation from the other co-owners in respect of the distillery. He accordingly made order that it would be best if by agreement of parties the Commissioner appointed for partition could divide the land so that the distillery falls within the block allotted to the 1st defendant. Failing that the question of the amount of the compensation was to be decided later.

From this decision the plaintiffs appeal and many matters of law were argued before us. The first contention of the appellants was that the deed 1D2 did not convey to the 1st defendant the right to claim compensation. By this deed Babunappu purported to convey the iron citronella boiler and the buildings and appurtenances belonging thereto together with all his right title and interest and all things belonging thereunto. In *Mohamad Bhai et al vs Silva et al* (14 N.L.R. 193) it was held that a purchaser

of land stands in the same position as his vendors in regard to any claim for improvements made by the vendors. As Middleton, J. put it, " He will stand in the same position as they did in regard to any claim for compensation that might have been sustainable by them as the successor in title of their right title and interest in the property." It is contended that where the property itself was not conveyed but the improvement only the right to claim compensation did not pass. I do not agree with this contention. In my opinion the words " together with all my right title and interest and all things belonging thereunto " are wide enough to convey the right to claim compensation for the improvement.

Further it was argued by the appellant that Babunappu was only a *usufructuary* and that as such he had no claim to compensation in respect of improvements made by him. No case has been cited to us, where this matter has been adjudicated upon in Ceylon and the question is not free from doubt. In *Livera vs Abeysinghe* (18 N.L.R. 57) it was held that a purchaser from a *fiduciary* heir could not claim compensation for useful improvements from the *fidei commissaries*. The matter went up in appeal to the Privy Council—see *Livera vs Abeysinghe* (19 N.L.R. 492), where this particular matter was not decided, but on the facts the appellant was held not to have acted *bona fide*. Later in *Dassanayake vs Tillekeratne* (20 N.L.R. 89), it was held that a *fiduciary* is entitled to the same right of compensation for improvements as any other *bona fide* possessor and to retention of the property until the compensation is paid and that a purchaser from a *fiduciary* is in the same position as the *fiduciary*.

The rights of the *usufructuary* have been considered in South Africa, and there is a conflict of opinion. Maasdorp in his Institutes of South African Law (5th edition) at page 183 says: " Useful expenses may also be recovered by the *usufructuary* at any rate to the extent to which the property has been enhanced in value thereby." The authority cited is Schorer Note 228 to Grotious. Maasdorp, however, also refers to the case of *Brunsdon's Estate vs Brunsdon's Estate & Others* (S.A.L.R. (1920) Cape P. Division page 159) where in a learned judgment Kotze, J. points out *inter alia* that there was a mistranslation of the Dutch word " Bruicker " in the text of Grotious. He adds that the word does not mean " usuary " but merely " tenant or lessee." Kotze, J. comes to the conclusion " that the statement made by Schorer.....is not borne out by an examination of the sources and that both principle and authority lead to the conclusion that a *usufructuary* is not, in the absence of special circumstances, entitled to claim for improvements made by him to the property over which he enjoys the right of *usufruct*." Kotze, J. does not define what " the special circumstances " are.

As I have said before this matter is not free from doubt and will have to be decided in a proper case. I do not think it is necessary to decide the matter now, for the respondent contends that in this case the improvements have been made with the consent and acquiescence of the true owners. The District Judge has so held, but the appellant disputes that finding and contends that in this case it must be presumed that Babunappu in making the improvement intended to benefit his children either at once or at his death. I do not think it is possible to hold that he intended to benefit the children at once, because the evidence is that Babunappu was in possession of the improvement from the time he made it and it was an improvement which was useful for his own occupation and enjoyment of the citronella land. Did he intend that the improvement should go to his children at his death so as to negative any claim for compensation for improvement on his part ? The evidence of the 1st plaintiff is that she thought her father was erecting the distillery for his children but this represents nothing more than her hope, and perhaps explains the eagerness with which she consented to the improvement. As against this is the fact that the erection of the distillery was a good business proposition for Babunappu himself and the further fact that in 1934 he transferred the distillery to one of the children only. This appears to have been done without any protest by the other children, and the 1st defendant has been in exclusive possession of the distillery from that date.

We have been asked to presume in this case that Babunappu intended in making the improvement to benefit his children by it. It has certainly been held that a resulting trust which would otherwise be held to arise when one man pays the purchase price of property but takes the transfer in the name of another, may be rebutted where such other person is the lawful wife or child. In such a case a *prima facie* but rebuttable presumption arises, that the purchaser intended the ostensible grantee to take beneficially. No case has been cited to us, in which a similar presumption has been applied to circumstances akin to those existing in the present case, and I think that in some of the cases cited to us the point if valid, may well

have been taken. Apart, however, from any presumption, I think it is permissible to lead evidence in a case of this nature to prove that the improver did not intend to benefit himself or intended to benefit the real owner so as to negative any claim for compensation. On an examination of the whole of the evidence which is in fact very scanty, I think that we may hold that Babunappu erected the distillery for his own benefit and not for the benefit of his children. His conduct is more consistent with that view and I think it is more likely that the children also took the same view. Also there is no evidence that Babunappu ever expressed an intention that the improvement should go to the children and the fact that he retained substantial interest in the land and in the improvement I think entitles us to hold that he made the improvement for his own benefit.

There can I think be no doubt that the children, the real owners of the property consented to and acquiesced in the making of the improvement.

It has been strongly argued that even this does not give to a *usufructuary* the right to claim compensation.

Wille in Principles of South African Law (1937 edition) page 353 sets out the right to improvements to property as follows :

> "A person who expends money or labour in improving property intending to do so for his own benefit thinking either that the property belongs to himself or that he has the right to occupy it for some substantial period whereas in fact he has no such right or title to the property and in consequence the improvements are acquired by the owner of the property is entitled to claim from the latter the amount by which the property has been enhanced in value. Even a person who has made improvements on another person's property *mala fide* that is knowing he had no title to the property is entitled to claim the same measure of compensation if the owner stood by and allowed him to make the improvements without objection."

It is to be noted that in South Africa the right to claim compensation has been given to a *bona fide occupier*, *e.g.* a person holding an invalid lease as against his own lessor and a person holding a lease from A who unwittingly made improvements on B's land (*vide Rubin vs Botha* S.A.L.R. (1911) A.D. page 568 and *Fletcher & Fletcher vs Bulawayo Waterworks Co., Ltd.* S.A.L.R. (1915) A.D. page 636 at 645).

Now in the present case I think Babunappu must be regarded as a *mala fide* improver because he knew he had no title to the property. The rule that consent and acquiescence on the part of the owner gives a right of compensation to the improver is, I think, of wide application and is not restricted to special classes of persons such as lessees or tenants. In *Nugapitiya vs Joseph* (28 N.L.R. 140) Garvin, J. said : " The owner who stands by . . . . . will not be permitted to deny the improver's status to claim compensation so that he may take the full benefit of the improvement and enrich himself at the improver's expense." That case is somewhat akin to the present case. I do not think that the right to claim compensation can be denied to Babunappu and to the purchaser from him the 1st defendant.

I may add that the question whether the 1st defendant was entitled to a *jus retentionis* did not arise for determination in the present case.

A further point was taken that the present claim to compensation being a mere money claim cannot be asserted in a partition action and reliance was placed by the appellant on two cases *De Silva vs De Silva* (1 S.C.D. 70) and *Silva vs Linohamy* (2 Bal. Notes of Cases 19). I do not think these cases are of authority today—see Jayawardene on Partition page 118 to 120—and they do not appear to be consistent with later decisions. I am inclined to be in agreement with the *dictum* of Garvin, A.C.J. in *Johannes vs Podisingho* (28 N.L.R. 283 at 285) that " the provisions of the Partition Ordinance were clearly intended to be a proceeding for the determination of every material question in dispute between the parties."

The appeal is dismissed with costs.

MOSELEY, J.

I agree.

Appeal dismissed.

Present: De Kretser, J. & Wijeyewardene, J.

THANGAMMA & ANOTHER vs MUTTAMAAL & OTHERS

S. C. No. 19—*D. C. Jaffna No.* 15752.
Argued 5th April, 1943.
Decided on 9th April, 1943.

Negotiorum gestio—*Plaintiff's claim for recovery of proportionate share of expenses incurred in litigation—Benefit to defendants—Principles governing a claim on the basis of* negotiorum gestio—*Roman Dutch law.*

Does our law recognize the management of litigation by one person for another except to the extent permitted by the Civil Procedure Code.

The plaintiffs brought this action to recover from the defendants a half share of the expenses incurred in successfully contesting a claim to property by one K. which resulted in benefit to the defendants. Defendants *inter alia* denied that plaintiffs could maintain the action in law.

Held : (i) That the plaintiffs were not entitled in law to maintain the action.
(ii) That our law does not recognize the management by one person of the litigation of another except to the extent allowed by the Civil Procedure Code.

Per De Kretser, J. : " Wessels gives the following as the general principles which govern *negotiorum gestio:* (*a*) there must be two parties; (*b*) the person benefited must be ignorant of the act; (*c*) there must be an intention to act as *negotiorum gestor.* Accordingly under (*a*) he says " There is no *negotiorum gestio* if a person administers his own affairs under the false belief that he was managing those of another. If however, the *negotiorum gestor* in managing his own affairs at the same time manages those of another, then quoad the interest of the other party there is *negotiorum gestio.*"

Cases referred to : *Union Bank vs Beyers* (3 S.C. 89)
Molife vs Barker (N.O. 27 S.C. 9)
Prince vs Berrange (1 M. 435)

N. Nadarajah, K.C., with *N. Nadarasa*, for the defendants-appellants.
S. J. V. Chelvanayagam with *T. Nadarajah*, for the plaintiffs-respondents.

De Kretser, J.

The facts are as follows : One Kandiah died leaving a widow but no children. Under the *Thesawalamai* his property would devolve on his relatives on his father's side and on his mother's side, but if he left a step-brother then that step-brother would exclude all others.

His widow applied for letters of administration naming certain persons as respondents and valuing the deceased's estate at Rs. 7,178/31. The 1st defendant was the 37th respondent.

One Kandappu then filed papers alleging that he was the son of Kandiah's father Saravanamuttu, by a subsequent marriage and that the bulk of the deceased's estate had been acquired while he was living in separation from his wife. He claimed letters. He valued the estate at Rs. 6,906/62.

Some of the respondents filed a petition of objection claiming that they and the 37th respondent, *i.e.* the present 1st defendant were the deceased's heirs on the father's side and that Kandappu was an illegitimate son of Saravanamuttu. They call him the 39th respondent but in the widow's application the 39th is one V. Thiagarajah, M.C. Delft. They denied the widow's right to letters, claimed letters themselves, and alleged the widow had not disclosed a sum of Rs. 15,000/– due to the deceased. One has to infer from another petition given by Kandappu later that the widow had been granted letters. In this later petition Kandappu prayed that he be declared heir to all the *mudusom* property and to half the *thediatetam*. An inquiry followed and the court held that he was not the deceased's heir but made no order as to costs.

According to the evidence the paternal half of the estate if I may so call it, went half to the present 1st defendant and half to the 2nd plaintiff and her four sisters. The 1st defendant was in India where she married the 2nd defendant, who had held judicial office there. They had had notice presumably of the application of the widow and they certainly had notice of Kandappu's later application for he had prayed for an *order nisi* against all the respondents. The case has been argued on the footing that they did have notice but chose to take no part in the contest, preferring to let the law take its course.

The plaintiffs bring the present action alleging that they spent Rs. 1,500/– in contesting Kandappu's claim and claiming that defendants should pay half *i.e.* Rs. 750/– in terms of an agreement made in December, 1935, at Chundikuly in Jaffna. In the alternative they claim

that they had rendered service to the 1st defendant and saved the property and so were entitled to recover Rs. 750/– being the proportionate share of the expenses. Defendants filed answer denying the claim and alleging that instead of having litigation incurring such fabulous expenditure the difference between the parties could have been settled satisfactorily by other means. They denied that plaintiffs could maintain the action and put them to the proof of alleged expenses.

The trial judge, who seems to have been much impressed by the 2nd plaintiff's poverty and the fact that defendants were well off and ought to pay, held quite easily that there had been no such agreement as plaintiffs had alleged, that on a generous estimate she could not have spent more than Rs. 800/– and putting this claim on the same footing as one for compensation when one lifts a burden on a property by paying a mortgage debt condemned defendants to pay Rs. 400/– and fixed costs at Rs. 60/- . In this hotly contested claim he allowed only 60/– as costs but thought plaintiffs had incurred Rs. 800/– in the previous inquiry, he does not explain why in the absence of proof plaintiff's expenditure should be fixed on a generous scale. If there was no proof he could accept, it was not open to him to speculate generously. He has also lost sight of 2nd plaintiff's statement in D2 that she had spent Rs. 85/– up to the stage of inquiry. It is inconceivable that she could have spent nearly nine times as much for the inquiry itself. I should be surprised if the expenses exceeded Rs. 200/–. Besides the heirs on the maternal side were interested in resisting Kandappu's claim and they did not do so. They too benefited in the same way as the 1st defendant did.

The plaintiff starts with a heavy burden of falsehood on her shoulders. Such falsehood is hardly in keeping with her position as friend and benefactor of the 1st defendant.

On the appeal it was not attempted to uphold the trial judge's reasoning but it was sought to justify his order on the footing that this was a case of *negotiorum gestio.*

Before passing to a consideration of the law applicable to the case, it is necessary to deal with two letters written by the 2nd plaintiff, D2 and D3. In the first written on the 2nd of July to the 1st defendant's father, Rev. Anketell, who appears to have been a stranger to her, she states how the parties claim from Kandiah's estate. She goes on to say that 1st defendant had asked why there should be litigation as the inheritance would devolve on the plaintiff spontaneously. She discloses the existence of Kandappu and states that although he had been given the surname of Saravanamuttu his mother's marriage was not registered and there had been no tying of *thali* and no dowry, but that Saravanamuttu had described her as his wife in a document; that as her husband was a practical man in court work and as her sisters were not well off they had given him a power of attorney and filed a petition; that certain documents had been obtained and up to that date they had spent Rs. 85/– and the case was fixed for the 8th instant *i.e.* six days from the date of the letter and they required more money for expenses. She called upon the minister to think of God, that she was a poor woman and 1st defendant was in comfort, that giving to the poor was lending to the Lord, that 1st defendant knew nothing about " this inheritance " or who her relatives were and that 2nd plaintiff had therefore begged of the District Judge to give " this inheritance " to her; that if 1st defendant were to take her half she (plaintiff) would have no share and if the 1st defendant had an *urumai* (by which is meant, I understand, a right of inheritance) she (plaintiff) would have dropped the matter; that the minister should speak to the first defendant, who had at first thought the inheritance would devolve on her spontaneously but had later spoken of retaining a proctor. She goes on to ask him to intercede and send her some money; that 1st defendant might think Rs. 85/– an exorbitant sum but she would give the information later; that if 1st defendant succeeded to her half she (plaintiff) would get very little after all the funeral and testamentary expenses had been defrayed and that there was no use in her spending money if the others remained silent. She suggests that 1st defendant should give her a power of attorney and then she (plaintiff) would be benefited. She adds a postcript that it would not be stated what Providence would do in court business and they could not expect to win the case. She had previously estimated her share as 3 *lachams* and Rs. 10/– or Rs. 15/– only; She adds a *lacham* would not fetch more than Rs. 30/– or Rs. 40/– and each would get about two *lachams.*

It is quite apparent from this letter that she was seeking only her own benefit and that her suggestions were two-fold, namely that 1st defendant would either be so charitable as to send her some money, considering it a loan to God, or at least abandon her rights in plaintiffs favour. There is not the slightest suggestion of her acting on 1st defendant's behalf; on the contrary she states that 1st defendant had intimated that if she were to take action she would be retaining her own lawyer.

D3 was written to the 1st defendant about 11 months later. She says the trial date was the 16th June, about 2 months ahead, that she had sold even her *thalikody* for expenses, that a sum of Rs. 150/- was required for proctor and advocate, Rs. 30/- for witnesses, and copies of four deeds had still to be obtained, that she had made two unsuccessful attempts previously, through her husband apparently, and would be sending him in a week's time and she begged first defendant to sympathize and help. From this letter too it is clear that all she wanted was financial assistance, and that she was aware that 1st defendant had chosen to abstain from taking part in the contest. Turning to the law, counsel for respondent relied very strongly on certain passages in Wessels' Law of Contract in South Africa, and repeatedly referred to the fact that the first defendant had benefited from plaintiff's action and that no one should be made richer at the expense of another. Wessels undoubtedly is an authority that is entitled to the highest respect. Let us see what he says; he starts with this statement: "It is a general principle of our law that it is wrongful for one person to interfere, uninvited, with the affairs of another....."

"To this general rule however there is an exception. A person who from a sense of duty or out of friendship, undertakes to administer the affairs of one who is absent in a way beneficial to the latter, does a meritorious and not a wrongful act." Note that the exception is made because it is a meritorious act and is intended to encourage a sense of duty and of friendship towards one who is unable to look after his own interests. Wessels goes on to say that the person who interferes must justify his interference and show that he acted in the interests of the person whom he intended to benefit and that in fact his interference proved to be, or might have been anticipated to be, useful to the absent person. He states that the English law does not recognize *negotiorum gestio* and quotes an authority.

It is clear that plaintiff does not come within the terms of the exception. In *Union Bank vs Beyers** de Villiers, C.J. had said: "The doctrine that a person can act as trustee or mandatory or occupy some similar relation towards another person who is *sui juris* without his will and without his consent has no place so far as I am aware in our law." Wessels gives the following as the general principles which govern *negotiorum gestio*: (*a*) there must be two parties (*b*) the person benefited must be ignorant of the act (*c*) there must be an intention to act as *negotiorum gestor*. Accordingly under (*a*) he says "there is no *negotiorum gestio* if a person administers his own affairs under the false belief that he was managing those of another. If however, the *negotiorum gestor* in managing his own affairs at the same time manages those of another, then quoad the interest of the other party there is *negotiorum gestio*."

Counsel for respondent seizes on this latter statement. But it must be remembered that Wessels is now dealing only with his statement that there must be two parties and is not throwing overboard all the other principles governing the question. Besides a person may by mistake manage affairs which are partly his own and, to escape from the rule Wessels has just laid down, it is possible that a person may manage at the same time his own affairs and those of another which are quite distinct from his. Under (*b*) he states that "the quasi contract of *negotiorum gestio* presupposes that the unauthorized act is done on behalf of a person who is ignorant of it and who has not instructed the *negotiorum gestor* to do it.....Hence, if the person whose affairs are being administered is aware of what is being done, and being able to, raises no objection, there is no *negotiorum gestio* but a tacit contract of mandate." In the present case the 1st defendant was not ignorant of the pending litigation, nor was she aware that plaintiff was managing her (defendant's) affairs; as far as she was aware plaintiff was managing her own affairs.

Counsel next seized upon a statement made by Wessels under this sub-head (*b*). In para 3563 he gave the opinion of Pothier that a person whose affairs had been well administered against his will and had in fact been benefited should recoup the *negotiorum gestor*. He states that Groenewegen and Voet had expressed similar opinions. But Wessels himself pointed out that the maxim *nemo debet locupletari cum alterius detrimento* applied only when there was *damnum* and *injuria*. It may be true that the *dominus* is enriched and that the unauthorized manager has suffered a detriment, but the detriment was not suffered *cum injuria* but voluntarily. If the *negotiorum gestor* suffers a loss he does so with open eyes and deliberately.

If Wessels was not merely placing before the reader a number of possible views, as I believe he was, then his comment means that the maxim did not apply as Pothier thought it did. He goes on to say: "There may, however, be cases where the court would grant a *negotiorum gestor* his *utiles et necessarias impensas* even though the *dominus* was opposed to the interference on the same principle that such expenses are accorded to the *mala fide* possessor though these cases

* 3 S.C. 89

should be the exception and not the rule." Counsel argues that that statement applies to the present case.

To begin with, Wessels does not state that such is the law, nor does he give a single instance. But he is careful to point out that there may be exceptional cases, and that even in such cases one should be slow to allow the expenses. They would be cases which would approximate to the case of a *mala fide* possessor, where something necessary had been done to preserve a property owing to a sudden emergency which might be taken to overrule the general objection of the *dominus* to interference in his affairs. In this case too the *dominus* would be ignorant of the danger, and the act of the *negotiorum gestor* would still bear on it the stamp of meritoriousness. I can scarcely believe that if the *dominus* knew of the danger and deliberately abstained from taking steps, and the *negotiorum gestor* knew of his objection, that nevertheless he would be entitled to interfere and to claim compensation.

Immediately after setting out the opinions of Pothier, Groenewegen, and himself, Wessels quotes the opinion of de Villiers, C.J. in the case of the *Union Bank vs Beyers* (*supra*) and consistantly with his previous opinion states that "the South African courts may follow Groenewegen, Voet and Pothier and allow *impensas utiles et necessarias* where the general rule may be considered to be too harsh, as where the *dominus* has been manifestly enriched and no donation was intended."

The decision of de Villiers, C.J. was given in 1884 and the edition of the Law of Contract in South Africa by Wessels from which I am quoting was published in 1930, and apparently no case had yet arisen in which the law there laid down had been questioned.

When Wessels himself only says that the South African courts may follow a certain course, I do not think we would be justified in acting in the belief that they will do so. And here again we must remember that he is still dealing with the case of a person who is benefited but ignorant of the act. In the present case the present defendant was well aware of her rights and plaintiff had at no time prior to this case pretended that she was acting on behalf of the 1st defendant.

This brings us to the 3rd principle (*c*), under which Wessels states that it is essential that a person who without authority manages the affairs of another should have intended to act as a *negotiorum gestor* and should have intended to claim the cost of his voluntary administration. He quotes among other authorities the case of *Molife vs Barker* * In the succeeding paragraphs Wessels states that the above proposition is not universally admitted and that in strict law there can be no reciprocal actions *de negotiis gestis* unless the voluntary agent had the *animus negotium gerendis*.

I can find nothing therefore in Wessels to support the contention of respondent's counsel that in the circumstances of the present case plaintiff is entitled to succeed.

Counsel for the appellant raised a further point, and that was whether it was possible for us to recognize that one person may manage the litigation of another except to the limited extent allowed by the Civil Procedure Code.

As plaintiff herself indicated in her letter, litigation is not a business in which one can look for success with any degree .of certainty and it would be a very serious state of things — certainly in Ceylon—if it were possible to indulge in litigation on the excuse that one was carrying on the business of another. The Civil Procedure does not allow it. I do not think it is the policy of the law to throw open the door to doubtful transactions of a champertous nature. The relations of co-ownership have created sufficient complications without our adding to them, but hitherto no co-owner has indulged in litigation and then brought an action against the other co-owners to recoup himself for expenses. Even plaintiff has not asserted her right in a logical way, for it was conceded that the maternal relatives had also benefited. That being so, she should have charged a part of her expenses to them.

Maasdorp (111. 453, 4th Edn.) says: "As regards the business or property to be administered, it may with one exception, be of any kind whatsoever, provided it be not either physically or legally impossible. The exception referred to is that no one is entitled to institute an action in court on behalf of another without having a proper power of attorney from the latter for the purpose; nor will he be allowed to defend such action without such power."

As Mr. Nadarajah put it, suppose A being poor retains a proctor and B eminent counsel, and A's proctor is content to leave the management of the case to B's counsel, would B be entitled to claim a proportion of his expenses from A? Clearly not. Supposing A did not retain a proctor at all but appeared in person and conducted his own case, there would be no difference. Why should there be any if A merely kept away?

Mr. Chelvanayagam could not meet this argument although he was given a second opportunity of addressing the court. All he could

do was to refer us to the case of *Prince vs Berrange* * which is referred to by Maasdorp just before he made the statement quoted above. But Maasdorp does not use it as an argument in the way counsel did. He uses it in connection with another proposition, namely, that where a person undertakes the affairs of another with a view to his own benefit rather than that of the owner the latter will only be liable in so far as he was actually benefited thereby. He is dealing very briefly with the subject and is only stating that a person's own business may be mixed up with that of another. With all due respect I do not think he has correctly stated the conclusions reached in the case he quotes. The case is very briefly reported. The facts are as follows : One Dieleman and his wife, the defendant, executed a mutual will. He died and his widow subsequently married Anderson. The joint estate had been valued on the basis that it included a slave called Steyntje and her children. After litigation the Privy Council ruled that Steyntje was free and not a slave, with the result that the value of the estate was reduced by 6,000 rix dollars. Prior to her second marriage the defendant had executed a kinderbewys in favour of her two sons (plaintiffs) for one half of the joint estate.

The action was brought by the attorney of the two sons, who conceded that the value of the slave should be deducted although the sons had been promised half of the estate as originally valued. Defendant, however, claimed to be allowed to deduct one half of the expenses incurred by her in the litigation. It was admitted that during that period defendant was not the guardian of the plaintiffs who had other guardians, that plaintiffs had not by themselves or their guardians been in any way parties to the action or given defendant any guarantee for her costs. It will be noted that it was not alleged that either the children or their guardian had been ignorant of the litigation. The court held that defendant had instituted the action *causa sui proprii commodi*, and as it had been unsuccessful the minors had derived no benefit from it and therefore those costs had not been in *rem versum* of the plaintiffs. Here the reasoning seems to have been that a minor is not bound by a contract unless it be to his benefit, and besides the plaintiff had sued for her own convenience only, she having the usufruct of the estate. The court went on to say that as they had not been *locupletiores facti* the defendant could not claim as a *negotiorum gestor* and plaintiffs were under no equitable obligation to pay any part of the costs.

The decision therefore appears to have gone on many grounds, and it is not correct to fix on any one ground as the basis of that decision.

For the reasons which I have given I think the decree entered in this case cannot be sustained and would, therefore, allow the appeal with costs and order that plaintiffs' action be dismissed with costs.

Wijeyewardene, J.

I agree. *Appeal allowed.*

Present: De Kretser, J.

THE KELANI VALLEY MOTOR TRANSIT CO. vs THE COLOMBO-RATNAPURA OMNIBUS COMPANY

In the matter of a case stated to the Supreme Court (No. 3289) by the Tribunal of Appeal in terms of the Motor Car Ordinance and the Omnibus Service Licensing Ordinance.

Argued on 17th & 18th May, 1943.
Decided on 21st May, 1943.

Case stated—Tribunal of Appeal under Motor Car Ordinance—Omnibus Service Licensing Ordinance—Sections 4, 7, 6 (1) (*e*)—*Applications by two persons for road service licences—Rules to be observed in deciding which application to be granted—Meaning of the terms "in respect of the same route or of routes which are substantially the same" in Rule* 1, *First Schedule—How may holders of majority of licences be determined as required by rule* 1 (*ii*) *in First Schedule.*

The successful applicants' right to be heard in the Supreme Court.

The Kelani Valley Motor Transit Company and the Colombo-Ratnapura Omnibus Company applied to the Commissioner of Motor Transport under section 3 of the Omnibus Service Licensing Ordinance for road service licences between Colombo and Ratnapura. The deciding factor of preference between the two applicants as required by rule 1 (*ii*) in the 1st schedule was, who held the majority of licences. Bet-

* 1 M. 432

ween Colombo and Ratnapura the latter company had eleven licences and the former six. To points beyond Ratnapura, within the Ratnapura district each held seven licences. The former company, however, held six licences from Panadura to Badulla *via* Colombo and Ratnapura and four other licences from Panadura to points beyond Ratnapura in the Ratnapura district. The question, therefore, at issue was whether the said six licences from Panadura to Badulla should be reckoned as licences in respect of the same route or of routes which are substantially the same in order to determine the holders of a majority of licences. The Commissioner and the Tribunal of Appeal held that they should be taken into account, thereupon a case was stated for the opinion of the Supreme Court.

Held : (i) That a licence in respect of Colombo to Badulla is not an authority to use the omnibus on the Colombo-Ratnapura route, though it may use the highway between these points. The two licences are not identical. The word "route" does not mean "highway."

(ii) That on a case stated by the Tribunal of Appeal for the opinion of the Supreme Court under the Motor Car Ordinance No. 45 of 1938 the party successful in the Tribunal of Appeal should be heard by the Supreme Court.

R. S. Pereira, K.C., with *J. E. M. Obeyesekera*, for the appellants.
H. V. Perera, K.C., with *D. W. Fernando* and *Stanley de Zoysa*, for the respondents.
T. S. Fernando, Crown Counsel, for the Commissioner.

De Kretser, J.

The case stated for the opinion of this court arises from the following facts: The Kelani Valley Motor Transit Company, whom I shall call the respondent, and the Colombo–Ratnapura Omnibus Company whom I shall call the appellants are the parties concerned. The Commissioner took up for consideration applications for road service licences between Colombo and Ratnapura and in dealing with them guided himself as he is required to do by Ordinance No. 47 of 1942 by the rules laid down in the first schedule to that ordinance. The question is whether he correctly interpreted the relevant rule. At the hearing the debate was mainly regarding the meaning of the word "route" incidentally bringing in the meaning of the expressions "same route or routes which are substantially the same," and "licence .....authorizing the use of omnibuses on such route or on routes substantially the same as such route."

The appellants contended that "route" meant that route under consideration, and that was Colombo to Ratnapura and licences covering those two points only should be considered in deciding which of them held the majority of the licences, while the respondents contended that "route" only meant the highway between the two points mentioned and the licences to be taken into account were those under the authority of which omnibuses could be used on that section of the highway and should include all licences which related to that section and the highway beyond the *termini*.

Between Colombo and Ratnapura the appellants held eleven licences and the respondents only six.

Between Colombo and points beyond Ratnapura but still in the Ratnapura district the appellants held seven and respondents seven.

The respondent, however, held six licences from Panadura to Badulla *via* Colombo and Ratnapura, and from Panadura to points in the Ratnapura district beyond Ratnapura four licences. While, therefore, the respondents, were in a minority regarding the first two classes they held the majority of the licences when all four classes were taken into the reckoning. Even if the buses from Panadura to the Ratnapura district were taken into account still the respondents were in a minority and the contest therefore raged round the six omnibuses which went as far as Badulla.

From the above statement it will be clear that consistency of argument necessarily means either the inclusion or the exclusion of the last three classes and that it is incorrect to discuss the matter on concessions "for the sake of argument."

Ordinance No. 47 of 1942 made certain drastic changes in the existing law and it is necessary to ascertain if possible the principles underlying the alterations and to do that a brief review of the history of the law is both useful and necessary. It is necessary also to bear in mind that the ordinance is to be read and construed as one with the Motor Car Ordinance No. 45 of 1938 as amended by section 22 of the new ordinance.

Briefly, then, the earlier ordinance insisted that applicants for licences should not only notify the routes on which they proposed to establish services but also specify the *termini* of such routes, and it was made obligatory on licensees on pain of penalty to complete the run between the points specified except for reasons which were named such as a mechanical breakdown. One would imagine that if an applicant said that he proposed to run his omnibus between Colombo and Ratnapura he had already specified the *termini* and that insistence on his naming them was superfluous.

It was only intended, however, to cure an existing evil which caused inconvenience to the public, whose interests were of paramount importance and it was sought to prevent a licensee from abbreviating the service for which he had a licence on the pretext that he could stop or start from any point within the ambit of his licence. The requirement that he should continue to specify the route as he did before was not meaningless but was only intended to fix down the licensee to the obligation to run his omnibus between the points specified. "The route," therefore, continued to mean "the run" or "the service," and even if it did not it now came to mean the run between the points specified. That is, the words had a particular significance and did not mean merely the highway between the points named. As if to emphasize this, the ordinance used the word "highway" in various sections as I shall show later. An applicant for a licence did not, when he named the route, mean to apply for permission to use the highway but he was naming the limits of the service he proposed to maintain. That is to say, he was designating the nature of his service to the public. Under the old ordinance which I shall call the main ordinance, there could however be many services by different parties on the same route and the same party might run his omnibuses on different routes. This led to many ugly situations of which the public and the courts are only too well aware. The new ordinance sought to remedy this evil by limiting the services on any particular route and even establishing monopolies, if possible, the monopolist compensating the rival who was eliminated. Vested interests had always been recognized and under the main ordinance the powers of the Commissioner were considerably fettered. It was desired probably to enlarge his discretionary powers (and he has been given very large powers under the new ordinance) but it was necessary to curb autocratic action on his part and to allay the fears of vested interests and so rules were made for his guidance which serves at least to veil his powers.

It was made possible for a company or individual to acquire existing licences on a particular route and then when the time came the Commissioner would give preference to the company or individual who held all or the majority of the licences on that route. The licences were those in force before January 1st 1943 and as licences were annual that meant licences for 1942.

In guiding himself however the rules which were given in schedule 1 were subordinate to the directions given in section 4, which amply safeguarded the interests of the travelling public and clause VI of sub-section (*a*) gave the Commissioner very large powers in the words "such other matters as the Commissioner may deem relevant," *i.e.* relevant chiefly to safeguarding the interests of the public.

Section 18 (2) gave the Minister for Local Administration extremely wide residuary powers, and he was empowered by amendment of the first schedule to "resolve any matter of doubt or difficulty which may arise in connection with the first issue of road service licences under this ordinance." He did in fact attempt to solve a preliminary difficulty and apparently was confronted with another as a result. The ordinance does not specify the order in which the Commissioner should take up the various routes for consideration. To my mind it did not because it was left to the Commissioner to exercise his discretion in the matter. He was expected to take up the more important services first. The main highways ran in about six directions and only sections of each were of major importance. To work the ordinance to his satisfaction he might make any start that would suit his purpose best. If the Commissioner's interpretation of the rule — with which the majority of the Tribunal of Appeal agreed — were correct, then it might make a great difference. To take the present claimants, if the Commissioner took up the route from Colombo to Avisawella the appellants would score an easy victory. If he then took up Colombo to Ratnapura section 7 of the new ordinance might involve him in difficulty, for section 7 (1) directed him to "so regulate the issue of licences as to secure that different persons are not authorized to provide regular omnibus services on the same section of the highway."

Note that the words are not "on the same route" but "on the same section of the highway." He was given power in a proviso to deal with a case where the needs of the public demanded services by more than one person, but this power was strictly limited by the condition that he could exercise it only if the section of the highway did not constitute the whole or major part of "any such route" *and* provided the principal purposes of the services licensed were substantially different.

It was agreed that the distance from Colombo to Ratnapura is 56 miles and from Colombo to Avisawella 30 miles, and that Colombo to Avisawella was the major part of the route Colombo to Ratnapura. I do not say that I agree with this interpretation of the word "major" but merely state that counsel agreed that that was its meaning. It would seem to

follow that competition could not be allowed between Colombo and Avisawella, which was the same section of the highway, and licences from Colombo to Ratnapura could only be issued to a rival on condition that no service was provided between Colombo and Avisawella, the condition being imposed under section 6. Conversely if the Colombo to Ratnapura route were first considered the applicants for licences between Colombo and Avisawella might have to be denied them later. Besides difficulties might arise regarding the assessment of compensation.

Now, under section 57 of the main ordinance the Commissioner was empowered to classify and number routes and he had to publish such lists in the Gazette. The Commissioner drew up a list classifying certain routes as main routes, others as subsidiary, and others as local, and this list was published in Gazette No. 8413 of the 18th November, 1938. The proclamation was for general information and related to licences for 1939, and purported to state the "principles" which had been adopted. When the question arose as to the order in which he should take up routes for consideration under the new ordinance, the Minister purporting to act under section 18 directed that he should first take up what had been classified as main routes. The regulation made by him was published in the Gazette No. 9057 of the 29th December, 1942. Colombo to Ratnapura was a main route, Ratnapura to Bandarawela and Bandarawela to Badulla were subsidiary routes. But at a conference (between whom is not stated) held on the 31st December, 1942 the Minister made the following minute, which was not published in the Gazette :

> "At a conference held on 31st December, 1942 the Hon'ble the Minister informed the Commissioner of Transport that the order of 26th December, 1942 published in Gazette No. 9057 of 27th December, 1942 should not be considered as affecting the definition of route or routes which are substantially the same in interpretation of these words in the first schedule to Ordinance No. 47 of 1942 and should not be taken into consideration."

Mr. H. V. Perera expressly stated that he did not argue that the fact that Colombo to Ratnapura was classified as a main route affected the question under consideration but he gave me the impression of adroitly suggesting that it should affect the question. He was right in stating that it had no bearing on this appeal. It is interesting to note that the Minister in the order he published gave another direction also, *viz.* that the Commissioner should first dispose of applications for the entirety or major portion of a highway before dealing with those affecting a minor portion of *such* highway. I give the order in full so that its force may be noticed :

> "1 A. Notwithstanding anything in paragraph 1 of this schedule, the Commissioner shall :
>
> (*a*) Dispose of each of the applications for the licence to provide an omnibus service along the entirety of the major section of a highway, before deciding to grant or refuse any application for a licence to provide an omnibus service a route which consists of or includes a part or a minor section of such highway.
>
> (*b*) Dispose of applications for the licence to provide an omnibus service on any route heretofore classified by the Commissioner as a main route, before deciding to grant or refuse any application for a licence to provide an omnibus service on any rate heretofore classified by him as a route subsidiary to that main route."

Mr. R. L. Pereira devoted much energy to urging that the route Colombo to Badulla was not substantially the same as the route Colombo to Ratnapura, and that if it were then Colombo to Ratnapura and the licences for the shorter section should be counted, whereupon the appellant would win.

Mr. H. V. Perera did not contend that the route Colombo to Badulla was substantially the same as Colombo to Ratnapura. He correctly stated that it was not. It is equally clear that Colombo to Avisawella is not substantially the same route as Colombo to Ratnapura.

Mr. H. V. Perera's *one* contention was that licences from Colombo to Badulla were licences "authorizing" the use of omnibuses on the Colombo–Ratnapura route, *route* meaning nothing more than *highway.*

He emphasized the difference in language between the main provision of the first rule — "licences...in *respect of* the same route" — and that in sub-section (1) and he went so far as to say that the phrase "in respect of a route" "catches up the whole concept of a licence" and, therefore, a licence *in respect of* Colombo to Ratnapura is not the same as one in respect of Colombo–Badulla.

To my mind the difference in phraseology does not make any difference. It is always dangerous to guide oneself solely by a difference in phraseology. One needs to know much more. The context may show that the difference is immaterial. Every licence "in respect of a route" does authorize the use of that omnibus on that route, and a licence authorizing the use of an omnibus on a route is a licence of that omnibus in respect of that route. A licence authorizes, and it must be in respect of some matter, in respect of a vehicle or of a commodity and in respect of routes, or hours, or other matters.

Mr. Perera's argument really depends on the assumption that "route" and "highway" are the same not only in ordinary language but in the ordinance also. If it be not so his whole

argument fails. I shall, however, look at the question from other points of view as well.

What is important is to consider the main provision of rule 1. It deals with applications for licences for road services in respect of the *same* route or of routes which are substantially the same. It may well have said "licences authorizing the use of omnibuses on the same route &c." It is the *route* which is the subject of consideration and the application must be for that route, that is, the route taken up for consideration. Mr. H. V. Perera conceded that much. Having then sorted out the applications and decided on the route to be considered, the next step is merely a counting of licences already held for *such* route. That is all the rule means, in my opinion. There is no justification for taking into the reckoning any licences not limited to that route. A licence in respect of Colombo to Badulla is not an authority to use the omnibus on the Colombo–Ratnapura *route* though it may use the highway between these points; it is conceded that it is not in respect of Colombo to Ratnapura nor in respect of the same route or one substantially the same, in brief, the two licences are not identical. The argument that the greater includes the less is fallacious. The longer highway may include the shorter but the routes are quite distinct and separate things, and the circumstance that the services use the same highway does not make one part of the other. In brief, I hold that the word "route" does not mean highway.

Mr. H. V. Perera argued that the word "only" would have come after the words "such route" if it was intended to limit the licences as indicated by me. The addition of the word "only" would have eliminated discussion perhaps, as would the addition of the words "or of routes of which it is a part," but I do not think the addition of these words necessary in order to gather the meaning of the legislature. One cannot ignore the words "such route." What is that. Clearly the route taken up for consideration, and what does rule 1 say? It refers to applications in respect of the *same route.* The route being considered is therefore a fixed thing and the licences to be considered must authorize the use of omnibuses on this fixed section, that and no more and no less. Too much emphasis should not be laid on the word *use* or the word *on.* The licence was not intended to authorize the use of an empty omnibus nor was it concerned with collecting a road tax: it was intended to provide a service and emphasis was laid on the *termini* of the route. The service was between the *termini* and the Commissioner would consider the main service, *viz.* that indicated by the *termini* and would not consider the wayside stopping-places which would be purely subsidiary matters.

The words "authorizing the use of omnibuses" would therefore mean "authorizing an omnibus service" and the service authorized would be, in the respondents' case, Colombo to Badulla and not Colombo to Ratnapura. Theoretically at least it is possible to contemplate bus after bus going past Ratnapura with a full complement of passengers from Colombo to Badulla, and while Badulla would be served Ratnapura might have no service at all. The primary service provided by the respondent would be for travellers to Badulla, and travellers to Ratnapura would only be taken if there were room. The more it is purely a service to Badulla the better would the public be served and probably the more would respondent benefit. It is one of the relevant matters which the Commissioner might consider under section 4.

It seems to be also that the whole scheme of the ordinance might be involved in chaos if Mr. H. V. Perera's contention were upheld. As the ordinance now reads, I think, the draughtsman, if he used colloquial language, might have said: "If you have more than one application for licences for a particular route, the route being those at present in existence, give the licence to the person who has all or the greater number of licences for that route, and compensate those who go out." If however respondents' contention be the true one, the Commissioner would have to consider all licences going past Ratnapura and even those *between* Colombo and Ratnapura, for those licensees might be affected when they did apply or rather when their applications were being considered. If Mr. H. V. Perera's clients failed, would compensation have to be awarded for the service Colombo to Badulla as well, or would the Commissioner have to wait and see how the respondents acted regarding Ratnapura to Badulla. He might have to wait and see how things turned out on other sections of the road between Colombo and Ratnapura. The result would be that he would not deal with a particular route but have to deal with all the connected routes at one time. Clearly this was not intended.

Again, would the respondents be entitled to vote, if I may so call it, when Colombo to Badulla, Colombo to Avisawella, Ratnapura to Badulla, etc. were being considered and also vote when Colombo to Panadura was being considered.

The route was the route of the main ordinance *i.e.* route between certain *termini*, and a

licence should not be considered as so many licences embodied in one document. In my opinion Mr. Perera's argument can be met by merely saying that there is no real difference between the phraseology in the different parts of rule 1, but I have considered it from all possible angles because it was so strenuously argued and such important issues are at stake.

Let us consider some of the sections of the new Ordinance. Section 2 says that when *a* licence has been issued specifying the *routes* on which a service is to be established, no omnibus shall be used on any *highway* included in such route except under the authority of that licence. At the very outset we have a clear distinction drawn between the route and the highway included in such route. Section 3 requires applicants for a road service licence to give particulars of the route or routes on which they propose to provide *a* service. It seems to me that a person proposing to establish a service between Colombo and Ratnapura and also between Ratnapura and Badulla would have to say so at one and the same time. The application being thus made the Commissioner cannot possibly take an application from Colombo to Badulla along with another application in respect of Colombo to Ratnapura for they would not be for the same route or substantially the same route. Licences for Colombo to Badulla would not come before him therefore. If he obeyed the Minister's direction and, being of opinion that Colombo to Badulla was one highway (which it is not, I believe) took up that section, Colombo to Badulla would be eliminated from consideration. It is interesting to note that the Minister seems to distinguish between *highways* and *routes*.

Section 4 (*b*) refers to "the proposed route or routes or any part thereof." It would seem that the route is an entity in itself and there may be a part of it. Section 6 (1) (*e*) refers to licences "in respect of the same section of a highway," not the same route or section of a route. Note also the words "in respect of," meaning nothing more than "authorizing the use of omnibuses on."

By section 10 a licensee is authorized to operate an omnibus service on the route or routes specified in the licence The section in the main ordinance requiring an omnibus to proceed from terminus to terminus is repealed. All that a licensee is expected to do is to provide a service on the route on which he is licensed. If he could provide a service only for part of the route, not only would that be a retrograde step but the licence would say so. The service and the route is one, and it was apparently considered unnecessary to require an omnibus to proceed to its termination provided the service was maintained.

Mr. R. L. Pereira referred me to Gazette No. 9007 of 16th September, 1942, which gives the reasons for the new ordinance. It only confirms the view which I have taken independently of this proclamation.

Counsel sought to throw light on the matter now under consideration by propounding certain problems regarding the question of compensation and others creating what seemed like unfair situations. I have considered these and other similar problems but I do not propose to go into them in detail. The time for considering such problems has not yet come. In my opinion they will never arise : *e.g.* if appellants ran only one omnibus between Colombo and Ratnapura and respondents ten between Colombo and Badulla and both applied for licences from Colombo to Ratnapura, appellants might not succeed for two reasons, *viz.* (*a*) under section 4 the Commissioner might eliminate him as not providing a sufficient service, and (*b*) respondents might limit some of their buses to the Colombo Ratnapura route when making this application, *e.g.* five to run on that route.

In my opinion, therefore, the appellants succeed and are entitled to their costs, and these the contesting respondents will pay.

I have already ruled on the right of the respondents to appear and be heard, and having of their own choice taken up the contest they cannot complain if they are ordered to pay costs.

It might be wise to make amendments in the ordinance which will make clear the position of parties like the respondent. Under the main ordinance applicants for licences were not pitted against each other as violently as they are now. Provision was made for objections being heard by the Tribunal of Appeal but the section dealing with reference to this court through the medium of a case stated was limited to questions of law only, whereas now questions of fact may be referred. The persons interested in the question of law or of fact and empowered to have it stated were the Commissioner or the unsuccessful applicant and the position still remains the same, but regarding respondents some doubt seems to exist as to whether "the other party" (of section 4 (6) (*e*)) includes the contesting applicant. I understand the party objecting is always heard by the Tribunal of Appeal. It seems to follow that he should be heard by this court too.

Appeal allowed.

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