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

WITH A DIGEST

VOLUME XXVI

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Section 5 of the Civil Law Ordinance is a general provision that applies to all contracts and engagements including Bills of Exchange and Promissory notes.

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In determining the value of the estate of a deceased person for the purposes of section 519 allowance must be made for debts or encumbrances incurred or created *bona fide* for full consideration in money or money's worth solely for the deceased's own use and benefit.

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(iii) That even if it is assumed that the order of the judge was intended to direct notice on the judgment-debtor, the failure to issue it was only a non-compliance with a direction of court and as such not an irregularity that had the effect of vitiating the sales.

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(2) That the defendant in consideration of the said marriage should give in dowry to the plaintiffs the premises specified therein and Rs. 300/– on the date of their marriage and Rs. 200/– to the first plaintiff on the execution of the said agreement.

(3) In the event of the defendant failing to give the second plaintiff in marriage to the first plaintiff, the defendant should pay to the first plaintiff the sum of Rs. 500/– as and by way of liquidated damages.

(4) In the event of the first plaintiff failing, refusing or neglecting to marry the second plaintiff the first plaintiff should pay to the defendant the sum of Rs. 500/– as and by way of liquidated damages.

The plaintiffs, having been duly married, sued the defendant claiming the transfer of the land specified in clause (2) together with the sum of Rs. 300/– referred to therein less Rs. 25/– already paid.

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Interest—Compound

The charging of compound interest is not illegal in our law if the parties have agreed to compound interest.

The agreement to pay compound interest need not necessarily be by written or spoken words but may result from a clear and unambiguous course of dealings between the parties.

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Lease

A lease can be terminated by mutual agreement between lessor and lessee and a notarially attested document is not necessary to make the surrender of a lease effectual and valid.

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Where the "enumerators" entrusted with the preparation of lists of voters in a Municipality made an error in preparing such lists and the error was discovered only after the lists were certified as correct and where the law provided a remedy for the rectification of such omissions before such certification,

Held : That no writ of *mandamus* should issue inasmuch as—

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(ii) That the Government Agent's functions under section 9 (1) of Ordinance No. 61 of 1939 are ministerial and not judicial.

(iii) That the Government Agent does not exercise judicial functions until the stage prescribed by section 9 (2) of Ordinance No. 61 of 1939 is reached.

(iv) That the Supreme Court cannot revise its judgment on the ground that it has been given *per incuriam* except for the purpose of correcting some clerical or typing error or in a case in which a judgment has been based *per incuriam* on a repealed enactment.

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(ii) An approval given by the Commissioner of Income Tax does not extend beyond the year of assessment.

(iii) That where a public officer vested with a discretion has exercised it fairly and honestly the Supreme Court will not grant a *Mandamus*.

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(ii) That the Returning Officer is not required to announce his decision under section 32 (4) to the assembled public.

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(iii) Once the hypothecary decree giving directions for the sale of mortgaged property by a named auctioneer is signed by the judge, the communication of the order to sell to the auctioneer may be made through an officer of court

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Negligence

A public servant who acts negligently in exercising the powers conferred on him by statute cannot escape liability, the *bona fides* of his action notwithstanding.

See PARAMASOTHY VS VENAYAGAMOORTHI .. 68

Nindagama Lands

See Partition 1
See Service Tenures 97

Novation

Novation—Undertaking to pay debt due from another—Acceptance by creditor—Prevention of Frauds Ordinance, section 78—(Chapter 57).

Held : That the undertaking given by the appellants amounted not to a guarantee, but to a novation and hence no writing was required.

RODRIGO & ANOTHER VS EBRAHIM .. 62

Oaths and Affirmations

A magistrate specially gazetted to hear a criminal case on a particular day has the power to administer an oath in support of an affidavit.

See SARAM VS SRI SKANDA RAJAH 108

Omnibus Service Licensing Ordinance

An appeal does not lie as of right to the Privy Council from the decision of the Supreme Court on a case stated under the Ordinance.

See THE K.V. MOTOR TRANSIT CO. VS THE C.-R. OMNIBUS CO. 112

Partition

Partition action—Panguwa *in a* nindagama *—Failure to perform services or pay commuted dues for over ten years—Acquisition of full dominium by tenants—Maintainability of partition action—Nature of the obligations of the tenants—Service Tenures Ordinance (Chapter 323) section 24.*

Held : (i) That the obligations of tenants of a *panguwa* of a *nindagama* to render services

is in the nature of an indivisible obligation and therefore, the liability to pay commuted dues is also indivisible.

(ii) That where over ten years had lapsed since the performance of any services or the payment of any dues to the overlord in respect of such a land the dominium in such land became vested in the *nilakarayas* under section 24 of the Service Tenures Ordinance (chapter 233) and a partition action could be maintained in respect thereof.

Penal Code

Penal Code section 311 (*seventhly*)—*When does cutting into bone constitute grievous hurt.*

Held : That in the absence of evidence that the bone was either broken or cracked, so as to constitute a fracture within the meaning of section 311, the accused could not be convicted of grievous hurt.

Plaint

An application for amendment of a plaint may be made even in the appeal court.

Prescription

Prescription Ordinance—Section 7—Acknowledgment in writing of money borrowed on interest—Absence of promise to pay sum borrowed—Can an undertaking to pay be implied—Is the action prescribed in three years.

Held : That the document contained an acknowledgment of the borrowing of Rs. 275/- and from that acknowledgment an implied promise to pay that sum can be inferred as a matter of law. The action was, therefore, prescribed in six years.

No prescriptive title to a land belonging to a *pangu* can be acquired so long as some part of the dues has been recovered by the overlord in respect of a land belonging to that *pangu* within the last ten years.

Prevention of Frauds Ordinance

A notarially attested document is not necessary to make the surrender of a lease effectual and valid.

A novation need not be in writing.

Price Control

Control of Prices—Meaning of the words "tallow, locally produced."

Held : That the controlled article "tallow, locally produced" means the fat of animals.

Control of Prices Regulations 1942—*Breach of regulation* 6—*Onus of proof on whom.*

Held : That in a prosecution for breach of regulation 6 of the Control of Prices Regulations 1942, the onus of proving that the accused failed to furnish the return referred to therein is on the prosecution.

Control of Prices (Supplementary) Regulations 1942—*Regulation* 6 —*Charge of failure to furnish return of stock of price-controlled article kept at store or other place—Do the words "every person" in regulation* 6 *mean only the importers or wholesale traders.*

Held : That the words "every person" in regulation 6 cannot be restricted to mean only importers or wholesale dealers.

Control of Prices—Regulation 6—*Refusal to sell beef—Defence that beef was reserved for regular customers—Is such defence valid—Control of Prices Ordinance section* 4 (3).

Held : (i) That the defence should be accepted as a valid one.

(ii) That in any event, the conviction of the manager could not stand in the absence of proof that the employer of the salesman was out of the Island.

Privy Council

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

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

Promissory Note

A promissory note given on an account stated is enforceable.

Public Servant

*Public servant—Negligent exercise of powers conferred by statute—Customs Ordinance—*Bona fides *of act—Liability of public servant.*

Maintainability of action for damages to car by person other than registered owner.

Held : (i) That a person who, though not the registered owner, has a limited interest in a motor car of which he is in lawful possession, is entitled to maintain an action for damages caused to it consequent on the negligent act of another party.

(ii) That where a public servant acts negligently in exercising the powers conferred on him by statute, he cannot escape liability, notwithstanding the *bona fides* of his actions.

Res Judicata

The decree of a divorce court for alimony and maintenance does not oust the jurisdiction of the magistrate to make an order under the Maintenance Ordinance.

Revision—Powers of Supreme Court in

The Supreme Court will exercise its powers of revision even in a case in which an appeal lies, when the delay occasioned in bringing the matter up in appeal will render the relief granted useless to the parties unless their cause is promptly heard.

See DE SILVA vs DE SILVA 3

Sea-shore Protection

Sea-shore Protection Ordinance, Chapter 310 *sections* 2 *and* 5—*Removing sand from prohibited area—Meaning of sea-shore—Landward limit—Roman-Dutch law.*

Held : That the term "sea-shore" in section 2 of the Sea-shore Protection Ordinance should be interpreted in accordance with the Roman-Dutch law and includes the furthest line reached by the sea during the south-west monsoon storms, excluding exceptional or abnormal floods.

ZAIN vs FERNANDO 77

Service Tenures

Service Tenures Ordinance—Sections 9, 10, 14 *and* 15—*Liability of tenants or* nilakarayas—*Nature of—Right of overlord to sue for dues—Joinder of other* nilakarayas—*When may prescriptive title to land belonging to a* pangu *be acquired.*

Held : (i) That the provisions of the Service Tenures Ordinance make it clear that the liability to perform services or to pay commuted dues in respect of a *pangu* in a *nindagama* is an indivisible obligation owned jointly and severally by the *nilakarayas* and are exigible from any of them subject to his or their right to claim contribution.

(ii) That where a party has acquired prescriptive title to lands belonging to a *pangu* as against the *nilakarayas* and their successors, the overlord is entitled to sue such party to recover the entire dues, without joining the other *nilakarayas* or their successors.

(iii) That no prescriptive title to a land belonging to a *pangu* can be acquired so long as some part of the dues has been recovered by the overlord in respect of a land belonging to that *pangu* within the last ten years.

GUNARATANA THERO vs JAYARATNE .. 97

The obligations of tenants of a *panguwa* of a *nindagama* to render services is in the nature of an indivisible obligation and therefore, the liability to pay commuted dues is also indivisible.

Where over ten years had elapsed since the performance of any services or the payment of any dues to the overlord in respect of such a land the dominium in such land became vested in the *nilakarayas* under section 24 of the Service Tenures Ordinance and a partition action could be maintained in respect thereof.

See DINGIRI MENIKA vs KIRI BANDARA .. 1

Statute

Failure to comply with statute requiring notice to be given within a prescribed time is fatal.

See N.W. BLUE LINE BUS CO., LTD. vs PERERA 38

Statutory Duty

Where a public servant acts negligently in exercising the powers conferred on him by statute he cannot escape liability, notwithstanding the *bona fides* of his action.

See PARAMASOOTHY vs VENAYAGAMOORTHI .. 68

Supreme Court

See per incuriam 52

Trade Mark

An action arising out of an alleged infringement of rights under a trade mark is movable property, within the meaning of regulation 7 (1) of the Defence (Enemy Property) Regulations, 1939.

See BOGTSTRA vs THE CUSTODIAN OF ENEMY PROPERTY 5

Urban Councils Ordinance

Once the Government Agent informs the public that he proposes to commence the preparation of the list of persons possessing the qualifications specified in sections 7 and 8 on a specified date, he is not free to alter that date.

The Government Agent's functions under section 9 (1) are ministerial and not judicial.

The Government Agent does not exercise judicial functions until the stage prescribed by section 9 (2) is reached.

See WIJESEKERE vs A.G.A., MATARA .. 52

Village Communities

Village Communities Ordinance section 14 (4)—*Election held at a time different from that given under section* 14 (4) *without notification in the manner prescribed by that section—Mandamus.*

Held : That where a Village Committee election was adjourned from the time fixed under section 14 (4) of the Village Communities Ordinance to another time the election cannot be declared invalid unless it can be proved that the result would have been different if the election had been held at the time for which it had originally been fixed.

RANASINGHE vs GOVT. AGENT, SABARAGAMUWA 58

Words and Phrases

"Tallow, locally produced" means the fat of animals.

See Control of Prices 43

"Next date of trial" means at any time during the course of the next trial date.

See BARLIS vs WEERASINGHE 60

"Resident on the date of the preparation or revision, as the case may be, of such list."

See WIJERATNE vs PIUS SILVA 57

"Language of the defendant"

See MILLER & CO., LTD. vs RATNASEKERE .. 7

"Sea-shore"

See ZAIN vs FERNANDO 77

"Any other party."

See MARIKAR vs SUPRAMANIAM CHETTIAR .. 17

"Wholesale."

See DISSANAYAKA (S.I.P.) vs JOTIDASA .. 9

"Retail."

See DISSANAYAKA (S.I.P.) vs JOTIDASA .. 9

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

DINGIRI MENIKE & TWO OTHERS vs KIRI BANDARA & ANOTHER

S. C. No. 240 (*F*)—*D. C. Kegalle No.* 1486.
Argued on 20th July, 1943.
Decided on 29th July, 1943.

Partition action—Panguwa in a nindagama—Failure to perform services or pay commuted dues for over ten years—Acquisition of full dominium by tenants—Maintainability of partition action—Nature of the obligations of the tenants—Service Tenures Ordinance (Chapter 323) section 24.

Held : (i) That the obligations of tenants of a *panguwa* of a *nindagama* to render services is in the nature of an indivisible obligation and therefore, the liability to pay commuted dues is also indivisible.

(ii) That where over ten years had lapsed since the performance of any services or the payment of any dues to the overlord in respect of such a land the dominium in such land became vested in the *nilakarayas* under section 24 of the Service Tenures Ordinance (chapter 233) and a partition action could be maintained in respect thereof.

Cases referred to : *Jotihamy vs Dingirihamy* (3 Bal. 67)
Appuhamy vs Menike (19 N.L.R. 361)
Asmadale vs Weerasuriya (3 Bal. 51)
Martin vs Hatana (16 N.L.R. 92)
Dias vs Carlinahamy (21 N.L.R. 112)
Molligodde Unambuwa vs Puncha Weda (1875 – Ram. 226)
Siripina vs Kiribanda Korala (5 N.L.R. 326).

H. V. Perera, K.C., with *Dodwell Goonewardene*, for the 3rd & 4th defendants-appellants.
L. A. Rajapakse, with *R. N. Ilangakoon*, for the plaintiffs-respondents.

HOWARD, C.J.

This is an appeal by the third and fourth defendants from a decree of the District Judge of Kegalle holding that a partition action in respect of the land described in the schedule can be maintained by the plaintiffs who claimed by virtue of inheritance and possession. The appellants contended that the land which was the subject-matter of the action formed part of a *paraveni pangu* in a *nindagama* and as such could not be the subject of a partition action. The learned judge held that the land in question at the time of the registration under the Service Tenures Ordinance (Chap. 325) did belong to the *nindagama* but as over ten years had elapsed since the performance of any services or the payment of any dues to the overlord in respect of this land, the dominium in such land had by reason of the provisions of section 24 of the Ordinance become vested in the *nilakarayas*.

The contention of Mr. Perera that the learned judge came to a wrong decision is based on the following grounds :

(*a*) That a *paraveni panguwa* cannot be the subject of a partition.

(*b*) That it must be shown that neither services have been performed nor dues paid in respect of all the lands included in the *panguwa* and not merely in respect of the lands the subject of the action.

(*c*) That the burden of proof that no such services have been performed nor dues paid rests on the plaintiffs ;

(*d*) That even if it is established that no services have been rendered and no dues paid for over ten years and no action brought therefor, section 24 of the Ordinance merely provides that the right to claim such services and dues is lost but does not confer on the *nilakarayas* dominium in the land.

Proposition (*a*) is not disputed. In fact it was so held in *Jotihamy vs Dingirihamy* (3 Bal. 67). This case was followed by the Full Bench in *Appuhamy vs Menike* (19 N.L.R. 361) where it was held that persons entitled to an undivided share in a *panguwa* in a *nindagama* are not entitled to bring a suit for the partition of the land. In his judgment in this case Ennis, J. cited with approval the case of *Asmadale vs Weerasuriya* (3 Bal. 51) where it was held that the obligation was indivisible. Also the case of *Martin vs Hatana* (16 N.L.R. 92) where it was held that the liability to pay commuted dues was also indivisible. After quoting the definition of " ownership " from 2 Maasdorp 31 as comprising (1) the right of possession, (2) the right of usufruct and (3) the right of disposition and that these three factors are all essential to the idea of ownership but need not all be present in equal degree at one and the same time, Ennis, J. said that in his opinion a *paraveni nilakaraya* holds all the rights which, under Maasdorp's

definition, constitute ownership, but he, nevertheless, does not possess the full ownership, in that the *ninda* lord holds a perpetual right to service, the obligation to perform which attaches to the land. *Appuhamy vs Menike* was subsequently followed by Schneider, A.J. and Loos, A.J., in the case of *Dias vs Carlinahamy* (21 N.L.R. 112), who held that lands subject to service tenures cannot be sold or partitioned under the provisions of the Partition Ordinance, unless it may be in cases where the proprietor of the *nindagama* and the *paraveni nilakaraya* are all consenting parties to the proceedings. It will be observed that in neither *Appuhamy vs Menike* nor *Dias vs Carlinahamy* did any question arise as to the position created when the *panguwa* by reason of section 24 of the Service Tenures Ordinance was free from any liability on the part of the *nilakarayas* to render services or pay commuted dues therefor.

With regard to propositions (*b*) and (*c*) due regard must be paid to the decision in *Asmadale vs Weerasuriya* (*supra*) which was followed in *Martin vs Hatana*, (*supra*) that the obligation of the tenants of a *panguwa* of a *nindagama* to render services is in the nature of an indivisible obligation, and therefore the liability to pay commuted dues is also indivisible. The whole amount may be recovered from one tenant. The payment, therefore, of the dues by one tenant in respect of the whole *panguwa* prevents forfeiture of the *ninda* proprietors' rights against the other tenants, under section 24 of the Service Tenures Ordinance, and it is also a bar to the other tenants gaining prescriptive rights under section 3 of the Prescription Ordinance. So far as the evidence in this case goes, I agree with the learned judge that the plaintiffs have established that neither services were performed nor dues paid in respect of the land the subject of this action for a period of ten years. No evidence has been tendered by the appellants that such services were performed or dues paid in respect of other lands of the *panguwa*. In view of the fact that the plaintiffs had proved that no services were performed nor dues paid in respect of the land sought to be partitioned, I am of opinion that the burden of proof rested on the defendants to show that such performances were made or dues paid in respect of other lands of the *panguwa*.

With respect to proposition (*d*), Mr. Perera contended that section 24 did not create in the *nilakaraya* a dominium over the land free from services. Resident rights over minerals and timber, so he asserts, retain for the landlord the dominium over the land. It is, therefore, necessary to consider what these rights are. In *Molligodde Unambuwa vs Puncha Weda* (1875 – Ram. 226) it was held that a tenant of a *paraveni* land has not the right to dig for his own use for plumbago to be found in the *panguwa* or do anything permanently to diminish its value, nor has the proprietor a right to lease the mine to third parties. The judgment in this case also referred to an unreported case, Avissawella No. 5303, in which the Supreme Court decided that in the absence of agreement authorizing a tenant to appropriate or to cut down trees growing on the land, he had no right to do so. The judgment also stated as follows: "It is true that a *paraveni* tenant is a proprietor in that he cannot be ejected so long as he performs services." This seems to imply that the only clog on the full ownership of the *nilakaraya* is the obligation to perform services. Relief from such obligation would, therefore, confer full ownership. This view was also apparently taken by Ennis, J. in *Appuhamy vs Menike* (*supra*) in the following passage :

> "These cases seem to show that the *ninda* lord and the *nilakaraya* were owners in common of the mineral rights but I am unable to see that the common ownership of such a right affects the question before us, as there would be no difficulty in limiting mineral rights to the several shares after partition."

Further on in the judgment the following passage occurs :

> "The present tenure of a *paraveni nilakaraya* could well be described in much the same terms. It seems to me that this case enunciates the rule as to whether or not a burdened ownership can be the subject of partition, *i.e.* the question as to whether or not the burden can be made to attach the partitioned parts in severalty decides the point."

The learned judge then held that as the service of a *paraveni nilakaraya* is indivisible, it cannot be made to attach to portions of the *panguwa* in severalty and hence the decision in *Jotihamy vs Dingirihamy* (*supra*) was right. It is also relevant to refer to the following passages from the judgment of de Sampayo, J., delivered in the same case :

> "The state of the law to be gathered from the above references is made clearer by the Service Tenures Ordinance No. 4 of 1870. It is remarkable that nowhere in the Ordinance is the lord of a nindagama referred to directly or indirectly as the owner of the lands held by the *paraveni nilakarayas*. On the other hand, section 24 declares that if services are not rendered or commuted dues paid by the *paraveni nilakarayas* for a period of ten years, the *panguwa* shall be deemed free thereafter from any liability on the part of the *nilakarayas* to render services or pay commuted dues. It seems to me clear that in such a case the Ordinance intends that what was previously qualified ownership shall become absolute ownership.....A difficulty is no doubt created by such cases as *Siripina vs Kiribanda Korala* (5 N.L.R 326) but I confess I cannot quite understand the principle by which it was held in those cases that neither the proprietor of the *nindagama* nor the

tenant could gem or dig for minerals without consent of the other. The court appears to have struck out a middle course with regard to gems and minerals in the absence of anything to be found in the law relating to agricultural land such as those belonging to a *panguwa*. In any case I do not think that this consent to gemming or mining really affects the question of ownership of the land."

The only other case that in this connection merits attention is that of *Siripina vs Kiribanda Korale* (*supra*) where it was held that in the absence of proof of any custom neither the landlord nor the tenant of a *nindagama* can gem on land without the other's consent.

Inasmuch as the land is no longer subject to a liability to perform indivisible services I am of opinion that the learned judge was right in coming to the conclusion that it could be the subject of a partition action under the Ordinance. The appeal is therefore dismissed with costs.

KEUNEMAN, J.

I agree.

Appeal dismissed.

Present: MOSELEY, S.P.J. & WIJEYEWARDENE, J.

DE SILVA vs DE SILVA

Revision in D. C. Colombo No. 720 (Divorce)
Argued on 5th August, 1943.
Decided on 16th August, 1943.

Civil Procedure Code section 753—Powers of Supreme Court to revise a judgment from which an appeal lies.

Held : That the Supreme Court will exercise its powers of revision even in a case in which an appeal lies, when the delay occasioned in bringing the matter up in appeal will render the relief granted useless to the parties, unless their cause is promptly heard.

Cases referred to : *Atukorale vs Samynathan* (18 Ceylon Law Recorder 200)

E. F. N. Gratiaen with *H. W. Jayawardene*, for the defendant-petitioner.
N. Nadarajah, K.C., with *A. H. C. de Silva*, for the plaintiff-respondent.

WIJEYEWARDENE, J.

The plaintiff filed this action on April 29th 1943 asking for the dissolution of her marriage with the defendant on the ground of malicious desertion and for the custody of her son born on July 27th 1939. The defendant filed answer denying the allegations made against him and asking for the dissolution of the marriage or for a decree of separation on the ground of "constructive malicious desertion" on the part of the plaintiff. He, too, asked for the custody of the child. The case was fixed for trial early in October.

On May 27th the plaintiff petitioned the court for the custody of the child *pendente lite*. The defendant opposed that application and the District Judge after inquiry, delivered his order on July 30th granting the application of the plaintiff and reserving the right of the defendant to have access to the child. The defendant preferred an appeal against that order on August 2nd and also filed papers in revision in this court on the same day.

When the matter came up in revision before us, the plaintiff's counsel took a preliminary objection. That objection, as I understood it, was that this court had no jurisdiction to exercise its revisionary powers in this case especially in view of the appeal taken against the order. A similar objection taken in *Atukorale vs Samynathan* (18 Ceylon Law Recorder 200) was not entertained by Moseley, S.P.J. and Soertsz, J. In the course of his judgment Soertsz, J. said :

> "The powers by way of revision conferred on the Supreme Court of Ceylon by sections 21 and 40 of the Courts Ordinance and by section 753 of the Civil Procedure Code are very wide indeed and clearly, this court has the right to revise any order made by an original court, whether an appeal has been taken against that order or not. Doubtless, that right will be exercised in a case in which an appeal is pending only in exceptional circumstances. For instance this jurisdiction will be exercised in order to ensure that the decision given in appeal is not rendered nugatory."

I am in respectful and full agreement with the view expressed in that case. It must take some time for the appeal to be heard. Even after the appeal is perfected and sent to this

court it has to remain on the list of pending appeals for at least fourteen days before it is heard and normally it should be taken " in the order of its position on the roll." No doubt provision is made for a party " to accelerate the hearing of an appeal " but an application for such a purpose can be made only after it has been numbered and entered on the roll. It is, therefore, most unlikely that the appeal will be heard before the trial in the District Court. It will serve no useful purpose to hear the appeal after the trial as the appeal itself is from an *interim* order. I think, therefore, that this is a matter in which our revisionary powers should be exercised.

As the main dispute between the parties has to be decided at the trial, it is desirable to avoid a detailed discussion of the evidence led at the inquiry. It is admitted that both the parents are very much attached to their child. There are, however, certain matters which cause me some anxiety, when I consider the advisability of entrusting the child to the plaintiff pending the action. There is evidence that, when the child was quite young she attempted or threatened to take the child from his cot and jump from the upper floor of the house, as her husband went to a birthday party shortly after her father's death. There is also evidence that a few days after the defendant removed the child stealthily from their house to his sister's place in Galle she made a statement to Mr. Manickawasgar which was understood by him as a threat to harm the child in certain circumstances. There is also the proved fact that she drank or made a serious effort to drink iodine when she quarrelled with her husband over the removal of the child. The defendant has spoken of his " genuine fear " as to what might be done to the child, if, after the child is given to the custody of the plaintiff on the *interim* order, the court enters a decree at the end of the trial for the restoration of the child to the defendant. Considering her attachment to the child, there is no doubt that such an adverse order will cause her the greatest anguish. Would she have sufficient will power to face the situation and part with the child in obedience to the order of court or would she in a moment of despair feeling that nothing should separate her from her child kill the child and kill herself as the defendant says she threatened to do ? It may perhaps be most unlikely that the plaintiff will be guilty of such rashness as feared by the defendant, but I am not prepared to question the sincerity of the defendant when he says that he entertains such a fear. In view of the evidence as to her temperament and the incidents to which I have made a brief reference it cannot be said that the defendant's fears are groundless and that there is no risk whatever of her acting in a rash manner. Counsel for the plaintiff has undertaken that, if the order of the District Judge is affirmed, the child will be handed over to approved custody a given number of days before the hearing. While such a course would no doubt remove the child from any threatened danger, it would involve a number of moves which would have an unsettling effect upon the child. Under these circumstances, is it necessary to interfere with the present arrangements made by the defendant? The father has undoubtedly, a better right to the custody of a child in the absence of any special reason. It cannot be said that the arrangements made by him are unsatisfactory so far as the interests of the child are concerned. Since March 18th the defendant has kept the child with his sister and mother. It is admitted that these ladies are very fond of the child and are bringing him up in very comfortable surroundings. There is also the fact that, as a result of certain definite views the plaintiff holds with regard to the upbringing of children, the boy's life was so regulated at home that he is not likely to feel the loss of his mother's company very much. Moreover there is a possibility of more changes in the custody of the child if the *interim* order is sustained.

I think that, in all the circumstances of this case, it is best that the child should continue to remain in the defendant's custody during the pendency of this case. Adequate arrangements should be made by the defendant to enable the plaintiff to see her child twice a month in Galle or, if the plaintiff prefers it, once a month in Colombo. The details of these arrangements will be laid down by the District Judge, if the parties cannot agree.

I set aside the interim order of July 30th 1943, so far as it affects the custody of the child and direct an order to be made as indicated in the preceding paragraph.

MOSELEY, S.P.J.

I agree.

Order set aside.

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

BOGTSTRA & ANOTHER vs THE CUSTODIAN OF ENEMY PROPERTY

870 *D. C. Colombo No.* 11015/*M*
Argued on 4th and 5th March, 1943.
Decided on 23rd March, 1943.

*Enemy property—Action arising on an infringement of rights under a trade mark—Plaintiff company carrying on business in Holland—Holland occupied by the enemy subsequently—Plaintiff company under enemy control—Does right to proceed with such action vest in the Custodian of Enemy Property—Defence (Enemy Property) Regulations, 1939—Regulations 7 (1) and 49 (1) (c).**

Evidence Ordinance—Can courts take judicial notice of facts other than those mentioned in section 57.

The plaintiff company incorporated under the laws of the Netherlands, brought this action against the defendants on 25th October, 1939 in respect of an alleged infringement of rights under a trade mark. The answer was filed on 9th March, 1940 and on 9th May, 1940, Holland was occupied by the enemy. The Custodian of Enemy Property thereupon applied to court to be substituted in place of the plaintiff on the ground that under regulation 7 (1) of the Defence (Enemy Property) Regulations of 1939, all movable and immovable property belonging to the plaintiff became vested in him and in support produced a letter dated 26th June, 1940 written from London by the Acting Under Secretary for the Minister of Trade, Industry and Shipping, Netherlands, informing the local agents that they could not obtain any information as regards the plaintiff and that the latter does not figure among the firms which have since the outbreak of the war transferred their seats to territories of the Kingdom outside Europe.

This application was opposed on the ground that the plaintiff was not an enemy as defined in regulation 49 of the regulations. The District Judge allowed the application and the defendant appealed.

On appeal a further point was taken that the subject-matter of the action was neither movable nor immovable property.

Held : (i) That on the materials before it, the court would be justified in drawing the inference that the plaintiff was an "enemy" within the definition in regulation 49 (1) (*c*).

(ii) That an action arising out of an alleged infringement of rights under a trade mark is movable property, within the meaning of regulation 7 (1).

(iii) That it is open to a court to take judicial notice of facts other than those mentioned in section 57 of the Evidence Ordinance.

Cases referred to : *Ex Parte Master of the Supreme Court* (1906–T.S. 563)
Englishman Limited vs Lajpat Rai (1910–I.L.R. 37 Cal. p. 760)
Re an arbitration between N. V. Gebr, Van Udens Scheepvaart en Agentuur Maatschappij and Sovfracht (1941–3 All Eng. Rep. p. 419)

H. V. Perera, K.C. (with him *E. F. N. Gratiaen*), for the appellants.
N. Nadarajah, K.C. (with him *N. K. Choksy*), for the 1st respondent.

JAYETILEKE, J.

The plaintiff, a company incorporated under the laws of the Netherlands and carrying on the business of manufacturing and selling condensed milk at Leeuwarden, instituted this action against the defendants on October, 25th 1939, to restrain them from importing or selling condensed milk bearing a certain mark and also from passing off the condensed milk imported by them as that marketed by the plaintiff. The plaintiff also claimed an account of the profits earned by the defendants or in the alternative Rs. 5,000/– as damages.

On March 9th, 1940 the defendants filed answer and on May 9th 1940, Holland was occupied by the enemy. On February, 27th 1942, the respondent who is the Custodian of Enemy Property in Ceylon, filed a petition and an affidavit and moved to be substituted in place of the plaintiff or alternatively, to be added as a plaintiff, on the ground that under regulation 7 (1) of the Defence (Enemy Property) Regulations of 1939 all movable and immovable property belonging to the plaintiff became vested in him.

The regulation, omitting immaterial words, reads thus :

> "All movable or immovable property belonging to or held or managed for and on behalf of an enemy shall be and is thereby vested in the custodian and shall be deemed for all purposes to have been so vested in him from the commencement of the war."

The motion was opposed on the ground that the plaintiff was not an "enemy" as defined in regulation 49 of the regulations. The learned District Judge held against the defendants on that point and made an order adding the respondent as a plaintiff. The defendants appealed from that order.

On appeal a further point was raised, namely, that the subject-matter of the action is not movable or immovable property.

* Gazette No. 8499. 9th September, 1939.

Mr. Perera contended that all things are divided into corporeal and incorporeal and that only corporeal things are sub-divided into movable and immovable.

This argument bears some similarity to that which was addressed to the court in *Ex Parte Master of the Supreme Court.* * In discussing the common law meaning of the expression "immovable property," Innes, C.J. said :

> "The question may be regarded from two stand-points. You may look at it first in this way : that all things are divided into corporeal and incorporeal, and that corporeal things are subdivided into movable and immovable—leaving non-corporeal out altogether, and making 'movable' and 'immovable' simply subdivisions of corporeal things. That seems to be the view of Van der Keessel. He says (section 178) : 'By the law of Holland, as under the Roman law, incorporeal things, when the law or the will of the owner has given no direction to the contrary, are not comprehended under movables or immovables, as in the case of legacies, agreements, and mortgages.' (Voet I. 8. section 8) looks at the matter from another stand-point: 'Incorporeal things are things which can neither be handled nor touched, and consist in a right, as inheritances, servitudes, debts, actions, and revenues. But as the greatest portion of the Municipal Laws ignores the division into corporeal and incorporeal and is content with a mere division into movables and immovables (Mat. De Auct. 1. 3, 13 and De Crim. 48, 20. 4. 21) it will be worth while to inquire under which class each incorporeal thing is to be accounted, whether movable or immovable.' In his opinion incorporeal rights should wherever possible be divided into movable or immovable. It seems to me that the view expressed by Voet is the commonsense and the preferable one. I think our law would favour the division of such rights into one or other of the above categories wherever possible."

I respectfully agree with this view. The incorporeal rights mentioned by Voet are not exhaustive. Rights to patents, designs, trade marks, copyrights, etc. have been treated by the law as incorporeal. (Maasdorp's Institutes of South African Law Vol. 2, page 1). Such rights from their very nature must be reckoned as rights to movables.

The expression "property" is defined in regulation 49 as follows :

> "Property means movable or immovable property and includes any rights, whether legal or beneficial, in or arising out of property, movable or immovable."

This action was instituted by the plaintiff for the vindication of certain rights based upon the ownership of a trade mark. These rights arise out of movable property within the meaning of the definition of "property."

I now come to the only other argument that remains to be dealt with and that is based on the meaning of the expression "enemy" in regulation 7 (1). The part of the definition which is relevant to this appeal is clause (*c*) which reads :

> "(*c*) Any body of persons (corporate or unincorporate) carrying on business at any place, if and so long as the body is controlled by a person who is an enemy within the meaning of this definition."

The respondent produced a letter addressed by the manager of the plaintiff to the local agents and posted at Leeuwarden on May 3rd 1940, giving them detailed instructions as to what they should do with monies due to the plaintiff in the event of Holland being occupied by the Germans. He also produced a letter dated June 26th 1940, written from London by the Acting Under Secretary for the Minister of Trade, Industry and Shipping, Netherlands, to the local agents informing them that the Royal Netherlands Government was unable to obtain any information as regards the actual position of the plaintiff and that the latter does not figure among the firms which have, since the outbreak of the war, transferred their seats to territories of the Kingdom outside Europe.

It was urged that this evidence did not prove that the plaintiff was carrying on business in Holland or that the plaintiff was controlled by an enemy on and after May 9th 1940. A similar point seems to have been taken in *Re an arbitration between N. V. Gebr, Van Udens Scheepvaart en Agentuur Maatschappij and Sovfracht* (1941–3 All Eng. Rep. p. 419).

In that case the respondents, a company incorporated under the laws of the motherland and carrying on the business of shipowners at Rotterdam charted one of their vessels to the appellant, a Russian Company.

A clause in the charterparty provided for arbitration in London. Disputes having arisen between the parties in April, 1940, each party appointed an arbitrator but before the matter could proceed further the German invasion of the Netherlands took place and the country was occupied by the enemy in May, 1940.

The appellants and their arbitrator subsequently refused to proceed with the arbitration on the ground that the respondents took out a summons asking for the appointment of an umpire. It was contended for the appellants that the summons should be dismissed for three reasons, one of them being that the respondents had become enemies under the Trading with the Enemy Act of 1939.

That act has a definition of "enemy" which is identical with ours but it does not have a provision which corresponds with regulation 7 (1) of our Regulations.

The only evidence before the court was that contained in an affidavit sworn and filed by the solicitor acting for the appellants which stated that they are a Dutch Company, that is to

* (1906) T.S. 563

say, a company incorporated under the laws of the Netherlands, and have their principal place of business at Rotterdam. It was further stated that Holland was occupied by the Germans in the second week of May, 1940, the arbitration having been begun in the previous month.

In June 1941, the court was invited on this evidence, to infer or to take judicial notice of the following facts :

(*a*) That the appellants continued to carry on business.

(*b*) That the occupation of Holland by Germany continued, and

(*c*) That the appellants were controlled by the enemy.

Referring to (*a*) Goddard, L.J. said :

" I think it is fair to draw the inference that the appellants are still trading or endeavouring to do so, in Rotterdam though it may be for the purpose only of winding up their business."

I presume that Goddard, L.J. referred to the severe punishment that Rotterdam had received at the hands of the Germans when he used the words " or endeavouring to do so." Perhaps very few buildings remained undamaged after the bombing of Rotterdam and he was therefore of opinion that trading in Rotterdam under these circumstances really amounted to " an endeavour to trade."

Referring to (*b*) and (*c*) Du Parcq, L.J. said :

" We were asked to take judicial notice of the fact that this occupation continues, and there is no dispute about this, or about the fact that some degree of control, which may well be severe, is exercised by the enemy over the inhabitants."

Section 57 of the Evidence Ordinance (Chapter 11) gives a list of the facts of which the court shall take judicial notice. That list is not exhaustive and it is open to a court to take notice of facts other than those mentioned in the section.

In the *Englishman Limited vs Lajpat Rai* (1910–I.L.R. 37 Cal. p. 760) the scope of section 57 of the Indian Evidence Act No. 1 of 1872 which is almost identical with section 57 of our Evidence Ordinance was considered. In the words of Woodroffe, J. :

"……Facts, however, of which judicial notice may be taken are not limited to those of the nature specifically mentioned in these clauses. These are mentioned because, as regards them, the court is given no discretion. As to others the court must determine in each case whether the fact is of such a well-known and established character as to be the proper subject of judicial notice……."

Woodroffe and Ameer Ali in their Commentary on the Law of Evidence applicable to British India say that the courts may and will take judicial notice of, generally speaking, all those other facts at least of which English Courts take judicial notice. (9th edition page 469).

The evidence in this case is much stronger than the evidence in the case of *Re an arbitration between N. V. Gebr, Van Udens Scheepvaart en Agentuur Maatschappij and Sovfracht* (*supra*), which, in the opinion of Lord Greene, Master of the Rolls, was colourless.

I feel that, on the materials before me I would be justified in drawing the inference that after the occupation of Holland by the enemy the plaintiff continued to carry on business in Leeuwarden at least, for the purpose of winding it up and that some degree of control is exercised by the enemy over the plaintiff. The plaintiff would thus be an enemy for the purposes of the Defence (Trading with the Enemy) Regulations of 1939.

The order of the learned District Judge is, in my opinion, correct and I would accordingly dismiss the appeal with costs.

MOSELEY, A.C.J.

I agree.

Appeal dismissed.

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

MILLER & CO., LTD. & ANOTHER vs RATNASEKERE

S. C. No. 188—*D. C. Trincomalee No.* 2416.
Argued on 12th December, 1942.
Decided on 14th December, 1942.

Civil Procedure Code section 55—*Meaning of the words " language of the defendant."*

Held : That the words " language of the defendant " in section 55 of the Civil Procedure Code do not necessarily mean the language of the race to which he belongs, but the language the defendant understands.

Dodwell Goonewardene, for the defendant-appellant.

E. B. Wickramanayake, with *F. C. W. Van Geyzel*, for the plaintiffs-respondents.

SOERTSZ, J.

This appeal is devoid of merit. It is I think an attempt on the part of the defendant-appellant to delay his creditors in this case as long as possible. He was sued by plaintiffs for the value of goods sold and delivered to him.

The action was instituted on the 7th February, 1941. There was great difficulty in serving summons on the defendant. It was over a year later that summons was eventually served. On the day fixed for him to file answer he was absent and the case was fixed for *ex parte* trial for the 9th March, 1942. There was another adjournment this time at the instance of the plaintiff and the *ex parte* trial took place on the 12th March, 1942, and decree *nisi* was entered returnable for the 13th April, 1942. There were further delays and the decree *nisi* was not served on the defendant till the 15th of June, 1942. On that day a proctor filed proxy from the defendant and was given time to show cause. The inquiry took place on the 2nd July, 1942.

The defendant asked that the decree *nisi* be set aside on the ground that the service of summons and of the copy plaint on him was not in conformity with section 55 of the Civil Procedure Code inasmuch as the summons and the copy plaint served on him were in the English language. He is a Sinhalese and he contends that he should have been served with a summons and a copy plaint in the Sinhalese language.

Mr. Goonewardene appearing for him submits that the requirement of section 55 in that respect is imperative and that the failure to comply with it has resulted in rendering all subsequent proceedings void.

The relevant words of section 55 are :

> "The summons together with such copy or concise statement each translated into the language of the defendant attached thereto shall be delivered .....to the Fiscal of the District in which the defendant resides who shall cause the same to be duly served on the defendant....."

Counsel's contention went so far as to maintain that in the case of a Sinhalese defendant even if he speaks and reads and writes English and only speaks but does not read or write Sinhalese the summons and the copy plaint served on him must be in the Sinhalese language. Similarly in Tamil, in the case of a Tamil or a Muslim.

I do not think the legislature could have contemplated such a fatuous proceeding and the words of the section do not drive us to that conclusion. "The language of the defendant" does not necessarily mean the language of the Ethnic group to which he belongs, but on a reasonable interpretation it means the "language the defendant understands."

There are, as we know, cases of men who do not understand or who cannot read or write the language of their race, but are proficient in some other language and in the case of such persons their language for the purpose of this section must be said to be that other language.

In this case the evidence makes it clear that the defendant who is a Sinhalese understands English and that he carries on his correspondence in English through a clerk. Most probably he speaks and reads and writes Sinhalese too. In other words he is bilingual and summons and copy plaint in either language would in my opinion be a sufficient compliance with the requirement of section 55 of the Civil Procedure Code. But in the case of a Sinhalese, who understands only Sinhalese, the summons and the copy plaint must be in that language, whether he can read it or write it or not, for it is imperative that summons and a copy plaint must be served.

The cases to which counsel made reference in the course of argument, are, by no means inconsistent with this interpretation.

I would dismiss the appeal with costs.

DE KRETSER, J.

I agree.

Appeal dismissed.

Present: KEUNEMAN, J.

DISSANAYAKA (Sub-Inspector of Police) JOTIDASA

S. C. No. 702—*M. C. Kurunegala No.* 7168.
Argued on 25th November, 1942.
Decided on 7th December, 1942.

Defence (Miscellaneous) Regulations—Order under regulation 43 *(D)—Sale of sugar wholesale to a person other than a retail trader—Meaning of "wholesale" and "retail."*

The accused who was both a wholesale dealer and a retail trader in sugar sold 3 bags of sugar to B who was not a retail trader in sugar. He contended that the sale was a retail sale and did not constitute a breach of paragraph 9 of the Controlled Articles (Sugar) No. 2 Order, 1942.

Held : That the sale of 3 bags of sugar was not a retail sale and that the sale constituted a breach of paragraph 9 of the Controlled Articles (Sugar) No. 2 Order 1942.

Cases referred to : *Treacher & Co., Ltd. vs Treacher* (1894 W.N. 4)
Philips vs Parnaby (L.R. 1934 – 2 K.B.D. 299)
Bowles vs Scott (1909 – T.S. 412)
Moore vs Pearce's Dining & Refreshment Rooms, Ltd. (L.R. 1895 – 2 Q.B.D. 657).

L. A. Rajapakse, with *Ananda Pereira*, for the accused-appellant.
A. C. Alles, Crown Counsel, for the complainant.

KEUNEMAN, J.

The accused was charged for a breach of paragraph 9 of the Order made by the Governor under regulations 43(D) of the Defence (Miscellaneous) Regulations and published in the Gazette Extraordinary No. 8961 of July 3rd, 1942.

Paragraph 9 runs as follows :

"Save as otherwise provided in paragraph 10, no wholesale dealer carrying on business outside Colombo shall sell or supply any sugar to any person unless that person produces to him for inspection at the time of such sale or supply a certificate under the hand of the Government Agent to the effect that such person is a registered retail trader."

Paragraph 10 is as follows :

"Nothing in.....paragraph 9 shall be deemed to prohibit or restrict the sale of sugar by retail at any shop or premises by any wholesale dealer, if that wholesale dealer has been authorized by writing under paragraph 4 (6) to sell sugar by retail at such shop or premises : Provided that the total quantity of sugar which may be sold by retail at such shop or premises during any period shall not exceed the quantity specified in such writing to be the maximum quantity which may be sold by retail at such shop or premises during that period."

The accused who is a dealer in sugar outside Colombo is charged with the sale of 3 bags of sugar to Abdul Samad, who did not at the time of the sale produce a certificate of the Government Agent to show that he is a registered retail trader. In fact Abdul Samad had no such certificate.

The accused, in his defence urged that the sale was one permitted by paragraph 10, in view of the fact that while he is a registered wholesale dealer, he had also been authorized by writing to sell sugar by retail. He contends that the sale in question was a "sale by retail."

The evidence of the Price Control Inspector establishes that the accused was a wholesale dealer, and had also been given authority to sell sugar by retail. On the 21st July, 1942, the accused was authorized to sell 10 bags of sugar by retail within a fortnight.

On the 25th July, Abdul Samad came to the accused's boutique with Ismail and Ibrahim. Each of the 3 men purported to purchase a bag of sugar at the rate of Rs. 34/50 a bag, but in point of fact all three bags were purchased by Abdul Samad, who had a tea boutique and needed the sugar for preparing tea there. Ismail and Ibrahim were merely nominal purchasers, and Abdul Samad paid for all three bags. Ismail and Ibrahim are dealers in dry fish, and did not deal in sugar or want the sugar. They were taken to the accused's shop because according to Abdul Samad "the accused wanted three persons to buy three bags." I think it must be taken that the accused sold 3 bags of sugar to Abdul Samad, and resorted to a subterfuge to make it appear that he was selling one bag each to three persons.

The question, however, remains as to whether this can be regarded as a "sale by retail." No doubt the accused showed in his return that he had sold the three bags in question out of his retail stock (he had authority to sell ten bags

by retail in the fortnight.) But this return was made after the seizure of the three bags of sugar, which took place as the bags were being removed from the shop to the bus.

The Order does not define what is meant by "a sale by retail." The term "retail trader" and "wholesale dealer" are defined but these definitions do not help us to solve the problem. In the New Oxford Dictionary the word "retail" is said to mean the sale of commodities in small quantities, while "wholesale" connotes sale in large quantities, in gross, as opposed to retail. I have also been referred by Crown Counsel to the case of *Treacher & Co., Ltd. vs Treacher* (1894 W.N. 4). In that case defendant was under covenant not to carry on, or be engaged or concerned or interested in the business of chemists druggists and soda water manufacturers and general merchants, "so far as the same may be considered retail." "He and his partner could not sell sample bottles without 'breaking bulk,' that is to say, without opening a case and taking out a bottle, and it appeared there was no limit to the sale of these single bottles.....As a general rule 'wholesale' merchants dealt only with persons who bought to sell again, whilst 'retail' merchants dealt with consumers. In this sense of the word, as well as from the fact that defendant and his partners were ready to sell any number of single bottles, the defendant has been guilty of a breach of the covenant" (per Bacon Vice-Chancellor). In *Philips vs Parnaby* (L.R. 1934 – 2 K.B.D. 299), the dictum of Bacon, V.C., with regard to the difference between wholesale merchants and retail merchants, is emphasized.

Mr. Rajapakse referred me to Bell's South African Legal Dictionary (2nd edition) page 486. "Retail, in small quantities; to sell by retail is to sell in small quantities." As regards quantity there is a reference to the case of *Bowles vs Scott* (1909 – T.S. 412) where Bristowe, J. said: "Now, 'quantity' is a relative term. What would be a large quantity for a bachelor, keeping up a bachelor establishment is a small quantity for a man with a large number of children and dependants. So that quantity, taken by itself is not a conclusive criterion. There may be cases in which mere considerations of quantity would govern the decision, but it is not in itself decisive. It must be looked at in conjunction with all the other circumstances of the case."

But he added later: "It seems to me that if goods are bought for the purposes of a business, that is, with a view of making a profit out of them, the presumption, at all events is that they are bought wholesale and not *retail;* for persons who buy for their business usually buy wholesale, and the profits of the business frequently depend upon the difference between the wholesale and the retail prices." (I am quoting from Bell's Legal Dictionary as the case is not available to me).

No doubt, it is correct that Abdul Samad cannot be regarded as a retail trader in sugar. I think the Magistrate was in error in holding him to be such retail trader. The only evidence on the point is that of Abdul Samad himself, who said, "I bought this sugar for my tea boutique at Puttalam" and "the sugar was for making tea only." There is no evidence that Abdul Samad was a seller of sugar as such. See in this connection the case of *Moore vs Pearce's Dining & Refreshment Rooms, Ltd.* (L.R. 1895 – 2 Q.B.D. 657). But it is clear that Abdul Samad was purchasing the sugar not for the consumption of himself and his family or household, but for the purposes of his business as the owner of a tea boutique. This is a circumstance which is of importance. There is also the fact that the accused did not "break bulk," but sold by the bag. He made no distinction between the owner of a tea boutique and a dealer in dry fish, who did not need any sugar. In fact, he did not in this case genuinely adopt his own standard of one bag per person but under the pretence of selling to three persons, sold the three bags in reality to one person. No doubt the actual quantity sold is in itself inconclusive, but the quantity sold is substantial, a little less than one third of the entire stock he could dispose of by retail in a fortnight, and the quantity does not indicate that the transaction was a retail sale.

It would no doubt have been more satisfactory if the Order had provided a certain maximum quantity as constituting a sale by retail. But in the absence of any such definition, I have to consider all the circumstances of the case, and after such consideration, I am of opinion, that the transaction in question cannot be regarded as a sale by retail. The appeal must accordingly be dismissed, and the conviction and sentence affirmed.

Appeal dismissed.

Present: KEUNEMAN, J.

PONNUDURAI vs MAILVAGANAM

S. C. No. 555—M. C. Point Pedro No. 2535.
Argued on 2nd September, 1943.
Decided on 13th September, 1943.

Control of Prices Regulations 1942—*Breach of regulation* 6—*Onus of proof on whom.*

Held : That in a prosecution for breach of regulation 6 of the Control of Prices Regulations 1942, the onus of proving that the accused failed to furnish the return referred to therein is on the prosecution.

Cases referred to : *Perkins vs Dewadasan* (39 N.L.R. 337)
The King vs Turner (105 E.R. 1026)
Apothecaries Co. vs Bentley (171 E.R. 978)
Williams vs Russel (149 L.T. 190)
Roche vs Willis (151 L.T. 154)

L. A. Rajapakse, with *N. M. de Silva*, for the accused-appellant.
G. E. Chitty, Crown Counsel, for the respondent.

KEUNEMAN, J.

The accused in this case was charged with having in his possession a stock or quantity of seven bags of chillies, a price-controlled article in his house which is not a registered store or place and failing to furnish to the Controller a return specifying such store or place, and thereby committing a breach of section 6 of the Control of Prices Regulations of 1942 published in Government Gazette No. 9019 of October 8, 1942. The charge set out that the offence was punishable under section 5 (6) of the Food Control Ordinance (Chapter 32), but this is not correct, as the offence is really punishable under the Control of Prices Regulations of 1942.

Section 6 of the regulation 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."

It is to be noted that the offence alleged is the breach of a positive requirement to furnish a return to the Controller.

This case has followed an unusual course. The Inspector of Police gave evidence of the search at the house of the accused who was present, and of the finding of the seven bags of chillies. The Inspector proved that chillies were a price-controlled article and produced a Gazette in support of this, and added that the accused had no permit to store the chillies. The cross-examination of the Inspector was directed to the point whether the accused was or was not a wholesale trader or importer. Thereafter the record runs as follows :

> " Defence concedes that the premises where these chillies were seized were not registered and also that the chillies were found in the house of the accused. In view of this the prosecution closes its case. The accused leads no evidence. I find the accused guilty."

I think the proceedings at this point were irregular and that the magistrate should not have accepted what is apparently an admission of the accused's counsel. But I need not consider that matter further for counsel for the appellant urges that there is no evidence that the accused failed to furnish a return to the Controller. Certainly there is no evidence whatsoever on that point.

Crown Counsel contends that the burden of proof on this point lay on the accused and that it was not incumbent on the prosecution to prove a negative. He relies on the case of *Perkins vs Dewadasan* (39 N.L.R. 377) and the English cases followed in that decision. In 39 N.L.R. 337 the charge was that the accused " not being a medical practitioner did practice for gain....." in breach of section 41 (*b*) of Ordinance 26 of 1927. De Kretser, J. followed the English cases and came to the conclusion that the burden of proving that he is a medical practitioner lay on the accused.

I have examined the English cases relied upon. In *The King vs Turner* (105 E.R. 1026) the offence charged was that the accused being a carrier and not having the qualifications set out under 10 heads did unlawfully have in his custody and possession sixteen pheasants and five hares. It was held that the burden of proving the qualifications was on the accused person. In *Apothecaries Co. vs Bentley* (171 E.R. 978) a penalty was claimed in that the defendant practised as an apothecary " without having obtained such certificate as by the said Act is

required." It was held that the affirmative had to be proved by the defendant and not the negative by the plaintiffs. In *Williams vs Russel* (149 L.T. 190) Talbot, J. said :

> "On the principle laid down in *Rex vs Turner* and numerous other cases, where it is an offence to do an act without lawful authority the person who sets up lawful authority must prove it and the prosecution need not prove the absence of lawful authority."

This was a case where the accused was charged with using a motor vehicle without there being in force in respect of such user a policy of insurance.

In *Roche vs Willis* (151 L.T. 154) the offence alleged was that the respondent did unlawfully drive a heavy locomotive when under the age of 21. The section in the Road Traffic Act 1930 was as follows :

> "A person under 21 years of age shall not drive a heavy locomotive.....on a road unless on first applying for a licence.....he satisfies the licensing authority that he was.....in the habit of driving a motor vehicle of that class."

It was held that the onus of bringing himself, if he could, within the proviso or exception or exemption lay upon the respondent.

I do not think any of these cases are applicable in the present instance. The proof of the finding of the chillies in the house of the accused no doubt establishes that the accused desired to keep a stock or quantity of such articles in his house. The substance of the charge is that the accused failed to furnish to the Controller a return in the manner specified. The accused is not trying to force upon the prosecution the proof of any proviso, or exception or exemption. In my opinion the burden of proving this fact lay upon the prosecution and in the circumstances the prosecution fails.

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

Conviction set aside.

Present: WIJEYEWARDENE, J.

DABRERA vs ATURUGIRIYA POLICE

134 *M. C. Colombo No.* 5490.
Argued & Decided on 13th April, 1943.

Control of Prices (Supplementary) Regulations 1942—*Regulation* 6—*Charge of failure to furnish return of stock of price-controlled article kept at store or other place—Do the words "every person" in regulation* 6 *mean only the importers or wholesale traders.*

Held : That the words "every person" in regulation 6 cannot be restricted to mean only importers or wholesale dealers.

C. Suntheralingam, for the accused-appellant.
G. E. Chitty, Crown Counsel, for the complainant-respondent.

WIJEYEWARDENE, J.

The accused is charged with failing to furnish to the Controller of Prices a return as required by regulation 6 of the Control of Prices Regulations 1942. Regulation 6 reads :

"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...."

The counsel for the accused-appellant, argued that the words "every person" in regulation 6 should be given a restrictive interpretation so as to include only "the importers or wholesale traders" referred to in the earlier Regulations. He said that if the words were given their ordinary meaning, then such a construction would lead to results that could not have been contemplated by the legislature, as, for instance, the prosecution and conviction of any householder who kept half a pound of sugar for his use.

Now the draftsman used the words "importer or wholesale trader" in regulations 2, 3, 4 and 5 but when he came to regulation 6 he refrained from using those words and adopted instead the words "every person." The legislature could not therefore, have intended that the words "every person" should convey the same meaning as the words "importer or wholesale trader." In fact an examination of the various Regulations shews that regulations 2, 3, 4 and 5 form a group applicable to a restricted class of persons while regulation 6 stands apart from that group,

I am unable to agree with the contention that by giving the words "every person" their natural meaning, the regulation would be made wide enough to bring within its provisions even a householder keeping, for instance, half a pound of sugar for his consumption. Such a contention appears to me to ignore the effect of the words "stock" and "store" occurring in the Regulation. I may add that I think that the words "quantity" and "place" in the Regulation are controlled and qualified by the words "stock" and "place" used in conjunction with them. An additional reason against such a contention is furnished by regulation 7. The legislature, no doubt, intended that the Controller should publish a notice under that Regulation specifying the quantity of any price-controlled article that a person could have "in his possession or under his control" without contravening the provisions of regulation 6. With such a notice in existence, regulation 6 would not create the situation referred to by the accused's counsel even though the words "every person" are given this natural meaning. Even if it is open to make a charge under regulation 6 against a householder possessing a small quantity of a price-controlled article, in the absence of such a notice a judge will no doubt take into consideration all the facts and circumstances of such a case and pass an appropriate sentence.

The accused in this case kept in a separate room in his house 50 bags of Australian flour and 6 bags of white sugar claimed by his witness William. I hold that he has kept a stock of price-controlled articles within the meaning of regulation 6 and that he has committed an offence by failing to give the requisite notice to the Controller.

On the evidence led in the case I have no doubt that the accused kept these articles with him in order to enable William to ask for and obtain a larger supply of flour and sugar than he would have got if the Price Control Inspector found the stock in question in William's possession. The learned magistrate has misdirected himself when he took a lenient view of the accused's conduct and fined him Rs. 75/–. This is a case in which the magistrate may very well have passed a sentence of imprisonment. In any event the fine imposed by the magistrate is grossly inadequate.

I affirm the conviction but increase the fine to Rs. 200/–. In default of the payment of the fine, the accused will undergo rigorous imprisonment of 2 months.

Conviction affirmed.

Present: WIJEYEWARDENE, J.

MOHAMED vs NUWARA ELIYA POLICE

S. C. No. 188–189—*M. C. Nuwara Eliya No.* 6102.
Argued on 9th April, 1943.
Decided on 16th April, 1943.

Control of Prices—Regulation 6—Refusal to sell beef—Defence that beef was reserved for regular customers—Is such defence valid—Control of Prices Ordinance section 4 (3).

The manager of a firm which ran a meat stall and his salesman were charged under Control of Prices Regulation 6 with having refused to sell beef to one G. who asked for 7 lbs. of beef on tendering Rs. 2/45 which was the value of the meat at the maximum retail price ruling on that day. The defence proved was that the beef found in the stall had been set apart to meet the orders of the regular customers whose orders were in the hands of the accused before G. asked for meat.

Held : (i) That the defence should be accepted as a valid one.

(ii) That in any event, the conviction of the manager could not stand in the absence of proof that the employer of the salesman was out of the Island.

E. F. N. Gratiaen, for the accused-appellant.
G. E. Chitty, Crown Counsel, for the Crown-respondent.

WIJEYEWARDENE, J.

The first accused is a salesman and the second accused the manager of the firm of Abram Saibo & Co. who run a meat stall at Nuwara Eliya. On October 15th 1942, one Mr. M. P. Gunawardene, a District Inspector of the Telegraph Department went to the meat stall and asked for 7 pounds of beef. He made a tender of Rs. 2/45 which was the value of the beef at the maximum retail price ruling on that day. Though there was a large quantity of beef in the stall, the first accused said in Tamil "No beef, cannot give." Mr. Gunawardene complained to the police and the police constable who went to the stall immediately afterwards found there 977 pounds of beef. The first accused told the constable when he was weighing the beef that all that quantity of beef had been set apart to meet "the orders of regular customers which had to be executed." The constable was shown the lists of customers whose orders amounted to 886½ lbs. for October 15th and 319 lbs. for October 16th. The constable has stated in his evidence that he "verified and found the orders to be correct." The evidence led in the case shows that in the absence of very special circumstances, cattle were slaughtered in Nuwara Eliya only on Mondays and Thursdays and that therefore Abram Saibo & Co. had to reserve a part of the beef received on October 15th to meet the orders for October 16th which was a Friday. It may be added that Mr. Gunawardene who has had considerable trouble in obtaining his supply of beef in October and November got himself registered as a regular customer of Abram Saibo & Co. towards the end of November and has experienced no difficulty after that in getting his "regular orders" executed.

On the above facts the accused were charged with having refused to sell 7 pounds of beef to Mr. Gunawardene on October 15th 1942, and thereby committed an offence in contravention of section 6 of the Control of Prices Regulations made by the Minister of Labour, Industry and Commerce under section 4 (3) of the Control of Prices Ordinance and published in the Government Gazette No. 8501 of September 11th 1939. The accused pleaded that there was no beef available for sale to Mr. Gunawardene as the beef then found in the stall had to be supplied to certain registered customers. There is no doubt as to the truth of the facts on which that defence is based. So far as the first accused is concerned the only question I have to decide is whether this plea affords a valid legal defence to the charge against him. Sub-section 1 of regulation 6 mentioned in the charge read with section 5 of the Control of Prices Ordinance makes it an offence for a trader to refuse or fail to supply an article the maximum price of which has been fixed, to a person who makes a demand for it and tenders payment at such maximum price. But the Regulation proceeds to state in sub-section 2 that in a prosecution for such an offence "it shall be a sufficient defence to prove that on the occasion in question the accused.....had not a sufficient quantity in his custody or under his control to supply the quantity demanded" as the beef found in the stall had to be supplied on the orders received by Abram Saibo & Co. before Mr. Gunawardene made his demand. I do not think it could be said that Abram Saibo & Co. had on that day any beef in their custody or under their control for executing the order for 7 lbs. I hold that the word "custody" and "control" are used to signify such a possession of an article as will enable the person in custody or control to dispose of it without infringing the rights of third parties or committing a breach of contract. The conviction of the accused cannot, therefore, be sustained.

I may add that in any event the conviction of the second accused cannot stand as there is no evidence to show that the employer of the first accused was out of the Island at the time of the alleged offence. Regulation 8 of the Defence (Control of Prices) (Supplementary Provisions) Regulations to which my attention was drawn by Mr. Chitty sets out the position clearly as follows: "Where any person who is employed by any other person (hereinafter referred to as "the employer") to sell articles in the course of any business carried on by the employer at any premises, is by reason of anything done or omitted to be done at those premises convicted of the offence of contravening any provision of any order, then the employer or when the employer is out of the Island, the person for the time being acting as manager or having control of the business shall also be guilty of that offence, unless he proves....."

I allow the appeal and acquit the accused.

Set aside.

Present: De Kretser, J.

SULAIMAN & OTHERS vs WILEGODA

S. C. No. 235—C. R. Colombo No. 83584.
Argued & Decided on 18th June, 1943.

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

Where the appellant's proctor on 13th November, 1942 gave notice of security to the respondents' proctor in which he moved to deposit on the same day Rs. 26/– as security for costs of appeal without making any reference to the money due for serving the notice of appeal, and when the security was not deposited till 17th November, 1942,

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

V. Thillainathan, for the defendant-appellant.
A. S. Ponnambalam, for the plaintiffs-respondents.

De Kretser, J.

A preliminary objection has been taken regarding the appeal on a point of law on the ground that the notice of security contemplated by section 756 had not been given. A notice had been given by the appellant's proctor in which he moved to deposit Rs. 26/– as security for the costs of appeal without making any reference to the money due for serving notice of appeal. The respondents' proctor received notice. It is contended for the appellant that according to the custom in the Court of Requests, a proctor when he signs to the effect that he received notice means thereby not only that he has no objection to the amount which it is proposed to tender, but also that he consents to the amount as proposed being tendered at some time within the period prescribed. When a further petition on the facts had to be filed, the proctor for respondents did not then barely take notice of the motion relating to security, but received notice for a particular date, indicating thereby that he wished to be heard, and accordingly he was heard. It would seem, therefore, that on the first occasion he meant to imply that he was satisfied with the notice given, but the defect did not end there. Quite clearly, the terms of the motion indicated that the amount was to be deposited that very day, that is, 13th November. But, in point of fact, it was not deposited until the 17th November. The notice, therefore, to which the respondents' proctor consented had not been given effect to and something else had been done of which he had no notice. There is also nothing to indicate that the cost of serving notice of appeal was tendered. It seems to me that the objection is fatal and the appeal petition should be rejected. It is suggested that this is a case in which relief may be given, but even if it had been such a case, I should not give relief, for I do not wish to encourage laxity.

The appeal was argued on the facts and, as often happens, a good deal of reference was made to the appeal on the law. Even if I had allowed the point of law to be argued, the point of law would have failed. There is no merit in the appeal on facts, and if anything the appellant has benefited by the extremely restricted view which the Commissioner took of the facts and of the law. It is quite clear that the promissory note was given by way of security to cover future transactions, and that neither party contemplated that the security so given should be extinguished on the same day, when the amount stated therein had been paid. On the contrary, the evidence in the case indicates that it was always regarded as merely security for the value of goods sold by the plaintiffs to the defendant. The defence in fact went on to say that the promissory note had been given in blank. There is no merit in the defence.

The appeal is dismissed with costs.

Appeal dismissed.

Present: WIJEYEWARDENE, J.

UDAYAR, MANNAR vs CASSIM

S. C. No. 397—M. C. Mannar No. 2788.
Argued on 16th July, 1943.
Decided on 20th July, 1943.

Evidence Ordinance — Presumption under section 114 (a) — Its applicability.

Held : That the presumption under section 114 (*a*) of the Evidence Ordinance is not confined to cases of theft.

J. E. M. Obeyesekere, for the accused-appellant.
G. P. A. Silva, Crown Counsel, for the respondent.

WIJEYEWARDENE, J.

The accused-appellant was charged with (*a*) housebreaking by night (section 443 of the Penal Code) and (*b*) theft (section 369) or, in the alternative, dishonest retention of stolen property (section 394). He was convicted under sections 443 and 369 and sentenced to rigorous imprisonment for two consecutive periods of six months.

In the course of a well-considered judgment the magistrate has analysed the evidence carefully and reached the decision that the goods found in the possession of the accused at Anuradhapura, on January 14th 1943, were some of the goods stolen from a house in Mannar which was burgled 8 days earlier and that the accused knew that they were stolen property. I do not think it necessary to refer to the evidence in detail, as I am in entire agreement with the learned magistrate with regard to the findings.

The conviction of the accused on the charges of housebreaking and theft is based upon those findings of fact. It is, no doubt, open to a court to draw such an inference of guilt under section 114 of the Evidence Ordinance as stated in the following passage in Taylor on Evidence (12th edition, paragraph 142) :

> " The presumption is not confined to cases of theft but applies to all crimes, even the most penal. Thus on an indictment for arson, proof that property which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner, has been held to raise a probable presumption that he was present and concerned in the offence. A like inference has been raised in the case of murder accompanied by robbery, in the case of burglary and in the case of the possession of a quantity of counterfeit money."

The presumption arising under section 114 of the Evidence Ordinance is not, however, a presumption of law but a presumption of fact " in the nature of a mere maxim " and the court has to consider carefully whether the maxim applies to the facts of the case before it.

The accused is a hawker of goods and there is no evidence whatever to show that he was seen near the burgled house or even in Mannar at or about the time of the burglary. I do not think it safe in the circumstances of this case to base a conviction for housebreaking and theft on the isolated fact of the retention of stolen property, eight days later.

I set aside the conviction under sections 443 and 369 and convict under section 394 and sentence the accused to rigorous imprisonment for six months.

Conviction varied.

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

MARIKAR vs SUPRAMANIAM CHETTIAR

S. C. No. 147/1941—*D. C. Puttalam No.* 4755.
Argued on 21st, 22nd & 23rd July, 1943.
Decided on 25th August, 1943.

Business Names Registration Ordinance section 9 (1) (*c*)—*Meaning of expression any other party—Civil Law Ordinance section* 5—*Is compound interest legal—Money Lending Ordinance section* 10.

Held : (i) That the words " any other party " in section 9 (1) (*c*) of the Business Names Registration Ordinance includes both the other party to the contract and any third party on whom the rights of the other contracting party may have devolved and is not limited to a third party only.

(ii) That a promissory note given on an account stated is enforceable.

(iii) That section 5 of the Civil Law Ordinance is a general provision that applies to all contracts and engagements including Bills of Exchange and Promissory Notes.

(iv) That the charging of compound interest is not illegal in our law if the parties have agreed to compound interest.

(v) That the agreement to pay compound interest need not necessarily be by written or spoken words but may result from a clear and unambiguous course of dealings between the parties.

Cases referred to : *Arunachalam Chettiar vs Ramanathan Chettiar* (37 N.L.R. 263)
Daniel vs Rogers (1918–2 K.B. 228)
Lyle Ltd. vs Chappell (48 Times L.R. 119)
Credit Company vs Pott (6 Q.B.D. 295)
Abeydeera vs Ramanathan Chettiar (38 N.L.R. 389)
Temperance Loan Fund Ltd. vs Rose & Another (1932–2 K.B. 522)
Lyle Ltd. vs Pearson & Medlycott (1941–A.E.R. Vol. 3 p. 128)
B. S. Lyle Ltd. vs Castle (1938–158 L.T. 242)
Re British Games Ltd. (1938-Ch. 240)
Siripina vs Somasunderam (38 N.L.R. 83)
Barber vs Mackrell (68 L.T. 29)
Sockalingam Chettiar vs Ramanayake (38 N.L.R. 229)
Wickremasuriya vs Silva (37 N.L.R. 274)
Ramasamy Pulle vs Tamby Candoe (1872–75; Ramanathan, 189)
National Bank vs Stevenson (16 N.L.R. 496)
National Bank vs Kurandam (1907–T.R. 155–cited in 3rd Vol. Bissett & Smith's Digest p. 560)
Mudiyanse vs Vanderpoorten (23 N.L.R. 342)
Obeysekere vs Fonseka (36 N.L.R. 334)
Ferguson vs Fyffe (8 E.R. 121)
Ex parte Beven (32 E.R. 588)
Samuel vs Newbold (1906–A.C. 461)
Laycock vs Pickles (4 B. & S. 497)
Siqueira vs Noronha (1934–Appl. Cases 337)
Evans & Co. vs Heathcote (1918–1 K.B. 418)
Firm Bishum Chand vs Seth Ghirdari Lal (50 I.L.R. 465)
Appuhami vs Theodoris Silva (9 S.C.C. 16)
Velupillai vs Marikar (2 Ceylon Law Weekly 314)
Daniel vs Rogers (1918–1 K.B. 149)
Hawkins vs Duche (1921–3 K.B. 226)
Natal Bank vs. Kuranda (Transvaal L.R.—1907 Vol. 6 p. 153)
Seaville vs Colley (9 S.C. 39)
In ReGillespie ex parte Robarts (L.R.-1887-18 Q.B.D. 286 at 295)
Mohamadu vs Ahamadali (17 N.L.R. 504)
Hongkong & Shanghai Bank vs Krishnapillai (33 N.L.R. 249)

N. Nadarajah, K.C., with *Cyril E. S. Perera, Dodwell Goonawardene* and *E. A. G. de Silva*, for the plaintiff-appellant.

H. V. Perera, K.C., with *N. K. Choksy* and *R. A. Kannangara*, for the defendant-respondent.

HOWARD, C.J.

In this case the plaintiff claimed, on the ground that they were harsh and unconscionable and substantially unfair under section 2 (2) of the Money Lending Ordinance, the reopening of certain transactions, the taking of an account between himself and the defendant the other party to such transactions, the setting aside of a promissory note marked "A" dated the 13th January, 1936, made by the plaintiff in favour of the defendant and the entering of judgment in his favour for any excess by him to the defendant. The defendant in reconvention claimed by virtue of promissory note marked "A" dated the 13th January, 1936, a sum of Rs. 52,948/70 together with interest thereon at 15 per cent. per annum amounting, less a sum of Rs. 1,050/- paid by the plaintiff, to the sum of Rs. 70,541/05.

The District Judge of Puttalam decreed that the transactions between the plaintiff and the defendant be reopened, but that such reopening should by reason of the proviso to section 3 of the Ordinance, be restricted to those falling within a period of six years prior to the date of the action. The learned judge further found that a sum of Rs. 29,672/- was due to the defendant from the plaintiff on the 19th June, 1931, and interest thereon and on subsequent loans to be calculated at the rate of 15 per cent. per annum up to the 9th March, 1932. Interest was also to be paid from 10th March, 1932, up to the date of action, namely 10th March 1938, at the reduced rate of 10 per cent. per annum and from the date of action till payment in full at the rate of 9 per cent. per annum.

Both parties to this action have appealed against the judgment of the District Judge. The plaintiff bases his appeal on the following grounds :

(*a*) That the defendant has made default in registering the particulars required in section 4 (1) of the Business Names Ordinance (Chapter 120) and hence his claim in reconvention was not maintainable. In this connection it was contended that section 9 (1) (*c*) of the Business Names Registration Ordinance does not apply to the parties to the contract.

(*b*) That note 'A' was unenforceable inasmuch as (1) it failed to set forth the particulars required by section 10 of the Money Lending Ordinance (Chapter 67), and (2) it was by reason of the provisions of section 14 of the said Ordinance fictitious. Plaintiff's counsel contended, therefore, that no accounting of the defendant's claim should have been ordered. This claim should have been dismissed.

(*c*) That no account was stated on the 19th June, 1931, and hence the proviso to section 3 of the Money Lending Ordinance was not applicable thereto.

The defendant, on the other hand, filed objections to the decree entered in the District Court as follows :

(*a*) That the learned District Judge should not have disallowed compound interest to the defendant ;

(*b*) That on or about the 13th January, 1936, the accounts between the parties were looked into and the plaintiff's liability ascertained and acknowledged by him at the sum of Rs. 52,948/70 well knowing that compound interest would be charged. Promissory note 'A' was given as security for this sum and hence defendant is entitled to claim payment of such sum ; and

(*c*) That the learned judge was wrong in holding that the note 'A' did not comply with the provisions of the Money Lending Ordinance and was not enforceable.

I will deal first of all with the points raised by the plaintiff's appeal. Document P1 is a certified copy of the registration of the business name of the defendant as P.R.L.V. It is dated the 7th March, 1919, and registers the name of the defendant only, the principal place of business being at Puttalam. P2 is a certified copy of the registration of the business name of the defendant and Letchumanan Chettiar as P.R.L.V. This registration is dated the 18th May, 1936, and registers both names, the principal place of business being at Colombo. P3 is a document, dated the 24th August, 1935, in which the defendant and Letchumanan Chettiar describe themselves as carrying on business at Colombo and Puttalam and hold themselves bound in a certain sum to the Mercantile Bank of India. P4 is a power of attorney dated the 29th July, 1935, by which the same two persons similarly described appoint a certain person as attorney to execute a mortgage in favour of the Mercantile Bank of India. Mr. Nadarajah also referred to documents P7-P14 to establish the fact that the defendant was not carrying on business alone as P.R.L.V. at Puttalam, but in partnership with Letchumanan Chettiar. It is contended on behalf of the plaintiff that these documents prove that on the 13th January, 1936, the date on which the plaintiff signed note "A" the defendant was carrying on business at Puttalam in partnership with Letchumanan Chettiar. This fact not being disclosed in the certificate of registration P1, the defendant has made default in complying with the provisions of section 41 (1) (*d*) of the Business Names Ordinance and being still in default his claim by way of reconvention is by reason of section 9 (1) of the Ordinance unenforceable. In my opinion, the plaintiff has not discharged the burden of proof imposed upon him of establishing that on the 13th January, 1936, Letchumanan Chettiar was a partner with the defendant in carrying

on the Puttalam business. It was also contended that there was a further default under section 4 (1) (*d*) inasmuch as the business carried on at Colombo was not disclosed. In view of the decision in *Arunachalam Chettiar vs Ramanathan Chettiar* (37 N.L.R. 263)*, there is no substance in this contention. The obligation to register is in respect of a different kind of business. The business carried on by the defendant at Colombo was not "another business occupation." Even if the defendant has made default in regard to the furnishing of the particulars required by the Ordinance, I am of opinion that there is another answer to the contention put forward on behalf of the plaintiff. Section 9 of the Ordinance is worded as follows :

> "9. (1) Where any firm or person required by this Ordinance to furnish a statement of particulars or of any change in particulars in respect of any business shall have made default in so doing, then the rights of that defaulter under or arising out of any contract in relation to that business made or entered into by or on behalf of such defaulter at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise,
>
> provided that—
>
> (*a*) The defaulter may apply to the court for relief against the disability imposed by this section, and the court, on being satisfied that the default was accidental, or due to inadvertence or some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may grant such relief either generally, or as respects any particular contracts on condition of the costs of the application being paid by the defaulter, unless the court otherwise orders, and on such other conditions, if any, as the court may impose ; but such relief shall not be granted except on such service and such publication of notice of the application as the court may order, nor shall relief be given in respect of any contract if any party to the contract proves to the satisfaction of the court that, if the provisions of this Ordinance had been complied with, he would not have entered into the contract ;
>
> (*b*) Nothing herein contained shall prejudice the rights of any other parties as against the defaulter in respect of such contract as aforesaid ;
>
> (*c*) If any action or proceeding shall be commenced by any other party against the defaulter to enforce the rights of such party in respect of such contract, nothing herein contained shall preclude the defaulter from enforcing in that action or proceeding, by way of counterclaim, set-off or otherwise, such rights as he may have against that party in respect of such contract.
>
> (2) In this section, 'court' means the court in which any action or other legal proceeding to enforce a contract is commenced by a defaulter."

It is contended by Mr. Nadarajah that the words "any other party" in proviso (*c*) to sub-section (1) means "third parties" and exclude the parties to the contract. I am unable to accept this contention. If it is a correct interpretation of the law, the same interpretation must be given to the expression "any other parties" in proviso (*b*). This would result in a party to a contract who is not a defaulter being denied his legal remedy. In this connection I would refer to the judgment of Pickford, L.J. in *Daniel vs Rogers* (1918–2 K.B. 228). At page 232 the learned judge in referring to the English Act said that he entertained considerable doubt whether the Act of 1916 was ever intended to apply to the enforcement of a contract except as between the parties to it. This passage definitely rules out the limitation of "any other party" to "third parties." I am, therefore, of opinion that the plaintiff having commenced an action against the defendant, the latter may, by reason of proviso (*c*), even though a defaulter, enforce by way of reconvention his claim against the plaintiff in respect of note "A."

I will now consider the question raised by the plaintiff with regard to the effect on his transactions with the defendant of sections 10, 13 and 14 of the Money Lending Ordinance. The learned judge has found that, (1) note "A" failed to comply with the provisions of section 10 of the Money Lending Ordinance and was unenforceable, (2) the amount mentioned therein as capital borrowed was false and fictitious to the knowledge of the defendant. Section 10 of the Money Lending Ordinance is worded as follows :

> "10. (1) In every promissory note given as security for the loan of money after the commencement of this Ordinance, there shall be separately and distinctly set forth upon the document —
>
> (*a*) The capital sum actually borrowed ;
>
> (*b*) The amount of any sum deducted or paid at or about the time of the loan as interest, premium, or charges paid in advance, and
>
> (*c*) The rate of interest per centum per annum payable in respect of such loan.
>
> (2) Any promissory note not complying with the provisions of this section shall not be enforceable ; provided that in any case in which the court shall be satisfied that the default was due to inadvertence and not to any intention to evade the provisions of this section, it may give relief against the effect of this sub-section on such terms as it may deem just.
>
> (3) The setting forth of the particulars required by sub-section (1) shall not affect the negotiability of any promissory note.
>
> (4) Any promissory note setting forth the said particulars substantially in the form given in the Schedule shall be deemed to be in compliance with this section.
>
> (5) The provisions of this section shall apply to renewals of any loan, and in all such cases the amount stated as the capital sum actually borrowed shall be the amount of the original loan."

In the margin of "A" we find that the amount borrowed is set out at Rs. 52,948/70 and the interest is stated to be 15 % per annum. In the body of the note the plaintiff acknowledges

* 44 C. L. W. 115 (Edd.)

the borrowing of Rs. 52,948/70 which sum he promises to pay on demand with interest thereon at 1¼% per mensem. It is contended by Mr. Nadarajah that note "A" was a promissory note within the meaning of section 10 and the particulars prescribed by sub-section (1) should have been set forth upon the document. He further maintains that "A" was a renewal of a previous loan. The sum of Rs. 52,948/70 set forth in "A" was made up of loans, interest on loans and other items, and therefore did not state the capital sum actually borrowed which should have been the amount of the original loan. Moreover the actual transaction was one for the payment of compound interest. The statement "interest at 15% per annum" did not reveal this. The first point that requires elucidation is whether note "A" was subject to the provisions of section 10 or, in other words, whether it was "a promissory note given as security for the loan of money." It is contended by Mr. Perera that, although "A" is in form a promissory note and purports to be an acknowledgment of money borrowed and received by the plaintiff and also to make compliance with sub-section (*a*), yet in fact it was nothing of the sort. He maintained that accounts were taken, that there was a discharge of items on each side and a real account stated for which "A" was given. In these circumstances the court had no power to reopen the transactions previous to note "A."

I agree with the finding of the learned judge that an account was stated between the parties in June 1931, when P29, the first of the three notes, was given to secure the payment of the balance after certain adjustments had been made. These adjustments took place more than 6 years before action brought, and, therefore, by virtue of the proviso to section 3 "no readjustment" of the account can be ordered in respect of this sum of Rs. 27,672/– which was allowed in account. A promissory note, P29, was given in respect of this sum. Was this a note given "as security for the loan of money"? It certainly purported to be so inasmuch as the word "borrowed" was employed. In *Lyle Ltd. vs Chappell* (48 Times L.R. 119) the facts were as follows: On the 25th April 1940, the appellants lent the respondent £150 at 15% interest for six months repayable by six monthly instalments of £42.10s each. The loan was secured by a promissory note under which, in default of any instalment, interest ran on the instalment. At the end of six months only two instalments had been paid leaving owing £204 in respect of the unpaid instalments and interest thereon. On the 22nd of October, 1930, a settlement was effected by the respondent signing a promissory note for £300 repayable by 60 weekly instalments of £5 each and a memorandum agreeing to borrow £200 with the sum of £100 for interest upon the terms of the promissory note. This memorandum concluded "I hereby authorize and request you to allocate the whole of the above advance of £200 in settlement of my promissory note in your favour dated 25th April, 1930." With regard to this transaction, Greer, L.J., on page 121, states as follows:

> "There does not seem to me to have been any final agreement before the document was signed as to how the relief from the old debt which had been agreed to by the parties should be effected, and nothing had happened which would in any way prevent the parties from carrying out the suggested arrangement in whatever manner they were both prepared to agree to. In my view, the document signed by the defendant, which appears on page 1 of the correspondence, is an agreement by him to discharge whatever was due on the promissory note of April 25th by borrowing from the plaintiffs a sum of £200 and authorizing them, instead of physically handing over the money to the defendant, to pay themselves the £200. The money lenders seem to have thought it necessary or desirable that they should physically hand over a cheque for £200 to the defendant and get it back again, but there is nothing in the agreement to the effect that this should be done, and, in my judgment, it was not essential that the agreement should be carried out in that way. If the money to be borrowed was intended to be used for the extinction of the debt agreed by the parties at £200, it seems to me unnecessary that the parties should go through the idle form of passing the cheque backwards and forwards. If the contract had provided for the borrowed money to be paid over to the defendant and then repaid to the plaintiffs, it would, according to the authorities, have been unnecessary to go through the form of handing over the money: see *Credit Company vs Pott* (6 Q.B.D. 295)."

The following passage on page 122 is also relevant:

> "In my judgment, the oral agreement made, as found by the learned judge, that the defendant should be relieved from his liability, could not be carried out by a renewal of the old debt with a grant of further time to pay it, plus additional interest. It could be carried out only by some method whereby the old debt would be extinguished and a new one created. The method of doing this was agreed by the defendant with the plaintiffs when he signed the memorandum of October 22nd."

I would also refer to the following passage from the judgment of Scrutton, L.J. on page 120:

> "In my opinion, when the time for payment of the original loan has expired without complete repayment and the time for repayment is extended on altered terms there is a fresh loan, and it is sufficient if the memorandum of the altered terms precedes the commencement of the extended period. The draftsmanship of section 6 might be better, but I cannot think that Parliament intended to render renewals impossible.
>
> As to the second point, I see no objection to the procedure of wiping off the old loan by treating it as

a new loan on the altered terms, when the fact that this is being done is shown on the face of the second memorandum."

The court held that the trial judge was wrong in holding that there was no loan on October 22nd that, therefore, there was no memorandum of the real transaction and that the contract was not enforceable. A reference was made to *Lyle Ltd. vs Chappell* (*supra*) in the local case of *Abeydeera vs Ramanathan Chettiar* (38 N.L.R. 389)* in which the defendant gave three cheques to the plaintiff at various times to cover the value of goods sold and certain advances made to him. Thereafter the cheques were returned and the promissory note, which was the subject-matter of the action, was given representing the amount due upon an account stated between the parties. The court constituted by Abrahams, C.J. and Soertsz, J. held that the note was given for a money lending transaction although no money actually passed between the parties at the time the note was given. In his judgment Abrahams, C. J. stated that the facts in *Lyle Ltd. vs Chappell* (*supra*) " bear a substantial resemblance to the facts in this case," and, applying the principle laid down in that case, held that there had been a notional lending and borrowing although no money had passed between the parties. On the authority of these two cases I have, therefore, come to the conclusion that, although no money was lent by the defendant at the time when P29 was signed by the plaintiff, there was a notional borrowing and lending and P29 was a promissory note given as security for the loan of money. Can, however, this principle of a notional conversion be carried still further and, as contended by Mr. Perera, be applied to note " A " of the 13th June, 1936, which must be treated as a security for a new loan in settlement of the previous loan and so preclude the court from reopening the transactions in respect of which it was given with a view to discovering whether compliance has been made with the provisions of the Money Lending Ordinance ? In this connection the following passage from the headnote of *Lyle Ltd. vs Chappell* (*supra*) is of interest :

" Quaere, whether when an old debt purports to be settled by a new loan a statement to that effect must appear on the memorandum."

The decision in *Lyle Ltd. vs Chappell* (*supra*) was considered in *Temperance Loan Fund Ltd. vs Rose & Another* (1938–2 K.B. 522) and in *Lyle Ltd vs Pearson & Medlycott* (1941–A.E.R. Vol. 3 p. 128). In the first of these cases the plaintiffs, who were registered money lenders, lent the defendant, Rose, the sum of £200 by cheque dated the 30th January, 1929, which was to be repaid, but the plaintiffs agreed to continue it on the terms stated in a memorandum dated the 30th July, 1929. In this memorandum the borrower acknowledged he was indebted in the sum of £248 and agreed to pay interest at 48 % per annum. Repayment of the said sum of principal and interest was to be by five consecutive monthly instalments of £8 each, the first instalment to be due and payable on 30th August, 1929, and the sum of £208 on 30th January 1930. A promissory note for the sum of £248 was given by the borrower on the same day for value received. The promissory note not having been paid on the 30th January, 1930, the plaintiffs sued the two defendants thereon. The defendant, Rose, did not defend the action, but the other defendant, the surety, did so on the ground *inter alia* that the memorandum of the contract did not show the date on which the loan was made as required by section 6 (2) of the Act and was, therefore, unenforceable. In his judgment on pages 528, 529, Scrutton, L.J. stated as follows :

" On the facts I have stated the note or memorandum should show either the date when the original cheque was given — namely, January 30th 1929, or if the loan is to be treated as made not on that date but on July 30th by the transaction of paying off the old loan and starting a new loan it should show that date. It states neither date. It merely says that the borrower acknowledges 'that the abovementioned sum of £200 is owing by the borrower,' and the reference to the date of the loan is struck off. There is, therefore, no compliance with the requirement of the Act that the date of the loan must be stated. The memorandum does not, as was suggested in *Lyle vs Chappell* (1932–1 K.B. 691) might be done, set out the real facts—namely, that there was a loan of £200 on January 30th 1929, which was to be repaid by a series of instalments by July 30th and a new loan made on different terms as to repayment, which new loan was made on July 30th. The memorandum merely says that the borrower is indebted in the sum of £248. That is not a compliance with the statute."

In his judgment Greer, L.J. referred to the contention of counsel who appeared on behalf of the money lenders, that " section 6 has no application to a case which is concerned with the payment of an admitted debt, even though that admitted debt happens to be the balance of a sum due for money lent." The learned Justice stated that, if this contention was right, the plaintiffs would not be affected by the Act and be entitled to succeed. In holding that this contention failed, he further stated that the language of the section is express that every contract which can be described as a contract for the repayment of money lent, and that includes a promise to pay the balance of money previously lent, is brought within the purview of the section. Further on in his judgment the

* 6 C. L. W. p. 143 (Edd.)

same judge explained his judgment in *Lyle Ltd. vs Chappell* (*supra*) and stated as follows :

> " In this case there was no evidence except the signature of the memorandum form, and we do not know whether it is an agreement in respect of the money which had been borrowed previously or whether it is an agreement for the repayment of money which was notionally deemed to be lent at the time of the signature ; but if there was no loan until the agreement was signed, it is impossible to say that the contract was personally signed before the money was lent, and the statute requires that this shall be done. In my judgment the only way in which this statute can be complied with in dealing with the renewal of the balance of an old loan is for the old loan to be treated as paid off and a new loan granted. The memorandum must be signed before the notional loan of that kind is made, otherwise section 6 is not complied with."

It is of course clear that in this case the Court of Appeal held that, as the date on which the loan was made did not appear on the memorandum, the promissory note was unenforceable. It was also held that it was not clear there was a new loan and hence the fact that there was a renewal of an old loan should be set out in the memorandum. Although the working of section 10 of our Ordinance is not the same as section 6 of the English Act, the principle laid down by this case is applicable. I am of opinion that note " A " should have set out the actual sum for which P29 was given as security.

In the second case, *Lyle Ltd. vs Pearson & Medlycott* (*supra*), the plaintiffs, registered money lenders, lent a borrower £100 on the 14th March, 1939, on a joint promissory note of the borrower and a surety, the interest being 150% per annum. On 13th June, 1939, a further £200 on the same terms was borrowed. At some time prior to the 1st January, 1940, a sum of £75 was repaid. On 1st January, 1940 when £400 was owing in respect of principal and interest, the plaintiffs took a new promissory note by the same parties, under which the latter agreed to pay £490 with interest at the rate of 25% per annum. It was contended that the court had no power to reopen the transaction previous to the last note of the 1st January, 1940, which, being at a moderate rate of interest, could not be attacked. It was held by the Court of Appeal that the court had power under the Money Lenders Act, 1900, section 1 (1) to reopen all the transactions back to the first note of the 24th March, 1939. The judgment of the court was delivered by Goddard, L.J., who, on pages 129-130, stated as follows :

> " The reason why the money lenders entered into this last transaction, in which the interest was at the seemingly exceedingly moderate rate of 25 per cent. was that they thought that they had found a loophole in the Money Lenders Act, 1900, by reason of the decision of this court in *B. S. Lyle Ltd. vs Castle* (1938–158 L.T. 242), reported in the form of a footnote to *Re British Games Ltd.* (1938–Ch. 240). If the plaintiffs and others of their fraternity think that that case affords the loophole which they seem to think they have found, the sooner they disabuse their minds of it the better. The defendant in this case had put forward a counterclaim to have the whole of the transactions reopened, on the ground that only £300 had in fact been lent, of which, as I say, £75 had been repaid, and that the interest charged on those loans was harsh and unconscionable, thereby making the third transaction harsh and unconscionable. The judge took the view, on the authority of *B. S. Lyle Ltd. vs Castle* (*supra*) and *B. S. Lyle Ltd. vs Chappell* (*supra*) that he could look at the last transaction only, and, finding it a loan of £490 with interest at 25 per cent. he came to the conclusion that there was nothing at all to show that the transaction was harsh or unconscionable, and, as the rate charged was 48 per cent. if nothing else could be looked at, it was for the defendants to have attacked the rate of interest, and not for the plaintiffs to have supported it, and, therefore, he gave judgment for the whole amount. In the opinion of this court, this shows an entire misapprehension of the position under the Money Lenders Act, 1900, and we do not think that *B. S. Lyle Ltd. vs Castle* decides anything of the nature which it is said that it decides. In the first place, the decision in *B. S. Lyle Ltd. vs Chappell*, is a clear authority in favour of the defendant in this case, showing quite clearly—and, indeed, an enquiry had been ordered in that case—that, in a series of transactions of this sort, the court can order the reopening of all the transactions which led up to the transaction."

On page 131 the learned Lord Justice also referring to *Lyle Ltd vs Chappell*, said as follows:

> " It is not the least authority for the proposition, which the judge, seems to have thought it was, that the Money Lenders Act, 1900, can be dodged in this patent and almost shameless way, so that, having lent money at a harsh and unconscionable rate of interest, the money lender can get out of any inconvenience and difficulties into which that may put him by entering into a transaction embodying all the previous loans and interest in a new promissory note and charging some low rate of interest on that, and then suing the defendant upon it as soon as he has made default. The result is that this appeal succeeds."

Any doubts about the point at issue that may have arisen from the decisions in *Lyle Ltd. vs Chappell* (*supra*) and *Temperance Loan Fund Ltd. vs Rose* (*supra*) are, in my opinion, removed by the judgment in *Lyle Ltd. vs Pearson & Medlycott* (*supra*). In view of this judgment, the contention put forward by Mr. Perera that where an account had been taken with regard to an old loan and a new note had been given, the court had no power to reopen the transaction previous to the last note, is clearly untenable. " A " was a renewal of a loan and hence the amount of the original loan should have been stated. In this connection *Siripina vs Somasunderam* (38 N.L.R. 83) has, in my opinion, no bearing on the facts of this case inasmuch as in that case

there was a new debtor on the second note who was jointly and severally liable with the debtor on the first note. With regard to what constitutes a renewal of a note I would refer to *Barber vs Mackrell* (68 L.T. 29) in which Lindley, L.J. stated as follows :

> " A bill is renewed when another bill is taken in its place, the parties to the bill and amount of it being the same, though perhaps in some cases the interest due on the first bill is added. The bill which is renewed is the old bill."

" A " was constituted almost entirely by the old loan and interest. I think there was a renewal and compliance not being made with para. (*a*) of sub-section 1, the note by reason of sub-section 2 is not enforceable. The question as to whether it is also " fictitious " within the meaning of section 14 is a matter of some doubt and, in view of the fact that " A " is unenforceable by reason of section 10 (2), does not require an answer. Although " A " is unenforceable by reason of section 10 (2), an action may still be maintained to recover the loan, *vide Sockalingam Chettiar vs Ramanayake* (38 N.L.R. 229)* and *Wickremasuriya vs Silva* (37 N.L.R. 274) †.

Although the defendant's claim in reconvention on " A " fails, I agree with the learned judge that there was sufficient evidence before him, both oral and documentary, to show that, when P29 was executed, an account was stated. The court had, therefore, on the authority of the cases I have cited, jurisdiction to order an account to be taken and adjudge what was fairly due to him.

I will now consider the objections raised by the defendants. I have already dealt with objection (*c*) and have come to the conclusion that the learned judge was correct in holding that " A " was unenforceable. With regard to objection (*b*) I have already held that, although accounts were looked into as between the plaintiff and defendant, " A " was a money lending transaction and hence subject to the provisions of the Money Lending Ordinance. The court had, therefore, power to reopen the transaction under section 2 of the Ordinance.

The only remaining point for consideration is whether the learned judge was correct in disallowing the claim of the defendant on such reopening for compound interest. It is contended by counsel for the plaintiff that according to the law in force in Ceylon compound interest was illegal. Such contention is, contrary to the decision in *Abeydeera vs Ramanathan Chettiar* (*supra*). The following passage from the judgment of Abrahams, C.J. deals with this point :

> " I propose to say something presently on what I take to be the true nature of the transaction for which the promissory note was given, but for the moment, dealing with the question of compound interest, I am of opinion that compound interest may be lawfully charged. The Money Lending Ordinance does not say that compound interest may not be charged. The only section in that Ordinance which has any reference to interest is section 4 which provides that rates above the rates mentioned in it are matters to be considered when a transaction is under review for the purpose of ascertaining whether it is harsh and unconscionable. Under the Roman-Dutch law, although it is not legal to charge compound interest, the South African Courts have allowed compound interest when there has been an undertaking to pay such interest or where there is a recognized custom to charge compound interest or where the contract between the parties sanctions it, unless the amount charged can be said to be usurious. (See Manfred Nathan, Common Law of South Africa, Vol. II, pp. 667-670). In *Ramasamy Pulle vs Tamby Candoe* (1872–75 ; Ramanathan, 189), it was held that the Dutch usury laws were purely local enactments and were not introduced into Ceylon. Section 3 of Ordinance 5 of 1852, as amended by section 97 of the Bills of Exchange Ordinance, No. 25 of 1927, enacts ' that no person shall be prevented from recovering on any contract or engagement any amount of interest expressly reserved thereby, or from recovering interest at the rate of nine per cent. per annum on any contract or engagement, in any case in which interest is payable by law and no different rate of interest has been specially agreed upon between the parties, but the amount recoverable on account of interest or arrears of interest shall in no case exceed the principal.' In *National Bank vs Stevenson* (16 N.L.R. 496) compound interest was allowed by reason of the custom of the banks and the acquiescence of the defendant."

The question of compound interest was also considered in *National Bank vs Stevenson* (*supra*) in which it was held that a charge of compound interest was maintainable as the rights of the parties in connection with the current account were, in terms of Ordinance No. 22 of 1866, which introduced into the Island the English law of banks and banking, governed by that law and not the Roman-Dutch. It would also appear that the Roman-Dutch law prohibiting compound interest was not introduced into South Africa, *vide National Bank vs Kurandam* (1907–T.R. 155—cited in 3rd Vol. Bissett & Smith's Digest p. 560). We are asked to say that the judgment of Abrahams, C.J. above cited, was not in accordance with the law and were referred to a number of cases in which it was held that the matter was governed by Roman-Dutch law which prohibited the charge of compound interest. The first of these cases is reported in Vanderstraaten's Reports, 1869–1871, p. 57, where it is stated as follows :

> " It is very clearly laid down by the Dutch law authorities 'that interest upon interest is not allowed, nor to be turned into principal, so as to increase the original debt' and 'that the amount of interest if in arrear may not exceed the principal.' Vander

* 7 C. L. W. p. 1.

† 4 C. L. W. 89. (Edd.)

Linden, 219. Van Leeuwen, 341. Grotious, 326. Voet 22.1.5 and 22.1.20."

We have also been referred to the views of numerous text-book writers on Roman-Dutch law on this point. The same view was taken in *Ramasamy Pulle vs Tamby Candoe* (*supra*) *Mudiyanse vs Vanderpoorten* (23 N.L.R. 342), *Obeysekere vs Fonseka* (36 N.L.R. 334). With regard to these cases I would observe that the aspect of Ordinance No. 5 of 1852 was not given consideration by the judges in the Vanderpoorten case. *Ramasamy Pulle vs Tamby Candoe* (*supra*) purported to follow, and, in my opinion mistakenly followed, the Vanderpoorten case and is therefore not authoritative. I am unable to accept the view held in *Obeysekere vs Fonseka* (*supra*) which is not binding on us. In *Mudiyanse vs Vanderpoorten*, a claim for repayment of money paid in respect of compound interest failed. The judgment as regards the legality of compound interest is *obiter*. In my opinion the question as to whether the Roman-Dutch law prohibiting compound interest was ever introduced into Ceylon or South Africa is a matter of some doubt. Even if it were, I am of opinion that by reason of the provisions of the Civil Law Ordinance (Chapter 66), section 5, and the Bills of Exchange Ordinance (Chapter 68), section 97 (2) it is no longer operative. The first of these provisions is as follows :

> "5. Provided that no person shall be prevented from recovering on any contract or engagement any amount of interest expressly reserved thereby or from recovering interest at the rate of nine per centum per annum on any contract or engagement, in any case in which interest is payable by law and no different rate of interest has been specially agreed upon between the parties, but the amount recoverable on account of interest or arrears of interest shall in no case exceed the principal."

I agree that Abrahams, C.J. was right in law in holding that this provision, which is a general one applying to interest on all contracts and engagements, including bills of exchange and promissory notes, sanctioned the payment of compound interest if agreed upon by the parties. It will be observed that section 5 provides that in no case shall the amount recoverable by way of interest exceed the principal. Bearing this in mind it is impossible to conceive that, if it had been intended to prohibit compound interest, it would not have been so stated. I am, moreover, of opinion that section 97 (2) of the Bills of Exchange Ordinance applies to the question of interest payable on a promissory note the rules of the common law of England, save in so far as such rules are inconsistent with the provision of the Civil Law Ordinance to which I have referred. English law applied, therefore, to all matters connected with bills of exchange, promissory notes and cheques, similarly to all banking matters, *vide* Pereira, J. in *National Bank vs Stevenson* (*supra*). The common law of England permitted a charge of compound interest on a contract express, or implied, *vide Ferguson vs Fyffe* (8 E.R. 121) and *Ex parte Beven* (32 E.R. 588). The learned judge was correct in holding that there was an implied agreement to pay compound interest. In these circumstances such charge was not in itself contrary to law. Although, however, the charge of compound interest was not prohibited by law, the question of such a charge is a matter that demanded consideration on a reopening of the transactions between the plaintiff and defendant under section 2 of the Money Lending Ordinance. In this connection I would refer to the case of *Samuel vs Newbold* (1906–A.C. 461), the headnote of which is as follows :

> "The relief which the Money Lenders Act, 1900, extends to a borrower is not limited to cases in which before the Act the Court of Chancery would have given relief.
>
> The policy of the Act is to enable the court to prevent oppression, leaving it in the discretion of the court to weigh each case upon its own merits and to look behind a class of contracts which peculiarly lend themselves to an abuse of power."

The following passage from the judgment of Lord Loreburn, L.C. at page 467, indicates the manner in which courts are to interpret the words " the transaction was harsh and unconscionable, or, as between the parties thereto, substantially unfair :

> "In my opinion this contention cannot be maintained, nor ought a court of law to be alert in placing a restricted construction upon the language of a remedial Act. The section means exactly what it says, namely, that if there is evidence which satisfies the court that the transaction is harsh and unconscionable, using those words in a plain and not in any way technical sense, the court may reopen it, provided, of course, that the case meets the other condition required. A transaction may fall within this description in many ways. It may do so because of the borrower's extreme necessity and helplessness, or because of the relation in which he stands to the lender, or because of his situation in other ways. These are only illustrations, and, as in the case of fraud, it is neither practicable nor expedient to attempt any exhaustive definition. What the court has to do in such circumstances is, if satisfied that the interest or charges are excessive, to see whether in truth and fact and according to its sense of justice the transaction was harsh and unconscionable. We are asked to say that an excessive rate of interest could not be of itself evidence that it was so. I do not accept that view. Excess of interest or charges may of itself be such evidence, and particularly if it be unexplained. If no justification be established, the presumption hardens into a certainty. It seems to me that the policy of this Act was to enable the court to prevent oppression, leaving it in the discretion of the court to weigh

each case upon its own merits and to look behind a class of contracts which peculiarly lend themselves to an abuse of power."

In the present case taking into consideration the fact that compound interest, that is to say interest upon interest after rests every six months was payable, the rate charged in view of the provisions of section 4 (2) of the Ordinance must be deemed to be unreasonable. The return to be received by the defendant was, therefore, for the purposes of section 2 (1) (*a*) excessive, and the case meets what Lord Loreburn called "the other conditions." In *Samuel vs Newbold* (*supra*) the court was asked to say that an excessive rate of interest could not of itself be evidence that the transaction was harsh and unconscionable. Lord Loreburn in the passage I have cited, expressly declined to accept this proposition and said that it was in the discretion of the court to weigh each case upon its own merits and to look behind a class of contracts which peculiarly lend themselves to an abuse of power. In this case the learned judge has adopted this principle and I am not prepared to say that in reopening the transactions of 1936 and 1933 and disallowing the charges of compound interest he has exercised his discretion otherwise than in a legal and judicial manner. He was, however, in my opinion correct in holding that the proviso to section 3 bars the reopening of any account at a date exceeding six years from the date of the application to the court under section 2 (*a*). Hence the transaction of the 19th June, 1931, cannot be reopened. In these circumstances, the counter-objections of the defendant, and what I have referred to as ground (*c*) of the plaintiff's appeal, fail.

In the result both the appeal of the plaintiff and the counter-objections of the defendant must be dismissed with costs.

SOERTSZ, J.

The proceedings from which the appeal and the cross-objections before us arise were commenced by the appellant under section 2 (2) of the Money Lending Ordinance (Chapter 67) in order to have certain financial transactions that had taken place between himself and the respondent reopened, and an account taken, to enable him to recover such excess payment as he might be found to have made to the defendant. He also prayed that a promissory note granted by him to the defendant on January 13 1936, be set aside for the reasons stated in his plaint.

The appellant took the transactions back to 1931 in which year, he alleged, the respondent's then agent *represented* to him that a sum of Rs. 160,922 was due from him to the respondent, and that he, in view of that representation, "acting on the advice of his proctor..... agreed to settle the said sum by transfer of landed property to the defendant to the value of Rs. 133,250 and, in fact, did so" (paragraph 3 of the plaint) and "for the alleged balance Rs. 27,672.....gave a promissory note dated the 19th of June, 1931, on the assurance and advice of his proctor.....who acted for the defendant that the promissory note could be returned to him when the defendant who was out of the Island returned and settled equitably the accounts and the properties transferred and the fresh promissory note taken if anything was found to be due to the defendant." (Paragraph 4).

The appellant went on to aver that, the respondent not having returned to the Island, his attorney *induced* him to give him a fresh promissory note for Rs. 37,444.69 which the attorney said was the amount to which the sum of Rs. 27,672 of the first note had risen as a result of the addition thereto of the amount of interest that had accrued at the rate stipulated, and a sum of Rs. 2,000 given by the respondent, at the appellant's request, to the proctor already mentioned. Again, says the appellant, on the 13th of June, 1936, the same attorney *persuaded* him to give him a fresh promissory note for Rs. 52,948.70 which he alleged was the sum resulting from the addition to the amount of the second note of the interest that had accumulated in the interval, less several payments made by the appellant aggregating to the sum of Rs. 3,885.12. The appellant also averred that he signed the last note "with the greatest reluctance" and because "he had implicit faith in the defendant.....that the note would be discharged.....and the accounts equitably looked into and a fresh note taken for the amount actually due if any." (Paragraph 8).

The respondent filed answer and alleged that "on or about the 19th of June 1931 an account was stated, and a balance struck..... and a sum of Rs. 160,922 was found to be due and owing from the plaintiff to him" (paragraph 2 (*b*), and that property to the value of Rs. 133,250 having been transferred to him in part payment, the promissory note dated the 19th of June 1931 was given in respect of the balance outstanding (paragraphs 2 (*c*) and (*d*). Similarly, in regard to the two other notes, the respondent stated in paragraphs 3, 4 and 5 the circumstances in which they were made, and he averred that the making of the last note

was preceded by an account stated between them.

On those allegations and averments, he pleaded that there was no occasion either in law or on the facts for reopening these transactions, and he counterclaimed the sum of Rs. 70,541.05 on the last promissory note, together with interest.

There was a replication in which the appellant pleaded, *inter alia*, that the respondent's counterclaim was unenforceable by reason of the respondent's failure to comply with the requirements of the Business Names Registration Ordinance (Chapter 120).

The learned trial judge found, for the convincing reasons he gave in his judgment, that the three notes referred to in the plaint were not made in the circumstances alleged by the appellant, but that " the parties looked into accounts in June 1931, that the plaintiff transferred to the defendant certain properties in part payment of the accumulated balance .....and gave the note P29 (that is the first note of 1931) as security for the payment of the balance Rs. 27,672 "; that this amount was " wholly principal " and was due to the defendant. He then examined the transactions after the making of P29, and reached the conclusion that inasmuch as the sum of Rs. 52,948.70 of the last of the three notes included compound interest not agreed upon between the parties, the appellant is entitled to have the transaction to which the last note was related reopened. He also found that the amount of Rs. 52,948.70, including as it did interest that had accrued, was incorrectly described in the note as the capital sum borrowed and that, for that reason, it violated section 10 of the Money Lending Ordinance and was unenforceable. The counterclaim, therefore, failed.

But he found that there was sufficient evidence that there were transactions between the parties after the making of P29 and that this was " a case where despite the fact that note A (the last of the notes) is unenforceable, the court should, in the exercise of its discretion, and in the interest of the defendant, order the transaction embodied in that note to be reopened and an account taken."

It will be observed that the trial judge did not find that an account was stated as alleged in paragraph 5 of the answer, at or about the time the last note was given by the appellant. Indeed, there was no evidence whatever to support that allegation. This case must, therefore, be considered by us on the basis that the only account stated took place in June 1931.

In regard to the objection taken by the appellant under the Business Names Registration Ordinance, the learned judge overruled it, holding that, assuming although not finding, that the respondent had a partner whom he failed to disclose when he applied for registration of his business name, he was not debarred from making the counterclaim he set up, in virtue of the exemption afforded him by section 9 (1) (*c*) of the Business Names Registration Ordinance.

The appellant has appealed against the judgment and the respondent has filed cross-objection to it, and on the submissions made to us by counsel appearing for the two parties, the substantial questions that arise for decision may, I think, be formulated thus :

1. Has the respondent failed to comply with the requirements of the Business Names Registration Ordinance ?
2. If so, is he precluded from making his counterclaim ?
3. Is he debarred from enforcing his counterclaim by section 10 of the Money Lending Ordinance ?
4. Is the note on which the counterclaim is based fictitious within the meaning of section 14 of the Money Lending Ordinance ?
5. If it is, is the appellant entitled to have the counterclaim dismissed ?
6. If the note is neither fictitious nor obnoxious to section 10 of the Money Lending Ordinance is the respondent entitled to judgment as prayed for by him ? Or, has the court the power to order a reopening such as has been ordered ?
7. Is the charging of compound interest in the course of the transactions between the appellant and the respondent illegal ?
8. If so, what is the consequence in law ?
9. Is the amount charged as interest and included in the note on which the counterclaim is made excessive, and/or is the transaction represented by the note harsh or unconscionable or substantially unfair ?
10. What order should be made in the result ?

On the first of these questions I am in agreement with the findings of the trial judge on the facts, and I share his view of the correct interpretation of section 9 (1) (*c*) of the Business Names Registration Ordinance. Indeed, I do not think any other interpretation is reasonably possible. The words " any other party " set in contrast as they are with the word " defaulter " include *both* the other party to the contract and any third party on whom the rights of the other contracting party may have devolved and there does not appear to be any good reason for limiting the words " any other party " to a third party only, as counsel for the appellant sought to do.

The answer to questions 1 and 2 is that assuming a failure to comply with the Ordinance, the respondent is exempted from the ordinary consequences of such a failure by section 9 (1)

(*c*) and he is not precluded from making his counterclaim.

In regard to question 3, it must be considered in the light of the finding by the trial judge on the evidence of the appellant himself that an account was stated between him and the respondent in June 1931 and that the first of the three notes P29 was given to secure the payment of the balance due by the appellant after certain adjustments had been made.

On the evidence, it seems indisputable that the account stated in this instance was not a mere acknowledgment of a debt from which a promise to pay the debt is implied, but that it is what Blackburn, J., as he then was, called "*a real account stated*" in *Laycock vs Pickles* (4 B. & S. 497) or as known to the old law an *insimul computassent*. Such an account stated arose when—in the words of Blackburn, J.—"several items of claim are brought into account on either side, and being set against one another, a balance is struck, and the consideration for the payment of the balance is the discharge of the items on each side. It is then the same as if each item was paid and a discharge given for each, and in consideration of that discharge the balance was agreed to be due." "It is not necessary in order to make out a real account stated, that the debts should *in praesenti* or legal debts, the account may contain contingent or equitable debts or debts barred by a statute of limitation, or debts unenforceable by action." This was the view adopted by the Privy Council in the opinion delivered in *Siqueira vs Noronha* (1934 Appl. Cases 337). A claim on such an account stated may fail either wholly or as to a particular item only on certain grounds namely that there was no consideration or an illegal or immoral consideration or if on any other ground, the defendant, if he had actually paid the amount or the item in question, could have recovered back the money paid. See *Laycock vs Pickles* (*supra*) and *Evans & Co. vs Heathcote* (1918–1 K.B. 418). The appellant has not made out a case on any such ground, and indeed he was debarred from advancing such a case by the proviso to section 3 of the Money Lending Ordinance which says "that in any case in which any amount claimed at any time to be due has been settled in account, no repayment or re-adjustment shall be ordered in respect of any sum paid or allowed in account exceeding six years before the date of application to the court for relief." Here that period has been exceeded. The account stated took place in June 1931, and the appellant's application was made in March 1938. In the Indian case of *Firm Bishum Chand vs Seth Ghirdari Lal* (50 I.L.R. 465) Lord Wright in delivering the opinion of the Privy Council pointed out that a real account stated "may take place in respect of a money lending transaction even though the borrower was always the debtor of the lender and never able to sue the other for a demand or claim." In this case there is documentary evidence to show that there were, in the course of the dealings between the parties, a few transactions other than money lending. The account stated in June 1931 was in respect of all these transactions, and on a correct interpretation of the evidence in the case, it is clear that if the promissory note P29 had been made so as to embody the true facts, it should have read: "I.....promise to pay.....Rs. 27,672/– being the amount found to be due on an account stated between us, with interest thereon at ....." and not as it has been drawn up, to indicate the sum of Rs. 27,672/– as money borrowed. But, in my opinion, it is immaterial that the parties sought to aequiparate the promissory note to one given to secure a loan and, in that view of it to comply with the requirements of section 10 of the Money Lending Ordinance, for I think when we are considering the applicability of section 10 we should be guided by the substance of the transaction, not by its form, when there is evidence to show what the real transaction was.

Once the character of the promissory note is thus ascertained to be that of a note given to secure an amount due on an account stated, the theory of a notional loan advanced in the course of the argument is necessarily excluded. A transaction cannot be a non-loan transaction in reality, and a loan-transaction notionally any more than a thing can both be and not be. The fact that the occasion for the granting of P29 was that of an account stated renders inapplicable the case of *Abeydeera vs Ramanathan Chettiar* and the English cases referred to in that case and in the course of the argument.

The note P29 not being a note given to secure a loan of money, the second and third notes which were given as security for the amounts to which the sum covered by P29 had risen by effluxion of time are not "renewals" of any loan. In this connection it is not without significance that the appellant himself described the later notes as *fresh* notes.

The conclusion to which I come in this way is that the promissory note upon which the respondent makes his counterclaim is not unenforceable within the meaning of section 10 of the Money Lending Ordinance.

The next question relates to the fictitiousness of the note counterclaimed upon. The

taint of fictitiousness is incurred under section 14 only in the case of "*promissory notes given in respect of a loan and* only if in regard to them (*a*) "a reduction was made or a sum paid *at or about the time of the loan*.....without such reduction or payment being set forth upon the documents....." or (*b*) "*at or about the time of the loan*.....any collateral transaction was entered into with a view to disguising.....the rate of interest payable in respect thereof." The promissory notes with which we are concerned namely, P29, P30 and A were not given, according to the case put forward by the appellant in respect of *loans* made at the time they were given, nor was any sum paid or any reduction made, nor any collateral transaction entered into, at or about the time the notes were granted, with a view to disguising "the actual amount of the sum advanced or the rate of interest payable in respect thereof." The appellant's case, simply stated, is that a rate of interest other than that stipulated and shown on the notes has, in effect, been *subsequently* debited against him in the books. It is not his case that at the time the notes were made, he was told that he would have to bear either compound interest or a higher rate of interest, and that the rate appearing on the notes was inserted in order to disguise the real rate.

For these reasons I cannot see how any of these *three notes* could be said to be fictitious.

The next question that arose before us was the much debated question, "Is compound interest illegal in Ceylon?" That is a question on which I had already formed a view when I expressed my agreement with the judgment of Sir Sydney Abrahams, C.J. in the case of *Abeydeera vs Ramanathan Chettiar* (38 N.L.R. 359) and that view has only been confirmed by what I heard in the course of the argument in this case. This question, in my opinion has been answered for us by the legislature in Ordinance No. 5 of 1852 (Chapter 66) and in the Bills of Exchange Ordinance (Chapter 68). Section 5 of the former of these Ordinance says :

> "Provided that no person shall be prevented from recovering on any contract or engagement any amount by way of interest expressly reserved thereby or from recovering interest at the rate of 9% per annum on any contract or engagement in any case in which interest is payable by law and *no different rate of interest has been specially agreed upon between the parties.*"

This is a general provision and applies to interest on all contracts and engagements including bills of exchange and promissory notes. The case now before us relates to a promissory note. In view of the admitted fact that accounts were rendered regularly in writing by the respondent to the appellant showing that from the date interest became payable after P29 was made, compound interest was being consistently charged without any protest or question on the part of the appellant, the inference is irresistible that subsequent to the granting of P29 the parties had specially agreed to it. The words "specially agreed" do not, in my opinion, require that the agreement should result from written or spoken words. It may result from a clear and unambiguous course of dealings between the parties. The words "specially agreed" are not synonymous with "expressly reserved" or "expressly agreed." The words "specially agreed" are used to contrast a case in which there is expressed or implied agreement in regard to a rate of interest with a case in which, there being no agreement whatever in regard to interest, the law allows a rate of 9% per annum. This view is supported by what Walter Pereira, J. said in the course of his judgment in *National Bank of India vs Stevenson* (16 N.L.R. at p. 499) :

> "But quite apart from the matter of custom (that is the custom of Banks to charge compound interest of which evidence was tendered in that case) which, if proved, would of course bind the defendant, it seems to me that there is abundant evidence in the case to show that the defendant acquiesced in the charge of compound interest made by the plaintiffs and in the system of quarterly rests adopted by them, and that, hence, both these matters were to all intents and purposes involved in the agreement between the parties.....the defendant never once raised any objection to it."

It is clear from his judgment that the learned judge treated that case as one in which the evidence showed that the parties had by their course of business specially agreed that compound interest was chargeable. Facts could not have reproduced themselves with greater coincidence than the facts of that case and of this have done in regard to the course of dealings between the parties. If that interpretation is correct, it means that any amount of interest, however calculated, whether by adding interest to interest or not, and at any *rate*, may be charged, provided only that if occasion arises to sue for the recovery of the debt, the amount recoverable as interest shall, in no case, exceed the principal. The rules against compound interest and against arrears of interest not exceeding the capital sum are restrictions imposed by the Roman-Dutch usury laws and it is significant that section 5 of Ordinance 5 of 1852 states in the clearest possible terms that "the amount recoverable on account of interest or arrears of interest shall, in no case, exceed the principal," but says nothing in regard

to compound interest, as it surely would have done if the intention of the legislature was to prohibit it. In my view, this section sanctioned compound interest when it declared that subject to the limitation just referred to, any amount of interest expressly reserved or specially agreed upon may be recovered. I cannot read the words "rate of interest" in the phrase "and no different rate of interest has been specially agreed" as restricting chargeable interest to *simple* interest and as prohibiting compound interest. As pointed out by Cayley, J. in his dissenting judgment, holding against compound interest and against an unlimited rate of simple interest, in the case of *Ramasamy Pulle vs Tamby Candoe* (1875 Ramanathan's Reports at p. 197), "the restriction against compound interest would be futile, if the same result be obtained by recovering an exorbitant rate of simple interest. For, what protection would it be to a debtor to disallow compound interest, if he were allowed to stipulate in the first instance to pay simple interest at the rate of cent per cent?"

If I may say so with respect, that observation appears to me to be a sufficient refutation of the view taken by the two other judges in that case that any rate of simple interest may be recovered, *but not compound interest.* It exposes the incongruity of the two parts of that proposition, the effect of which is to interpret that section of the Ordinance as giving with one hand and taking with the other, for a money lender confronted with that proposition would hardly be in a dilemma. He would abandon any intention he may have had to charge compound interest, and by a simple arithmetical calculation, determine the rate of simple interest that would yield the same result.

But in regard to the question that was directly in issue in the case of *Ramasamy Pulle vs Tamby Candoe* I find myself in respectful agreement with the opinion of the majority, that *any rate* of interest may be recovered by agreement. Section 5 of the Ordinance says so in so many words. The two views, in proper combination, appear to me to solve the problem and lead to the conclusion that the legislature by means of this section abolished the Roman-Dutch usury laws against compound interest, and excessive rates of simple interest but, in order not to leave the money lender completely untrammelled, imposed a limit by providing that the interest recoverable at law shall not exceed the principal.

The anonymous case cited to us from Vanderstraaten's Reports dealt with the question of compound interest charged on a bond executed in the year 1837, and, probably, for that reason there was no reference at all to the Ordinance of 1852. That case cannot, therefore, be regarded as doing more than reaffirming the well-established rule of Roman-Dutch law against compound interest. The effect of the Ordinance on that rule was not considered.

The only other case cited to us which bears directly on this question is that of *Obeysekere vs Fonseka* (36 N.L.R. 335) in which Dalton, J. held that on a note given by a debtor to his creditor for the amount of interest then due, undertaking to pay a certain rate of interest thereon, the creditor could not recover anything more than the principal because, he said, to allow interest would amount to allowing interest upon interest. With all respect to that learned judge, I am unable to share his view that because the note was given to secure the interest due, the principal amount shown on the note continued to be interest, its identity unchanged. It seems to me that if that view is pursued to its logical conclusions, it leads to untenable results, for it means, for instance, that if the debtor actually handed to the creditor the interest due and borrowed it back promising to pay interest on it, he will nevertheless not be liable to pay interest. In other words, he will be entitled to an interest-free loan. That view is inconsistent with that taken in *Abeydeera vs Ramanathan Chettiar* and in the English cases referred to in that judgment, namely that when a debtor in the position of the debtor in the case before Dalton, J. finding himself unable to pay the interest that had accrued gives his creditor a promissory note for the amount due, the resulting position is, on analysis, no other than a lending by the creditor and a borrowing by the debtor of the amount due — a notional loan as it has been called. Apart, however, from my respectful disagreement with the conclusion to which Dalton, J. came in the view he took of the transaction in that case, for the reasons I have stated, I disagree with his ruling in regard to compound interest. The other cases cited to us *Mudiyanse vs Vanderpoorten* (23 N.L.R. 342), *Appuhamy vs Theodoris Silva* (9 S.C.C. 16), *Velupillai vs Marikar* (2 C.L.W. 314) deal with different questions and are easily distinguishable. For these reasons, I reach the conclusion that compound interest was legally chargeable in virtue of section 5 of Ordinance 2 of 1853.

But, this case involving as it does a promissory note, I am of opinion that compound

interest was chargeable on it in virtue of section 97 of the Bills of Exchange Ordinance as well. This section, or rather, its equivalent originally occurred in Ordinance No. 5 of 1852 and in view of it the dissenting judge himself in the case of *Ramasamy vs Tamby Candoe* (*supra*) held that bills of exchange and promissory notes stood on a different footing and were exempted thereby from the English laws of usury (at page 198). Section 97 (2) of the Bills of Exchange Ordinance provided that "the rules of the common law of England including the merchant law in so far as they are not inconsistent with the *express provisions of this Ordinance* or any other *Ordinance* for the time being in force shall apply to bills of exchange, promissory notes and cheques." What then is the meaning of the phrase "shall apply to"? In regard to that I am in respectful agreement with what Walter Pereira, J. said in interpreting section 2 of Ordinance 5 of 1852 which, at the date of that judgment, contained what is now enacted in section 97 of the Bills of Exchange Ordinance. He said: "Section 2 of Ordinance 5 of 1852 introduced into this Island the law (that is the English law) relating to bills of exchange, promissory notes and cheques, and in respect of *all matters connected with any such instrument.*" The charging of interest is a matter connected with promissory notes. It follows that the English law applies, and the English law allows the charging of compound interest where, *inter alia*, parties have expressly or impliedly agreed thereto. The Roman-Dutch law rule which clearly forbade the charging of compound interest was swept away and was replaced by the English law including the merchant law so far as that law was not inconsistent with the Bills of Exchange Ordinance itself or with any other Ordinance in force for the time being.

On this answer to question 3, it would follow that, ordinarily, the respondent would have been entitled to judgment on his counterclaim for twice the amount of note P29, once on account of principal and once on account of recoverable interest. Similarly in regard to the sum of Rs. 2,000/– paid by him at the instance of the appellant to his proctor.

But, there is the Money Lending Ordinance to be considered. Under section 2, which is wide in scope, transactions are liable to be reopened both in cases brought for the recovery of money lent and in cases for the enforcement of any agreement or security made or taken *after* the Money Lending Ordinance, in respect of money lent either *before* or *after* the Ordinance. The evidence in the case establishes that from 1920 the dealings between the respondent and the appellant were, for a much greater part, by way of money lent by the former to the latter, and it appears to me, therefore, that although P29—given after a "real account stated"—created a debt different from a debt due on a loan of money within the meaning of either section 10 or section 14, the words "for the enforcement of any agreement or security..... *in respect of money lent* either *before or after* the commencement of the Ordinance" enable the court to reopen the transactions in question in this case and take an account under section 2 (1) (*a*) and (*b*) subject, however, to the condition that it may not order "a repayment or readjustment of the account in respect of any sum paid or allowed in account at a date exceeding six years before the date of the application to the court for relief" (section 4, Money Lending Ordinance). In this case there is an additional reason debarring an order for repayment or readjustment of anything paid or allowed in account before P29 was made, and that is the fact that it followed on an account stated. For these reasons, I am of opinion that it was competent for the trial judge to make the order he has made for a reopening of transactions between the date of P29 and that of the last note A. It is competent for the judge to so reopen the transactions and to take an account although the charging of compound interest, and the rate of interest charged are not illegal, for under the Money Lending Ordinance the question arises whether, in all the circumstances of a case, the interest charged, though not illegal, is excessive and whether, otherwise, the transactions are inequitable or harsh and unconscionable. This answer disposes of the other questions I formulated above as the questions arising between the parties.

In the event, the appeal and the cross-objections fail. In regard to costs, I believe a fair order would be to direct the appellant to pay half the costs of the appeal and leave the order as to costs of all the proceedings in the court below in the discretion of the District Judge.

KEUNEMAN, J.

The plaintiff brought this action alleging that he had dealings with the defendant for some years. He stated that defendant lent him moneys, and that in the year 1931 the capital lent amounted to the sum of Rs. 53,000/- odd, and the interest on the same to Rs. 107,000/- odd, the total being Rs. 160,000/- odd. In 1931 the plaintiff in point of fact transferred to the defendant property to the value of Rs. 133,000/- odd in liquidation of his liability, leaving a balance of Rs. 27,672/-, for which plaintiff gave promissory note P29 of the 19th June, 1931. Later plaintiff said he was persuaded by defendant's attorney to sign promissory note P30 of the 18th January 1933 for Rs. 37,444/69 which in fact included the capital sum of Rs. 27,672/- on P29, together with Rs. 2,000/- paid by defendant to proctor Muttukumaru on behalf of plaintiff for professional services at the 1931 accounting, and Rs. 7,772/69 interest. A further promissory note, A, was taken from plaintiff on the 13th January 1936, made up of the amount of P30, *viz.* Rs. 37,444/69, and interest on it, Rs. 19,389/13— the total of note A, being Rs. 56,853/82, less payment of Rs. 3,885/12 to wit Rs. 52,948/70. The plaintiff alleged *inter alia* that compound interest had been charged on these notes. The plaintiff said that these notes were signed, on the undertaking that they would be duly discharged and returned to him and the accounts equitably looked into and a fresh note taken for the amount actually due, if any. The plaintiff prayed that the court do reopen the transactions and take an account between the plaintiff and defendant under section 2 of the Money Lending Ordinance (Chapter 67) and set aside the promissory note A of 1936, and for judgment against the defendant for any excess paid to the defendant.

The defendant filed answer praying for the dismissal of plaintiff's action and in reconvention claimed judgment for the amount due on promissory note A of 1936.

In his application, the plaintiff alleged that promissory note A was fictitious within the meaning of section 10 of the Money Lending Ordinance, and further stated that the defendant could not maintain his counterclaim, because he had failed to comply with the provisions of the Registration of Business Names Ordinance (Chapter 120).

Several issues were framed to catch up the various matters arising from the pleadings.

On the evidence the learned District Judge criticised the testimony tendered by the plaintiff, who at the trial stated what was not in accordance with the pleadings. The District Judge rejected the plaintiff's contention that there was an agreement to waive the amounts due on the three promissory notes. Among other things, the plaintiff had taken over into his books the amounts shown in the defendant's accounts which had been sent to him. I think, however, that in view of the absence of any evidence on this matter on the part of the defendant, that it is difficult to avoid the conclusion that some form of protest was made by the plaintiff on each occasion. At the worst, however, the only fact proved as to the circumstances of these transactions after 1931 was that the plaintiff had signed each of the promissory notes. I do not think it has been proved that there was anything in the nature of an account settled or stated, except as the District Judge has rightly held in respect of the 1931 settlement. In that case there was a real looking into accounts, and a settlement entered into with the assistance of the plaintiff's proctor, and I further think that the District Judge was right in holding that in 1931, the whole of the interest then outstanding was paid by the plaintiff to the defendant, and only the principal amount of Rs. 27,000/- odd was left unpaid, and was secured by the promissory note P29. The District Judge held that the 1931 settlement could not be reopened in any event, because it took place more than six years before action brought, and was therefore preserved under section 3 of the Money Lending Ordinance.

As regards the later promissory notes, the District Judge held that note A, offended against the provisions of section 10 of the Money Lending Ordinance inasmuch as the amount shown as capital is incorrect. The note A was accordingly unenforceable. As regards both note P30, and note A, the District Judge holds that amounts of interest were added to the capital sums due and compound interest was charged. In point of fact although each of these notes provided for simple interest at the rate of 15% per annum, it had been the practice of the defendant, to have half-yearly rests, and after each period of six months, to charge interest on the amount then outstanding both as principal and interest. The District Judge held that there was no agreement at any time for the payment of compound interest. Though the District Judge does not specifically say so, I think it follows from his judgment that he also held that the interest actually charged was harsh and unconscionable, or substantially unfair between the parties.

The District Judge further held that although note A was unenforceable, he should

exercise his discretion in the interests of the defendant and order that the transaction embodied in that note should be reopened and an account taken.

As regards the objection based on the Registration of Business Names Ordinance, the District Judge held, that it was competent for the defendant to make a counterclaim under section 9 (1) (*c*).

From this judgment the plaintiff appeals, and the defendant has also filed counter-objections.

The appeal of the plaintiff referred to three matters. First he contended that in view of the fact that the defendant was in default under the Registration of Business Names Ordinance he was debarred from making any claim under note A, and that the only question the District Judge could decide was what amount if any had been paid in excess by the plaintiff. The plaintiff also argued that under section 2 of the Money Lending Ordinance, not only the notes P30 and A should be opened up, but also the 1931 arrangement represented by note P29.

The question relating to registration of business names depends on the construction of section 9 (1) (*c*) of Chapter 120. (Registration of Business Names Ordinance) *viz:*

> "If any action or proceeding shall be commenced by any other party against the defaulter to enforce the rights of such party in respect of such contract, nothing therein contained shall preclude the defaulter from enforcing in that action or proceeding, by way of counterclaim, set-off or otherwise, such right as he may have against that party in respect of such contract."

Counsel for the plaintiff argued that the words "any other party," must be read in the sense "any party other than a party to the contract." He referred to the fact that in proviso (*a*) of section 9 (1), the words "party to the contract" appears, and contended that the words "any other party" appearing in proviso (*b*) and (*c*) should be used as excluding parties to the contract. I do not think this argument is sound. Each of the provisos (*a*), (*b*) and (*c*) are independent of each other, and refer back to section 9 (1) where the word "party" does not occur. Further if provisos (*b*) and (*c*) are read independently, I think it is clear the words "any other party" are used in contradistinction to "the defaulter." If then the meaning is "any party other than the defaulter," it would follow that the words in question refer to a party to the contract. It can of course be argued that they also apply to those who are not parties to the contract, *e.g.* assignees.

The cases cited by counsel for the plaintiff, *viz. Daniel vs Rogers* (1918–1 K.B. 149) (*obiter* of Shearman, J.); *Daniel vs Rogers* (1918–2 K.B. 228); *Hawkins vs Duche* (1921–3 K.B. 226), do not assist him. In fact I think these cases are against him. In my opinion it is clear that where there has been a default, it is the defaulter who is precluded from *commencing* an action or other proceeding. Section 9 (2) seems to add emphasis to the point. But where proceedings are taken against the defaulter, by any other party, the defaulter is entitled to enforce his rights "by counterclaim, set-off or otherwise." Further there does not seem to be any reason why an assignee, for example, should be placed in a worse position than the original party to the contract.

As regards the point that the 1931 transaction should also be opened up, the matter is governed by section 3 of the Money Lending Ordinance. Clearly in this case the amount of the note P29 was "settled in account," in 1931, and on that note the sum of Rs. 27,000/– odd was "allowed in account." This took place more than six years before action brought—*viz.* before 1938. Therefore "no readjustment of the account" can be ordered in respect of this item. Further this sum of Rs. 27,000/– represents principal alone, and is in no way obnoxious to the Money Lending Ordinance. I hold that the finding of the District Judge was right on this point.

One other point in plaintiff's appeal may be mentioned. He argued that in view of the fact that note A has been held to be fictitious, no claim can be made in respect of the transaction disclosed in the note. The Privy Council in *Sockalingam Chettiar vs Ramanayake* (38 N.L.R. 229)* drew a sharp distinction between the effect of sections 10 and 13 on the one hand and that of section 8 on the other, (*i.e.* when the books of the money lender are not kept in accordance with the terms of that section). Under section 8 the money lender is not "entitled to enforce any claim." This would affect the whole transaction. Under section 10 and and section 13 the *claim* is not affected. Their Lordships held that there was "no inconsistency between section 3 and section 10," and although the promissory notes in question were admitted in that case to be fictitious, the transaction itself, which was a mortgage, was unaffected. It was held that "the provisions of section 13 do not prevent the court from reopening the transaction and taking the account under section 2." The fictitious promissory notes were not however admissible in evidence to prove the loan.

* 7 C. L. W. p. 1.

The plaintiff's appeal, therefore, fails.

The counter-objections of the defendant remain for consideration. At the outset I think it is desirable to determine what attitude the law of Ceylon has adopted towards compound interest, as many matters in appeal are dependent upon that point.

As regards the Roman-Dutch law, the matter seems abundantly clear. As Nathan puts it in the Common Law of South Africa (2nd Edition) Vol. 2 page 669: "It is clear that, by Roman-Dutch law the interest may not be turned into capital, upon which fresh interest is to be charged. In other words, the charging of compound interest is not legal." It is true that he adds that in South Africa the strict rule has not been applied. In fact the rule as regards compound interest in that country may perhaps be regarded as abrogated by disuse.

The Roman-Dutch authorities do not leave us in doubt, see Van Der Linden 1.3.4 (Henry's translation at 219), "that interest upon interest is not allowed, nor to be turned into principal, so as to increase the original debt." See also Grotious' Introduction to Dutch Jurisprudence (Maasdorp's translation, page 235): "It is, however, for good reasons forbidden to cumulate unpaid interest with the capital, and thus stipulate for compound interest, for people not seeing the consequences may thereby be entirely ruined." See also Voet 22.1.20. (Horwood's translation, page 22): "Similarly it is forbidden to claim interest upon interest or to turn interest again into capital (which is called *anatocismus*, compound interest)." Voet explains here how far the rule is carried.

In fact as Maasdorp puts it there were in the Roman-Dutch law, "two main rules .....*viz.* that compound interest is not allowed by our law, and that the amount of accumulated interest will in no case be allowed to exceed the principal." With the second rule we are not immediately concerned.

It is to be noted, however, that both these rules are inherent in the law, and are not the creatures of statute.

Have these rules regarding compound interest been adopted in this Colony? I do not think it is possible to have any doubt upon that point. The earliest case which I have been able to trace was in 1870, where three judges, who then constituted the Full Court, following the authority of Van Der Linden, Van Leeuwen, Grotious and Voet, held that compound interest was prohibited. The case is reported in Vander Straaten's Reports page 57. This was a case where a father by deed promised to pay to his minor children a sum of money with interest, on their coming of age, and further agreed to renew the bond every eight years, adding the interest then due to the principal. The Supreme Court held that the bond so far as it related to compound interest was invalid, and that it was illegal to have added the interest to the principal, and to make the whole sum so increased bear interest. In 1875 there was the important case of *Ramasamy Pulle vs Tamby Candoe* (Ramanathan 1872 and 1873, 6 page 189). The majority of three judges held that the Dutch usury laws relating to the rate of interest had not been introduced into Ceylon, but as Stewart, J. said "a distinction..... may legitimately be drawn between the (Vander Straaten) case and the present, the exaction of compound interest involving the infraction of a principle of fixed and general law, whereas the question before us is simply regarding a matter of detail relating merely to the rate chargeable as interest." All three judges concurred in the view that compound interest was prohibited. As regards the rates of interest, it was held that Ordinances, including section 3 of Ordinance 5 of 1852 (now enacted as section 5 of Chapter 66) had in any event swept away the Roman-Dutch rules as to rates of interest. In view of the argument addressed to us, that this same section affected the question of compound interest which will be dealt with later, it is of importance to note that all three judges were satisfied that the Roman-Dutch rules relating to compound interest had not been abrogated. No doubt this is *obiter*, but it is a weighty *obiter*. It was held that compound interest is illegal and cannot be recovered, even though expressly stipulated for.

These two cases were followed by a number of other cases, the references to which I may give: 16 N.L.R. 96; 23 N.L.R. 342; 2 C.L.W. 314; 31 N.L.R. 333; 36 N.L.R. 334; of these, the case of *National Bank of India vs Stevenson* (16 N.L.R. 496), is interesting. Here the Roman-Dutch prohibition against compound interest was reaffirmed, but it was held that by Ordinance No. 22 of 1866 in all questions or issues which arise or which may have to be decided with respect to the law of banks and banking, the law to be administered is the same as would be administered in England in the like case at the corresponding period. It was held that the keeping of a current account between the bank and its customer came within the legitimate business of a banker, and that the law governing the rights and liabilities arising in connection

therewith was the English law. It is of particular interest to note that section 3 of Ordinance 5 of 1852 (now section 5 of Chapter 66) was specifically referred to in the argument, but the only argument advanced was that the section restored the Roman-Dutch prohibition against compound interest to transactions otherwise governed by the English law—an argument very far removed from that which we shall have to deal with later. The judges did not agree with the argument then advanced.

There is, however, one case in which this current of authority has been broken, *viz. Abeydeera vs Ramanathan Chettiar* (38 N.L.R. 389).* This case appears to hold that the Roman-Dutch rule against compound interest has either not been introduced into Ceylon, or has been superseded by section 3 of Ordinance 5 of 1852, as amended by section 97 of the Bills of Exchange Ordinance No. 25 of 1927. The question of this section will be dealt with later, but at any rate it is clear that the question whether the prohibition against compound interest was in force in Ceylon was decided on the analogy of the South African law, and the Ceylon cases, with the exception of the case in Ramanathan, were apparently not referred to. I may point out that in South Africa, it was found that there were numerous cases in which compound interest had been allowed, and in *Natal Bank vs Kurunda* (Transvaal L.R. 1907–Vol. 6, page 155) it was held that the Roman-Dutch law had been abrogated by disuse. That case contains a citation from an earlier case, *Seaville vs Colley* (9 S.C. 39) as follows :

> "The presumption is that every one of these laws (*i.e.* the laws in force at the date of the British occupation in 1806) if not repealed by the local legislature, is still in force. This presumption will not, however, prevail in regard to any rule of law which is inconsistent with South African usages. The best proof of such usages is furnished by unoverruled judicial decisions."

It is clear therefore that the usages in South Africa had taken a different turn, and had consistently allowed compound interest. In Ceylon on the contrary there is a practically unbroken current of judicial authority prohibiting compound interest.

It has been argued before us that the rules of the Roman-Dutch law relating to compound interest have been abrogated by section 5 of Chapter 66 (formerly section 3 of Ordinance 5 of 1852), which runs as follows :

> "Provided that no person shall be prevented from recovering on any contract or engagement any amount of interest expressly reserved thereby or from recovering interest at the rate of nine per centum per annum on any contract or engagement, in any case in which interest is payable by law and no different rate of interest has been specially agreed upon between the parties, but the amount recoverable on account of interest or arrears of interest shall in no case exceed the principal."

The further argument is put forward that this section was not considered in the earlier cases. It is true that this section has not been specially referred to in the case reported in Vander Straaten's reports, and in a number of cases which followed that case. But I am not prepared to say that it was not considered. In fact this section played a great part in the determination of the case reported in Ramanathan's reports, and was utilized by the majority of the court to help in the decision that the Roman-Dutch rules as to the rates of interest had been superseded. But the judges did not go further and apply the section to the question of compound interest, which they held to be still governed by the Roman-Dutch law. I have referred to this as a weighty *obiter*. In the 16 N.L.R case the present argument advanced was not put forward. On the contrary it was argued (without success) that this very section introduced the Roman-Dutch rules of compound interest into matters which would otherwise have been governed by the English law. In that case the present argument would have been very relevant, and I think it is significant that it was not advanced. I do not think the learned judges who decided the other cases in question were unfamiliar with this section. I do not, however, propose to place too much reliance on the fact that the present argument had not been advanced before the 38 N. L. R. case, although perhaps this does not show that the argument is open to doubt. It may be noted in this connection that section 5 is headed "Legal Rate of Interest." I have myself carefully considered the argument now advanced, and I cannot agree with it for the following reasons :

(1) The language of the section is not sufficiently precise and definite to have the effect of repealing the rules against compound interest. Where the legislature desired to permit the adding together of principal and interest, and to allow interest to be paid on the aggregate, it has used very specific language. Compare for instance, section 192 of the Civil Procedure Code, which gives to the court the power to add together the amounts of principal and interest upon the date of decree, and to allow further interest on the "aggregate sum so adjudged." Whether this will be regarded as compound

* 6 C. L. W. 143.

interest or not under the Roman-Dutch law, it is unnecessary to consider, for the reason that the Ordinance has permitted it in precise language.

(2) The word "interest" in the section must, I think, be interpreted as simple interest, and not as including compound interest. It will be noted that the word "interest" occurs twice in the same section. On the second occasion, in relation to interest not specially agreed upon, the interest at the rate of nine per cent. per annum indubitably refers to simple interest. Was the word "interest" used in a different sense on the earlier occasion ?. I think not. Nor do I think the word "*amount* of interest" as compared with "*rate* of interest," makes such a fundamental difference as to necessitate one giving that phrase a different meaning.

(3) The Roman-Dutch rule relating to compound interest has a double aspect. It forbids (*a*) the charging of interest upon interest, and (*b*) the turning of interest into principal so that further interest may be levied upon it as principal. There is nothing in the section which we are considering which has any bearing upon this second aspect, and no words in the section can be regarded as permitting the turning of interest into principal. If it had been intended by the legislature to abrogate the rules relating to compound interest, one would naturally have expected a clear reference to this matter, and in the absence of reference to this matter, I conclude that the legislature did not intend to deal with the question of compound interest.

In the present case the actual notes only provide for 15% interest, *i.e.* simple interest. What is objected to is that at various points of time, interest on these notes has been converted into principal, so as to carry further interest, and in respect of note P30 and note A, it is clear that accrued interest so calculated, has been converted into principal. The section does not make this legal and it is prohibited under our law. I think that the notes are bad in that respect.

I may in passing here point that the reaffirmation in the section of the Roman-Dutch rule that the amount of interest recovered should not exceed the principal was necessary because the language of the section ("....no person shall be prevented from recovering..... any amount of interest expressly reserved....") may have been regarded as abrogating that rule in the Roman-Dutch law. It is to be noted, however, that the rule of the Roman-Dutch law against recovering as interest more than the amount of the principal is applied to cases which come under the English law as well. I do not think any argument can be based upon this to the effect that the rule against compound interest was impliedly abrogated. There was no necessity on the words of the section to refer to compound interest, which in my view was untouched by the words of the section.

For these reasons I have come to the conclusion that section 5 of Chapter 66 does not have the effect of repealing the Roman-Dutch law forbidding compound interest.

One further argument has been pressed before us, *viz.* that section 97 (2) of the Bills of Exchange Ordinance (Chapter 68,) has brought in the English law relating to compound interest, and has superseded the Roman-Dutch law, in the case of bills of exchange, cheques and promissory notes.

Section 97 (2) runs as follows :

> "The rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this Ordinance, or any other Ordinance at the time being in force, shall apply to bills of exchange, promissory notes, and cheques."

With regard to the history of this matter, Ordinance 5 of 1852, section 2 enacted that :

> "The law to be hereafter administered in this Colony in respect of all contracts and questions arising within the same upon or relating to bills of exchange, promissory notes and cheques, and in respect of all matters connected with any such instruments, shall be the same in respect of the said matters as would be administered in England in the like case at the corresponding period....."

Under this section our law followed all the changes in the English law, in relation to these matters, until 1927. In that year, Ordinance 25 of 1927 was passed, whereby the law in Ceylon relating to bills of exchange, cheques and promissory notes was codified, and section 2 of Ordinance 5 of 1852 was repealed by section 97 (3) of that Ordinance. But in section 98 (2) the section not appearing as section 97 (2) of Chapter 68 was enacted. It is interesting to note that this last section was taken directly from section 97 (2) of the Bills of Exchange Act 1852, the chief difference being that our section refers to the common law of England, and the English section merely to the common law.

Now this section was necessary in England for the purpose of preserving those matters

peculiarly relating to bills of exchange, cheques and promissory notes, on which the Bills of Exchange Act was silent or not sufficiently explicit. As Lindlay, L.J. said *In Re Gillespie Ex Parte Robarts* (L.R. 1887–18 Q.B.D. 286 at 295) " section 97 has been added to meet cases not exhaustively dealt with by the other sections of the Act." There was no need in England to import into this section matters which may have affected the legality of the transactions itself, for those would ordinarily apply, whether section 97 (2) was enacted or not. The only danger was that some rule relating to this particular subject would be regarded as repealed or abrogated, because it was not referred to in the Act. I do not think that in Ceylon we should give any extended meaning to those words. I am of opinion that even in Ceylon what was intended was to preserve the rules relating to negotiability and other special matters affecting these classes of instruments, and not to import the whole of the common law of England relating to separate branches of the law also, whenever a negotiable instrument of this character is in question. To hold otherwise would result in this curious anomaly, that although the money claim embodied in the transaction was illegal or invalid under our law, the security given for it would be regarded as valid.

It is interesting to consider that section 2 of Ordinance 5 of 1852 was actually wider in scope than the section we are considering, and in view of its language it has been held, for instance, that the English law relating to *assignments* of promissory notes had also been introduced into this Colony, *vide Mohamadu vs Ahamadali* (17 N.L.R. 504). But even sections of this kind have their limitations. For example, Ordinance 22 of 1866, (now section 3 of Chapter 66), introduced into this Colony the law of England in all questions relating to banks and banking, in language somewhat similar to that used in respect of bills of exchange. But it was held that " the right of a pledgee to sell his security without recourse to a court of law is peculiar to the English law of pledge and the common law of the land in the matter of the rights of mortgage and pledge does not give to the English law when the mortgagee or pledgee is a bank." See *Hongkong & Shanghai Bank vs Krishnapillai* (33 N.L.R. 249). It was perhaps a matter for argument and not free from doubt, if section 2 of Ordinance 5 of 1852 was still current, whether the prohibition against compound interest can be said to have been abrogated, or whether the subject of interest did not come within the scope of that section. The matter cannot be said to be concluded by any case, such as the 16 N.L.R. case, which dealt with banks and banking. However there is no need to consider that, because this section has now been repealed. For myself, I do not think that the more restricted language of section 97 (2) of Chapter 68 can be regarded as having put an end to the prohibition inherent in our law against the allowance of compound interest. In my opinion, the question of compound interest is a subject distinct and separate from that of bills of exchange, cheques and promissory notes, and that the language of section 97 (2) does not affect the former question.

The next matter of consideration is what application this finding has on the facts of the present case. The first point is that even if there was any notional conversion of interest into capital (cf 38 N.L.R. 389) —I am of opinion in the present case that the evidence is insufficient to enable us to hold that there was a notional conversion — that conversion was illegal and prohibited under our law so far as is related to interest, and that there has been in this case a " collateral transaction entered into with a view to disguising the actual amount of the sum advanced " within the meaning of section 14 of Chapter 67. If this is correct, the promissory note A, must be regarded as fictitious to the knowledge of the lender. This would give the court jurisdiction to reopen the transaction under section 2 (1) (*c*). If there was no notional conversion, then it is clear that this same conclusion must be reached. Further it would be evident that the transaction " is otherwise such that according to any recognized principle of law or equity the court would give relief," and the right to reopen the transaction would arise under section 2 (1) (*b*).

I do not propose to deal with the question whether there has been a default under sections 10 (1) or 10 (5), because that is not necessary for the decision of this case.

One further question remains, *viz.* whether the District Judge had power under section 2 (1) (*a*) to reopen the whole transaction, on the ground that it was harsh and unconscionable, or, as between the parties thereto, substantially unfair. On this point I think there is no possibility of doubt. On each of the notes P29, P30 and A simple interest was charged at the rate of 15 per cent. Under section 4 (1) (*c*) this was the highest rate of interest which can be considered reasonable, and any interest above 15% was to be deemed unreasonable and excessive.

Yet it is clear that in the case of each of the notes P29 and P30, the defendant charged compound interest, with half yearly rests, and the total amount of interest so calculated was incorporated into the succeeding notes, *viz.* P30 and A. Now, even if P30 and A can be regarded as notional conversions of principal and interest into fresh principal, and, as suggested in 38 N.L.R. 389, we must take it that there was a new notional loan of the total amount on each of these occasions, it is not possible for the money lender to take refuge behind that plea. It may be noted that on the decision of *Lyle vs Chappel* (1932–1 K.B. 692) the money lenders thought that they had found a loop hole in the Money Lending Act, but as Goddard, L.J. put it in *Lyle Ltd. vs Pearson & Medlycott* (1941–All England Reports Vol. 3, page 128, at 131), the Act could not "be dodged in this patent and almost shameless way, so that, having lent money at a harsh and unconscionable rate of interest, the money lender can get out of any inconvenience and difficulties into which they may put him by entering into a transaction embodying all the previous loans and interest in a new promissory note and charging some low rate of interest on that, and then suing the defendant upon it as soon as he has made default." The terms of section 2 are wide enough to catch up a transaction of this kind, in spite of the fact that there has been notional conversion, and a notional loan.

It may be further emphasized here, that the principle of notional conversion adopted by Abrahams, C.J. in 38 N.L.R. 389, is based upon the case of *Lyle Ltd vs Chappel* (L.R. 1932–1 K.B. 692). In each of those cases it was held that there was evidence of a new notional loan. The mere signing of a promissory note for the aggregate principal and interest does not however provide sufficient proof of such conversion. See the references to *Lyle Ltd. vs Chappel* in the later case. In *Temperance Loan Fund vs Rose* (1932–2 K.B. 522), Greer, J. referred to his own judgment in the earlier case, and made this comment: "In this case there was no evidence except the signature of the memorandum form, and we do not know whether it was an agreement in respect of the money which had been borrowed previously or whether it is an agreement for the payment of money which was notionally deemed to be lent at the time of the signature." *Lyle Ltd. vs Pearson & Medlycott*, also refers to this. On the facts in the present case, I am of opinion that it has not been proved that there was any notional loan — it is not even in evidence that the previous note was returned on the occasion of the making of a new note — and the only evidence available points in a different direction. Further, as I have already stated, such notional conversion of interest is obnoxious to our law. This makes the position of the defendant untenable.

I cannot support the arguments of defendant's counsel, and I think that the counter-objections fail.

In the result, both the appeal of the plaintiff and the counter-objections of the defendant must be dismissed with costs.

DE KRETSER, J.

I agree with my brother Soertsz.

WIJEYEWARDENE, J.

I have had the advantage of reading the judgment of my brother Keuneman and I agree with him:

i. That the words "any other party" in section 9 (1) (*c*) of the Business Names Ordinance (Chapter 120) are applicable to a party suing upon a contract entered into by him with the defaulter.

ii. That, in view of the settlement in 1931, section 3 of the Money Lending Ordinance (Chapter 67) bars the re-opening of the transactions at a date exceeding six years before the date of this action.

iii. That the promissory note A and P30 are fictitious within the meaning of section 2 of the Money Lending Ordinance and that the District Judge could have acted under sub-sections (*a*), (*b*) and (*c*) of section 2 (1) and ordered the re-opening of the transactions embodied in those notes.

iv. That the defendant is entitled to a decree in his favour in respect of any sum that may be found by the court to be fairly due to him on an account taken under section 2 (1) of the Money Lending Ordinance.

v. That the Roman-Dutch law disallowing compound interest, even where it is expressly stipulated for, is in force in this Island and has not been repealed by section 5 of the Civil Law Ordinance (Chapter 66).

I agree that the appeal and the counter-objections should be dismissed with costs.

Appeal and counter-objections dismissed.

Present: DE KRETSER, J.

THE N. W. BLUE LINE BUS CO., LTD. vs PERERA

Case stated under Nos. 3121, 3122 & 3123 *by the Tribunal of Appeal under the Motor Car Ordinance (The North-Western Blue Line Bus Co., Ltd.) No.* 235.

Argued & Decided on 16th June, 1943.

Motor Car Ordinance—Case stated under sections 4 (6) (*a*) *and* (*c*) *of the Motor Car Ordinance No.* 45 *of* 1938—*Failure to give the notice required by section* 4 (6) (*c*) *at or before the time when the case is transmitted to the Supreme Court.*

Held : That failure to give the notice required by section 4 (6) (*c*) of the Motor Car Ordinance No. 45 of 1938 within the time prescribed in that section is fatal, and a case stated will be rejected for such failure.

Cases referred to : *Cosmas vs The Commissioner of Income Tax* (39 N.L.R. p. 457)

N. Nadarajah, K.C., with *D. D. Athulathmudali*, for the appellant.

H. V. Perera, K.C., with *J. E. M. Obeyesekere*, for the respondent.

T. S. Fernando, Crown Counsel, for the Commissioner of Motor Transport.

DE KRETSER, J.

Crown Counsel takes a preliminary objection to the hearing of this case stated and the objection is that the party requiring the case to be stated did not send to the Commissioner the notice required by section (4) (6) (*c*) at or before the time when he transmitted the stated case to the Supreme Court. It is admitted that the case was handed in at the Registry on the 7th June and it is also admitted that the notice was posted on the 8th June. Crown Counsel submits the envelope which shows that the letter was posted on the 8th June and received by the Commissioner on 9th June. A similar provision in the Income Tax Ordinance was adjudicated upon by Poyser, J. and Keuneman, J. in the case of *Cosmas vs The Commissioner of Income Tax* (39 N.L.R. page 457). I see no reason to disagree with that decision. In fact Mr. Nadarajah frankly admits that it is against him. It is unfortunate but the objection has to be given effect to. The case stated is, therefore, rejected with costs.

With regard to the costs, I understand both from counsel and from the Registrar that as a result of a ruling by this court in a similar matter, the Registrar would allow Crown Counsel's costs up to 14 guineas and the costs of preparing the brief and in the case of private counsel would allow any sum for which a receipt was submitted together with costs of preparing brief. Mr. H. V. Perera for respondent in some cases that were dealt with by me yesterday, very generously offered to limit his client's costs to Rs. 525/–. It seems to me that that offer was made in the right spirit. It is impossible to regard each case from the point of view of the importance of the point argued and to say that one point of law is more important than another and it is impossible to assess what financial implications there are behind the contest. There may be very large sums involved, and probably there are large sums involved considering the way in which these contests are being fought. I think therefore that awarding a sum of Rs. 525/– to Mr. Perera's clients, Rs. 150/– to Crown Counsel would not be unreasonable and I so award costs.

Objection upheld.

Present: MOSELEY, J.

TODD vs TODD

In the matter of a petition under the Ceylon Divorce Jurisdiction Order in Council, 1936, and the Ceylon (Non-Domiciled Parties) Divorce Rules, 1936.

Argued on 23rd July, 1943.
Decided on 3rd August, 1943.

Divorce—Ceylon Divorce Jurisdiction Order in Council, 1936—Confession of defendant to an action for divorce—Letters written by the defendant to the plaintiff confessing adultery—Can they be put in evidence for establishing adultery.

Held : (i) That letters written to the plaintiff by the defendant wife confessing that she has committed adultery can be admitted in evidence for the purpose of establishing adultery on her part.

(ii) That a court can grant a divorce on such evidence even though it be the sole evidence of adultery where it is satisfied that the confession of the wife was beyond doubt *bona fide*.

Cases referred to : *Williams vs Williams & Padfield* (13 L.T.R. (N.S.) page 610)
Le Marchant vs Le Marchant & Ratclif (34 L.T.R. (N.S.) page 367)

F. C. W. Van Geyzel instructed by *Messrs. Julius & Creasy*, for the petitioner.
No appearance for the respondent.

MOSELEY, J.

This is a husband's suit for dissolution of marriage on the ground of the wife's adultery with X. The latter was not made a co-respondent in the suit, since it appeared to the court that there was no evidence against him except the confession of the respondent. The question for decision is whether the court should act on such a confession, where it is not corroborated by other evidence. Three letters written by the respondent to the petitioner were put in evidence in one of which she stated that she had lived with X in Colombo. That an opportunity of so doing had occurred was indeed indicated by the production of a hotel register which makes it appear that X spent one night at a hotel where the respondent was staying at the time. In another letter, written from South Africa, she stated that she was living under X's protection and was being supported by him. She expressed their intention of marrying as soon as her release from the present marriage may be obtained.

Several authorities were brought to my notice which go to show that the court may in a proper case act on such evidence. In *Williams vs Williams & Padfield* (13 L. T. R. (N. S.) page 610) Wilde, J. O. referred to the great danger of relying entirely on such confession. "In each case," said the learned judge "the question will be, whether all reasonable ground for suspicion is removed." This authority was followed by Hannen, P. in *Le Marchant vs Le Marchant & Ratclif* (34 L. T. R. (N. S). page 367), where it was considered that the confession by the wife was beyond doubt *bona fide*, and the court felt *bound* to act upon it.

In the present case it may well be that the main object of the respondent's admission was to facilitate the obtaining of her freedom. The letters are extremely frank and I have no reason to doubt the genuineness of the admissions. There is no suggestion of collusion.

There will be a decree *nisi*, returnable in six months.

Decree nisi allowed.

Present: WIJEYEWARDENE, J.

FAIZ MOHAMED vs ELSIE FATHUMMA *alias* MURIEL DE VOS

In the Matter of an Application for a Writ of Habeas Corpus

Argued on 28th October, 1942.

Decided on 12th November, 1942.

Custody of Muslim child—Application for—Writ of Habeas Corpus—Father's right to custody of son.

Held : That under the Hanafi law a Muslim father is entitled to the custody of his son, who has completed his seventh year, unless there are strong grounds for interfering with this right.

WIJEYEWARDENE, J.

This is an application for the custody of a male child. The petitioner is the father of the child. He is a Baluchi belonging to the Hanafi sect of Muslims. The second respondent, the mother of the child is a member of the Burgher community. She was a Christian until her marriage when she became a convert to Islam. The child was born on September 27, 1935. The petitioner and the 2nd respondent lived together for a few months after their marriage and then separated. In June, 1936, the petitioner applied for the custody of the child and his application was refused by this court in January, 1937 on the ground that the 2nd respondent was entitled to the custody of the male child under seven years.

Under the Hanafi law the mother's right to the custody of a son ends with the completion of his seventh year *vide* Ameer Ali (4th edition) Vol. 2 page 295. The present application cannot, therefore, be refused unless there are strong grounds for interfering with the legal right of the father. (*Idu vs Amirani* 8 Allahabad 323 ; *Ran Menika vs Paynter* 34 N.L.R. 127). The proceedings in this case do not disclose any such grounds. The petitioner has maintained the child during the last seven years and provided for his education at Zahira College. On the other hand the 2nd respondent lives with her parents and sisters all of whom are Christians. They appear moreover to be in impecunious circumstances. So long as the boy remains in the custody of the mother he will be brought up in a non-Moslem home. I hold that the petitioner is entitled to the custody of the child, and order that the child be given over to the petitioner on or before January 31, 1943. I have suspended this order till January 31, 1943, in order to enable the 2nd respondent to give more opportunities to the child to come in contact with the petitioner and get to know him more intimately. I trust that the 2nd respondent will consult the true interests of the child and try to instil into his mind feelings of love for the father so that he may not feel keenly the separation from the mother when he leaves her at the end of the period fixed by me.

I make no order as to costs.

Application allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: MOSELEY, J. (President), KEUNEMAN, J. & WIJEYEWARDENE, J.

REX vs MUSTHAPA LEBBE

(*Appeal No. 22 of 1943—Application No. 71 of 1943.*)
S. C. No. 6—M.C. Kalmunai No. 26078—2nd Eastern Circuit, 1943.
Argued on 20th & 21st September, 1943.
Decided on 4th October, 1943.

Court of Criminal Appeal—Charge of rape—Conviction by jury—Existence of real doubt as to guilt of accused—Indication from evidence led that jury prepared to convict accused because of his character—Is accused entitled to acquittal.

Held : That where a real doubt exists as to the guilt of the accused, coupled with a probability, on the evidence, that the jury formed an opinion unfavourable to the accused's character, it is safer that the conviction should not be allowed to stand.

Cases referred to : *Rex vs Isaac Schrager* (6 Cr. App. R. p. 253)
Rex vs John Reuben Parker (6 Cr. App. R. 285)
Rex vs John Alfred Bradley (4 Cr. App. R. 228)

M. M. Kumarakulasingham with *G. Thomas*, for the appellant.
E. H. T. Gunasekera, Crown Counsel, for the Crown.

MOSELEY, J. (President)

The appellant was convicted of rape. The act of intercourse is admitted, and the only issue to go to the jury was the one of consent. The story of the girl is that she was sweeping the compound of her house when she was seized from behind by the appellant, pulled into the house in spite of her resistance, placed upon the floor and raped. Her story in respect of what occurred outside the house is corroborated by the evidence of three persons who claim to have been eye-witnesses of the struggle which she says took place there. They are Aliar, a boy of ten or twelve years of age and a cousin of the girl, Adam Kandu, and Kalanden Lebbe, both next-door neighbours of the girl and either distant or so-called relatives. As to the events which followed inside the house there is only the evidence of the girl. Her story is that she resisted until she realized that resistance was futile. As she somewhat naively put it " I did not wish to struggle to the extent of preventing the accused from having intercourse with me." She explained that statement by saying that she realized the futility of struggling with a man who was stronger than herself. Parenthetically it may be observed that the medical witness was of opinion that the girl, who is twenty-two years of age, and the appellant are equal in strength. The injuries found on the girl were an abrasion on the cheek, an abrasion on the breast, and congestion of the left outer labia. The first two injuries are said by the girl to be due to bites by the appellant, the injury to the labia to the forcible introduction of the appellant's penis. In this connection the appellant was not found to have suffered any injury. The hymen of the girl was found to have been ruptured, the injury being several months old. The appellant, while setting up an act of voluntary intercourse does not account for the abrasions to cheek and breast. A further circumstance worthy of note is that the eaves of the house are admittedly very low and would provide a serious obstacle to a forcible carriage of the girl into the house without injury to her. Moreover, she said that she entered the house in advance of the appellant. We do not think it can be said that the above-mentioned circumstances go any distance towards corroborating the girl's evidence that she was an unwilling party.

In regard to the three eye-witnesses, they cannot claim to be entirely disinterested. Counsel for the appellant sought to discredit their evidence on the ground not only that they are all related, in varying degrees, to the complainant but that there was considerable delay in the recording by the village headman of their statements. On the latter point the evidence is somewhat conflicting, but, apart from the first information which was carried to the village headman by Adam Kandu, there would seem to have been ample time for the concoction and embroidery of a story. Adam Kandu, indeed, in his statement, gave details of a struggle in the compound, but at the trial in cross-examination he confessed that he was unable to say whether the struggle was real or feigned. A similar attitude was adopted by Kalanden Lebbe. This witness, for reasons best known to himself and which he was unable to formulate,

adopted the extraordinary course of locking the couple in the house and taking the key to the village headman. Neither of these witnesses, both able-bodied men, and relatives of the girl, made the slightest move towards rendering assistance to the girl, although the mere appearance of either on the scene would no doubt have been sufficient to prevent the act of intercourse whether it were forcible or voluntary. The account given by the boy, Aliar, convincing enough intrinsically, lost some of its value by his somewhat premature and spontaneous denial that he had been tutored, a possible inference being that his story had been at least embellished.

Passing on to events subsequent to the act, the village headman accompanied by Adam Kandu and Kalanden Lebbe arrived at the scene. With them, or following closely on their heels, were some Marikkars. The door was opened and apparently the girl lost no time in accusing the appellant of the offence. There appears to have followed a long discussion during which, according to the appellant, pressure was brought upon him to marry the girl. The girl herself spoke to the Marikkars' suggestion of marriage and to the appellant's rejection of the suggestion. Whatever was the object of the discussion, the fact remains that, according to the village headman, he was occupied from about 5 p.m. until 9 or 10 p.m. in recording the statements of three people which recording amounted to fifty lines of his diary. The possibility certainly presents itself that there must have been a certain amount of discussion as well, which would lend colour to the claim of the appellant that the question of marriage was brought up. There can be no doubt that prior to the incident there had been a proposal of marriage between the parties, a fact which was denied at the trial by the girl until she was confronted by her depositions in the lower court. Knowledge of this fact was also denied by the other eye-witnesses and by the village headman although it is scarcely credible that it was unknown to them, being, as they were, relatives or near neighbours. It is also pertinent to remark that, according to the girl, she remained lying on the floor after the act until the door was opened, while the appellant was found to be singing. The jury might well have asked themselves whether these circumstances are more consistent with the aftermath of an act of rape or one of voluntary intercourse. Another circumstance, which is perhaps in favour of the story of the appellant that this was a plot so to compromise him with the girl that he would be forced into a marriage with her, is that, whereas the village headman came on the spot soon after 4-30 p.m., the girl was not taken for medical examination until noon next day. His case was that he was ready and willing to marry the girl, and always had been so, provided a dowry was forthcoming, and that it was only after the importunities of the Marikkars had failed that this charge was brought against him. Moreover, evidence had been led by the prosecution that, if a Muslim man and woman were found in such circumstances, the punishment prescribed is a whipping or fine for both, unless it can be shown that the woman was not a consenting party. Punishment can be avoided if the parties marry. It is, therefore, a matter of importance to the woman that she should prove absence of consent. Her anxiety in regard to this might conceivably be shared by her relatives.

It seems to us, in view of all these circumstances, that there must exist a reasonable and substantial amount of doubt as to the guilt of the appellant. This court has, however, repeatedly laid down that, assuming a proper direction by the judge, it is not its function to re-try a case unless it has been shown to the satisfaction of the court that the verdict is unreasonable or that it cannot be supported having regard to the evidence. There is, in our opinion, as we have indicated, a real doubt as to the appellant's guilt. In *Rex vs Isaac Schrager* (6 Cr. App. R. 253) the conviction was quashed because "in all the circumstances it did seem to the court that there was a reasonable and substantial amount of doubt as to the guilt of the appellant. The conviction, therefore, could not stand." Again, in *Rex vs John Reuben Parker* (6 Cr. App. R. 285) where in the opinion of the Lord Chief Justice "there was evidence before the jury upon which they could act" there was held to be sufficient doubt as to the accuracy of the verdict for the court to give the appellant the benefit of it, and the conviction was quashed. Even in the light of these authorities we are doubtful if we should be disposed to interfere in the present case were it not for one circumstance. The appellant gave evidence on his own behalf and the jury, who seem to have followed the case throughout with great interest, cross-examined him at some length. One question put to him was this:

> "Was it reasonable to let down a girl after you had several acts of intercourse with her — to let her down because you were not getting the dowry?"

It was argued on behalf of the appellant that the question indicates that the jury had formed an opinion unfavourable to the appellant's character and that they were prepared to convict him, not because they were convinced that he had committed the offence, but because, after

hearing his evidence, they regarded him as a young blackguard. Crown Counsel sought to explain the question as an intimation by the jury that they found themselves unable to accept the appellant's story. We were not impressed by that view and we feel it highly probable that the jury had formed the view ascribed to them by counsel for the appellant. To adopt the words of the Lord Chief Justice in setting aside the verdict of the jury in *Rex vs John Alfred Bradley* (4 Cr. App. R. 228) "on the whole we think it safer that the conviction should not be allowed to stand." The appeal is allowed.

Conviction set aside.

Present: De Kretser, J.

AIYER vs YUSOOF

S. C. No. 406—*M. C. Colombo No.* 8724.
Argued on 12th October, 1943.
Decided on 14th October, 1943.

Control of Prices—Meaning of the words "tallow, locally produced."

Held : That the controlled article "tallow, locally produced" means the fat of animals.

H. V. Perera, K. C., with *Shelton de Silva*, for the accused-respondent.
G. E. Chitty, Crown Counsel, for the complainant-appellant.

De Kretser, J.

"Tallow, locally produced," is controlled under the Control of Prices Ordinance at Rs. 30/– per cwt. The accused is charged with having sold tallow at Rs. 120/– a cwt. The magistrate, after recording the evidence of all but two witnesses for the prosecution, one of whom was to speak to the process employed in producing the local material, acquitted the accused on the ground that what had been seized was *fat* and therefore, not a controlled article. He appears to have been influenced by his familiarity with tallow candles and by the evidence that tallow imported from Australia was whiter and less objectionable to the nose. He has not given sufficient consideration to the evidence actually before him and to the meaning to be attached to the word "tallow."

The witness Kriekenbeek makes a substance called "vegetable ghee" and has been doing so for many years. To make it he buys the material which was produced in court and further refines it. He called the substance produced *tallow* and claimed to have been responsible for the price being controlled owing to representations made by him that the butchers were raising the price of it inordinately. A butcher was called and confronted with two receipts he and his daughter had given in which they had described what was bought as *tallow*. He says he put that name down at the request of the customer, who the magistrate finds was Kriekenbeek — that the customer asked for tallow and selected the fat and bought it and that he only heard the word "tallow" after the Control of Prices Ordinance came into force or after the War started; he said he called the substance *harak thel* (that is, cattle fat) and that even if he boiled it more than once he would still call it *harak thel*. He also said it was called *kolloppu* in Tamil and that the fat was boiled because it would become offensive otherwise and as it could not be kept very long.

The magistrate thinks Kriekenbeek had the word "tallow" inserted because he was collecting material to have the price controlled. He therefore infers that Kriekenbeek had used the wrong word. But he forgets that this evidence indicated that Kriekenbeek was seeking to have controlled the very substance that was produced in court. The uncontradicted evidence therefore suggests that it was this substance that was aimed at under the description "tallow, locally produced."

Every witness in the case described the substance produced as tallow. Mr. Merry arranged for the purchase which led to the present case because of representations that tallow was being sold above the controlled price. In fact he had earlier arranged a meeting with the butchers in order to discuss the matter and he said that tallow was the fat of animals slaughtered at the slaughter house and boiled down in a cauldron.

When evidence was first given, a *kanakapulle* employed under the accused was called to speak to P1 on which the substance in question had been sold in six kerosene-oil tins. He described the substance as tallow — that is, if he gave his evidence in English. But if, as is more likely, he gave evidence in Tamil, then the interpreter translated the Tamil word as tallow. What is more the accused had displayed on his table the document P7 in which he stated that the price of "fat" was Rs. 30/- per cwt. using similar expressions both in Tamil and Sinhalese.

Under the Ordinance the prices of controlled goods must be exhibited and here we have therefore a clear indication that the accused considered what the magistrate calls fat to be the substance controlled. There is, therefore, evidence that both popularly and in the trade the substance produced is called tallow. It may not be as refined as the Australian product, which may be more acceptable both to the eyes and to the nose, but nevertheless it is tallow.

According to the Dictionaries — and four have been referred to — the word "tallow" comes from a Germanic root meaning hard or firm and is applied to the less fusible fat of animals between the loin and the kidneys. It is the same substance as suet but while suet is such fat cut up along with the fibrous or membranous matter, tallow has come to mean such fat melted and separated from such membranes. If it were not so separated, putrefaction would set in and the fat could not be kept so long. It would also be more offensive.

The evidence on record indicates that the substances produced in court had been boiled down and collected in tins. The Standard Dictionary says there is an inferior tallow used in making soap which is called "melted stuff" or "rough stuff" or "town tallow." It is not the degree of refinement nor its colour that distinguishes tallow from fat. There may be different varieties of tallow but fat of the nature I have described is tallow. The magistrate was right in calling the substance produced in court fat but appears to be wrong in thinking it was not tallow. It is "tallow, locally produced," is so understood in the trade and is the article controlled by the Regulation.

The acquittal is set aside and the case sent back for the magistrate to proceed with the trial.

Acquittal set aside and sent back.

Present: De Kretser, J.

RANASINGHE vs MACK (Municipal Commissioner, Galle)

In the matter of an Application for a Writ of Mandamus on the Commissioner of the Municipal Council of Galle (439).

Argued on 15th October, 1943.
Decided on 19th October, 1943.

Mandamus—Writ of—Omission to insert double qualification mark of voter—Omission discovered after certification under section 26 of the Colombo Municipal Council (Constitution) Ordinance (Chapter 194)—Failure to apply under section 23—Should mandamus issue.

Where the "enumerators" entrusted with the preparation of lists of voters in a Municipality made an error in preparing such lists and the error was discovered only after the lists were certified as correct and where the law provided a remedy for the rectification of such omissions before such certification,

Held: That no writ of mandamus should issue inasmuch as
(*a*) the Commissioner had not omitted to perform any duty.
(*b*) another remedy was available for obtaining relief.

Cases referred to: *The King vs The Revising Barrister for the Borough of Hanley* (3 K.B.D. 1912, p. 518)
Re The Town Clerk of Eastbourne Ex Parte Keay (66 Law Times 323)

J. E. M. Obeyesekere with *U. A. Jayasundere*, for the appellant.
E. F. N. Gratiaen, for the respondent.

De Kretser, J.

Mr. Obeyesekere intimated that he would not contest the statements in the affidavit of the respondent and when later he sought to reconcile that affidavit with applicant's I told him they were irreconcilable and invited him to call evidence. He did not accept the suggestion and argued differently. The facts appearing from the two affidavits are as follows:

Certain "enumerators" were entrusted with the task of preparing the preliminary lists. They used what the respondent calls "filed books" and the applicant "rough books." The enumerator concerned put down the applicant's name in his rough list with the double qualification mark which indicated that he was entitled to be both a voter and a candidate. The applicant states that he saw to this being done. When, however, the enumerator made his fair copy and sent it in he omitted the mark from the applicant's name as well as from others, as was discovered later. The lists were duly exhibited for inspection after due notification. The applicant failed to make a claim to have his name included in the list as qualified to be a candidate and the list was duly certified. Then, on the 26th of August he saw the respondent and asked to be allowed to inspect the list as he intended being a candidate for election. The omission was then discovered and the respondent being satisfied that the applicant was entitled to it, put down the double qualification mark against his name in his presence. Later the same day the respondent decided that he had no power to alter the list (and it is admitted he had none) and erased the mark he had inserted and the same day wrote to the applicant the letter A. The respondent's affidavit and the letter make it quite plain that the mark did not exist on the list and the enumerator when called upon to explain, admitted the omission. The applicant's affidavit to the effect that he did inspect the list at the proper time and that the mark then existed and that he later learned that it had been erased by some one and that when he saw the respondent the latter refused to "reinsert" the mark as he had no power to do so are quite incorrect and unworthy of one who aspires to be a Municipal Councillor. The petitioner took no steps till the 22nd of September, when he signed the petition which was received in the Registry on the 28th of September and as a result rule *nisi* issued only on the 29th of September.

Section 26 of the Ordinance prescribes the 7th of October as the latest day on which the lists should be certified and enacts that the list when so certified shall be "final and conclusive." At the present date therefore the lists are final and conclusive.

Mr. Obeyesekere admitted that the applicant's failure to avail himself of the remedy provided by section 23 of the Ordinance was a serious objection. He pleaded that the applicant was entitled to believe that the enumerator would do his duty in a proper manner. That, however, is no answer to his own omission to be vigilant. He had no right to assume that the enumerator may not have changed his mind for good reason or that the respondent may not have acted under the provisions of section 21 (*e*) before publishing the list.

Mr. Obeyesekere sought to find some means of escape in the ruling made in *The King vs The Revising Barrister for the Borough of Hanley* (3 K.B.D. 1912, p. 518) but the facts of that case are quite different. In that case the Revising Barrister heard certain objections and ordered that certain names should be expunged, but being unable to write owing to an injury to his hand he had employed a clerk and the latter had failed to strike out the names. As a result the Revising Barrister handed in to the Town Clerk an incorrect list, not having verified the accuracy of it as he should have done. As Channell, J. said he performed the judicial part of his work but omitted by inadvertence to perform the mechanical part. In these circumstances the court issued a writ of mandamus as there was no other remedy provided.

In the present case a remedy was provided. Unlike the applicant in that case, the applicant in this case has neglected to do what the law allowed and expected him to do. The respondent, unlike the Revising Barrister in that case, has not omitted to perform any duty imposed on him by the Ordinance, and the facts closely resemble those in *Re The Town Clerk of Eastbourne Ex Parte Keay* (66 Law Times 323) where the overseers made a mistake in preparing the list and the mistake was discovered only after the list had been published after revision. It was there held that no mandamus should issue as the Town Clerk had done his duty. The judges in the Hanley case approved of that ruling.

The applicant therefore fails, and his affidavit is not only belated but tainted with falsehood. The rule *nisi* is discharged. The applicant will pay the respondent's costs.

I note that the enumerator's explanation does not contain a word of regret. On the contrary he draws attention to section 23 and says that that section exists in order that omissions such as these may be rectified. The omissions are so many as to suggest not merely utter incompetence but corruption. Omissions like these seriously affect civic rights and while the ultimate responsibility is on the voter that does not justify the employment of incompetent persons in preparing the lists.

Rule discharged.

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

ISMAIL & ANOTHER vs SILVA & ANOTHER

S. C. No. 131—*D. C. Tangalle No.* 4787.
Argued on 22nd October, 1943.
Decided on 28th October, 1943.

Deed—Description of boundaries of land conveyed—Discrepancy in description—How construed.

Held : That the general description of the boundaries of the corpus of a land conveyed by deed does not enlarge the effect of the prior description.

Cases referred to : *Francis vs Hayward* (1882–22 Ch. D. 177)
Mellor vs Walmesley (1905–2 Ch. 164)

H. V. Perera, K.C., with *E. B. Wickramanayake* and *H. W. Jayawardene*, for the defendants-appellants.

N. E. Weerasooriya, K.C., with *Vernon Wijetunge*, for the plaintiffs-respondents.

HOWARD, C.J.

This is an appeal by the defendants from a judgment of the District Judge, Tangalle, entering judgment for the plaintiffs for declaration of title to a certain plot of land marked C in plan X filed of record. The question that arises for decision is as to the exact land sold upon a deed of conveyance dated the 24th March 1941 (marked D1) whereby the plaintiffs conveyed to the defendants the premises described and set forth in the schedule. The schedule is worded as follows :

> "All that the soil and plantation of divided allotment of land seventy and a half feet in length and thirty feet in width together with the entire boutique comprising of 3 boutique rooms built by me the said first named vendor and standing thereon of the entire land called the northern two third portion of the land called Illukketiyamulla depicted in T. P. 69969 situated at Walasmulla in West Giruwa Pattu in Hambantota District S. P. and bounded on the North by Illukketiyamulla and Gansabawa Road, East by Minor Road, South by the southern portion of the same land and West by T.P. 69874 containing in extent two roods and 27 perches being property held and possessed by me the said first named vendor by right of purchase upon transfer deed 8786 dated 18th July 1930 attested by D. D. S. Mutucumarana N.P. and by me the said second named vendor by right of purchase upon transfer deed 6258 dated 5th September 1919 attested by Notary aforesaid and which said portion is bounded on the North by a portion of the northern two-third portion of the land called Illukketiyamulla, East by High Road leading from Walasmulla to Katuwana, South by southern one-third portion of the land called Illukketiyamulla and West by T.P. 69874."

The plaintiffs were the owners of lots A, B, C and D as depicted in plan marked X. Their contention that only lot D passed by virtue of D1 to the defendants was accepted by the learned judge. In coming to that conclusion the latter held that as the specific dimensions of the premises sold were given at the beginning of the schedule those specific dimensions must control the description given at the end of the schedule. He also held that, although the western boundary given as west by T.P. 69874 would include lot C those words must be treated as a false description. The exact dimensions of the premises conveyed appear at the beginning of the schedule. Those are the dimensions of lot D. These dimensions are not an addition to something which has already been described, but are part and parcel of the description. According to the evidence of the notary who drafted D1 and gave evidence on behalf of the defendants, those dimensions 70½ feet by 30 feet were read out to the purchasers. Moreover as lot C included a well it seems hardly likely that it would be included in the conveyance. In my opinion the learned judge was right in holding that the subsequent description by boundaries was controlled by the earlier description in which the exact dimensions of the premises sold were specified. In this connection I would refer to *Francis vs Hayward* (1882–22 Ch. D. 177). At page 181 Jessel, M.R. stated as follows :

> "When after a description of a property it is stated that on one side it is bounded by a certain other property and it appears that it is not so bounded for every inch, there is an inaccuracy in the statement of the boundary but this is not enough to exclude what is not so bounded if it appears from the evidence to have been part of the property dealt with, and the previous description of that property is sufficient to include it."

In that case it was a question of the boundaries reducing the area that passed under the general description. It was held that the general description of the boundaries does not cut down the effect of the prior description. In my opinion the converse proposition that the general

description of the boundaries does not enlarge the effect of the prior description also applies. It was also held in *Mellor vs Walmesley* (1905–2 Ch. 164) that where in a conveyance of land the exact dimensions were stated on the parcels and marked on a plan and stated to be though not in fact "bounded on the west by the seashore" the words in inverted commas must be rejected.

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

Keuneman, J.

I agree. *Appeal dismissed.*

Present: Hearne, J.

SOMASUNDARAM vs UKKU & OTHERS

S. C. No. 50—C. R. Matale No. 5567.
Argued on 5th August, 1943.
Decided on 23rd August, 1943.

Civil Procedure Code section 480—Decree entered against unrepresented minor—Proceedings to have decree set aside after attaining majority.

Held : (i) That a minor, who was unrepresented in an action against him, may, even after attaining majority, proceed under section 480 of the Civil Procedure Code to have the decree entered against him, when a minor, set aside.

(ii) That section 480 applies not only to "orders" but also to decrees.

Cases referred to : *Khiarajmul vs Daim* (1905–32 Cal. 296 at 312)
Muttu Menika vs Muttu Menika (1915–18 N.L.R. 510)
Rashid-Un-Nisa vs Muhammad Ismail Khan (31 All. 572)
Rupesinghe vs Fernando (1918–20 N.L.R. 345)
Thiagarajah vs Balasooriya et al (14 C.L.W. 91)
A.I.R. 1934 Madras 386

J. E. M. Obeyesekere with *H. W. Thambiah*, for the plaintiff-appellant.
V. F. Gunaratne with *S. R. Wijetileke*, for the defendants-respondents.

Hearne, J.

The plaintiff sued three defendants on a promissory note for the recovery of Rs. 300/– and judgment was entered by default on 19th September, 1939. Thereafter execution was applied for and writ was issued. On 11th September, 1942, subsequent to the issue of the writ, the 3rd defendant applied to have all proceedings against her set aside on the ground that she was a minor on the date of judgment. Her application which was made seven months after she had attained majority was allowed and the plaintiff now appeals.

It was admitted for the purpose of this appeal that on the date judgment was entered the 3rd defendant was a minor and that no steps had been taken to have a *guardian ad litem* appointed. In these circumstances according to one view of the matter all the proceedings in so far as they affected the 3rd defendant are a nullity. "If one who was a minor at the time of the suit"—I quote from the judgment of the court in A.I.R. 1934 Madras 386—"is sought to be made liable on a decree passed in that suit, it is open to him to plead that that decree was a nullity and might be disregarded by him without instituting a suit to set aside that decree. This principle has been clearly laid down by the Privy Council in *Khiarajmul vs Daim* (1905–32 Cal. 296 at 312). If the present defendant was really no party to the former suit, it goes without saying that the decree passed in that suit would be a nullity as against him and, therefore, would be unenforceable."

A different view, however, has been taken by this court. In *Muttu Menika vs Muttu Menika* (1915–18 N.L.R. 510) it was held that a judgment against a minor who is unrepresented by a guardian "is at most an irregularity and that the judgment will stand as a valid adjudication until reversed....."

What steps should a person take who seeks to get rid of a judgment and decree passed at a time when he was a minor and in a suit in which he was not represented ? If he is to be regarded as being "in the proper sense of the term" *not* a party — and it was so held by the Privy Council in *Rashid-Un-Nisa vs Muhammad Ismail Khan* (31 All. 572) — he could file a separate suit as was done in that case. But if he was a party and there is a valid adjudication against him until

reversed, he would at least be entitled to intervene for the purpose of effecting a reversal of adjudication. *Muttu Menika vs Muttu Menika* (*supra*) indicates that he should proceed under section 480 of the Civil Procedure Code or apply for *restitutio in integrum*. *Rupesinghe vs Fernando* (1918–20 N.L.R. 345) says that section 480 of the Civil Procedure Code "should be availed of" and in *Thiagarajah vs Balasooriya et al* (14 C.L.W. 91), it was held that no relief would be given by way of *restitutio* in a case in which an application under section 480 provides an equally effective remedy.

It is clear that having regard to the particular view taken by this court the ordinary remedy has been held to be an application under section 480. It was under this section that the 3rd defendant moved. But counsel for the appellant has argued that the section is inapplicable at any rate in so far as the setting aside of a decree is concerned for the reason that while it enacts that every order made "..... may be discharged," an order means "the formal expression of any decision which is *not* a decree." A decree therefore cannot be discharged. This argument appears to run counter to the decisions of this court which bind me and all I need say even if those decisions refer to judgments and not to decrees, is this: A decree — and it is the inviolability of a decree, if section 480 is employed that has been urged — merely gives formal expression to the order contained in the judgment (section 188) and if that order is set aside the appellant may still retain the empty shell of a decree for what it is worth to him!

It was also argued that a minor may move under section 480 while he is still a minor and referring to 14 C.L.W. 91 a lunatic may do the same while he is still a lunatic, but a minor must resort to *restitutio* or at any rate, is precluded from moving under section 480 once, as in the present case he has attained majority. The same position, it is argued, applies to a lunatic after he has regained his sanity and has ceased to be a lunatic. The authorities which I have cited deal with the problem in general terms and draw no distinction between a minor and an erstwhile minor seeking relief in respect of a judgment passed against him while he was still a minor.

The appeal is dismissed with costs.

Appeal dismissed.

Present: WIJEYEWARDENE, J.

WIJESINGHE vs MOHOTTY & ANOTHER

S. C. No. 132—*C. R. Teldeniya No.* 240.
Argued on 30th September, 1943.
Decided on 5th October, 1943.

Kandyan law—Donation with the object of getting services and work performed when any festivity or mourning shall occur in connection with either of the donors—Services performed partly—Absence of a clause renouncing power to revoke—Can such deed be revoked.

The plaintiff and another, both Kandyans, gifted a land to defendant in 1923 "with the object of getting services and work performed duly and faithfully on the occasion when any festivity or mourning shall occur in connection with either of the donors" and a brother of the plaintiff. The defendant performed services for nearly twenty years during which period one of the donors died. The plaintiff revoked the deed of gift in 1942 and filed this action claiming the land against the defendant. The learned Commissioner dismissed the action holding that "it would be most inequitable to allow revocation of the deed after twenty years."

Held: (i) That the plaintiff's revocation of the deed of gift was valid inasmuch as the donors' intention to renounce the power of revocation could not be gathered therefrom.

(ii) That it is not inequitable to permit revocation as the donee was in possession of the land during the time he was rendering services and is also entitled to make a claim for improvements effected by him.

Cases referred to: *Bolonga vs Punchi Mahatmaya* (Ramanathan 1863–68 p. 195)
D. C. Kandy 22404 (Austin p. 140)

E. B. Wickramanayake, for the plaintiff-appellant.
S. A. Marikar, for the defendant-respondent.

WIJEYEWARDENE, J.

By deed No. 6184 of October 4th 1923 one Kiri Banda Veda Mahatmaya donated a land to his son, the plaintiff. By deed P1 of October 10th 1923, the plaintiff and Kiri Band Veda Mahatmaya gifted the land to the defendant, " with the object of getting services and work performed duly and faithfully on the occasion when any festivity or mourning shall occur in connection with either of the donors " or Loku Banda, a brother of the plaintiff. Kiri Banda Veda Mahatmaya died some years later, and the plaintiff by deed P2 of July 16th 1942, revoked the deed of gift P1. The plaintiff filed the action claiming the land against the defendants.

At the trial the first defendant gave evidence and stated that he entered into the possession of the land under the deed of gift and rendered as occasion arose such services as he had to perform under the deed. The Commissioner of Requests accepted the evidence of the first defendant and held against the plaintiff as he thought that in the circumstances of this case, it would be " most inequitable to allow revocation of the deed after 20 years."

The deed of gift P1 contains no express renunciation of the power of revocation. Nor is it possible to gather an intention to renounce that power from the covenants in the deed. Here then we have a deed of gift for services to be rendered. The donees have performed up to date the services contracted for, but there are further services to be performed by them in future. Could the deed be revoked ?

As a general rule, Kandyan deeds of gift are revocable, and before a particular deed is held to be an exception to that rule, it should be shown that the circumstances constituting non-revocability appear most clearly on the face of the deed itself, *Bolonga vs Punchi Mahatmaya* (Ramanathan (1863–68) p. 195). Armour mentions as an exception to this rule a gift made in consideration of payment of debts and for future assistance and support and containing a clause reserving the right to revoke. Now P1 cannot come under that class of gift as there is no renunciation of the right of revocation. In D. C. Kandy 22404 (Austin p. 140) the Supreme Court held a deed to be revocable when the donor transferred a land to another in consideration of assistance to be rendered even after such assistance had been rendered. It was held further in that case that, if the donee had spent any money, he could make a claim for it, " the assumption being that the gifted land left him harmless during the time he rendered assistance." I do not think it permissible to let considerations of natural equity override the Kandyan law on the subject. Moreover there does not appear to be anything inequitable in permitting revocation as the donee was in possession of the land during the time he was rendering services and is also entitled to make a claim for improvements effected by him as set out in section 6 of Ordinance No. 39 of 1938.

I hold that the plaintiff's revocation of P1 is valid. I set aside the judgment of the lower court and hold the plaintiff entitled to the land. I send the case back for the Commissioner of Requests to assess the compensation, if any, lawfully due to the defendants for the improvements alleged to have been effected by them.

The appellant will have costs of appeal and costs of the last trial date in the lower court. All other costs will be in the discretion of the court.

Judgment set aside.

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

KANDIAH & ANOTHER vs THAMBIPILLAI

S. C. No. 288 (*F*)—*D. C. Batticaloa No.* 126.
Argued on 27th October, 1943.
Decided on 9th November, 1943.

Contract—Promises based on legal and illegal consideration—Severability—Principles governing the doctrine of.

1st and 2nd plaintiffs and the defendant, (an uncle of the 2nd plaintiff) entered into a contract the material clauses of which were as follows :

(1) That the first plaintiff should marry the second plaintiff within 6 months of the execution of the agreement.

(2) That the defendant in consideration of the said marriage should give in dowry to the plaintiffs the premises specified therein and Rs. 300/– on the date of their marriage and Rs. 200/– to the first plaintiff on the execution of the said agreement.

(3) In the event of the defendant failing to give the second plaintiff in marriage to the first plaintiff, the defendant should pay to the first plaintiff the sum of Rs. 500/– as and by way of liquidated damages.

(4) In the event of the first plaintiff failing, refusing or neglecting to marry the second plaintiff the first plaintiff should pay to the defendant the sum of Rs. 500/– as and by way of liquidated damages.

The plaintiffs, having been duly married, sued the defendant claiming the transfer of the land specified in clause (2) together with the sum of Rs. 300/– referred to therein less Rs. 25/– already paid.

On a preliminary issue the learned District Judge held that clauses (3) and (4) are illegal and contrary to public policy and the various clauses of the agreement were interdependent and indivisible, and dismissed the action with costs.

Held : (i) That the promise to transfer the land and to pay a sum of Rs. 300/– contained in clause (2) is a separate promise by the defendant based on valid consideration and is independent of the performance of the promises in clauses (3) and (4).

Cases referred to : *De Silva vs Juan Appu* (29 N.L.R. 417)
Bastiam pillai vs Rasalingam (38 N.L.R. 89)
Pickering vs Ilfracombe Railway (L.R. 3 C.P. 250)
Lound vs Grimwade (39 Ch. D. 605)
Kearney vs Whitehaven Colliery Co. (1893–1 Q.B. 700)
Attwood vs Lamont (1920–3 K.B. 571)
Putsman vs Taylor (1927–1 K.B. 637)

H. V. Perera, K.C., with *A. S. Ponnambalam* and *R. A. Kannangara*, for the plaintiffs.

N. Nadarajah, K.C., with *E. B. Wickramanayake* and *G. Thomas*, for the defendant-respondent.

HOWARD, C.J.

In this case the plaintiffs appeal from the decision of the District Judge of Batticaloa dismissing their action with costs. The plaintiffs are husband and wife and claim from the defendant, who is the uncle of the second plaintiff, by virtue of an agreement, whereby the defendant undertook to transfer to the plaintiffs a certain piece of land and also to pay them a sum of Rs. 300/– in the event of the first plaintiff marrying the second plaintiff. The plaintiffs who were duly married averred that the defendant had paid a sum of Rs. 200/– on the execution of the said agreement and a further sum of Rs. 25/– out of the said sum of Rs. 300/–. The plaintiffs, therefore, claimed the transfer of land mentioned in the agreement and the balance due out of the said sum of Rs. 300/– namely Rs. 275/–. The learned judge decided as a preliminary issue that the agreement was illegal, contrary to public policy and hence unenforceable at law.

The agreement contained the following clauses:

(1) That the first plaintiff should marry the second plaintiff within 6 months of the execution of the agreement.

(2) That the defendant in consideration of the said marriage should give in dowry to the plaintiffs the premises specified therein and Rs. 300/– on the date of their marriage and Rs. 200/– to the first plaintiff on the execution of the said agreement.

(3) In the event of the defendant failing to give the second plaintiff in marriage to the first plaintiff the defendant should pay to the first plaintiff the sum of Rs. 500/– as and by way of liquidated damages.

(4) In the event of the first plaintiff failing, refusing or neglecting to marry the second plaintiff, the first plaintiff should pay to the defendant the sum of Rs. 500/– as and by way of liquidated damages.

The learned judge held that clauses (3) and (4) are illegal and contrary to public policy and that the various clauses of the agreement were so interdependent that he was not prepared to hold that it was divisible. In *De Silva vs Juan Appu* (29 N.L.R. 417) it was held by Schneider, J. and Garvin J. (Dalton, J. *dissentiente*) that a contract by which a brother promises to give his minor sister in marriage before a specified date and undertakes absolutely that, if his promise remains unfulfilled by that date, he will pay a sum of money, is invalid. This case was followed by Abrahams, C.J. and Fernando, A.J. in *Bastiampillai vs Rasalingam* (38 N.L.R. 89) where it was held that a promissory note granted in consideration of a promise by a father to give his daughter in marriage to the maker of the note is invalid for illegality of consideration. In this case it was argued that as the father promised to give a dowry there was legal consideration however, that, if any part of the consideration for a promise is illegal, that promise cannot be enforced. There can be no severance of the legal from the illegal part of the consideration. No doubt on the authority of the two cases I have cited a promise by a person to pay a sum of money in the event of his failing to give his niece in marriage is opposed to public policy and a claim based on it is unenforceable. Clause (3) was, therefore, invalid. I do not, however, think that the same considerations

apply to clause (4). It is not necessary to decide on the invalidity of either clauses (3) or (4), if the agreement is divisible. The rule, as laid down in *Pickering vs Ilfracombe Railway* (L.R. 3 C.P. 250) is set out in the 18th Edition of Anson on Contract at p. 240 as follows :

> " Where you cannot sever the illegal from the legal part of a covenant the contract is altogether void, but where you can sever them, whether the illegality be created by statute or common law, you may reject the bad part and retain the good."

It is apparent from the author's comments that the application of the rule is a matter of considerable difficulty. There is, however, no doubt that if any part of the consideration for a promise is illegal, that promise cannot be enforced. As Abrahams, C.J. said in *Bastiampillai vs Rasalingam* (*supra*) there can be no severance of the legal from the illegal part of the consideration. In this connection I would refer to *Lound vs Grimwade* (39 Ch. D. 605). The difficulty arises when a legal consideration supports promises some of which are legal and others illegal. In Pigot's case (77 E.R. 1179) we find the rule set out as follows :

> " It is unanimously agreed in 14 H. 8. 25, 26 &c. that if some of the covenants of an indenture or of the conditions endorsed upon a bond, are against law, and some good and lawful ; that in this case the covenants or conditions which are against the law are void *ab initio* and the others stand good."

This rule was followed in the case of *Kearney vs Whitehaven Colliery Co.* (1893–1 Q.B. 700) where the following passage occurs on page 711 from the judgment of Esher, M.R. :

> " If the consideration or any part of it, is illegal then every promise contained in the agreement becomes illegal also because in such a case every part of the consideration is consideration for the promise. But suppose there is nothing illegal in the consideration ; then upon that valid consideration may be several promises or liabilities. If any one of those be in itself illegal then it cannot stand, not because the consideration becomes illegal, but because the promise itself is illegal. It is a bad promise which cannot be supported by the consideration. But the other promises which are good and legal in themselves remain, and can be supported by the good consideration."

In the same case Lopes, L.J. said as follows on page 713 :

> " But where there is no illegality in the consideration and some of the provisions are legal and others illegal the illegality of those which are bad does not communicate itself to or contaminate those which are good, unless they are inseparable from and dependent upon one another."

The difficulties with regard to the rules that govern the doctrine of severance is apparent from a perusal of the judgments of the Court of Appeal in *Attwood vs Lamont* (1920–3 K.B. 571). The majority of the judges in this case, Younger, J. and Atkin, J. laid down the following principles at page 593 ;

> " The doctrine of severance has not, I think gone further than to make it permissible in a case where the covenant is not really a single covenant but is in effect a combination of several distinct covenants. In that case and where the severance can be carried out without the addition or alteration of a word it is permissible. But in that case only."

In later cases with respect of covenants in restraint of trade, the test suggested seems to be whether the parties have themselves made a clear severance in the contract. In this connection we have been referred to the case of *Putsman vs Taylor* (1927–1 K.B. 637). The headnote in this case is as follows :

> " A promise may be enforceable notwithstanding that the promisor has in the same document made promises, supported by the same consideration, which are void provided that the severed parts are independent and that not the kind but only the extent of the promisor's obligations will be changed by the partial enforcement. Agreements in restraint of trade form no exception to this rule.
>
> The defendant was employed by the plaintiff, a tailor carrying on business at three places. A, B and C in Birmingham, as manager and cutter. The defendant in consideration of the employment, promised that on the determination of his agreement he would not for five years (1) set up as a tailor himself (2) enter into the employment of a named neighbouring trade rival (3) be employed in any capacity with any tailor carrying on business in A, B or C.
>
> Held, that the promise not to take service with any tailor in A could be severed from the other promises and enforced in that it did not affect the original effect and meaning of the agreement — namely, to protect the plaintiff against an improper use by the defendant of the knowledge which he had acquired in the plaintiff's service — but only limited the scope of its operation."

The following passage appears from the judgment of Salter, J. on the doctrine of severability :

> " The doctrine of severability is not confined to contracts of service, not to contracts in restraint of trade. If a promisee claims the enforcement of a promise and the promise is a valid promise and supported by consideration the court will enforce the promise, notwithstanding the fact that the promisor has made other promises supported by the same consideration which are void and has included the valid and invalid promises in one document. But if the promise sought to be enforced is invalid as being in undue restraint of trade or for any other reason the court will not invent a valid promise by the deletion, alteration, or addition of words and thus enforce a promise which the promisor might well have made but did not make. The promise to be enforceable must be on the face of the document a separate promise, a separate compact, the subject of separate consideration and accord, the performance of which is independent of the performance of any other promises which the promisor may have made. If the promise is a separate promise and valid the court will enforce it. Whether it is separate or not, depends on the language of the document. Severance as it seems to me is the act of the parties not of the court."

It only remains to apply to the facts of the present case the principles formulated in the cases I have cited. The consideration for the defendant's promise on which he is sued is the first plaintiff's promise to marry the second plaintiff. This consideration was legal. Applying the tests referred to by Salter, J. in *Putsman vs Taylor* (*supra*) I am of opinion that the defendant has made promises which are obviously separate. If the third and fourth clauses are ignored the change does not give to the agreement a meaning and object different in kind, but only in extent. The severance does not alter the original meaning and effect of the agreement which was to ensure to the plaintiffs a dowry on marriage. It merely limits the extent of the agreement. The promise to transfer the land and to pay a sum of Rs. 300/- contained in clause (2) is on the face of the document a separate promise by the defendant. To use the words of Younger, L.J. in *Attwood vs Lamont* the whole agreement is not a single covenant but a combination of several distinct covenants. Clauses (1) and (2) together form a compact and accord separate from clauses (3) and (4). The performance of this separate compact is independent of the performance of the compact in clauses (3) and (4). Being a separate promise and valid the court will enforce clause (2).

In these circumstances the order of the learned District Judge must be set aside and the case is remitted to him for further trial. The plaintiffs are awarded costs in this court and the court below.

KEUNEMAN, J.

I agree. *Set aside and sent back.*

Present: DE KRETSER, J.

WIJESEKERE vs THE A. G. A., MATARA

In the matter of an application under section 42, Chapter 1 of the Legislative Enactments and for a Writ of Mandamus (445).

Argued on 12th October, 1943.

Decided on 15th & 20th October, 1943.

Mandamus—Urban Councils Ordinance No. 61 of 1939 section 7 (2), and 9 (1), (2)—Can a mandate issue under section 42 of the Courts Ordinance to compel the Government Agent to exhibit the notice required to be exhibited by section 9 (2).

Held : (i) That once the Government Agent informs the public that he proposes to commence the preparation of the list of persons possessing the qualifications specified in sections 7 and 8 of Ordinance No. 6 of 1939 on a specified date, he is not free to alter that date.

(ii) That the Government Agent's functions under section 9 (1) of Ordinance No. 61 of 1939 are ministerial and not judicial.

(iii) That the Government Agent does not exercise judicial functions until the stage prescribed by section 9 (2) of Ordinance No. 61 of 1939 is reached.

(iv) That the Supreme Court cannot revise its judgment on the ground that it has been given *per incuriam* except for the purpose of correcting some clerical or typing error or in a case in which a judgment has been based *per incuriam* on a repealed enactment.

Cases referred to : *Dankotuwa Estate Co., Ltd. vs Tea Controller* (19 C.L.W. p. 41)
De Silva vs De Silva (21 C.L.W. p. 41)

H. V. Perera, K.C., with *Cyril E. S. Perera*, for the petitioner.
Crossette Tambyah, Crown Counsel, for the respondent.

DE KRETSER, J.

This is an application for a *Mandamus* on the Assistant Government Agent, Matara and arises in the following circumstances: By section 7 of the Urban Councils Ordinance No. 61/1939 the qualification of voters is fixed and that qualification must exist "on the date of the commencement of the preparation" of the list of voters which section 9 requires to be prepared. No person is qualified to vote unless his name appears in such list. The date on which the preparation is commenced is, one therefore, of the utmost importance and the list prepared confers or takes away legal rights on or from possible voters. It would be more satisfactory if such an important date were definitely fixed by the Ordinance itself, but though it is not so

fixed, it is a date of which the public ought to be aware and necessarily must be aware for such a list can hardly be prepared in secrecy or in the privacy of some office.

The Ordinance contemplates that the preparation of such a list will have a commencement and that it will not be ended as soon as it is begun. No provision is made in the Ordinance for any notice to be given to the public of this important date but the Government Agent who is a responsible officer is presumably expected to do things in a fair and proper manner.

The respondent in this case did publish a notice in the Government Gazette of the 12th March 1943 notifying "for general information that the preparation of the electoral rolls for the forthcoming Matara Urban Council Elections 1943 will be commenced on April 12th 1943." Whether any further notices were posted up or not is not known but it is admitted by Crown Counsel appearing for him that the respondent caused instructions to be sent to the Vidane Aratchi of Matara some time before the 12th of April ordering him to get the headman within his *peruwa* to start the making of the electoral lists and that the Vidane Aratchi caused a notice to be published by beat of tom-tom on the 10th and 11th April, 1943, that the preparation of lists of qualified voters would commence on the 12th April. Accordingly the lists were prepared by the headmen. It is further admitted that it came to the notice of the respondent thereafter that only a comparatively small number of voters would be entitled to vote, the others being disqualified by reason of their not having paid all rates and taxes due from them by the 12th April.

On this statement of facts it would appear that however unfortunate the consequences may be, it was the respondent's plain duty to proceed in the manner indicated in the Ordinance. I was informed that in two other Urban Councils the same situation had arisen, and on appeal to the authorities remedial legislation had followed with regard to those Councils. To judge by the affidavit and from statements of counsel, the respondent seems to have thought he could deal with the situation himself. What he did was by a fresh notification in the Gazette, to cancel the previous notification and to fix the 15th of June as the date on which the preparation of the electoral list would be commenced. The later list was dealt with, and some persons seem to have objected to the inclusion of fresh names on the ground that the proper date to be considered was the 12th April. The proceedings are not before me, but I understand from Crown Counsel that the respondent ruled that he was justified in taking the course he did, and that the fresh names were properly on the list. Crown Counsel suggested that as no *Mandamus* would lie if the respondent had exercised judicial functions, therefore no *Mandamus* should issue. In my opinion the Government Agent does not exercise judicial functions until the stage indicated in section 9 (2) is reached. When he causes a list to be prepared under section 9 (1) he is acting as the administrative officer in charge and is performing purely ministerial duties. He gave instructions to his headmen, who presumably were told what they had to do, and, who, no doubt, would have with them the list already in existence and would proceed to revise it. They would ascertain whether the candidates possessed the qualifications mentioned in section 7 and were much better qualified to do that in the first instance than the Government Agent himself.

Crown Counsel next submitted that no *Mandamus* would lie where the Ordinance itself provided a sufficient remedy, and his position was that the remedy lay by way of objection under section 9 (2) and that such objection had in fact been taken and dealt with.

Section 9 assumes that the list has been properly prepared and that such list contains the names of persons possessing the qualifications specified in section 7. For such list to be in order, therefore, the date when a commencement was made with the preparation of the list is all important. Section 9 (2) contemplates objections to a list which has been prepared in terms of the Ordinance. I do not think, therefore, the second objection is sound.

His third objection was that section 9 (1) requires the Government Agent to prepare the list and that during the stage when his agents are collecting the material he is not preparing the list and that he does so only when he applies his mind to the information so gathered. Crown Counsel did not say so but what his objection really amounts to is that the Government Agent must perform the manual task of compiling the list, for quite clearly he cannot have the means of checking the information supplied to him until interested members of the public have made claims or objections. Besides, at what time would he apply his mind ? Would that depend on whether he was well or ill, busy or at leisure, inclined to take up the matter or not ? How would the public know the crucial time at which rights were being established or taken away. It is not only the matter of payment of taxes, but a person who was not of age on a particular day may be of age on another day, and a person

who had not been resident long enough may have his term of residence lengthened, and equally a person who had been resident long enough within the 18 months preceding might find himself disqualified, all these serious consequences depending on when the Government Agent decided to apply his mind to the list. As a matter of fact Crown Counsel's statement amounts to an admission that the respondent did apply his mind to it and because he found that an unfortunate situation would result if he adopted other measures.

Crown Counsel next pointed out that the Ordinance fixes certain dates either expressly or by necessary implication, and argued that with regard to other dates the Government Agent had a discretion. Undoubtedly, he had a discretion as to the date he would fix for the commencement of the preparation of the list, but once he had exercised that discretion certain legal rights flowed from the Ordinance and it was not within his discretion to interfere with the rights or disqualifications so created. Crown Counsel's submission amounts to saying that he could keep on fixing different dates in the exercise of his discretion until a stage was when he could not do so because his list had to be posted for claims and objections not later than three months before the elections. I do not think the Ordinance contemplates that the dates of the commencement of the preparation of the list could be varied in this manner.

In my opinion quite clearly that date was the 12th of April with regard to the particular Urban Council now being dealt with, and the respondent had no right to alter that date. No objection was taken on the ground of delay or of the consequences that might result from the issuing of a *Mandamus* but I put both positions before counsel. It seems to me that neither the delay nor the consequences that may ensue ought to influence the court in the circumstances of this case. To refuse a *Mandamus* will mean that any election held on a list illegally prepared might well have its legality questioned and involve both the Government and candidates and voters in needless inconvenience and expense. The latest day for holding an election is apparently the 15th of December, and it may be that legislation will be required postponing the date of the elections, if no other remedy exists; but that course is preferable to the holding of an election on a list illegally prepared.

I accordingly direct that a mandate do issue on the respondent requiring him to exhibit the list the preparation of which was commenced on the 12th April and to proceed thereon in the manner provided in the Ordinance. I shall make order as to costs after hearing counsel.

De Kretser, J.

This matter was set down for today in order that I may hear counsel on the question of costs, regarding which I thought that it was possible that they may arrive at some agreement. Crown Counsel has nothing to say on the matter of costs and there seems to be no reason why costs should not follow the event. The petitioner will, therefore, be entitled to his costs.

Crown Counsel, however, invites me to reverse my finding on the ground that I have made an error in holding that a Writ of *Mandamus* may issue on this occasion. I have grave doubts as to my power to revise my judgment except it be to correct some clerical or typing error without affecting the substance of the judgment or, perhaps, as Mr. Perera concedes, in a case in which a judgment has proceeded *per incuriam*, for instance, on some enactments which, it was subsequently discovered, had been repealed. It is, no doubt, convenient and advisable to correct an error rather than let it mislead any person, especially a subordinate court, but on the other hand, if such a power were exercised except in the most exceptional circumstances, I think the most embarrassing consequences would result. There would be no limit of time during which the court may not be invited to reverse its findings. On the analogy of the "staircase wit" we should have counsel indulging in staircase arguments. I have heard Crown Counsel on the point he wishes to urge and, far from being convinced that there is an obvious error in my judgment, I am inclined to think that there is none, for at least it appears that there are conflicting *obiter dicta* of this court which in themselves, prove that the error is not so obvious. In fact, if I were inclined to accede to his request, I should have to set this matter for argument before a Fuller Bench, which will lead to delay in a matter in which already too much time had elapsed.

His argument is based on section 42 of the Courts Ordinance and on certain *dicta* in judgments of this court. The first one referred to by him, was the case of An application for a Writ of Prohibition to be directed to the members of a Field General Court Martial (18 N.L.R. p. 334) where the then Full Bench dealing with section 46 which corresponds with section 42 of our present enactment came to the conclusion that the Writ of Prohibition could not issue to the Court Martial in view of the proviso to

section 4 which corresponds to the present section 3. De Sampayo, J. in the course of that judgment drew attention to the fact that section 42 confers "not separate powers, but one power to do several things, which are all mentioned *uno flatu;* namely, to inspect records, issue mandates, and transfer cases." In the same case, Wood Renton, C.J. stated: "In the next place, the use of the word 'person' in that section may find its explanation in the circumstance that a Writ of *Mandamus*, for which also the section provides is issuable to individuals as well as to tribunals." The case is really, therefore, against Crown Counsel's contention.

He also referred me to the case of an application for mandate in the nature of a Writ of *Certiorari* in the case of the *Dankotuwa Estate Co., Ltd. vs Tea Controller* (19 C.L.W. p. 41). That case dealt with an application for a Writ of *Certiorari* which could issue only to a judicial officer. The application concerned a person who was not a judicial officer, and Soertsz, J. after quoting copiously from the English law referred to section 42, and certainly did use expressions which were general enough to cover all the writs mentioned therein, but he was only concerned with the particular type of writ applied for and his interpretation of section 42 with reference to that particular type of writ is, if I may say so with all respect, quite in accordance with my own view. I do not think he ought to be taken to have intended more. He did hold that the rule *ejusdem generis* applied. With all due respect, I venture to disagree with him. To begin with, that rule must give way to a more urgent rule which insists on the object of the legislature being first given effect to. It is a rule that may have been applied to the section if it were dealing with only one type of writ, but section 42 deals with a variety of writs. I do not think the judgment in the matter of an application for a Writ of *Certiorari* reported in 23 C.L.W. at page 41, compels me to come to another conclusion. The Chief Justice was there rather dealing with the expression "tribunal" and he came to the conclusion that tribunal meant an inferior court and not the Supreme Court.

In *De Silva vs De Silva* (21 C.L.W. page 41) which was an application for a Writ of *Quo Warranto*, Wijeyewardene, J. doubted the correctness of the interpretation put on the word "other person." A Writ of *Quo Warranto* does not issue to a person acting judicially but is used to question the validity of an election, for instance. In such a case, it is the private person who is affected and against him the writ goes. In the case of a Writ of Prohibition the writ may go against a judge or a party to a suit. If one applied the rule *ejusdem generis*, one would be driven to the conclusion that the legislature had made useless provision for cases which would never arise. It seems to me that section 42 is drafted compendiously, and was intended to give the fullest powers to this court and not to limit its powers. The writs mentioned were writs known to the English law, and we have hitherto gone to that law for direction and guidance. The section seems in the first part, to give this court (1) authority to inspect and examine the records of any court and (2) to grant and issue according to law, mandates in the nature of Writ of *Mandamus*, *Quo Warranto*, *Certiorari*, *Procedento*, and Prohibition. What did the Ordinance mean by the phrase "according to law"? It must only mean in the circumstances the English law; that means that the writs would issue in the circumstances and under the conditions known to the English law. These would include the persons against whom the writs would issue. The section might well have stopped at the word "prohibition," and the mere fact that it does enumerate certain persons need not force one to the conclusion either that there has been an alteration in the law or that the provision is nugatory. This court is empowered to grant and issue *Mandamus* according to law; against whom it would issue would be governed by the English law and I think the expression "other person or tribunal" was advisedly used to catch up all the different persons to whom the various writs might apply according to the circumstances in each case prescribed by law. Crown Counsel's argument is based on the statement in my judgment that the Assistant Government Agent at a certain stage was acting administratively. That statement was made with reference to the particular argument raised namely that he was acting on a judicial capacity and had already pronounced his judgment after hearing certain parties and that therefore this court should not allow the writ which would in effect, reverse his judgment declared by section 9 (2) to be final and conclusive. When a judicial officer makes an error in his judgment after considering the matters urged before him then clearly a Writ of *Mandamus* will not lie. But the judicial officer is not always giving judgments. He is quite frequently acting administratively and may sometimes be said to be acting even mechanically. The distinction was well brought out by Channel, J. in the case of Hanley Election (3 Queen's Bench Division 518) which I had occasion to refer to only yesterday with regard to another application. In that particular case

the Revising Barrister, having acted judicially had failed to perform what Channel, J. called "the mechanical part of his duty" namely, to see that the final list conformed with his judgment. In the present case it is not clear that the Assistant Government Agent was not acting in a judicial capacity even at the stage at which he orders the preparation of the list. The Government Agent comes into the picture only for the purpose of preparing and settling the electoral list and perhaps for certain other limited purposes. To settle that list he has to act judicially and to act judicially he must have the list before him, much in the same way as any judge has before him the cause list. Each name in the list before him may potentially be objected to and he may then have to exercise his judgment. It is possible that there may be no objections whatever in which case he may act almost mechanically in certifying the list; but merely because he acts administratively or mechanically it does not follow that the Ordinance does not bring him in purely to exercise judicial function.

For the reasons which I have given, I cannot reopen the argument any further in this matter. I have already indicated that costs will follow the event.

Mandamus allowed.

Present: Jayetileke, J.

DE KRETSER vs KANDASAMY

S. C. No. 515/1943—*M. C. Point Pedro No.* 2166.
Argued on 22nd September, 1943.
Decided on 5th October, 1943.

Criminal Procedure Code section 190—*Accused charged on two counts—Can magistrate acquit accused of one charge and reserve his finding on the other for consideration.*

Held : That where an accused is charged under two counts, it is open to a Magistrate under section 190 of the Criminal Procedure Code to acquit the accused of one charge immediately he arrives at his finding on that charge, and reserve the other charge for consideration of his finding.

Cases referred to : *Samsudeen vs Sutharis* (29 N.L.R 10)

L. A. Rajapakse with *H. W. Thambiah* and *S. N. Rajah*, for the appellant.
E. H. T. Gunasekera, Crown Counsel, for the complainant-respondent.

Jayetileke, J.

In this case the accused was charged under sections 344 and 314 of the Penal Code (Chapter 15).

On 5th May, 1943 the magistrate appears to have come to the conclusion at the close of the case that the accused was not guilty on the first charge, but he had not reached a decision in regard to the second charge in view of a question of law that was raised. He thereupon recorded "forthwith" a verdict of acquittal on the first charge in terms of section 190 of the Criminal Procedure Code (Chapter 16).

So far as the second charge was concerned he could not on that occasion record a verdict, because he had not found the accused guilty or not guilty and he deferred his verdict till May 8th, 1943.

Mr. Rajapakse contends that under section 190 it was not open to the Magistrate to record his verdict on the two charges on two different dates.

The sole question then is whether the magistrate should have deferred his verdict on the first charge till he reached a conclusion regarding the second charge. Section 190 does not say that he should do so. That section seems to contemplate the simple case of one charge, and must be read *mutatis mutandis*, in a case involving several charges. Each charge is, in reality a separate case and would be tried separately but for the provisions as to the joinder of charges. Directly one charge is found not to be established the accused should, I think, be acquitted as early as possible.

In *Samsudeen vs Sutharis* (29 N.L.R. 10) Dalton, J. said :

"It seems to me that the conditions precedent to the recording of the verdict is the finding of the verdict."

It would, therefore, have been open to the magistrate to defer recording his verdict on the first charge till he had found on the second charge as well. But it seems to me that the magistrate has acted in strict compliance with section 190 when he made the orders above referred to.

I would dismiss the appeal.

Appeal dismissed.

Present: SOERTSZ, J.

WIJERATNE vs PIUS SILVA

S. C. No. 758—Colombo M. M. Objection 1, 2 & 3.
Argued on 4th October, 1943.
Decided on 6th October, 1943.

Colombo Municipal Council (Constitution) Ordinance section 14 (6)—*Meaning of the words "resident on the date of the preparation or revision, as the case may be, of such list."*

Held : That section 14 (6) of the Colombo Municipal Council (Constitution) Ordinance provides that in the course of the preparation and revision of lists the date on which a resident's name comes up to be entered on the separate list for a ward shall be the date of preparation or revision *vis-a-vis* that resident.

N. Nadarajah, K.C., with *E. B. Wickramanayake* and *J. L. M. Fernando*, for the appellant.

H. V. Perera, K.C., with *U. A. Jayasundere* and *P. Malalgoda*, for the respondent.

SOERTSZ, J.

This is an appeal preferred under section 24 of the Colombo Municipal Council (Constitution) Ordinance (Chapter 194) against an order made by the Municipal Magistrate under section 23 (6) on objection taken by the respondent under section 23 (2), expunging the name of the appellant from the separate list which the Commissioner, acting in compliance with section 21 (*d*) had caused to be made for the ward of Modera.

The respondent's objection to the appearance of the appellant's name on that list was advanced *inter alia* on the ground that in order to enable a voter to have his name entered on the list for any ward, the law requires that he should be resident in that ward on the 1st of May of the relevant year and the respondent alleged that in fact the appellant was not so resident although he claimed to have been. On appeal, the appellant's submission was that his residence within the ward from the 5th of June as found by the magistrate was sufficient to justify the appearance of his name on the list for that ward.

On the evidence adduced by the parties the magistrate found that the appellant was not resident in Modera ward on the 1st of May this year and adopting part of the interpretation which the respondent contended for, he made the order in question now.

For the purpose of examining the cases put forward by the appellant and by the respondent section 14 and particularly sub-sections 14 (2) and 14 (6) must be interpreted by reading them with section 21.

Section 14 deals with the qualifications and disqualifications of voters. It provides by sub-section (1) that :

> "No person shall be qualified to vote..... unless the name of such person appears in the new or revised list of persons duly qualified to vote, certified as hereinafter provided and in force for the time being."

Sub-section (2) goes on to say :

> "No person shall be entitled to have his name placed on such list in any year as a person duly qualified to vote unless such person *on the date of the commencement of the preparation or revision* as the case may be, of such list for that year, has the qualifications and is free from the disqualifications enumerated in the subsequent part of that sub-section."

Sub-section (2) paragraph (*f*) says that :

> "Except in the case provided for in paragraph (*g*) (iv) of this sub-section, is resident within the limits of any ward of the Municipality and has for a continuous period of at least six months in the period of 18 months immediately prior to the said date resided within the limits of any ward of the Municipality."

It will be observed that in regard to all these qualifications and disqualifications their existence or non-existence is determined with reference to a definite date, namely, the 1st of May of the relevant year. That is the date fixed by section 21 sub-section (1) paragraphs (*a*) and (*b*) which enact that :

> (*a*) "On the 1st day of May in the year in which a general election is required....the Commissioner shall commence the preparation of the new lists."
>
> (*b*) "On the first day of May in every year other than a year in which a general election is to be held the Commissioner shall *commence the revision* of the lists.

Those provisions are followed by paragraph (*c*) which says :

> "The said first day of May shall in each case be deemed to be the date of commencement of the preparation or revision of the list."

The purpose of this clause appears to be to obviate any case in which by oversight, inadvertence or neglect the Commissioner does not comply with the requirement of paragraphs

(*a*) and (*b*) and does not commence the preparation of the lists on the date appointed in those clauses. The object of the legislature appears clearly to be to secure that there shall be one date with reference to which the question of the qualification or disqualification of a citizen to be a voter shall be determined.

Once the matter of the right to be a voter has been so determined the legislature goes on to enact that the eligible voters shall be allocated to the different wards into which the Municipality has been divided and by sub-section 14 (6) it provides that :

> "The name of any person who in any year is qualified to vote under the provisions of this Ordinance shall be entered in the new or revised list of persons qualified to vote prepared for the Ward in which that person is resident on the date of the preparation or revision as the case may be of such list for that year."

As the words stand they make it quite clear that the legislature is here adopting not a fixed "artificial" date as it does in sub-section 14 (2) for the purpose of determining the qualification or disqualification, but an actual date which may vary as between ward and ward and may even vary within the same ward in relation to the residents of that ward — the actual date being "the date of the preparation or revision as the case may be of such list for that year." This difference between sub-section 14 (2) and sub-section 14 (6) in the selection of a crucial date is quite understandable if the different purposes of the two sub-sections are borne in mind.

But it is contended that the words "on the date of the preparation or revision" contemplates a single date and that it is not possible to assign such a date to a process whether of preparation or revision which *ex necessitate rei* must extend over a period, and upon that contention it is argued that for those words there should be substituted the words "on the date of the commencement of the preparation or revision." But if we did that we should be legislating and not interpreting. Nor do I encounter any temptation urgent enough to lure me into such a course for the supposed difficulty of assigning a single date to a process such as this can be surmounted in virtue of the Interpretation Ordinance by reading "*dates*" of the preparation or revision for "*date*" of preparation or revision.

In that way we find that this sub-section provides that in the course of the preparation and revision of lists the date on which a resident's name comes up to be entered on the separate list for a ward shall be the date of preparation or revision *vis-a-vis* that resident.

For these reasons, I am of the opinion that no case was made out for depriving the appellant of his right to be a voter in the Modera ward and I accordingly set aside the order of the magistrate and direct that the appellant's name do remain on the list.

In regard to costs, section 25 provides for an order as to the payment of the costs of the inquiry. There is no provision in regard to the costs of appeal. I, therefore, direct that the respondent do pay to the appellant Rs. 52/50 as costs of the inquiry. I limit the costs in this way for the reason that the appellant protracted the inquiry unduly by endeavouring to show what was not true in fact — that he was in 205, Modera Street on the 1st of May.

Order set aside.

Present: HEARNE, J.

RANASINGHE vs GOVERNMENT AGENT, SABARAGAMUWA

Application for a Writ of Mandamus on the Government Agent, Ratnapura (228).
Argued on 5th November, 1943.
Decided on 10th November, 1943.

Village Communities Ordinance section 14 (4)—*Election held at a time different from that given under section* 14 (4) *without notification in the manner prescribed by that section—Mandamus.*

Held : That where a Village Committee election was adjourned from the time fixed under section 14 (4) of the Village Communities Ordinance to another time the election cannot be declared invalid unless it can be proved that the result would have been different if the election had been held at the time for which it had originally been fixed.

Cases referred to : *G. R. Karunaratne vs Government Agent, Western Province* (32 N.L.R. 169)

C. V. Ranawake with *W. W. Muthurajah*, for the petitioner.
Walter Jayawardene, Crown Counsel, for the 1st respondent.
N. Nadarajah, K.C., with *Sylvan J. Fernando*, for the 2nd respondent.

HEARNE, J.

The validity of the election of the 2nd respondent to represent Ward No. 15 in the Village Committee of Palle Pattu has been challenged by the petitioner on various grounds.

It was argued that, in contravention of the peremptory provisions of section 14 (3) of the Village Communities Ordinance the meeting of the voters of Ward No. 15 for the purpose of electing their representative was held outside the village area of Palle Pattu. The meeting was held at " Kandangomuwa " which has been brought under the operation of the Small Towns Sanitary Ordinance and it was claimed that this fact alone made it a legal entity distinct from Palle Pattu even if, as is the case, it falls geographically within the limits of Palle Pattu. This is not necessarily so, but in certain circumstances, which have not been shown to obtain it may be so.

In his petition the petitioner alleges that the election in respect of Ward No. 14 was over at 3 p.m. that " no time of resumption" was announced that many of the voters left for refreshment, that " work " (in connection with Ward No. 15) was resumed at 3.15 or 3.30 p.m., that " about this time " a rope was drawn across the entrance to the premises where the election was held, and finally that several voters were thereby prevented from recording their votes.

Nine voters have filed an affidavit to the effect that at 3 p.m. " they understood the election for Ward No. 14 was still going on " (according to the petitioner it was then over) that they went to the bazaar for refreshment and that on their return at 3.30 p.m. they were not allowed to enter the election premises.

The unsuccessful candidate, in his affidavit, stated that the presiding officer (he was appointed by the 1st respondent) told him that the election for Ward No. 15 would follow the election for Ward No. 14 which started at 1.45 p.m. and that " it was altogether impossible for him to have informed all his supporters of the alteration in time."

It is clear, confining myself for the moment to the nine voters referred to above, that if they had been present as they said till 3 p.m. they at least could have been informed by the candidate whom they had come to support of the change in time. The presiding officer's version is that two or three voters arrived after the polling was declared closed and were not allowed to vote. It appears from the petitioner's affidavit that many of the voters had arrived very early in the morning had had no midday meal and had gone to their homes or the bazaar for refreshment. The presiding officer states in his affidavit that it was about 2 p.m. that by public announcement he adjourned the meeting of voters for the purpose of electing the member for Ward No. 15 from that hour to 3.30 p.m. If the nine voters were present at 2 p.m. and according to them they did not leave till 3 p.m. they should have been fixed with knowledge of the adjournment. It is difficult to form an idea of the veracity of persons whom one has not seen but the probabilities of the matter suggest that the pangs of hunger were responsible for their failure to record their votes. Out of a total strength of 510, 440 voters recorded their votes. Surely they must have been apprised of the changed hour of the election ? Again how did so many of them gain access to the polling booth if " about the time " voting was resumed " a cordon of rope was put up " to prevent such access ? The affidavits in support of the petitioner's case do not ring true. The presiding officer's explanation of the purpose of the rope is reasonable and in all probability in accordance with the facts.

The third ground was that certain persons alleged to be minors were allowed to vote. These " minors " have filed affidavits denying that they voted, but even if they were allowed to vote, upon their right to do so being challenged, the decision of the presiding officer is final and conclusive. It appears that a record was not made of the objections raised in accordance with the provisions of section 16 (5) (*d*), but this is not a ground for avoiding the election.

The final ground was that the adjournment of the meeting from 2 to 3.30 p.m. if announced at all to the voters present (I hold that it was) was not notified thereafter by beat of tom-tom, and written notices as required by section 14. Unless it was alleged and proved that this omission would have led to a different result, the election cannot be declared illegal. 32 N.L.R. 169.

The rule is discharged with costs.

Rule discharged.

Present: KEUNEMAN, J. & WIJEYEWARDENE, J.

BARLIS vs WEERASINGHE

S. C. No. 185—*D. C. Matara No.* 83/13993.
Argued on 15th September, 1943.
Decided on 22nd September, 1943.

Postponement—Trial of case—Consent order to pay costs on or before next date of trial —Can the costs be paid during the course of the day.

On an application for postponement of the hearing of a case on a date fixed for trial the court made the following order : " In view of the medical certificate I allow a date. Defendant to pay Rs. 105/– as plaintiff's costs of the day. If costs are not paid on or before the next date of trial, of consent, judgment to be entered for plaintiff as prayed for with costs."

Held : That the payment of costs during the course of the next trial date was a sufficient compliance with the terms of the order.

Cases referred to : *Fernando vs Wimalatissa* (5 C.W.R. 243)
Schrader vs Joseph (15 N.L.R. 111)
Marikar vs Colombo Municipal Council (2 Br. 240)
Hadjiar vs Kunjie (1 A.C.R. 3)
Simon Singho vs William Appuhamy (6 C.L.R. 99)

H. V. Perera, K.C., with *C. J. Ranatunge*, for the defendant-appellant.
N. E. Weerasooriya, K.C., with *L. A. Rajapakse*, for the plaintiff-respondent.

KEUNEMAN, J.

In this case, on the 19th November, 1941, the defendant was absent and the following order was made :

" In view of the medical certificate I allow a date. Defendant to pay Rs. 105/– as plaintiff's costs of the day.
If the costs are not paid on or before next date of trial, of consent judgment to be entered for plaintiff as prayed for with costs. Trial 12–1–42."

On the 12th January, 1942, the journal entry is as follows :

" Trial case called — Defendant and Proctor absent Enter judgment for plaintiff as prayed for with costs — *Vide* order of 19th November, 1941."

The facts are as follows and are borne out in the record : The defendant went to the office of the plaintiff's proctor on 12th January 1942 to tender the sum of Rs. 105/–. The plaintiff's proctor was not there and the defendant then went to the resthouse to instruct his own counsel, who had come from Galle and was with his counsel when the case was called in court. He arrived in court a few minutes after the case was called and disposed of. The sum of money was immediately tendered to the plaintiff's proctor who refused to accept it and the money was then immediately deposited in court and the defendant moved that the order be vacated. This application was refused and the defendant appeals from that order.

Counsel for the defendant-appellant argues that the District Judge had no power to enter the order of the 12th January 1942, inasmuch as the defendant had time under the consent order of the 19th November 1941 to tender the sum of Rs. 105/– during, at any rate, the ordinary working hours of the 12th January, 1942. He argued that the defendant was not in default, when the order of the 12th January was made. The District Judge however, thought that the words " on the date of trial " meant " when the case is taken up on the date of trial " and not at any time on that day.

No case has been cited to us, nor have I been able to find an authority which is exactly in point. In *Fernando vs Wimalatissa* (5 C.W.R. 243) the order was that the costs should be paid " by the next date." Payment made on the actual date of trial, but before the trial, was held to be a sufficient compliance with the order. Bertram, C.J. held that the phrase " by the next date " would ordinarily be interpreted as meaning " on the next date " and added :

" If I promise a person that I will let him have a book by Monday he does not generally understand that he is going to get the book on Sunday but would consider that my promise was perfectly complied with if I let him have the book in the course of Monday."

In this case, however there was a further condition. In the judgment the condition is set out as follows: " that the costs were to be paid in evidence." This is clearly an error, and I think that the amendment suggested by both counsel, *viz.* " in advance " is most likely. In any event it was the further condition that induced Bertram, A.C.J. to hold that the sum was payable before the case came for hearing.

I think this case supports the proposition that payment of costs in the course of the date of trial is sufficient.

My brother Wijeyewardene has also referred me to the case of *Schrader vs Joseph* (15 N.L.R. 111), which involved the construction of section 823 (2) of the Civil Procedure Code.

> " If upon the day specified in the summons or upon any day fixed for the hearing of the action the defendant shall not appear or sufficiently excuse his absence the Commissioner.....may enter judgment by default against the defendant."

It was held that these words referred to default at the time, if any, when the defendant was required to attend, and if no time was fixed, at the time when the case is called for hearing. There were two reasons given: (1) That the section refers to default on the part of the defendant in doing something which he ought to do and that in the absence of any rule of procedure to the contrary, it is the duty of the defendant to appear either at the time the case is fixed for hearing or when the case is called on. (2) The practical inconvenience if a contrary interpretation was given is emphasized. This case overruled two previous cases *viz. Marikar vs Colombo Municipal Council* (2 Br. 240). and *Hadjiar vs Kunjie* (1 A.C.R. 3).

In the present case, I do not think there is any recognized rule of procedure which requires that payment should be made before the case is taken up for trial. There are, of course, practical inconveniences, which have been emphasized before us, but these can always be weighed beforehand by the judge who makes the order and by the parties who consent to it and it is in the power of the judge, if he thinks it desirable to order that the payment be made before the case is taken up, to make that point clear, in his order. Where, however, the order made permits the payment to be made on the date of trial, I do not think we should impose any restriction which prevents the party from making the payment during the course of that day, and at any rate during the ordinary working hours of that day. In my opinion the case of *Schrader vs Joseph* (*supra*) is a special case and can be differentiated. I hold that the defendant was in time in tendering and depositing the amount of costs on the 12th of January, 1942.

No doubt it was within the power of the District Judge when the defendant was absent at the time the case was called, to have fixed the matter for *ex parte* hearing. But this was in fact not done and I do not think that in the face of the defendant's explanation we should make that order now.

I allow the appeal with costs and send the case to the District Judge for trial in due course. The plaintiff will be entitled to the sum of Rs. 105/– deposited by the defendant. Costs in the court below will be in the discretion of the District Judge.

WIJEYEWARDENE, J.

This is an action for declaration of title to a land. When the case was taken up for trial on November 19th 1941, the defendant's proctor tendered a medical certificate and applied for a postponement on the ground of the defendant's illness. The journal entries show that the plaintiff objected to a postponement as "expenses had been incurred in connection with the trial." The judge thereupon made the following order:

> " In view of the medical certificate I allow a date....." etc.

On January 12th 1942, the defendant and his proctor were absent when the case was called and the judge entered judgment for the plaintiff referring to the order made by him on the previous date. On the same day the defendant filed an affidavit and moved for a notice on the plaintiff to shew cause why the judgment should not be vacated.

According to that affidavit the defendant went to the office of the plaintiff's proctor about 8-30 a.m. on January 12th, to tender the sum of Rs. 105/–. He found the proctor's office closed and he then attended a consultation between his proctor and counsel who had come down from Galle. After the consultation he came with his lawyers to the courts at 10.5 a.m. and his proctor tendered the day's costs to the plaintiff's proctor which the latter refused to accept, as judgment had been entered a few minutes earlier.

The facts as stated in the defendant's affidavit are not disputed. The District Judge refused to vacate the judgment as he thought that the defendant had failed to tender the sum of Rs. 105/– within the time mentioned in the order of November, 19th.

The order of November 19th states that the payment should be made " on or before the next date of trial." If these words are given their natural meaning a payment made " on the next date of trial " would be in compliance with the order.

It was argued for the respondent that the words should be interpreted as if they were " at or before commencement of the trial." The effect of the order in question is to create a situation where a judgment affecting the rights of the parties to a land will be given without an adjudication by a court of law, and I think, therefore, that such an order should be construed strictly against a party seeking to oust the ordinary jurisdiction of a court. Moreover,

I do not think that the words could be interpreted in the way suggested by the respondent's counsel. The position becomes clear if one considers a case where an order is made that the payment should be made "before the next trial date." If the respondent's contention is entertained, that order would mean that the payment could be made "before the commencement of the trial" and the order would, therefore, justify a payment being made even on the trial date before the case is taken up for trial. It cannot possibly be the case that when a party is requested to make a payment before a certain date he would be entitled to make the payment during a certain period of that day. Moreover if this interpretation is accepted there would be no appreciable difference between an order for payment "on or before the next date of trial," and an order for payment "before the next date of trial."

It should be noted that the order did not contemplate a payment into court. The payment could therefore, be made at any reasonable time within the period fixed by the order and need not necessarily be made during the time that the office of the District Court is open. As indicated in *Simon Singho vs William Appuhamy* (6 C.L.R. 99) different considerations would apply when the money had to be deposited in court. I would refer to the case of *Schrader vs Joseph* (*supra*) though it was not cited at the argument. I do not think the reasoning in that case could be adopted in this case. In that case the court had to construe the words of a statute with regard to the performance of a judicial act. Here we are concerned with interpreting an agreement entered into between the parties, with reference to an act to be performed by one of the parties though, no doubt, an order of court is based on that agreement.

The respondent's counsel referred to difficulties that may arise if the words in the order are given their natural meaning. What is going to happen, asked he, if the defendant fails to pay the money at the commencement of the trial and the judge then hears the case and decides in favour of the defendant on the merits and the defendant does not pay the money on the trial date even after the judgment? Such difficulties however could be avoided easily if the parties take the trouble to express clearly the terms agreed upon.

I agree that the order proposed by my brother should be made in the case.

Appeal allowed.

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

RODRIGO & ANOTHER vs EBRAHIM

S. C. No. 182(*F*)—*D. C.* (*F*) *Colombo No.* 9517.
Argued on 22nd & 23rd September, 1943.
Decided on 5th October, 1943.

Novation—Undertaking to pay debt due from another—Acceptance by creditor—Prevention of Frauds Ordinance, section 78—(*Chapter* 57).

On 27th June, 1938, a sum of Rs. 2,769/88 was due to the plaintiff from the 1st defendant for supplying labour for transferring goods from steamers. On 5th August, 1938, the defendants-appellants entered into a deed of partnership to carry on the business of the 1st defendant under the firm name of M. & Company wherein they undertook to pay all debts incurred by the 1st defendant up to that date. The plaintiff accepted and received Rs. 200/- as part payment from the appellants and further at their request continued the work of loading and transporting goods.

The appellants failed to pay the balance sum due and on being sued by the plaintiff, the District Court entered judgment for him.

In appeal it was contended *inter alia* that inasmuch as the undertaking by the appellants, if any, to the plaintiff, amounted to an agreement charging them with the debt of the 1st defendant, and it being not in writing, was of no force or avail in law by virtue of section 18 of the Prevention of Frauds Ordinance (Chapter 77.)

Held : That the undertaking given by the appellants amounted not to a guarantee, but to a novation and hence no writing was required.

Cases referred to : *Fernando vs Abeygoonesekera* (34 N.L.R. 160)
Kader Saibu vs Teverayan (4 N.L.R. 165)
Ex parte Lane in re Lendon (1846–10 Jurist, 382)

H. V. Perera, K.C., with *C. Thiagalingam* and *C. Renganathan*, for the defendants-appellants, 2*a* and 2*b*.

N. E. Weerasooriya, K.C., with *E. G. Wickramanayake*, for the plaintiff-respondent.

HOWARD, C.J.

This is an appeal from a decision of the District Judge of Colombo entering judgment for the plaintiff as claimed for the sum of Rs. 2,769/88 and costs. The plaintiff maintained that this sum became due from the defendants in the following circumstances: The plaintiff had contracted with the first defendant to supply labour for the transport of merchandise discharged from steamers calling at Colombo under the agency of Messrs. Narottam & Pereira, Ltd. On the 27th June, 1938, there was due under this contract to the plaintiff a sum of Rs. 2,769/88. On 5th August 1938 the defendants entered into a deed of partnership to carry on the business of the first defendant under the firm name of Munisamy & Company. On this deed the appellants contracted with the first defendant to pay in full all debts that had been incurred by the first defendant up to the date of the said deed. It was also alleged by the plaintiff that, immediately after the execution of the said deed, the appellants requested the plaintiff to carry on the work of loading and transporting merchandise from the said steamers and stating that they would pay the amount due from the first defendant. The plaintiff states that he accepted this undertaking to pay the said sum and continued the work of loading and transporting merchandise. It was further maintained by the plaintiff that, in pursuance of this agreement a sum of Rs. 200/- was paid by the appellants to the plaintiff in part payment. In finding in favour of the plaintiff the learned judge held:

> (*a*) That the appellants undertook to pay the debt due by the first defendant to the plaintiff;
> (*b*) That the plaintiff agreed to accept from the appellants payment of the sum due to him;
> (*c*) That there was a novation of the debt due by the first defendant to plaintiff by reason of the plaintiff agreeing to recover the debt from the appellants;
> (*d*) That the first defendant is released from liability, but the debt has been taken over by the firm of Muniswamy & Co. consisting of the three defendants.

Counsel for the appellants has challenged the decision of the learned judge on two grounds as follows: (*a*) That it has not been established that the appellants undertook to pay the debt of the first defendant to the plaintiff; (*b*) that the first defendant was not released from his obligation to pay the plaintiff and hence there was no novation of his debt. In these circumstances the undertaking by the appellants, even if given, was an agreement for charging them with the debt of the first defendant, not being in writing it was, by virtue of section 18 of the Prevention of Frauds Ordinance (Chapter 57) of no avail in law. I am of opinion that there is no substance in (*a*). It was a pure question of fact and it is impossible to say that in arriving at the conclusion he did, the learned judge has misdirected himself.

The main argument of Mr. Perera has been concentrated on (*b*). Section 18 of the Prevention of Frauds Ordinance is worded as follows:

> "No promise, contract, bargain or agreement, unless it be in writing and signed by the party making the same or by some person thereto lawfully authorized by him or her, shall be of force or avail in law for any of the following purposes:
> (*a*) For charging any person with the debt default or miscarriage of another.
> (*b*) For pledging movable property, unless the same shall have been actually delivered to the person to whom it is alleged to have been pledged;
> (*c*) For establishing a partnership where the capital exceeds one thousand rupees.
> Provided that this shall not be construed to prevent third parties from suing partners, or persons acting as such, and offering in evidence circumstances to prove a partnership existing between such persons, or to exclude parol testimony concerning transactions by or the settlement of any account between partners."

The first point that arises for consideration is whether the agreement made by the appellant charged them with the debt of the first defendant to the plaintiff. If it cannot be regarded in law in so doing, then there is no necessity to determine whether such agreement is in writing and signed by the appellants. Mr. Weerasooriya has referred us to Evans' translation of Pothier's Law of Obligations. "Novation" is dealt with in Vol. 1 part III, c. 2, p. 380 *et seq.* and the various kinds of novations are particularized. The second kind, according to the author is that which takes place by the intervention of a new debtor, where another person becomes a debtor in my stead, and is accepted by a creditor, who thereupon discharges me from it. The person thus rendering himself debtor or another, who is in consequence discharged is called expromissor and this kind of novation is called *expromissio*. The expromissor differs entirely from a surety who is sometimes called in law adpromissor. For a person by becoming a surety does not discharge, but accedes to, the obligation of his principal, and becomes jointly indebted with him. At page 385 the author states that in order to constitute a novation, the consent of the creditor is requisite. The question as to whether an agreement which constituted a novation of the second kind referred to by Pothier was considered in *Fernando vs Abeygoonesekera* (34 N.L.R. 160). In this case the defendant had given the plaintiffs a verbal promise to pay certain debts of his father, deceased, owing to the plaintiffs, and the question for decision was, whether the promise was enforceable wanting

anything from the defendant in writing. In the judgment of Macdonell, C.J. I find the following passage :

> " It seems to me, however, that if the evidence of the defendant-appellant is rightly apprehended what he did was not to guarantee the debt of his deceased father but to assume that debt himself; it was a case of novation not of guarantee, and if a novation, no writing was required. If there be an existing debt for which a third party is liable to the promisee, and if the promisor undertakes to be answerable for it, still there is no guarantee if the terms of the arrangement are such as to effect an extinguishment of the original liability. If A says to X, give M a receipt in full for his debt to you, and I will pay the amount, this promise does not fall within the statute, for there is no suretyship, but a substitution of one debtor for another — Anson on Contract, 12th edition page 77 citing *Goodmay vs Chase*. Here it certainly seems as if there had been a substitution of one debtor for another of the defendant-appellant for the estate of his deceased father. If so, it is a case of novation and not of guarantee, and it has never been suggested that the statute, Ordinance No. 7 of 1840, enacted that a novation to be valid must be in writing. It can be by parol merely and still be perfectly valid."

Applying the reasoning formulated by Macdonell, C.J. to this case, it seems to me that what the appellants did was not to guarantee the debt of the first defendant but to assume it themselves. There was, therefore, a substitution of one debtor for another. The fact that the plaintiff continued the work of unloading on the undertaking given by the appellants, that he has accepted Rs. 200/- from the appellants in part payment of the debt due by the first defendant and that he has sued the appellants, indicates that this was a case of novation *vide Kader Saibo vs Teverayan* (4 N.L.R. 165). The joinder of the first defendant as a party does not, in my opinion, affect the legal position of the appellants. Even if there is no evidence express or implied to suggest the release of the first defendant there is still the substitution of one debtor for another, namely the firm of Muniswamy & Co. for the first defendant. It was a case of novation, not of guarantee. Hence the agreement can be parol and still be perfectly valid.

A reference to the 18th Edition of Anson on Contract, pp. 64-66 reveals the fact the English law formulates the same principles. A promise of guarantee or suretyship is always reducible to the form " Deal with X, and if he does not pay you I will." A promise of guarantee must, moreover, be distinguished from one of indemnity. In this connection another illustration that appears on page 65 is very much in point ; If two come to a shop and one buys and the other to gain him credit, promises the seller "If he does not pay you, I will," this is a collateral undertaking and void without writing by the Statute of Frauds. But if he says, " Let him have the goods, I will be your paymaster" or " I will see you paid," this is an undertaking as for himself, and he shall be intended to be the very buyer and the other to act as but his servant. It has not been suggested in this case that the plaintiff supplied the labour for loading and transporting merchandise on a collateral undertaking by the appellants to pay the previous amount due only if the first defendant failed to do so. The undertaking given was for the appellants themselves.

The facts in the case of *Ex Parte Lane In Re Lendon* (1846–10 Jurist, 382) bear a striking similarity to those in the present case. The headnote is as follows :

> " A being a creditor of B, B and C enter into a partnership and by verbal agreement among the parties A is treated as the creditor of B and C. Such an agreement is not impeached or affected by the Statute of Frauds. On the bankruptcy of B and C A's debt is proveable against either joint estate."

The following paragraph from the judgment is very much in point :

> " I am of opinion upon the evidence that the impression of Miss Lane the creditor and of Mr. Lendon the elder, the debtor was of that description with reference to the debt that was due to her from him in the year 1838 when he admitted his son into partnership. I think it very probable treating the debt in the way that I have mentioned that all parties considered the trade as changed by the admission of the son into that business and that it was considered that the trade was indebted and is still indebted to Miss Lane for the money. I am of opinion that that understanding was communicated to Miss Lane by the uncle and cousin or one of them with the assent of both, and that Miss Lane distinctly acceded to it. I am of opinion that from thenceforth all transactions between them proceeded upon that basis."

There is no doubt that in the present case that the debt due by the first defendant to the plaintiff was after the partnership agreement was executed and regarded by all parties as one due, if not by the appellants only by the partnership. Hence there was a novation.

The promise by the appellants to pay the debt due by the first defendant was moreover made upon the condition that the plaintiff should carry on with the work of loading and transporting merchandise. It was therefore founded upon a new consideration and was not merely for the debt of the first defendant. "Such an undertaking though in effect it be to answer for another person, is considered as an original promise and not within the Statute." *Vide* 7th edition of Leake on Contracts p. 165.

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

WIJEYEWARDENE, J.

I agree.

Appeal dismissed.

Present: JAYETILEKE, J.

VALUE vs THE COMMISSIONER OF INCOME TAX

Application for a Writ of Mandamus on the Commissioner of Income Tax.
Argued on 12th November, 1943.
Decided on 26th November, 1943.

Mandamus—Withdrawal of approval of an accountant approved by the Commissioner of Income Tax under section 2 of the Income Tax Ordinance—Exercise of discretion by Commissioner—Delay in applying for mandamus—Power to approve—Does it include power to disapprove.

Held : (i) That the power conferred by section 2 of the Income Tax Ordinance on the Commissioner to approve certain persons before they can be authorized to act on behalf of assessees carries with it an implied power to disapprove a person who has been approved, or revoke an approval once given.

(ii) An approval given by the Commissioner of Income Tax does not extend beyond the year of assessment.

(iii) That where a public officer vested with a discretion has exercised it fairly and honestly the Supreme Court will not grant a *Mandamus*.

(iv) That the Supreme Court will not grant a *Mandamus* where the applicant has delayed to make the application.

(v) That a delay of nearly eleven months was unreasonable delay.

Cases referred to : *In Re Application for a Writ of Mandamus on the Assistant Government Agent, Uva* (39 N.L.R. 450.)
Rex vs Askew (4 Burr. 2189.)
Smith vs Chorley Rural Council 1897 Q.B.D. 678.)
The King vs Archbishop of Canterbury (15 East. 789.)
Board of Education vs Rice (1911 A.C. 179.)
Local Government Board vs Arlidge (1915 A.C. 120.)

C. Suntheralingam, in support.
H. H. Basnayake, Crown Counsel, for the Attorney-General, for the respondent.

JAYETILEKE, J.

The petitioner obtained from this court a rule for a *Mandamus* to compel the Commissioner of Income Tax " to withdraw his decision as communicated by his letter dated December 23, 1941." By that letter the Commissioner informed the petitioner that for the reasons stated by him at an interview he had decided to withdraw the petitioner's approval as an authorized representative under the Income Tax Ordinance for the year 1942-1943 and subsequent years.

In 1932 the petitioner was approved by the Commissioner as an authorized representative and he functioned as such till 1941. On March 20th, 1941, Mr. Paulusz an assistant assessor in the Department of Income Tax made an assessment on A. S. S. Sangaralingam Chettiar for the year 1937-1938. On April 16th 1941, the assessee appealed against the assessment. Thereupon the Commissioner made an order under section 76 (2) of the Ordinance that payment of the tax be held over pending the result of the appeal. On August 1st, 1941, the Commissioner cancelled the said order as the appellant failed to take the necessary steps to prosecute the appeal.

On December 15th 1941, the petitioner had an interview with Mr. Paulusz on behalf of the assessee in connection with the appeal. Mr. Paulusz says that at the end of the interview the petitioner said " if you like any little thing — this is not from me but they asked me to ask you — they will let you have it."

Mr. Paulusz understood this to be an enquiry whether he would accept an illegal gratification from the assessee and he promptly reported the matter to his immediate superior, Mr. Burah who called up the petitioner and asked him for an explanation. Mr. Burah says that the petitioner told him that he could not recollect the exact words used by him but what he wanted to convey was that he was willing to give any further information. Mr. Burah was satisfied as to the truth of Mr. Paulusz's complaint and he reported the matter to the Commissioner.

Exhibit C is a note of an interview the Commissioner had with the petitioner about the complaint. It is dated December 23rd 1941, and it reads : " I enquire from him what his explanation is of the complaint made by Mr. Paulusz. He states that this case had been previously dealt with by another accountant and that after he was engaged the assessor worried the client a great deal and there was great delay

in settling the case. His client had said that perhaps it may be because the assessor wants money from them. When he saw Mr. Paulusz he mentioned this but before he could finish what he was saying Mr. Paulusz got excited and took him to Mr. Burah.

The Commissioner referred to the file and found that there was no delay on the part of the assessor but it was the petitioner who was delaying and asking for time. He also found that there was nothing to indicate that the assessor was in any way worrying the assessee and that he was only inviting his attention to the appeal and asking for figures.

He, thereupon, made the following order: "I have no doubt that Mr. Paulusz's version is the correct one, and that Mr. Value had attempted to make a suggestion that his client was willing to give a present to the assessor if he would settle the appeal in their favour. I consider this a very serious offence. An approved accountant who could make such a suggestion is totally unsuitable to be kept on the list. In file 21/96 this same accountant made an improper request to an assistant assessor that he should make "an estimated additional assessment on a client so that the accountant may be given the opportunity of recovering his fees. I consider Mr. Value unfit to be continued as an approved accountant and accordingly withdraw approval."

On December 23rd 1941, by his letter quoted in para 7 of the petitioner's petition, the Commissioner informed the petitioner that he had decided to withdraw his approval and that no accounts prepared by him for 1942-43 or subsequent years would be accepted and that he will not be permitted to represent his clients for income tax purposes.

Thereafter the petitioner did nothing till May 29th 1942, when he wrote the letter marked D to the Commissioner. In that letter he states:

> "I took your decision, Sir, and without appearing to question it now I would respectfully urge on you that it was made on the uncorroborated testimony of one person in each instance in respect of two alleged statements made by me. I do not say, Sir, that it is not competent for you to do so I only pray that you will consider the possibility of a misunderstanding on the part of Mr. Paulusz who first, complained against me....."

This letter contains an *ad misericordiam* appeal to the Commissioner to reconsider his decision. It seems to me that what the petitioner wanted the Commissioner to do was to make a fresh order approving him in view of his long connection with the Department. That is the only reasonable interpretation that can be placed on the letter, having regard to the fact that the petitioner stated that he accepted the Commissioner's decision.

The Commissioner presumably refused to accede to the petitioner's request and the latter thereupon interviewed the Commissioner with counsel. The note of the interview, X, shows that the attitude taken up by the petitioner at the interview was different from that taken up by him in the letter D. Counsel seems to have urged that a formal charge should have been framed against the petitioner and a full and proper enquiry held.

The Commissioner considered the points raised and decided to adhere to the order made by him on December 23rd, 1941. The petitioner made the present application on November 3rd 1942. At the very outset I may say that one of the principal general rules applicable to *Mandamus* is that the court will refuse to grant it unless the application is made in proper time. In my opinion there has been in this case an unreasonable delay in making the application. The order complained of was made by the Commissioner on December 23rd 1941 and the present application was made on November 3rd 1942.

The Writ of Mandamus is a high prerogative intended for the purpose of supplying defects of justice. It is founded upon a passage of *Magna Charta* that "the Crown is bound neither to deny justice to any man nor to delay any man in justice."

In Re Application for a Writ of Mandamus on the Assistant Government Agent, Uva (39 N.L.R. 450) Abrahams, C.J. said:

> "The petitioner must show that the officer against whom the remedy is prayed for has infringed a right or to put it another way, that an officer who is under a duty to do something on his behalf has refused to do so."

The petitioner alleges in his petition that what he told Mr. Paulusz was that "his client wished to know whether by withdrawing the stand-over order the officer concerned expected something." His complaint seems to be that the Commissioner did not give him an opportunity of establishing his defence by cross-examining Messrs. Paulusz and Burah.

At the argument before me Mr. Suntheralingam contended that the Commissioner had no power to revoke his approval and that if he had the power he could only exercise it after a proper enquiry.

There is no express provision in the Ordinance which confers on the Commissioner the power to approve or disapprove a person as an authorized representative. But the definition of the expression "authorized representative" in section 2 presupposes such a power, which

in the absence of an express provision, must be taken to be implied.

Having regard to the general scheme of the Ordinance and the nature of the work an authorized representative is permitted to do, which is specified in sections 71 and 73 (2) of the Ordinance, I am inclined to the view that the legislature did not intend that the Commissioner should give his approval for all time, but only for the particular year of assessment. A fresh approval is, therefore, necessary for the subsequent year.

As the Ordinance does not provide that the approval should be given in a particular form, a person, who has been previously approved is entitled to assume that he has been approved for the subsequent year unless the Commissioner informs him that he has decided to withhold his approval.

The question arises, whether the Commissioner has no power to revoke his approval, if the person approved subsequently becomes insane, or is found to be incompetent or guilty of fraudulent or corrupt practices, or otherwise becomes unfit to continue as an approved representative.

I think such a power is inherent, in the absence of anything to the contrary, in the Ordinance. The approval amounts to no more than permission given by the Commissioner to an accountant to represent a taxpayer for the purposes mentioned in sections 71 and 73 (2) of the Ordinance.

The word used in the Ordinance is "approved" and that implies that the Commissioner is invested with a discretion to approve or not. The taxpayer is given the right by sections 71 and 73 (2) to do certain acts through the medium of an authorized representative. When an application is made to the Commissioner for his approval, I think there is a legal duty imposed on him to exercise his discretion judicially. In the words of Lord Mansfield in *Rex vs Askew* (A Burr 2189) "the discretion must be exercised in a manner fair, candid and unprejudiced and not arbitrary, capricious and biassed, much less coupled with resentment or personal dislike."

His decision is not liable to be controlled by this court if he has acted fairly and honestly.

In *Smith vs Chorley Rural Council* (1897 Q.B.D. 678) Lopes, L.J. said :

> "The rule applicable to such a case is that the exercise of the discretion of a tribunal, however erroneous it may be, upon a question within its jurisdiction and when honestly, exercised, cannot be questioned. Any other conclusion would lead to this — that although the legislature has entrusted to a local tribunal a discretion as to a particular matter which they consider and as to which they honestly exercise their discretion still the court would direct them to exercise their discretion in a different way — a result which in my opinion would be absurd."

The only other question is whether the Commissioner should have framed a charge against the petitioner and held a public enquiry. This question was considered in *The King vs Archbishop of Canterbury* (15 East. 789) where the right of approving a fit and proper person to an endowed lectureship was by statute vested in the Bishop of the Diocese. Lord Ellenborough, C.J. said :

> "It has been urged however, (and much stress was laid upon it in the argument) that it was the duty of the bishop to have instituted his inquiry upon the subject, in the manner and by the means usually adopted in Courts of Law, that is, by the formal production of the charges made against the applicant in a judicial course, and by a public and solemn hearing of the several parties, their proofs and witnesses. But in the first place, what power has the Bishop to compel the attendance of parties and witnesses ? what power has he to administer an oath ? or what word is there in the Act of Parliament that prescribes the mode by which he shall attain a conscientious satisfaction on the subject ? It only requires him first to approve, that is before he licenses ; and in so doing it virtually requires him to exercise his conscience duly informed upon the subject to do which he must duly impartially and effectually inquire, examine, deliberate, and decide."

The same view has been taken by the House of Lords in *Board of Education vs Rice* (1911 A.C. 179) and *Local Government Board vs Arlidge* (1915 A.C. 120). With this view I am in respectful agreement.

On the materials before me, I am unable to say that the opinion formed by the Commissioner was not fair and honest or that he did not give the petitioner a fair hearing before making his order. Whether it was proper for the Commissioner to withdraw his approval was a question for him and not for me to determine. The legislature has left the decision of that question to him. All I have to decide is whether he has honestly exercised his discretion and I am of opinion that he has.

The rule is discharged with costs.

Rule discharged.

Present: MOSELEY, J. & KEUNEMAN, J.

PARAMASOTHY vs VENAYAGAMOORTHI & ANOTHER

S. C. No. 262*M.*—*D. C. Finals* (*Jaffna*) *No.* 15713.
Argued on 28th June, 1943.
Decided on 6th July, 1943.

Public servant—Negligent exercise of powers conferred by statute—Customs Ordinance—Bona fides of act—Liability of Public servant.

Maintainability of action for damages to car by person other than registered owner.

Held : (i) That a person who, though not the registered owner, has a limited interest in a motor car of which he is in lawful possession, is entitled to maintain an action for damages caused to it consequent on the negligent act of another party.

(ii) That where a public servant acts negligently in exercising the powers conferred on him by statute, he cannot escape liability, notwithstanding the *bona fides* of his actions.

L. A. Rajapakse with *C. T. Olegasegaram*, for the plaintiff-appellant.
N. Nadarajah, K.C., with *H. W. Thambiah*, for the defendants-respondents.

MOSELEY, J.

The respondents to this appeal are respectively the Udaiyar of Pandiaterrippu and Kirama Vidane of Mathakal. It is not disputed that on 22nd September, 1939, they were in receipt of information of the arrival of a ship with "contraband." In order to intercept cars by means of which they suspected the contraband would be transported, and if necessary to arrest the persons concerned in the transportation, they stationed themselves on the road which runs from Kayts to Kankasanturai. Having failed in their efforts to stop by signal the first car to pass, they proceeded to barricade the road by placing across it the trunk of a palmyrah palm and reinforcing the obstruction by tying a rope at a height above the trunk of the palm. The appellant, who was returning from Kayts by car with two friends at about 1 *a.m.* on the 23rd, saw the obstacles when he was 15 or 20 yards distant from them. He applied his brakes but, the road being wet after recent rain, the car skidded and collided with the palmyrah trunk. The appellant and the car both sustained injuries in respect of which the appellant sued the respondents for damages. The parties went to trial on a number of issues. It is sufficient at the moment to say that, with one exception, these were answered generally in the appellant's favour. At the close of the examination-in-chief of the appellant, however, the following issue was framed :

> "XI Was plaintiff the owner of the car in question on the dates material to this action ?"

This issue was answered in the negative and the learned judge held that it followed that the appellant was not entitled to recover damages. Holding further that the respondents were wrongful, he, while dismissing the action, ordered the parties to bear their own costs. It is not, I would say easy to understand why, upon this finding the appellant should have been deprived, for example, of damages which he claimed and for which the learned judge found to some extent in his favour in respect of medical expenses and pain of mind and body. These are claims on which the appellant should have succeeded irrespective of ownership of the car. But the matter, I think, goes further. Issue XI was answered in the negative upon the evidence that the appellant's brother was registered under the Motor Car Ordinance as owner of the car. Moreover, the appellant in his report to the police, made a few hours after the incident, described his brother as the owner of the car, and in the light of that evidence it seems to me impossible to say that the learned judge was in this respect wrong. But does the fact of non-ownership deprive the appellant of the right to sue for the damages caused to the car ? Counsel for respondents relied upon a passage which appears in Mc Kerron's Law of Delict (2nd edition, page 126) which implies that a non-owner has no cause of action unless he proves that he is in possession of the property and has a limited interest therein. Now, in this case, the appellant explained why the car was registered in his brother's name, namely, that the latter had advanced Rs. 450/– towards the purchase price of the car, but his evidence that the car was in his possession that he used it for the purposes of his business, and that he himself paid the account for the repairs necessitated by the incident, all goes to prove that he had at least a limited interest in the case. Moreover, as was observed by Mc Kerron, at page 214 of the work above quoted, "trespass is essentially a wrong to possession and not to ownership. An action for trespass can, therefore, be maintained by any

person in lawful occupation or possession of the property at the date of the trespass. Thus a bailee can sue for a trespass causing damage to the goods the subject of the bailment. . . ."

In my view, therefore, the learned judge erred in dismissing the action on this ground. He appears further to have thought that if the appellant was acting within the scope of the employment of a third party (and he found as a fact that he was so acting) that the action must necessarily fail. In arriving at this conclusion he has seriously misdirected himself as to the effect of the authorities upon which he relied.

These authorities deal with the liability of a master for the tort of a servant committed while acting within the scope of his employment, and do not affect the right of a servant to sue.

Counsel for the respondents, while supporting the judgment, did so mainly upon another ground. The respondents, who, as has already been stated, were public servants pleaded in their answer that they acted in good faith in the lawful discharge of their duties and that therefore no action was maintainable against them. Bearing on this point issues 1 and 10 were framed and answered as follows :

> I. Was the act complained in paragraph 3 of the plaint done by defendants wrongfully and without any warning to the public. (Answer : Yes.)
>
> 10. Were defendants acting *bona fide* in the discharge of their duties as public servants ?
>
> (Answer : Yes, but it does not mean that *bona fides* exonerates the defendants.)

Counsel contended that the answers to these issues are mutually contradictory, and that the learned judge in finding that the respondents were, even in a qualified fashion acting *bona fide* in the discharge of their duties was inconsistent in finding that they were acting wrongfully and without any warning to the public. I do not myself find any difficulty in reconciling the answers to these two issues, even if one accepts unreservedly counsel's contention that the respondents were performing a statutory duty imposed upon them by the Criminal Procedure Code, The Poisons, Opium and Dangerous Drugs Ordinance and the Customs Ordinance. Each of these legislative acts no doubt confer a duty or right to arrest and to resort to various devices towards effecting arrest, and counsel quoted from Nathan's Law of Torts (page 8) to the effect, that " if a man does that which the law justifies him in doing, he commits no delict."

Assuming that a defendant has discharged the onus laid upon him of proving that his act was justified by law, it is, however, open to the plaintiffs " to show that the defendant is not entitled to the protection of the statute because the powers conferred were exercised negligently. Negligence in this connection means the failure to take reasonably practicable measures to prevent the damages complained of." Mc Kerron's Law of Delict (2nd edition page 89). It seems to me that, the learned judge if he had in mind the principle of law, which seems to me to be well established, could well answer issues 1 and 10 as he did. The 2nd respondent gave evidence to the effect that he had the 1st respondent stood in front of the obstruction and signalled to approaching car to stop by calling out " stop, stop " raising their hands. He wore his badge, characterized by the learned judge as " puny " and had his diary, perhaps equally puny, in his hands. With them he said were 10 or 12 other people to assist if necessary. The appellant testified that there was no one on the road, that no one signalled, and that no one approached until a few minutes after the car came to a halt. Even if one accepts the 2nd respondent's version can it be said that the respondents took reasonably practicable measures to prevent such damages as were caused ? The appellant says that he applied his brakes as soon as he saw the obstruction and that in spite of that the car struck the palmyrah trunk. It could hardly be suggested that he did not do everything in his power to avoid a collision which must inevitably cause damage. In the circumstances, I think it may fairly be said that the obstructing of a main road in this manner without taking effective steps to avoid such damages is, to put it at its very lowest, a negligent act. It seems to me, that in that event the respondents cannot escape liability notwithstanding the *bona fides* of their actions.

Counsel for the appellant has criticized the action of the learned judge in reducing the amounts claimed in respect of medical expenses and damages for non-user for the period for which the car was out of action although the appellant's evidence in support of these items was not contradicted. I do not propose to interfere with the opinion of the learned judge expressed after hearing the evidence. The amounts which the appellant is entitled to recover under the various heads are as follows :

> Repairs to car : Rs. 351/–, non-user : Rs. 50/–. Medical attendance : Rs. 25/–, Pain of mind and body : Rs. 150/–, Total Rs. 576/–.

I would, therefore, allow the appeal with costs. The judgment of the lower court is set aside and judgment entered for plaintiff for Rs. 576/– and costs.

KEUNEMAN, J.

I agree.

Appeal allowed.

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

ELLEN NONA & OTHERS vs PUNCHI BANDA

S. C. No. 27—D. C. (F) Kandy No. 572.
Argued on 2nd November, 1943.
Decided on 12th November, 1943.

Kandyan Law—Intestate succession—Property acquired by Kandyan woman before marriage—Death of woman leaving illegitimate child and deega *married widower—Does the widower inherit any rights to such property.*

A Kandyan wife, possessed of property acquired by her before marriage, died leaving her surviving her *deega* married husband and an illegitimate child,

Held : That the illegitimate child inherited the property and that the husband had neither title nor life-interest in it.

Cases referred to : *Naide Appu vs Palingurala* (2 S.C.C. 176)
Saduwa vs Siri (63 Bal. Rep. 18)
Tikiri Banda vs Appuhamy (18 N.L.R. 105)
Seneviratya vs Halangoda (24 N.L.R. 257)
Dunuweera vs Muttuwa (43 N.L.R. 512)

L. A. Rajapakse, for the 3rd defendant-appellant.
N. E. Weerasooriya, K.C., with *H. W. Thambiah*, for the plaintiff-respondent.

KEUNEMAN, J.

This is a partition action. The title to one-fourth share of this land is in dispute between the plaintiff and the 3rd defendant.

The owner of this one-fourth share was Muttu Menika who obtained title under P2 of 1913. Muttu Menika was at the time unmarried. In 1916 (see XI) an illegitimate child, Punchi Appuhamy, was born to her. The plaintiff claims the whole of Muttu Menika's share by virtue of transfer P3 of 1938 from Punchi Appuhamy to Hendrick Appuhamy, and transfer P4 of 1940 by the latter to the plaintiff. In 1918 Muttu Menika married the 3rd defendant in *diga* (see 3D1) and a child was born of the marriage, Heen Menika, who died on 2nd December, 1920 (see X2) before the death of her mother. Muttu Menika herself died on 9th December, 1920.

The plaintiff claims the whole share of Muttu Menika through the illegitimate child, Punchi Appuhamy. The 3rd defendant, as the *diga* married widower, claims to be entitled to the same share in preference to the illegitimate child. In the alternative, the 3rd defendant claims a life interest in the share of Muttu Menika, and this was the argument mainly pressed before us.

The first question to be decided is the right of the illegitimate child to succeed the mother. On this point there is clear authority — See *Nitinighanduwa*, p. 106 :

> "There is no distinction or difference amongst children. The child born in proper wedlock, the child born to a woman whilst in an unmarried state, the child born to her whilst in concubinage with a man of a higher caste than herself and the child born to her while living with a man of an inferior caste — these several children will have an equal right to the maternal inheritance."

See also *Nitinighanduwa*, p. 15 ; Perera's Armour p. 83.

I think it is clear that the husband has no title to the share of his deceased wife as against the illegitimate child of the deceased wife.

The question that remains is as regards the husband's claim to a life interest in the land. In this case it must be noted that the property is to be regarded as the acquired property of the wife — but it is property acquired *before* the marriage.

Fortunately, on this particular point there is good authority. In Perera's Armour, p. 29 section 34, appears a quotation from Sawers :

> "A wife dying (intestate) leaving a husband and children, her peculiar property of all description goes to her children and not to her husband."

In the same Volume p. 30 section 36 where the *diga* married wife died *without issue*, it is stated :

> "A *deega* married woman having died without issue and intestate leaving *goods* partly acquired during the coverture, and partly consisting of goods which she has brought with her at her marriage the goods first mentioned will remain to her husband and the rest will go to her parents."

This in terms applies only to goods and not to landed property, but I think it is clear that differentiation between property brought by the wife to the marriage and property acquired during the coverture was of wider application. Hayley (Sinhalese Laws and Customs) at p. 461 quotes from D'Oyly's Sketch of the Kandyan Constitution on p. 308 as follows :

> " If the wife dies leaving a husband and children all property acquired from her husband reverts to him — by herself (from parents or otherwise) goes to the children everything acquired during coverture goes to her husband."

D'Oyly clearly deals with all classes of property and I do not think there can be any doubt that he was referring to a *diga* married wife. There should, however, I think, be one qualification for this passage, namely that the husband obtained not the dominium but only a life interest, at any rate where the deceased wife left children, in the two classes of property specified, namely (*a*) property acquired from the husband himself and (*b*) property acquired during the coverture. In my opinion this point is brought out in *Nitinighanduwa* at p. 114 — the passage itself deals with the case where the wife left no issue.

> " If the proprietress has no children or grandchildren and dies leaving a parent or her husband all the property obtained through her parents and all property acquired by her in any manner whatsoever before her marriage with the herein mentioned husband, will be inherited by the parent. The property acquired jointly with her husband after the marriage will come into *possession* of her husband."

In cases decided by our courts, the law relating to property acquired during coverture is emphasized, see Austin 66 ; *Naide Appu vs Palingurala* (2 S.C.C. 176). In *Saduwa vs Siri* (3 Bal. Rep. 18) it was expressly held that " a husband surviving his *diga* married wife is entitled to a life interest over the landed property acquired by her *during coverture*, where the deceased has left children." This was subsequently upheld in the three judge case of *Tikiri Banda vs Appuhamy* (18 N.L.R. 105), which also clearly and in express terms related to property acquired by a *diga* married wife during the coverture.

In this particular case I do not think it is necessary to comment on the passage in Sawers' Digest, p. 11, namely :

> " The husband is the heir to his wife's landed property, which will at his demise go to his heirs."

This was the opinion of Doloswela Dissawe and was opposed to the opinion of the chiefs of the *Udaratta*. This will have to be read in conjunction with the quotation from Sawers cited earlier with a later passage in Sawers ;

> " A wife dying intestate, leaving a son who inherits her property, and that son dying without issue, the father has only a life interest in the property which the son derived or inherited from or through his mother."

I need only say that this passage has been very fully dealt with in *Tikiri Banda vs Appuhamy* (*supra*), in *Seneviratna vs Halangoda* (24 N.L.R. 257) and in *Dunuweera vs Muttuwa* (43 N.L.R. 512), and I do not think there is anything which I can usefully add. In the particular instance involved in this case, I think it will be sufficient for us to follow the decisions of our courts, which have granted to the *diga* married widower only a life interest in property acquired by the wife during coverture where the wife left children. It is too late now for a *diga* husband to claim more than a life interest in such a case.

In arriving at a decision in this case I am not unmindful of the fact that there are divergent opinions expressed in our courts as to the position of a *diga* married widower, in the case where the deceased wife left no children. In *Seneviratne vs Halangoda* (*supra*) it was held that where a Kandyan wife married in *diga* died issueless, the husband did not inherit any portion of the wife's landed property acquired before marriage. In that case the property in question was landed property given as dowry to the wife. The contest in the case was between the assignee from the husband and the devisee of the mother. In the later case of *Dunuweera vs Muttuwa* (*supra*) the authority of *Seneviratna vs Halangoda* was doubted and it was held that where a Kandyan woman married in *diga* dies without issue the surviving husband succeeds to her acquired property in preference to her brothers and sisters and no distinction was drawn between property acquired before marriage and property acquired after marriage. In each of these cases the earlier writers and cases were exhaustively examined and a study of these cases brings home to the reader how dangerous are the " quicksands " (to use the phrase of Pereira, J.) which beset the student who adventures on the study of Kandyan law.

However, in my opinion, it is possible in this case to steer clear of the quicksands. In the difficult condition of the law, I think there are two beacons to guide us. One is the passage from D'Oyly I have already mentioned, which refers in clear terms to the case where the Kandyan wife died leaving both husband and children. I have already made my comment on this. The distinction between property acquired during marriage and property otherwise acquired is clearly brought out. Further, it follows from

the decisions of our courts that the right of the surviving husband is only a life interest in property acquired during the marriage. I think these decisions I have referred to provide another beacon. I may add that the passage I cited from D'Oyly does not appear to have been considered in any of the cases previously decided in our courts.

I am of opinion in this case that the property of the Kandyan wife, acquired by her before her marriage, was inherited by her illegitimate child and that the husband had neither title nor life interest in that property.

I may add that this decision is based upon the fact that the deceased wife left both a husband and a child. I have no desire to trespass upon the further question as to what the law is when a Kandyan wife dies without issue, leaving a husband and either a parent or brothers or sisters. That matter will, no doubt, come up for final decision on some later occasion.

The appeal is dismissed with costs.

HOWARD, C.J.

I agree.

Appeal dismissed.

Present: MOSELEY, J.

WELIPENNA POLICE vs PINESSA

S. C. No. 332—*M. C. Kalutara No.* 18467.
Argued and Decided on 9th July, 1943.

Criminal Procedure—Can evidence in rebuttal be led in Magistrate's Court.

Held : That there is no provision for the calling of evidence in rebuttal in the Magistrate's Court.

R. L. Pereira, K.C., with *S. W. Jayasuriya*, for the accused-appellant.
G. P. A. Silva, Crown Counsel, for the complainant-respondent.

MOSELEY, J.

The appellant was convicted of robbery of a buffalo and was sentenced to two months' rigorous imprisonment. The appellant gave evidence in the course of which a statement was put to him which was alleged to have been made by him to constable K. J. Perera. The appellant denied that this statement had been correctly recorded. At the close of the case for the defence, counsel for the prosecution moved to call constable Perera in rebuttal. Counsel for the defence did not object to this course and the constable was accordingly called and he produced the statement which he swore to be correctly recorded.

So far as I can discover, there is no provision for the calling of evidence in rebuttal in the Magistrate's Court. The procedure was, therefore, irregular and it is impossible to say to what extent the mind of the learned magistrate may have been influenced by having before him two contradictory statements made by the appellant.

I, therefore, allow the appeal and quash the conviction and sentence. There will be a new trial before another magistrate.

New trial ordered.

Present: SOERTSZ, J. & HEARNE, J.

DE FONSEKA ET AL vs THE CHARTERED BANK

S. C. No. 25-26-0—*D. C.* (*Inty.*) *Colombo No.* 54335.
with S. C. No. 64-65-0—*D. C.* (*Inty.*) *Colombo No.* 54335
Argued on 9th, 10th, 11th and 12th November, 1943.
Decided on 26th November, 1943.

Civil Procedure Code section 349—*Adjustment of decree*—*Certification*—*What amounts to certifiable adjustment.*

Mortgage Decree—*Setting aside sales under*—*Failure to issue notice under section* 347—*Is such notice necessary*—*Where court directed notice to issue does failure to issue such notice vitiate sales held thereon.*

Once the judge has signed a hypothecary decree giving directions, is it necessary that the communication of such directions to the auctioneer should also be signed by the judge himself.

In 1935, the plaintiff bank obtained a hypothecary decree against the 1st defendant for a sum of Rs. 2,860,347/31 on a primary mortgage. In 1938, the plaintiff had recovered a sum of Rs. 793,910/85 by sale of mortgaged properties and this sum had been certified of record. Thereafter, on a joint-motion by both parties, execution was stayed pending the decision of the Privy Council in a connected case in which the 1st defendant had appealed to His Majesty in Council. There was a third case pending between them in the District Court of Colombo. At this stage after negotiations a sum of Rs. 8¾ lakhs was offered on behalf of the 1st defendant in full satisfaction of what was then due on the decree and the plaintiff bank stated that it would accept that amount in full satisfaction provided the 1st defendant

(i) withdrew the appeal before the Privy Council and the action in the District Court,
(ii) withdrew the allegations made by the 1st defendant against the plaintiff bank and its lawyers,
(iii) paid a sum of 8¾ lakhs before a certain date.

The 1st defendant withdrew the appeal in Privy Council and the action in the District Court but failed to pay the 8¾ lakhs on the stipulated date.

Thereupon the plaintiff on 15th August, 1941, submitted a motion acknowledging the receipt of a further sum of Rs. 120,000/– and asking for the order to sell to recover the balance without notice to the 1st defendant, or in the alternative for notice on the 1st defendant's proctor. The judge stated on the motion "allowed." Order to sell was issued and the remaining lands were advertised to be sold. The 1st defendant made an application for stay of sale but was refused whereupon he applied to court for certifying of record the aforesaid agreement as an adjustment of the decree and for a cancellation of the sales held after August 1941 on the ground that they were illegally held inasmuch as

(*a*) on a correct interpretation, the order made by the District Judge on the motion of 15th August, 1941 means the judge directed notice to issue on the judgment-debtor and not the order to sell to the auctioneer.

(*a*) if, however, the correct meaning is that the judge directed order to sell to issue, it was not competent for him to do so.

(*c*) the order to sell, in any event was not properly authenticated and communicated to the auctioneer as it was signed by a clerk and not by the judge.

Held : (i) That the alleged adjustment was not one certifiable under section 349 of the Civil Procedure Code, inasmuch as there was no completed contract but a case of negotiations which failed to achieve the end which the parties had in view.

(ii) That in a case involving a hypothecary decree, directing that the mortgaged property be sold by a named auctioneer, no order for sale with notice to the judgment-debtor under section 347 of the Civil Procedure Code is necessary.

(iii) That even if it is assumed that the order of the judge was intended to direct notice on the judgment-debtor, the failure to issue it was only a non-compliance with a direction of court and as such not an irregularity that had the effect of vitiating the sales.

(iv) That once the hypothecary decree giving directions for the sale of mortgaged property by a named auctioneer is signed by the judge, the communication of the order to sell to the auctioneer may be made through an officer of the court.

Cases referred to : *Perera vs Jones et al* (41 N.L.R. 193)

R. L. Pereira, K.C., with *C. E. S. Perera, G. P. J. Kurukulasuriya* and *Dodwell Gunawardene*, for the 1st defendant-appellant in No. 25 and the petitioner-appellant in No. 64 and the petitioner-respondent in No. 65.

H. V. Perera, K.C., with *N. K. Choksy*, for the plaintiff-respondent in No. 25 and the plaintiff-appellant in No. 26 and the plaintiff-respondent in Nos. 64 and 65.

E. F. N. Gratiaen with *S. Nadesan* and *T. K. Curtis*, for the 2nd petitioner-respondent in No. 25 and the 3rd defendant-respondent in No. 64 and the petitioner-appellant in No. 65.

S. Nadesan, for the 4th respondent in Nos. 25, 64 and 65.

C. J. Ranatunge, for the 14th and 15th defendants-respondents in Nos. 25, 64 and 65.

A. C. Nadarajah, for the 19th and 20th, 21st and 22nd defendants-respondents in Nos. 24, 64 and 65.

L. A. Rajapakse with *Kingsly Herat*, for the 8th defendant-respondent in Nos. 26, 64, and 65.

N. M. de Silva with *E. A. G. de Silva*, for the 9th, 10th, 11th and 17th defendants-respondents in Nos. 25, 64 and 65.

L. A. Rajapakse with *F. W. Obeyesekara*, for the 6th and 13th defendants-respondents in Nos. 25, 64 and 65.

SOERTSZ, J.

There are four appeals before us. In order of date, the earliest is the appeal by the 1st defendant from an order made against him refusing his application for the stay of the sale of certain lands of his then due to be held in pursuance of an order issued by the court to the auctioneer named in the decree. The respondent to that appeal is the plaintiff Bank, the decree holders. The second appeal is also by the 1st defendant, and it is preferred against an order refusing to set aside the sales that took place after the application to stay the sales had been rejected. The respondents to it are the plaintiff Bank and certain parties interested as puisne encumbrancers and purchasers in execution. The third appeal is taken by the plaintiff Bank, from an order certifying an adjustment of the decree under section 349, on an application made by the first defendant to have it certified. The respondents are the 1st defendant and the other respondents named in the 1st defendant's second appeal. The fourth appeal is by the Bank of Chettinad against the order made by the judge on an application made by that Bank for certification of the alleged adjustment and against the order for costs made against them. The respondents are the other parties concerned in the 2nd and 3rd appeals. In addition to these appeals, there are cross-objections taken by the 1st defendant under section 772 of the Civil Procedure Code to the order against which the plaintiff has appealed, the 1st defendant being dissatisfied with the terms in which the adjustment is recorded as certified.

The facts from which these copious tears flow are these: On the 1st March, 1935, the plaintiff bank obtained a hypothecary decree against the 1st defendant for a sum of Rs. 2,860,347/31 due to them on a primary mortgage. The decree directed that this sum be paid forthwith or, in default, that the mortgaged lands be sold by an auctioneer, a Mr. Meaden. By the 17th of October 1938, the Bank had recovered in three instalments a sum of Rs. 793,910/85 and had certified these payments of record. Thereafter, in some connected case pending between the Bank and the 1st defendant, the latter had preferred an appeal to His Majesty in Council, and on a joint motion made by both parties to the District Judge of Colombo, execution of the decree in the present case had been stayed to await the decision of that appeal. There was a third case pending between them, also in the District Court of Colombo.

In this state of things, an Advocate of this court, apparently a friend of the 1st defendant attempted the role of the *deus ex machina* to terminate this prolific litigation and bring about a happy ending.

On the 16th December of 1940, he wrote letter A12 making " a firm offer" of 8 lakhs in full satisfaction of what was then due to the Bank on the decree. An interview followed and the offer was raised to 8¾ lakhs. By their letter A19 of the 17th of February 1941, the Bank's proctors stated that the Bank would accept that amount in satisfaction provided the 1st defendant withdrew the appeal before the Privy Council and the action in the District Court, and also recanted all allegations that he had made against the Bank and their lawyers. They also stipulated that the sum of 8¾ lakhs should be paid in certain instalments before certain named dates. But, in regard to this, the final arrangement was that that amount should be paid on or before the 15th of June 1941. The 1st defendant accordingly withdrew his appeal, his action and his words but, unfortunately he failed to pay the money. Then exactly two months after the final date fixed for the payment of the money the Bank's proctors submitted a motion acknowledging the payment of a further sum of Rs. 120,000/– and asking for execution of their decree to recover the balance still due. They obtained an order for the sale of the other lands executable under the decree. Thereupon, the 1st defendant came forward saying that the decree had been adjusted so as to limit his liability under it to 8¾ lakhs and asking that this adjustment be certified under section 349 of the Civil Procedure Code and that the sale order be stayed. The application for the stay of the sale was peremptorily refused. In regard to the certification of the alleged adjust-

ment, the trial judge made a curious order with which neither party appears to be satisfied.

He said: "The adjustment would appear to have become ineffectual because it has not been given effect to within the stipulated time. It is now, if I may say so, spent ammunition. But Mr. Amerasekara argues that time is not the essence of the adjustment and, as long as there is an adjustment of which information is given to court by petition by the judgment-debtor, the court shall record the same.....that it would be time enough to consider the legal effect of the certified adjustment if and when effect is sought to be given to it by some one interested in the matter. I do not wish to be understood as agreeing with Mr. Amerasekara in his submission that time is not the essence of the adjustment, but with regard to the remainder of his submission I am unable to say that I disagree with him."

Consequent on the refusal to stay sale, the 1st defendant and the Bank of Chettinad, who occupy the position of secondary mortgagees, asked that the sale that had taken place be set aside.

The questions that then arise for our decision are: (*a*) Was there such an adjustment in this case as was certifiable under section 349 of the code? (*b*) Were the sales illegal and liable to be set aside? The first of these questions depends for its answer upon the correct interpretation of section 349. The relevant part of it provides that "(1) if any money payable under a decree is paid out of court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, he shall certify such payment or adjustment to the court whose duty it is to execute the decree; (2) the judgment-debtor may also by petition inform the court of such payment or adjustment, and apply to the court to issue a notice to the decree-holder to show cause.....why such payment or adjustment should not be recorded as certified. And if after due service of such notice the decree-holder fails to appear on the day fixed or having appeared, fails to show cause why the payment or adjustment should not be recorded as certified, the court shall record the same accordingly."

In this instance, the question of certification arises under part 2 of section 349 on a motion presented by the judgment-debtor. I am of opinion that on the facts before us, there was no certifiable adjustment at all. All that had taken place between the 1st defendant and the plaintiff at the end of their course of negotiations was that the plaintiff had offered to take 8¾ lakhs in full satisfaction of his decree if the 1st defendant, on his part, accepted that offer by performing the conditions upon which it was made to depend. But, when the 1st defendant satisfied only some of those conditions and failed to perform the most important one — the payment of 8¾ lakhs — the offer lapsed and there was no adjustment. This is not a case of completed contract by which the judgment-debtor promises to do something on a future date and the decree-holder accepts it as an immediate adjustment in entire or partial satisfaction of the decree, but rather, a case of negotiations which failed to achieve the end which the parties had in view.

It is stated that, on this interpretation, the 1st defendant receives no consideration in return for the surrender of his appeal and of his action. I do not think that is quite true. He obtained an extension of time. The fact that, in the end, that extension yielded no material benefit is his misfortune and not the plaintiff's fault.

All the talk there was in the course of the argument about time not being of the essence of the contract appears to me to be entirely beside the point in a case like this, where there was no concluded contract, it having failed owing to the inability of the offeree to comply with a condition precedent, within the time he had the offeror agreed upon.

Mr. Gratiaen and Mr. Nadesan, although appearing for third parties wept—the latter with some appearance of sincerity—over the inability of a debtor, in this view of section 349, to certify an arrangement like this for, they said that that would mean that although, under the agreement, the debtor was given time to pay, nevertheless, the creditor would be able to take out writ during the period, for a court may not recognize any uncertified arrangement. But, in reality, the debtor is not in as hard a case as that. There is section 344 to which he could resort if the decree-holder were to attempt to break faith.

The next question is whether the sales that took place after August, 1941, all or any of them, are liable to be set aside on the ground that they were illegally held in that they were held — so it was contended — without a proper order sanctioning them. The absence of such an order was urged on the grounds that (*a*) on a correct interpretation, the order made by the judge on the motion of the 15th of August 1941, means that the judge directed *notice* to issue on the judgment-debtor to show cause against sale being ordered, and not that he allowed the *order for sale* to be sent to the auctioneer. (*b*) If however the correct meaning of that order is that he

directed an order for sale, it was not competent for the judge to make such an order without notice to the judgment-debtor. (*c*) The order for the sale was, in any event, not properly authenticated and communicated to the auctioneer in that it was not signed by the judge but by someone purporting to act as the clerk of the court by order of the judge.

After careful consideration of the motion paper, the minute of it made on the journal, and evidence of Mr. Ludovici, I am quite satisfied that the trial judge has interpreted the order correctly as meaning that by it the court allowed an order of sale to issue without notice. The journal shows that the order was made after Mr. Ludovici had seen the judge in Chambers to support his submission that, in the circumstances of this case no notice was necessary as a preliminary step. If the judge had not accepted that submission, it is not at all likely that he would have made his order with the one word "allowed." He would in that event, surely have made it clear that notice should issue in the first instance. Be that as it may, I am of opinion that, in a case involving a hypothecary decree, directing that the mortgaged property be sold by a named auctioneer, no order for sale with notice to the judgment-debtor under section 347 of the Civil Procedure Code is necessary. I had occasion to give my reasons for that view in *Perera vs Jones et al* (41 N.L.R. 193) and I adhere to that view. In the result, therefore, even if we assume that the order of the judge was intended to direct notice to issue in the first instance, the failure to issue it was only a non-compliance with a direction of the court and as such not an irregularity that had the effect of vitiating the sales.

In regard to the appeal of the Bank of Chettinad, who stand in the place of secondary mortgagees, and who also have taken the objection that the sales are bad for want of notice to them, all I need say is that they have no voice whatever in the matter. They are not judgment-debtors and were not entitled to be noticed.

As regards the objection, that the order to the auctioneer was not authenticated and communicated to him properly, assuming that to be so, it is again a mere irregularity and cannot be said to invalidate the sales which ultimately rested on the direction given in the decree itself. But, there is evidence on the record to show, and we were also informed from the Bar, that for over two years, it has been the practice in the District Court of Colombo for communications of this kind to be made to the auctioneer through an officer of the court. As far as I am aware, there is no requirement of law or of procedure that the order sent to the auctioneer authorizing him to sell should be signed by the District Judge or by any particular officer of his court. It is not disputed that, in fact, this order was signed by a clerk of the court in obedience to the direction of the court.

It would, indeed, be deplorable to all but judgment-debtors if judicial sales were liable to be set aside on grounds like these, and if the public should come to regard participation in these sales as *periculosae plenum opus aleae*.

It is clear that the 1st defendant has subjected the record of this case to a microscopic examination in search of flaws in a desperate attempt to have the sale set aside and so to retrieve his fortunes. One cannot help sharing his regret that he just failed to have his lands sold in the abnormally inflated market for land that exists today, but there are the rights and dues of others to be considered.

I allow the appeal of the plaintiff and set aside the order of certification made by the District Judge. I dismiss both the appeals and the cross-objections of the 1st defendant as well as the appeal of the Bank of Chettinad. In regard to costs, I think a fair order would be to direct that the costs as of one inquiry and of one appeal be paid to the plaintiff in the proportion of half by the 1st defendant that is to say E. C. de Fonseka and half by the 2nd respondent (The Bank of Chettinad) and the 4th respondent (A. R. M. Raman Chettiyar) between them. The 1st and 2nd respondents, that is to say, E. C. de Fonseka and the Bank of Chettinad, will also pay each Rs. 500/–, as the costs here and below of the purchasers who were represented by counsel at the hearing before us.

HEARNE, J.

I agree.

Appeal of plaintiff allowed.

Appeal of 1st and 2nd defts. dismissed.

Present: SOERTSZ, J. & KEUNEMAN, J.

ZAIN vs FERNANDO

S. C. No. 882—*M. C. Kalutara No.* 16385.
Argued on 26th November, 1943.
Decided on 14th December, 1943.

Sea-shore Protection Ordinance, Chapter 310 *sections* 2 *and* 5—*Removings and from prohibited area—Meaning of sea-shore—Landward limit—Roman-Dutch law.*

Held : That the term "sea-shore" in section 2 of the Sea-shore Protection Ordinance should be interpreted in accordance with the Roman-Dutch law and includes the furthest line reached by the sea during the south-west monsoon storms, excluding exceptional or abnormal floods.

Cases referred to : *Attorney-General vs Chambers* (23 L.J. Ch. 662 ; 43 E.R. 486)
Pharo vs Stephen (S.A. Reports–1917 A.D. p. 1)
Surveyor-General (Cape) vs Estate De Villiers (S.A. Reports–1923 A.D. 588)

H. V. Perera, K.C., with *E. B. Wickramanayake*, for the accused-appellant.
T. S. Fernando, Crown Counsel, for the complainant-respondent.

KEUNEMAN, J.

This appeal was argued before me originally, and I referred it to a Bench of two judges. It was later argued on 7th April 1943 before my brother Soertsz and myself and was referred to the magistrate for the recording of evidence on specified points. After some delay the evidence was recorded, and the appeal was further argued before us.

The accused was charged with removing sand from a prohibited place, to wit, the part of the sea-shore at Kalutara North, which lies between the northern administrative limit of Kalutara Urban Council and the Kaluganga, proclaimed under section 2 of the Seashore Protection Ordinance, Chapter 310, published in Government Gazette 863 of 24th May 1940. The offence was punishable under section 5 of Chapter 310. The accused was convicted of this offence.

The Gazette defines the northern and the southern limits of the prohibited area, and there is no question that the sand was removed from between the limits. The question we have to decide is whether the place the sand was taken from was part of the "sea-shore" for under section 2 the Governor has power to proclaim "any part of the sea-shore" as a prohibited area, and thereupon no person can remove sand, etc. from "such area or from the bed of the sea contiguous thereto to a distance of one mile from the shore." It is to be noted that, while the seaward limit is defined, the landward limit is not and that will depend on the meaning of the word "sea-shore."

Counsel for the accused contended that the word "sea-shore" should be determined according to the English law and cited the case of *Attorney-General vs Chambers* (23 L.J. Ch. 662 ; 43 English Reports 486) where it was held that "in the absence of any evidence of particular usage, the extent of the right of the Crown to the sea-shore landwards is *prima facie* limited by the line of the medium high tide between the springs and the neaps."

Cranworth, L.C. in this case stated: "What is the *littus?* Is it so much as is covered by the ordinary spring tides, or is it something less ?"

The rule of the civil law was *est autem littus maris quatenus hybernus fluctus maximus excuorit.* This is certainly not the doctrine of our law. All the authorities concur in the conclusion that the right is confined to what is covered by "ordinary tides," whatever be the right interpretation of that word. By *hybernus fluctus maximus* is clearly meant extraordinary high tides though "speaking with physical accuracy," the winter tide is not in general "the highest."

Cranworth, L.C. considered the authorities and came to the conclusion that "the Crown's right is limited to land which is for the most part not dry or manurable," and that this limit is "the line of the medium high tide between the springs and neaps. All land below that line is more often than not covered at high water, and so may be firstly said, in the language of Lord Hale, to be covered by the ordinary flux of the sea."

If the English meaning of "sea-shore" is adopted, it is clear that on the evidence in this case the accused had committed no offence by removing sand from a prohibited area.

Counsel for the prosecution contended that in Ceylon the word "sea-shore" has to be given the meaning appropriate to it under the Roman-Dutch law, and not that under the English law. He cited the case of *Pharo vs Stephen* (S.A.

Reports (1917) A.D. p. 1), where it was held that under the Roman-Dutch law the boundary of the sea-shore is the furthest line reached by the sea during the ordinary winter storms, excluding an exceptional or abnormal flood. This was a decision of three judges. In the very learned and convincing judgments, the authorities in the Roman law, the Roman-Dutch law and the English law were fully discussed.

"The conclusion then to which I come," said Solomon, J.A., "is that the definitions in the *Corpus Juris* which are all subsequentially to the same effect, were adopted by the Roman-Dutch jurists, and that by *maximus fluctus hybernus* they understood the furthest line reached by the sea during the ordinary winter storms, excluding an exceptional or abnormal flood. And if that is the Roman-Dutch law on the subject we must accept it as binding upon us, unless we are justified on some good legal ground in rejecting it." He further quoted authority for the proposition that *fluctus* in the definition *of littus* does not mean tide, but the flow of the sea when agitated by storms.

Maasdorp, J. A. discussed the question whether *hybernus* referred to the winter season or the stormy season, and came to this conclusion :

> "As a rule the line reached during the stormy season of the year by the water of the sea would be indicated by the effect of the water on the land, or it could be ascertained from the evidence of residents in the neighbourhood. Then again we must not take into account any extraordinary or occasional storm, but only annually recurring stormy weather that is indicated by the word *hybernus* used in the definitions, which points to something happening every season."

Solomon, J.A. also cited authorities which lead to the conclusion that the reference is to a particular stormy season.

The case of *Pharo vs Stephen* (*supra*) was apparently followed in the case of *Surveyor-General (Cape) vs Estate De Villiers* (S.A. Reports (1923) A.D. 588). This was a decision of five judges, where the question arose of interpreting the words in a grant "S.E. to the sea-coast." In this case the position of the Crown and of the public in respect of the ownership and use of the sea-shore was also discussed but we are not concerned with this matter in the present case.

What is the position in Ceylon ? I am of opinion that we are bound to adopt the Roman-Dutch interpretation of one word "sea-shore," unless there is some good ground for rejecting that interpretation. The Roman-Dutch law applied to the maritime provinces, and the terms should be interpreted in accordance with that law. There is no evidence of any consistent interpretation in any other sense in reported cases. In fact this appears to be the first time that the word sea-shore has been defined. There is one difficulty, however, that in Ceylon we have no season which can be spoken of as winter. But there is a particular season, namely, the south-western monsoon, which is a stormy season annually recurrent on this coast of Ceylon, and I think the phrase *fluctus hybernus* may well be applied to that season of the year, and that in this area the furthest line reached by the sea during the ordinary south-west monsoon storms, excluding exceptional or abnormal floods, would be the limit of the sea-shore.

As regards the evidence in the case it seems clear that during the non-stormy periods the highest point reached by the waves of the sea is the broken line marked C in the sketch Sk 1. This line appears to correspond to the bank depicted in plan P2. Beyond that and to the east is a sandy piece of ground extending 57 to 60 feet landwards. This is the portion from which the sand was removed by the accused. On this portion there are no houses or plantations. East of this portion is another piece of ground planted with coconuts extending 19 to 35 feet eastwards to the beach road. There are four coconut trees on this piece about 40 years old. I am inclined to think that this planted portion may *prima facie* be regarded as not part of the sea-shore, but we are not concerned with it, but rather with the portion west of the planted area, for it was from that portion that the sand was removed.

In the evidence originally led, Mr. Cyrill de Zoysa the Chairman of the Urban Council, stated, "I can say that during the south-west monsoon the waves beat right up to the beach road," and his evidence was accepted by the magistrate. In the later evidence recorded, Hendrick Perera, who is a fisherman living in the vicinity of the belt, practically opposite the spot where the sand is alleged to have been removed, said that normally during the monsoon, the sea reaches almost close to the road—roughly about four or five feet off the road.....It happens regularly during monsoon time. This is important evidence, because Hendrick Perera had exceptional opportunities for observation, and there is nothing in his cross-examination to suggest that he is an unreliable witness. This evidence establishes that the *maximus fluctus hybernus* reached well beyond the point where the sand was removed. For the defence also certain witnesses were called. R. W. Fernando, a Head Master who owns land about 100 or 200 yards from the spot and lives in a house 300 yards from the shore, said that he had only known the sea reach the road on one occasion, and that was at the spot where the accused removed the sand. In cross-examination he added "in monsoon

times the waves do not regularly reach the road in fact it happened only once to my knowledge at or about the spot where sand had been removed. The protective sand bank has been washed off during the monsoon." This is bank along broken line C in Sk 1.

L. W. Peiris, Vice-Chairman, Urban Council, who lived close by to the sea-shore said : "During rough weather, *i.e.* the south-west monsoon, the waves go beyond the sand bank. They go about six feet beyond the sand bank — not more. The weakness of this evidence is that it does not specifically relate to the spot where the sand was removed. Simon Dalpathadu also spoke to the effect of waves in relation to his own house X2 in sketch Sk 1, which is considerably to the north of the spot where the sand was removed. He added, however, in cross-examination "the waves do not go up to the road even in monsoon time. It comes to about a fathom from the road."

I think the evidence establishes that waves of the sea during the south-west monsoon period reached the spot where the sand was removed, and this took place in the case of an ordinary storm, and not only in one exceptional or abnormal storm.

I think the offence alleged has been brought home to the accused. The appeal is accordingly dismissed.

SOERTSZ, J.

I agree. *Appeal dismissed.*

Present: JAYETILEKE, J.

JOSEPH vs THE RETURNING OFFICER, MUNICIPALITY, COLOMBO & OTHERS

Writ of Certiorari and Mandamus against the Returning Officer, Municipality, Colombo, by Mr. S. M. Joseph. (No. 528).
Argued on 9th, 10th & 16th December, 1943.
Decided on 20th December, 1943.

Mandamus—Writ of Certiorari—Courts Ordinance section 42—Colombo Municipal Council (Constitution) Ordinance sections 31, 32 and 37.

Held : (i) That a candidate, to whose nomination paper no objection has been taken within the time prescribed in section 32 (2), must be regarded as duly nominated, even though the nomination paper does not satisfy the requirements of section 31 (2).
(ii) That the Returning Officer is not required to announce his decision under section 32 (4) to the assembled public.

Cases referred to : *Pritchard vs Mayor, Alderman and Citizens of Borough of Bangor* (13 Appeal Cases 241)
Davies vs Lord Kensington (L.R. 9 C.P. 720)

N. Nadarajah, K.C., with *C. S. Barr-Kumarakulasingham* and *V. Wijetunga*, for the petitioner.
N. K. Choksy with *R. A. Kannangara*, for the respondent.
Cyril E. S. Perera with *V. F. Gunaratne*, for the intervenient.

JAYETILEKE, J.

This is an application for *Writ of Mandamus* to compel the 1st respondent to take the necessary steps under section 37 of the Colombo Municipal Council (Constitution) Ordinance on the footing that the petitioner is a duly nominated candidate for the Mutwal Ward. In the course of the inquiry the petitioner amended the petition *abundanti cautela* and asked for a *Writ of Certiorari* to quash the decision of the 1st respondent that he was not a duly nominated candidate.

The petitioner, the 2nd respondent, and one Mr. Mendis were nominated as candidates for the election for the Mutwal Ward at the general election of the Colombo Municipal Council. The 1st respondent was duly appointed Returning Officer for that ward.

On nomination day the petitioner handed to the 1st respondent two nomination papers A and R1, the copies of each B and R2. The papers were not examined by the 1st respondent but placed in a tray which was on his table. They were passed on by a clerk called Fernando to another clerk who had been detailed by the

1st respondent to scrutinize them. The latter found that the written consent of the petitioner to be nominated as a candidate was not annexed to or endorsed on B, and he brought the fact to the notice of the 1st respondent. R1 and R2 had got mixed up with some other nomination papers and were not scrutinized by him. The 1st respondent inquired whether there were any papers besides A and B and was informed there were none. He then took the objection that B was not a true copy of A within the meaning of section 31 of the Ordinance.

The 1st respondent says that he took the objection before 1-30 p.m. upheld it, and announced his decision at 3-30 p.m. on the microphone.

A large volume of evidence was led by the petitioner to prove that no such announcement was made. It seems unnecessary for me to decide whether such an announcement was made because section 32 (4) does not require the Returning Officer to make a public announcement of his decision on an objection. There is ample evidence that the 1st respondent informed the petitioner of the objection taken by him and of his decision thereon as required by the sub-section.

Mr. Nadarajah faintly argued that it was not necessary to have the written consent of the candidate annexed to or endorsed on the copy. The short answer to this contention is that section 31 provides that a *true copy* must be delivered with every nomination paper. B is not a true copy of A because the written consent of the petitioner which is endorsed on A does not appear on it.

The petitioner alleged in his affidavit that he handed to the 1st respondent two nomination papers and a copy of each. He further alleged that candidates were prevented from scrutinizing nomination papers, that the copies of nomination papers were not posted up on the board before 1-30 p.m. that objections were entertained after 1-30 p.m. that there was a large crowd round the 1st respondent and that the proceedings were conducted by the 1st respondent in a very unbusinesslike manner.

These allegations were not denied by the 1st respondent. The cause of the trouble seems to have been that one person had been appointed Returning Officer for 3 wards.

There can be no doubt that whoever was responsible for making the appointments has committed an egregious blunder. It was not humanly possible for one person to examine and pass 700 nomination papers within the prescribed time. The 1st respondent has himself failed in his duty to make adequate arrangements to have the nomination papers scrutinized for he had only twelve clerks to help him in the work.

The 1st respondent in his affidavit stated that the petitioner handed to him only one nomination paper and one copy.

But in course of inquiry he brought to my notice that he caused a search to be made to satisfy his own conscience that there was no other nomination paper and he came across the nomination paper R1 and the copy R2 which he produced in court. He pointed out that R2 was not a true copy of R1 as the written consent of the petitioner was not annexed to or endorsed on it. He admitted that no objection was taken by anyone to R1.

Mr. Nadarajah contended that as no objection was taken to R1, it must be taken to be a valid nomination paper and that the 1st respondent was not justified in refusing to put the petitioner in nomination. He relied on the case of *Pritchard vs Mayor, Alderman and Citizens of Borough of Bangor* (1889–13 Appeal Cases) in which Lord Watson said at page 252 :

> "If no objection is made, or if objections are stated repelled by the Mayor, then the nomination becomes a valid nomination. I do not mean to suggest that it is final and conclusive upon questions of disqualification or other similar objections which may be taken to it, but I think it was intended to be conclusive to this effect, that the nomination paper so sustained as valid should form the basis of the election, and that the nominee in that paper should be treated as a person for whom votes could be given before the Returning Officer."

The functions of a Returning Officer with regard to the nomination of candidates are defined in sections 31, 32, 33, 34, 35, 36 and 37 of the Ordinance.

Under section 32 (2) he is under an obligation to reject any objection taken to a nomination paper after 1-30 p.m. on nomination day.

The nominations of the petitioner, the 2nd respondent, and Mr. Mendis were duly handed on to the 1st respondent within the prescribed time. No objections were taken to the nomination papers of either the 2nd respondent or Mr. Mendis but, as I said before, one of the nomination papers of the petitioner, to wit, R1, was mislaid by the 1st respondent.

As no objections was taken to R1, I am of opinion that it must be taken to be a valid nomination. It was therefore the duty of the 1st respondent to put all three candidates in nomination and to take the necessary steps under section 37 sub-sections (1) and (2).

Sub-section (1) provides that if more than one candidate stand nominated for the ward,

the Returning Officer shall forthwith adjourn the election to enable a poll to be taken, and shall allot to each candidate a colour by which the ballot box for the reception of ballot papers in favour of such candidate shall be distinguished at the poll. Sub-section (2) provides that immediately after such adjournment the Returning Officer shall report to the Commissioner that the election is contested and shall send him copies of the nomination papers and a statement of the colour allotted to each candidate. Sub-section (3) provides that upon the receipt of such report the Commissioner shall take the necessary steps to have a poll taken.

The evidence shows that the 1st respondent failed to put the petitioner in nomination and that his report under sub-section (3) was that the 2nd respondent and Mr. Mendis stood nominated for the ward. The poll was taken on 4th December 1943 and the 2nd respondent was declared elected.

The question arises whether the 1st respondent's failure to put the petitioner in nomination and to comply with the provisions of section 37 (1) and (2) vitiates all the subsequent steps taken by him.

In *Davies vs Lord Kensington* (L.R. 9 C.P. 720) the Returning Officer refused to put in nomination one of two candidates on the ground that he declined to deposit or give security for £40 which the Returning Officer demanded as a moity of the estimated expenses to be incurred by him in carrying out the provisions of the Ballot Act.

Lord Coleridge, C.J. said :

"He (the Returning Officer) improperly insisted upon a condition which he had no right to impose and his refusal to put Mr. Davies in nomination was without justification, and consequently the election and return of Lord Kensington was void."

Batt, J. said :

"The refusal of the Returning Officer to put the second candidate in nomination was a breach of duty which altogether avoided the election, and therefore we must hold the return of Lord Kensington to be void."

The question of principle raised here are indistinguishable from those which were argued in the two cases I have referred to. Mr. Choksy urged that a *Writ of Mandamus* which is a high prerogative writ, should not be issued in this case because the petitioner has not complied with the provisions of section 31 of the Ordinance.

A *Writ of Mandamus* is, no doubt, a writ discretionary on the part of this court. Though R2 is not a true copy of R1, I am satisfied on an examination of R1 that the written consent of the petitioner has been given to his nomination. The petitioner has proved that the 1st respondent was under a duty to put him in nomination and that he has failed to do so.

In these circumstances, I am of opinion that, the relief prayed for in para (*a*) of the petitioner's original petition should be granted by this court. I declare the election of the 2nd respondent void and make the rule absolute with costs against the 1st respondent. I would make no order for costs against the 2nd respondent.

Rule made absolute.

Present: KEUNEMAN, J. & JAYETILEKE, J.

TULIN FERNANDO vs AMARASENA

S. C. No. 685—*M. C. Colombo No.* 17227.
Argued on 18th November, 1943.
Decided on 25th November, 1943.

Maintenance Ordinance—Res Judicata—Order for alimony and maintenance in divorce case—Does such order oust the jurisdiction of the magistrate to order maintenance.

Held : That the existence of a decree of a civil court for alimony and maintenance does not oust the jurisdiction of the Magistrate to make an order under the Maintenance Ordinance, where a husband fails to maintain his wife and children.

Cases referred to : *Aryanayagam vs Thangamma* (41 N.L.R. 169)
Subbaramakkamma, Petitioner (2 Weir p. 615)
In Re Mohamed Ali Mithabhai (A.I.R. 1930 Bombay 144)
Kent vs Kent (A.I.R. 1926 Madras 59)
Saraswathi Debi vs Narayan Das Chatterjee (A.I.R. 1932 Calcutta 698)
In Re Taralakshmi Manuprasad (A.I.R. 1938 Bombay 499)

L. A. Rajapakse with *H. Deheragoda*, for the applicant-appellant.
Nihal Gunasekera, for the respondent.

KEUNEMAN, J.

This case has been referred to us under section 38 of the Courts Ordinance for the determination of a question of law, in view of two divergent decisions of this court. The facts are as follows : The applicant was the wife of the respondent and applies here for maintenance on behalf of her legitimate child. In the earlier divorce action, the respondent was ordered to pay Rs. 15/– as alimony and maintenance for the applicant and the child. It is clear that nothing has been paid by the respondent under that order. The respondent claims that the jurisdiction of the magistrate has been ousted by the previous order of the District Court relating to the maintenance of the child.

In the argument before us, respondent's counsel urged that the principle of *res judicata* applied. I do not think this argument is maintainable. The issue involved in the civil case is not the same as that in the maintenance case, and further in view of the fact that the applicant in the maintenance case need not necessarily have been the mother, it is doubtful whether the parties can be regarded as identical. I think the real question is whether the jurisdiction of the magistrate has been ousted by the order in the divorce case.

Under section 2 of the Maintenance Ordinance, Chapter 76, " if any person having sufficient means neglects or refuses to maintain his wife or legitimate or illegitimate child," the magistrate may order him to make a monthly allowance for that purpose. In the Ordinance several grounds are set out on which this order will be refused, but the existence of a prior order in a civil case is not one of the grounds.

Counsel for the respondent desires us to follow the ruling of De Kretser, J. in *Aryanayagam vs Thanggamma* (41 N.L.R. 169) :

> " So long as the order of the District Court remains it is the order of a court of competent jurisdiction and on general principles it ought to be a bar to separate proceedings on the same subject-matter."

In arriving at this decision De Kretser, J. depended mainly on the case of *Subbaramakkamma, Petitioner* (2 Weir p. 615). The case itself is not available here, and we have only the reference to it in later cases and in Sohoni's Code of Criminal Procedure. In the 1941 edition of Sohoni the decision is set out as follows :

> " A woman is not entitled to an order under this section from a magistrate, when a decree for maintenance obtained by her in a Civil Court is in force."

The section referred to is section 488 of the Criminal Procedure Code of India which is very closely akin to section 2 of our Maintenance Ordinance.

The attention of De Kretser, J. was not drawn to the fact that there are later Indian cases dealing with this point. He only refers to a Bombay case, which I shall have occasion to refer to later. In that case the civil decree could not be executed by the wife owing to the insolvency of the husband, and in the circumstances it was held that the magistrate could act under section 488.

The same point came up for decision later in Ceylon before Soertsz, J. (see S.C. Minutes, 20th December 1940, S.C. 249—M.C. Colombo 16453). In this case also after the wife had obtained a decree for judicial separation and alimony, the husband was adjudicated insolvent. Soertsz, J. referred to the Bombay case I have mentioned namely, *In Re Mohamed Ali Mithabhai* (A.I.R. 1930 Bombay 144) where it was held that in the circumstances I have mentioned the decree of the civil court was merely " a paper decree," which could not be executed on account of the pendency of insolvency proceedings. Patkar, J. added : " A mere decree of a civil court awarding maintenance is not equivalent to maintaining the wife."

Reference was made in this case and also by Soertsz, J. to the case of *Kent vs Kent* (A.I.R. 1926 Madras 59). There Devadas, J. emphasized the language of section 488 and pointed out that what had to be proved to the satisfaction of the magistrate was " that the husband had neglected to maintain his wife," and where that was proved, the magistrate had jurisdiction. The decree in the civil case was for certain reasons not executable, but Devadas, J. added : " Even if held to be executable, I am of opinion that so long as the husband does not maintain the wife either by payment of alimony or otherwise, the magistrate's jurisdiction to order him to pay is not taken away." The case in Weirs' Reports was differentiated. In another part of his judgment Devadas, J. said : " A mere order for maintenance is non-equivalent to maintaining the wife, and the order whatever may be its force or nature cannot take away the magistrate's jurisdiction as long as the husband neglects or refuses to maintain the wife."

Soertsz, J. in the case before him came to the conclusion that the existence of the civil decree for alimony was no bar to the exercise of the magistrate's jurisdiction to grant an order for maintenance.

In the case of *Saraswathi Debi vs Narayan Das Chatterjee* (A.I.R. 1932 Calcutta 698) Mitter, J. approved of the decision in *Kent vs Kent* (*supra*). The case, however, related to an agreement outside court by the husband to

maintain the wife. This was held not to be sufficient to oust the jurisdiction of the magistrate.

Further, in the case of *In Re Taralakshmi Manuprasad* (A.I.R. 1938 Bombay 499) the facts were as follows : A compromise decree was passed in a civil suit brought by the husband for restitution of conjugal rights, whereby it was provided that a certain sum was to be paid for arrears of maintenance, and that the husband should pay Rs. 15/- a month for maintenance of the wife and Rs. 5/- a month for the maintenance of the daughter and that a previous order made under section 488 should be cancelled. The order already made under section 488 was accordingly cancelled. The husband paid the arrears of maintenance under the civil decree, but failed to pay the subsequent maintenance. In the circumstances the wife applied for a fresh order under section 488. It was held by Beaumont, C.J. that the jurisdiction of the magistrate was not ousted. In his judgment Beaumont, C.J. said :

> "Section 488 contains no direction that an order under that section cannot be made if there is a decree for maintenance of a Civil Court although under sub-section (4) conditions are specified under which an order cannot be made. Of course the existence of a decree of a Civil Court is relevant when the magistrate is considering what form of order he should make under section 488 but in our opinion the mere existence of a decree of a Civil Court does not oust the jurisdiction of a magistrate in a proper case to make an order under section 488. It seems to us wrong in principle to allow the husband in this case to take advantage of the decree which he has made no attempt to carry out. We think, therefore, that the case must be sent back to the learned City Magistrate to be dealt with on the merits. It is for him to consider whether there is any evidence which would bring the case under sub-section (4) and if he comes to the conclusion that an order for maintenance should be made he ought to make it clear in his order that anything paid under the decree of the Civil Court will be taken into account against anything which he may order to be paid. That is a mere question of the form of the order. In our view the existence of the decree of the Civil Court does not oust the jurisdiction of the magistrate."

In my opinion the later Indian decisions set out the true principle which we should follow. Where all that is shown is the existence of a decree of a civil court, that is no bar to the exercise of jurisdiction by the magistrate. Of course it is open to the husband to show that he is making payments under the civil decree and therefore, has not failed or neglected to maintain the wife and children. In the present case the husband (respondent) has made no attempt to comply with the civil decree against him. I, therefore, set aside the order of the magistrate and send the case back to him to make an appropriate order under the Maintenance Ordinance. The magistrate will bear in mind the warning given by Beaumont, C.J. as to the form of the order and will not lose sight of the fact that the order of the District Court relates both to his wife and to the child.

The appellant is entitled to the costs of the appeal.

JAYETILEKE, J.

I agree.

Order set aside.

Present: JAYETILEKE, J.

LIVERSZ vs RETURNING OFFICER, MUNICIPALITY, COLOMBO & ANOTHER.

Application for a Writ of Certiorari and Mandamus against the Returning Officer, Municipality, Colombo (No. 527.)

Argued on 7th & 9th December, 1943.

Decided on 13th December, 1943.

Mandamus—Writ of Certiorari—Courts Ordinance section 42—Colombo Municipal Council (Constitution) Ordinance section 30.

Held : (i) That the payment of the deposit required by section 30 of the Colombo Municipal Council (Constitution) Ordinance to the Municipal Treasurer does not satisfy the requirements of the Ordinance.

(ii) That failure to make the prescribed deposit with the Returning Officer renders a candidate's nomination open to objection.

Cases referred to : *Becke vs Smith* (2 M. & W. at 195)

C. S. Barr-Kumarakulasingham with *V. Wijetunga* and *George Samarawickreme*, for the petitioner.

J. E. M. Obeyesekere with *R. A. Kannangara*, for the respondent,

N. K. Choksy, for the intervenient.

JAYETILEKE, J.

The petitioner was a candidate for the Wellawatte south ward at the general election of elected members of the Colombo Municipal Council.

The 1st respondent is the Secretary of the Council and was duly appointed the Returning Officer of that ward. The 2nd respondent was a candidate for that ward.

On November 9th 1943, the petitioner deposited with the Municipal Treasurer Rs. 250/– and obtained a receipt P1. On the day of nomination, namely November 11th 1943, he heard that an objection was likely to be taken to his nomination paper on the ground that his deposit was not made in strict compliance with the provisions of section 30 of the Municipal Council (Constitution) Ordinance. He, therefore, went up to the 1st respondent and inquired whether he intended to take any action in regard to the supposed irregularity. The latter replied that he would not take any objection himself but, if any objection was taken by a voter, he would uphold it. He did not make any suggestion to help the petitioner out of the difficulty, though on the previous day he had, very properly helped Sir Ratnajothi Saravanamuttu by exchanging his own receipt for that of the treasurer.

I find myself unable to comprehend why this discrimination was made by the 1st respondent.

The petitioner, thereupon, went in search of the Treasurer whom he eventually found in the Commissioner's room. He explained to the Treasurer his difficulty and asked him to take back his receipt and give him the money he had deposited.

At this stage the petitioner says that the Commissioner shouted "Why are you people worrying us without taking the trouble to read the Ordinance." This would have been an appropriate remark to be addressed to both the 1st respondent and the Treasurer, for the former did not seem to know that he had no power to entertain objections after 1-30 p.m. and after that he was not entitled to except deposits from the candidates.

When the petitioner asked the Treasurer for a refund of his deposit, he was told that he could be given a cheque but not cash. The Treasurer says that it would have been difficult to get Rs. 250/– in cash from the shroff, as the previous day's collection had been sent to the bank the previous evening. He admitted that on November 10th he learnt that the deposits made with him by some of the candidates were not in order, yet he failed to provide himself with sufficient money to return the deposits to those candidates on the day of nomination. However that may be, no effort seems to have been made by him to help the petitioner out of the difficulty.

It is not competent to me to investigate what reasons prompted the Treasurer to take up this unhelpful attitude, but, it seems to me, that his indifference on this occasion is not what a member of the public was entitled to expect from a person in a responsible position.

The petitioner was not willing to accept a cheque either because he was told by the Treasurer, or he thought, that a cheque would not be accepted by the respondent, and took the chance of an objection not being taken. Unfortunately for him, two objections were lodged against his nomination paper on the ground that he had failed to make his deposit with the Returning Officer. The objectors were the 2nd respondent and Mr. M. O. Fernando, a voter. The 1st respondent says that Mr. M.O. Fernando lodged his objections at 1-30 p.m. and the 2nd respondent at 1-25 p.m.

The petitioner led some evidence to prove that the 2nd respondent's objection was lodged at 1-34 p.m. but failed to lead any evidence to prove that Mr. M. O. Fernando's objection was not lodged before 1-30 p.m. Both objections were upheld by the 1st respondent.

It is unnecessary for me to decide whether the 2nd respondents objection was not lodged in time, because, it seems to me, that Mr. M. O. Fernando's objection was lodged well within time.

I, therefore, proceed to consider whether the petitioner complied with the provisions of section 30 of the Ordinance.

It provides that a candidate *shall deposit with the Returning Officer* Rs. 250/– before 1 p.m. on the day of nomination, and that the Returning Officer *shall forthwith credit the said sum* to the Municipal Fund. If a candidate fails to observe the provisions of this section, provision is made in section 32 for an objection to be taken to his nomination paper on that ground.

The petitioner paid his deposit to the assistant shroff of the Council, who received the money on behalf of the Treasurer, and issued the receipt P1. The question arises whether this payment can be said to be a deposit with the 1st respondent within the meaning of section 30.

In clear and unambiguous language section 30 provides that the Returning Officer shall forthwith credit the money received by him to the Municipal Fund.

In order to comply with that requirement of the law the Returning Officer must either have the money in his hands or have control over the money.

The words "deposit with the Returning Officer," therefore imply that the candidate must either pay the money to the Returning Officer or deposit it in such a way that the Returning Officer will have dominium or control over the money. P1 shows that the petitioner did not deposit the money to the credit of the 1st respondent.

The money has been credited to the deposit account of the Municipal Council Elections.

On the materials before me I am unable to say that the 1st respondent had dominium or control over the money.

I am therefore, of opinion that the deposit in question was not a deposit with the Returning Officer within the meaning of section 30 of the Ordinance.

It was urged by counsel for the petitioner that I should not insist on a meticulous compliance with the provisions of the section so long as the intention of the legislature was that the money should eventually be credited to the Municipal Fund and the money has, in fact, been credited to the Fund.

That section says in unambiguous language that the candidate shall deposit Rs. 250/- with the Returning Officer and the latter shall forthwith credit the said sum to the Municipal Fund.

When the words used in a statute are clear it is not permissible for me to depart from the ordinary and plain meaning of those words on the mere supposition that the intention of the legislature was different from that indicated by the plain meaning of the words.

The general rule is laid down by Parke, B. in *Becke vs Smith* (2 M. & W. at 195) :

> "To adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but not further."

Though the ultimate destination of the money is as indicated in the section, the legislature must have had good reasons for providing that the money should be deposited with the Returning Officer. To uphold counsel's contention I shall have to disregard as inoperative what appears in the section and to read into the section words which are not expressed therein. My function is to give words which appear in a statute their natural meaning. I cannot disregard as inoperative what appears in the section or read into the section words which are not expressed therein. I am bound by fixed rules of law and am not at liberty to legislate for myself.

The law says that the money shall be deposited with the Returning Officer. That has not been done and the objection that has been taken under section 32 is, in my opinion, well founded.

With much regret I would discharge the rule but in view of the unhelpful attitude of the 1st respondent I would make no order as to his costs. I would award to the 2nd respondent half costs of this application.

Rule discharged.

Present: WIJEYEWARDENE, J.

THE COLLECTOR OF CUSTOMS, N.P. vs VELUPILLAI

S. C. No. 570—*M. C. Pt. Pedro No.* 2053.
Argued on 30th September, 1943.
Decided on 5th October, 1943.

Customs Ordinance section 139*A*—*Criminal Procedure Code section* 413—*Goods found and seized in the possession of the accused—Customs authorities not entitled to their return.*

Held : That goods found in the possession of an accused person acquitted of an offence under section 139A of the Customs Ordinance should be returned to him in the absence of evidence that the goods were forfeited under the Customs Ordinance.

H. W. Thambiah, for the appellant.
E. H. T. Gunasekera, Crown Counsel, for the Attorney-General.

WIJEYEWARDENE, J.

This is an appeal by the accused against an order made by the magistrate regarding the disposal of certain goods produced before him in this case. The accused has also filed papers in revision against that order.

The Sub-Collector of Customs, Pt. Pedro, found the accused conveying the goods in question in a car along Pt. Pedro–Valvettiturai road on September 24th 1942. He took the goods and the accused to the Customs House, Pt. Pedro. He produced the accused next morning at the Police Station. The Inspector of Police made his report to the magistrate under sections 22 and 38 of the Criminal Procedure Code and produced the accused who was admitted to bail by the magistrate.

On November 25th the Collector of Customs, N.P., filed the plaint alleging that :

> (*a*) The accused was knowingly concerned in conveying the goods in question ;
> (*b*) All the goods were liable to duty and no duties had been paid.
> (*c*) The accused became liable to forfeit either treble the value of the goods or the penalty of Rs. 1,000/– under section 127 of the Customs Ordinance (Chapter 185) ; and
> (*d*) The accused has, thereby, committed an offence punishable under section 139A of the Customs Ordinance.

The plaint was accompanied by a written statement of the Principal Collector of Customs, dated 23rd November stating as required by section 139A that he was of opinion that the penalty imposed by him on the accused was not likely to be recovered. That statement showed that a penalty of Rs. 250/– had been imposed " under the provisions of sections 127 and 155 " of the Customs Ordinance.

When the case came up for trial on April 10th 1943 the Sub-Collector of Customs, Pt. Pedro, gave evidence referring to the goods which were then before the court and the hearing was adjourned for May 22nd. On that day the magistrate intimated to the prosecution that he did not "think any useful purpose would be served in proceeding with the case " and acquitted the accused. Thereupon the counsel or the prosecution asked the magistrate to record the following statement :

> " At the Departmental inquiry held by the Collector of Customs the accused claimed the goods seized as owner and these goods have been forfeited by the Customs authorities."

On May 24th the magistrate delivered his judgment giving his reasons for acquitting the accused. In the course of his judgment, he said that there was " not even *prima facie* evidence that the goods in question were dutiable or whether they were imported or whether duty on them was paid or not." Proceeding to deal with the question of disposal of the goods he said :

> " The Collector of Customs has forfeited these articles by virtue of his admitted and undoubted powers under the Customs Ordinance. If the Collector has acted wrongly the accused is not without his remedy, but as far as I am concerned I am not going in these proceedings to interfere with the order made by the Collector of Customs. Under the circumstances I think that the fair and, to use the words of section 413 of the Criminal Procedure Code, the ' fit ' order to make is to order that the articles .....be returned to the Customs Authorities from whose custody these articles were produced before Court."

The judgment of the magistrate shows that in his opinion the goods were not property regarding which any offence appeared to have been committed or which had been used for the commission of any offence. The magistrate, therefore, had no jurisdiction to make an order as he thought " fit " under section 413 of the Criminal Procedure Code. Under these circumstances, the only proper course to adopt is to return the goods to the person in whose possession it was. The evidence as indicated by me, shows clearly that the Customs authorities seized the goods in the possession of the accused. By seizing the goods the Customs authorities cannot claim to be regarded as a person from whose possession the goods were produced before the court. If such a contention is maintainable, then every police constable who arrests a man, say on a charge of stealing a watch and produces the accused in court with the watch, can claim that the watch be restored to him even though the accused is acquitted and the court finds that no offence had been committed in respect of that watch. There is some reference in the judgment to an order of forfeiture by the Customs Authorities. It is sufficient to say that there is no evidence of such an order, as of course, the statement of counsel after the acquittal of the accused cannot be considered as evidence. Moreover neither the plaint nor the written sanction of the Principal Collector of Customs refers to a section of the Customs Ordinance under which these goods could have been forfeited. It is not, therefore, necessary to consider in this case what the effect of such an order of forfeiture would have been.

I set aside the order of the magistrate and direct that the goods be restored to the accused-appellant.

Order set aside.

Present: DE KRETSER, J.

WIJESINGHE vs DAVOOD & ANOTHER

S. C. No. 478–9—*M. C. Colombo No.* 14420 (*Defence Regulations*).
Argued & Decided on 16th July, 1943.

Food Control Regulations—Sections 16 *and* 7—*Failure to obtain valid coupons from ration book for rice supplied in the form of meals—Liability of servants.*

The 1st accused a waiter, and the 2nd accused a cashier of a hotel were convicted under section 16, Part 3, of the Food Control Regulations for having sold rice in the form of meals without obtaining the surrender of a valid coupon for rice as required by section 7 of the regulations.

Held : (i) That the conviction against the accused could not be sustained inasmuch as the rice could not be said to have been in the control of the accused.
(ii) The rice found in a hotel, whether cooked or uncooked, is in the control of the manager or proprietor of such hotel

H. V. Perera, K.C., with *S. Saravanamuttu* and *Seyed Ahamed*, for the appellants.
J. M. Jayamanne, Crown Counsel, for the respondent.

DE KRETSER, J.

The two accused are charged with a breach of section 16 part 3 of the Food Control Regulations. The evidence disclosed that the 1st accused is a waiter and the 2nd accused is a cashier of a place known as the Modern Cafe, 79, Keyzer Street. The Price Control Inspector was given a meal by the 1st accused without any rice ration book being produced or a coupon being surrendered in terms of regulation 7. He handed a rupee note which was taken by the 1st accused to the 2nd accused who is clearly described by the Inspector as being the cashier. A protest was made regarding the price and the cashier told him there would be no reduction. It is difficult to follow the lines of the defence in the lower court or what actually the magistrate was driving at in his judgment. It would appear that both these persons are charged as being persons having in their control a quantity of a controlled commodity, namely rice, and selling the same without complying with the Regulations. It is freely admitted that it is difficult to say that both persons were in control of the rice. It seems to me that section 16 must be interpreted with due reference to the facts of each case and that section 7 which has been mixed up with section 6 in the charge supplies the proper reasons.

An authorized distributor in terms of that section would supply such quantity of rice as the Deputy Food Controller authorized him to supply to the manager or proprietor of a hotel or an eating house. The person then in possession of that rice, that is, the controlled commodity, would be the proprietor or manager and it would be in his premises that that quantity of rice would be eventually found. Accordingly section 7 makes provision for the supply of a controlled commodity in the form of a meal and specifically enjoins the manager or proprietor to sell or deliver to any person a quantity of that commodity only in the form of a meal, and goes on to make the production of a ration book by the customer and the surrenderer of a valid coupon a *sine qua non* to the supply of a meal. Had either of these accused been the manager or proprietor he would be liable under section 16 as read with section 7, but I cannot hold that the rice was in the control of the waiter merely because he served the customer. On further search the Police discovered both cooked and uncooked rice on the premises. They were clearly not in the possession of the waiter, and everyone knows that a waiter merely conveys a meal from the kitchen to the table. The person in whose possession the rice is, whether cooked or not, is the manager or the proprietor. The learned magistrate in his footnote describes the 2nd accused as the manager but there is not a word of evidence to that effect. On the contrary the Price Control Inspector distinctly called him the cashier, which he need not have done if he was also the manager.

In the circumstances I do not find that any offence has been committed by these accused, and the conviction and sentence are, therefore, set aside and the accused acquitted.

Conviction set aside.

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

NADAR vs FONSEKA

S. C. No. 346 (*F*)—*D. C. Chilaw No.* 11687.
Argued on 26th & 27th October, 1943.
Decided on 3rd November, 1943.

Prescription Ordinance—Section 7—Acknowledgment in writing of money borrowed on interest—Absence of promise to pay sum borrowed—Can an undertaking to pay be implied—Is the action prescribed in three years.

On 15th August, 1941 defendant was sued on a document dated 1st April, 1936 which stated that "he has borrowed and received in full from Soona Yana Isak Nadar, the sum of Rs. 275/– of lawful money of Ceylon, having promised to pay interest at the rate of 15 per cent. per annum until this sum is paid in full." In the margin it is stated as follows: "Capital sum borrowed Rupees Two hundred and seventy five—No interest was deducted — Interest at the rate of 15 per cent. per annum."

The learned District Judge held that inasmuch as there was no statement that the defendant promised to pay the sum of Rs. 275/– the agreement did not fall within section 7 of the Prescription Ordinance and that the action was therefore, prescribed in 3 years.

Held: That the document contained an acknowledgment of the borrowing of Rs. 275/– and from that acknowledgment an implied promise to pay that sum can be inferred as a matter of law. The action was therefore, prescribed in six years.

Cases referred to: *Jinasena & Co. vs Rodrigo* (32 N.L.R. 322)
Dawbarn vs Ryall (17 N.L.R. 372)
Spencer vs Hemmerde (1922–2 A.C. 507)
Tanner vs Smart (6 B. & C. 603)
Smith vs Thorne (18 Q.B. 143)
Chasemore vs Turner (L.B. 10 Q.B. 500, 506)
Green vs Humphreys (26 Ch. D. 479)
Quincey vs Sharpe (1876–1 Ex. D. 72)
Lee vs Wilmot (L.R. 1 Ex. 364, 367)

N. Nadarajah, K.C., with *E. B. Wickramanayake*, for the plaintiff-appellant.
H. V. Perera, K.C., with *Sam P.C. Fernando*, for the defendant-respondent.

HOWARD, C.J.

In this case the plaintiff appeals from the decision of the District Judge of Chilaw dismissing his action with costs. The only question that arises for consideration is whether the document P1 can be regarded as a written contract, agreement or bargain under which the defendant agreed to pay a sum of Rs. 275/– with interest at 15 %. This document was made on the 1st April, 1936, in favour of one Soona Yana Isak Nadar, was endorsed on the 7th October, 1940, to the plaintiff, a younger brother of Nadar, and the action was commenced on the 15th August, 1941. The learned judge held that P1 was not an agreement falling within the provisions of section 7 of the Prescription Ordinance and the claim was, therefore, prescribed. In coming to this conclusion the learned judge was influenced by the fact that P1 did not contain a statement that the defendant promised to pay the sum of Rs. 275/–. In the body of the document the defendant states he has "borrowed and received in full from Soona Yana Isak Nadar the sum of Rs. 275/– of lawful money of Ceylon, having promised to pay interest at the rate of 15 per cent. per annum until this sum is paid in full." In the margin it is stated as follows. "Capital sum borrowed Rupees Two Hundred and Seventy Five (Rs. 275/–) — No interest was deducted — Interest at the rate of 15 per centum per annum." P1 purports to be signed by the defendant in front of two witnesses. In his judgment the learned judge referred to the case of *Jinasena & Co. vs Rodrigo* (32 N.L.R. 322) and sought to distinguish it from the present case by reason of the fact that the Statute of Frauds required that the agreement must state what the contract was and the documents D3 and D4 in that case contained all the elements of the contract reduced to writing. The learned judge's attention does not seem to have been invited to the Full Bench case of *Dawbarn vs Ryall* (17 N.L.R. 372) in which it was held that a claim for compensation for a deficiency of land purported to be sold by deed was founded on a written contract of sale and not prescribed within six years. Although the contract made no mention of compensation, it was held that a claim to the same was implied by law. In his judgment in this case Pereira, J. stated that he failed to see the distinction that was sought to be drawn by respondent's counsel between an express undertaking and one that

is only implied by law from the terms of a contract. Ennis, J. in his judgment also stated as follows :

> "The terms of the contract in this case were evidenced by the written document, and anything implied by the written document is as much a part of that document as if separate words had been used."

The question, therefore, that arises for consideration is whether an undertaking to pay the sum borrowed, namely Rs. 275/– may be implied from the terms of P1. Ennis, J. seems to think that such implication may arise as a matter of law or as a question of fact. The words "until this sum is paid in full" that appear in P1 in my opinion imply a promise to pay. I am also of opinion that P1 is an acknowledgment of the borrowing of a sum of Rs. 275/– and from that acknowledgment there arises an implied promise to pay as a matter of law. In this connection I would refer to the following passage that appears on page 620 of Pereira's Laws of Ceylon :

> "From this contract which is unilateral arises an action to the lender or his heirs against the borrower or his heirs to return a like sum of money or quantity of the thing lent, and of the same quality and this after the expiration of the time limited by the contract, or if no time has been fixed, then after a reasonable time to be determined by the judge." (V.d.L. 1.15.2.)

The judgment of Lord Sumner in the House of Lords case of *Spencer vs Hemmerde* (1922–2 A.C. 507) contains a review of the authorities on the doctrine of acknowledgment. In the judgments of Their Lordships the law, as laid down in *Tanner vs Smart* (6 B. & C. 603) was accepted. In this connection I would refer to the following passage from Viscount Cave's judgment on page 513 :

> "Since the case of *Tanner vs Smart* the law as there laid down has been uniformly accepted, and it must be held to be settled law (1) that a written promise to pay a debt given within six years before action is sufficient to take the case out of the operation of the statute of James I; (2) that such a promise is implied in a simple acknowledgment of the debt ; but (3) that where an acknowledgment is coupled with other expressions such as a promise to pay at a future time or on a condition or an absolute refusal to pay, it is for the court to say whether those other expressions are sufficient to qualify or negative the implied promise to pay. The decisions upon the Act are very numerous ; but in every one of them the law has been assumed to be as above stated and the decision has turned upon the meaning of the particular words used in the case. It is therefore unnecessary to refer to the authorities in detail ; but some statements of the principle by distinguished judges may, I think, be usefully quoted."

It is useful also to refer to three other cases which were cited with approval by Their Lordships. In *Smith vs Thorne* (18 Q.B. 143) Parke, B. said :

> "There has been no question, since *Tanner vs Smart* that an acknowledgment of a debt must, in order to take it out of the operation of the Statute of Limitations, be sufficient to support the promise laid in the declaration, namely, to pay on request. By Statute 9 Geo. 4 C. 14 that acknowledgment must now be in writing ; but it must still support a promise to pay on request either by showing on the face of it, an unconditional promise to pay, or by the collateral fact of the performance of the condition, or the occurrence of the event, by which the promise is qualified. No doubt a mere acknowledgment of the existence of the debt (as, for instance an I.O.U.) if unaccompanied by any expression which control its effects, is sufficient to support an unconditional promise to pay."

In *Chasemore vs Turner* (L.R. 10 Q.B. 500, 506) Amphlett, B. formulated the rule as follows:

> "The principle I take to be this — First of all, if there be an absolute unconditional acknowledgment of the debt that is sufficient. If that stands alone, and nothing is said about payment, the acknowledgment of the debt would imply a promise in law to pay the debt. But if there is not only an acknowledgment of the debt but a promise to pay the debt in words we then have to look whether the promise to pay is an unqualified unconditional promise or whether it is a conditional promise ; and if it is a conditional promise to pay, and the condition is not performed, then the mere acknowledgement of the debt will not take the case out of the statute."

In *Green vs Humphreys* (26 Ch. D. 479) Bowen, L.J. said :

> "I regret that we have had to add one more to the cloud of cases which are collected around this particular point. The law has been clear for fifty years, and all the cases that have been reported since that time are merely illustrations of the way in which the court applies the principle. It is clearly settled that to take a case out of the statute there must be an acknowledgment or a promise to pay, and that where there is a clear acknowledgment that the debt is due from the person giving that acknowledgment a promise to pay will be inferred. That was laid down by Lord Tenterden in *Tanner vs Smart* and the proposition as Chief Baron Kelly said in *Quincey vs Sharpe* (1876 1 Ex. D. 72) has never been disputed and it has been restated over and over again in all the courts. Now, first of all, the acknowledgment must be clear in order to raise the implication of a promise to pay. An acknowledgment which is not clear will not raise that inference. Secondly, supposing there is an acknowledgment of a debt which would if it stood by itself be clear enough, still if words are found combined with it which prevent the possibility of the implication of the promise to pay arising then the acknowledgment is not clear within the meaning of the definition ; because not merely is there found in the words something that expresses less than a promise to pay (which as Lord Bramwell pointed out in *Lee vs Wilmot* (L.R. 1 Ex. 364, 367) will not necessarily put an end to the implication of the promise to pay) but because the words express the lesser in such a way as to exclude the greater."

In this case there is clearly an acknowledgment of the debt. It is an admission that there is a debt owing. This in my opinion is a fair construction of P1, read by the light of the

surrounding circumstances. This acknowledgment, therefore, raises the implication of a promise to pay. The only point that remains for consideration is whether it is an unconditional promise to pay forthwith. Or it is a promise to pay only in the event of failure to make payments of interest? There is, no doubt, a promise to pay interest if the principal is not paid. But this express promise does not exclude the implied promise to pay the principal. The promise to pay the principal is, therefore, unconditional.

In my opinion the appeal succeeds. Judgment must be entered for the plaintiff as claimed together with costs in this court and the District Court.

KEUNEMAN, J.

I agree.

Appeal allowed.

Present: WIJEYEWARDENE, J.

DIONIS APPU vs DON SAMEL

S. C. No. 113—*C. R. Tangalle No.* 16477.
Argued & Decided on 8th July, 1943.

Court of Requests—Plaintiff admittedly entitled to half share of land worth less than Rs. 300/- *—Action for declaration of title and ejectment from entire land—Test of jurisdiction.*

Plaintiff, who admittedly was entitled to a half-share (valued at Rs. 150/-) of a land, sued the defendant for declaration of title and ejectment. Plaintiff further pleaded that he had acquired prescriptive title to the land and the defendant was in wrongful possession of the entire land. He prayed (*a*) that he be declared entitled to this land; (*b*) that the defendant be ejected therefrom.

The learned Commissioner held in plaintiff's favour both on the questions of title and prescription but dismissed the action on the ground that it is the value of the whole land that determined jurisdiction and that being over Rs. 300/- he could not entertain the action.

Held: That the prayer in the plaint could not alter the matter in dispute between the parties as formulated in the issue, *viz.* the title to an undivided half share of the land valued at Rs. 150/- and that therefore, the court had jurisdiction.

Cases referred to: *Abeyegoonewardene vs Alwis* (1 C.W.R. 86)

Cyril E. S. Perera, with *H. Wanigatunge*, for the appellant.
No appearance for the respondent.

WIJEYEWARDENE, J.

This is an action for declaration of title. According to the averments in the plaint one Ambepitiyage Maddumma Appu was the original owner of the lots A and B in plan No. 564 T marked X and the title to this lot devolved on the plaintiff in 1926. The plaintiff pleaded further that he had acquired title by prescription and stated that the defendant wrongfully set up title to an undivided half share and was in possession of the two lots. The plaintiff valued the undivided half share at Rs. 150/-.

The defendant filed answer stating that Ambepitiyage Maddumma Appu and Edirisinghe Aratchige Maddumma Appu was each entitled to an undivided half share. While admitting that the plaintiff was entitled to a half share through Ambepitiyage Maddumma Appu, the defendant pleaded that the half share of Edirisinghe Aratchige Maddumma Appu had devolved on him. The defendant raised also a plea as to jurisdiction on the ground that an undivided half share was worth more than Rs. 300/-.

The learned Commissioner held in a well considered judgment that Edirisinghe Aratchige Maddumma Appu was not entitled to an undivided half share and found in favour of the plaintiff on the questions of title and prescriptive possession. The Commissioner held, however that the entirety of the two lots was worth more than Rs. 300/- and that he had, therefore, no jurisdiction to entertain the action as he was of opinion that it was the value of the entire lots that determined the question of jurisdiction. He accordingly dismissed the plaintiff's case with costs.

The Commissioner appears to have been influenced by clauses (*a*) and (*b*) of the prayer in the plaint in forming his opinion that the value of the entire land should be considered in deciding

the issue as to jurisdiction. Now, these clauses (*a*) and (*b*) read as follows :

(*a*) That the plaintiff be declared entitled to the land.

(*b*) That the defendant be rejected therefrom and the plaintiff be restored to possession thereof.

It is not unlikely that the plaintiff prayed for a declaration of title to the entirety and not a half share as he feared that in the latter case the defendant might say that there was no matter to be adjudicated upon as the defendant had always admitted the title of the plaintiff to a half share. Clause (*b*) was necessary as the defendant was in possession of the land claiming to be a co-owner of the plaintiff. The defendant could not have been disturbed in that possession if he was co-owner. But once it was found that the defendant was a mere trespasser and not the owner of an undivided half share the plaintiff was entitled to get him ejected from the entire land which he was claiming to possess as co-owner. These clauses in the prayer cannot alter in any way the fact which emerges clearly from the pleadings and the issues, namely, that the only matter in dispute between the parties was the title to an undivided half share of the land. The Commissioner should, therefore, have considered only the value of the undivided half share (*vide* section 75 of the Courts Ordinance). I think that the decision in *Abeyegoonewardene vs Alwis* (1 C.W.R. 86) referred to by the Commissioner should be interpreted with reference to the particular facts of that case.

I set aside the decree of the lower court and direct decree to be entered —

(*a*) Declaring the plaintiff entitled to the entirety of the lots A and B.

(*b*) Ejecting the defendants from lots A and B and restoring the plaintiff to the quiet possession of lots A and B.

(*c*) Ordering defendant to pay damages at Rs. 50/- a year from 1st January 1941 until the plaintiff is restored to possession.

(*d*) Granting plaintiff costs in the Court of Requests and costs of appeal.

Appeal allowed.

Present: JAYETILEKE, J.

MUTHUMENIKA vs SUDU MENIKA & OTHERS

S. C. No. 44—*C. R. Badulla No.* 10697.
Argued on 11th & 19th November, 1943.
Decided on 7th December, 1943.

Misjoinder—Causes of action—Declaration of title to land and damages, and for value of articles wrongfully removed—Sections 35 *and* 805 *of the Civil Procedure Code—Amendment of plaint in appeal court.*

Plaintiff brought this action on two causes of action (1) for a declaration of title to a land and damages consequent on ouster and (2) for the value of certain articles wrongfully removed from the house.

Held : (i) That the joinder of the two causes of action is obnoxious to section 35 of the Civil Procedure Code.

(ii) That there is no provision in the Civil Procedure Code for striking off a cause of action improperly joined.

(iii) That an application for amendment of the plaint may be made even in the appeal court.

Cases referred to : *Alagamma vs Mohamadu* (4 C.W.R. 73)
Mohummud Zahoor Ali Khan vs Mussumat Thakooranee Rutta Koer (11 Moore Indian Appeals p. 487)

J. M. Jayamanne with *Kingsly Herat*, for the defendants-appellants.
N. Kumarasingham, for the plaintiff-respondent.

JAYETILEKE, J.

The plaintiff brought this action against the defendants on two distinct and separate causes of action. She stated in her plaint that on December 16th, 1940 the defendants acting in concert, unlawfully broke open the door of her house and removed articles of the value of Rs. 40/- and that on December 30th, 1940, they took forcible possession of the house and land in which she lived and reaped the paddy cultivated by her on a portion of the land of the value of Rs. 20/-.

She claimed a declaration of title to the land, Rs. 20/- as damages consequent on the ouster, and Rs. 40/- being the value of the articles removed by the defendants.

The defendants pleaded that under section 35 of the Civil Procedure Code the two causes of action could not be combined and that the action should, therefore, be dismissed.

There can be no doubt that the joinder of the two causes of action is obnoxious to the provisions of section 35 of the Civil Procedure Code. The plaintiff sought to justify the joinder under section 805 of the Civil Procedure Code which is applicable to an action instituted in the Court of Requests. It reads: "The plaintiff may unite in the same plaint two or more causes of action when they all arise (1) out of the same transaction or transactions connected with the same subject of action; (2) out of contract express or implied. But it must appear on the face of the plaint that all the causes of action so united are consistent with each other that they entitle the plaintiff for the same kind of relief and that they affect all the parties."

An examination of the plaint shows that section 805 cannot possibly help the plaintiff. In the first place the causes of action do not arise out of the same transaction and in the next they do not entitle the plaintiff to the same kind of relief.

The question now arises what should be done in view of the defect I have alluded to. There is no provision in the Civil Procedure Code for striking out a cause of action which has been improperly joined but section 93 gives the court the power to allow the plaint to be amended.

In *Alagamma vs Mohamadu* (4 C.W.R. 73) De Sampayo, J. said:

> "Even if the action be regarded as joining two distinct causes of action it does not follow that the action as far as the 4th plaintiff is concerned should necessarily be dismissed. Section 17 of the code is one of a number of sections concerned with the framing of an action and it is obvious from the whole set of provisions that the intention of the code is not to make technical defects wholly to defeat an action but to facilitate the correcting of such defects in order that the court may once for all adjudicate on the merits of the case. Section 93 gives to the court wide powers of amendment and I think the District Judge should have exercised those powers in this case....."

The proceedings do not show that any application was made by the plaintiff at any stage to amend the plaint. That may be due to the fact that the learned Commissioner was of opinion that there was no defect in the plaint.

Counsel for the plaintiff asks me for permission to amend the plaint by striking out the first cause of action.

In *Mohummud Zahoor Ali Khan vs Mussumat Thakooranee Rutta Koer* (11 Moore Indian Appeals 487) an application for amendment was allowed in the most advanced stage before their Lordships of the Privy Council. Though the power of amendment conferred by section 93 is vested both in the original as well as in the Appellate Court I do not think I should exercise that power without a proper application and without giving the defendants an opportunity of showing cause.

I can however, see no objection to the plaintiff being given an opportunity of making an application to the court below with notice to the defendants.

I would set aside the judgment appealed from and send the case back to the court below for the consideration of an application by the plaintiff to amend her plaint by deleting her claim for Rs. 40/–. If no such application is made within fourteen days of the receipt of this record in the court below the action will be dismissed with costs.

If an application is made and it is allowed, judgment will be entered for the plaintiff as prayed for in paras *a* and *b* of her plaint and Rs. 20/– as damages. The appellant will be entitled to the costs of appeal, but all costs in the court below will be in the discretion of the Commissioner.

Judgment set aside.

Present: KEUNEMAN, J. & JAYETILEKE, J.

KING vs KALU BANDA

S. C. No. 38—D. C. (Cr.) Kandy No. 166.
Argued & Decided on 10th November, 1943.

Criminal Procedure Code section 201—Authority of the Attorney-General to conduct prosecution before the District Court—Should such authority be in writing.

Held: That the authority of the Attorney-General required by section 201 of the Criminal Procedure Code need not be in writing.

D. Jansze, Crown Counsel, for the Attorney-General-appellant.
No appearance for the respondent.

KEUNEMAN, J.

The Attorney-General in this case appeals against an order of acquittal entered by the District Judge under peculiar circumstances. When the case was called on this particular date Mr. Gunewardene appeared and said that he appeared for the prosecution. He produced a state telegram signed by 'AyG' clearly referring to the Attorney-General. In that telegram the Attorney-General has said :

> You also have my general authority to conduct prosecutions in all cases committed for trial before the District Court of Kandy until I inform you to the contrary.

The telegram is dated 11th May and the proceedings in this case took place on the 17th May. The only point which the judge made was that he did not regard that the telegram itself was an adequate document upon which he could act. On examination of section 201 of the Criminal Procedure Code it seems clear that a written authority is not demanded. The section runs as follows :

> " In every trial before a District Judge the prosecution shall be conducted by the Attorney-General or the Solicitor-General or a Crown Counsel or by some pleader generally or specially authorized by the Attorney-General in that behalf."

There is no reference to the authority being given in writing by the Attorney-General. In this case the telegram itself was produced, and I think it was *prima facie* evidence that general authority of the Attorney-General was given to Mr. Gunewardene to conduct the prosecution. No doubt there may be cases where the judge is in doubt as to whether special or general authority has been given. In that case it would perhaps be advisable to adjourn the case until the matter is settled. In this particular instance there is no room for doubt that Mr. Gunewardene on that date was authorized to appear on behalf of the Attorney-General. In the circumstances, I set aside the order of acquittal, and send the case back for trial in due course before the District Judge.

JAYETILEKE, J.

I agree.

Set aside and sent back.

Present: JAYAWARDENE, J.

GOPALLAWA vs FERNANDO & ANOTHER

S. C. No. 144—*C. R. Matale No.* 17391.

Argued & Decided on 30th August, 1926.

Landlord and Tenant—Lease—Surrender—Is formal notarially attested writing necessary to effect.

Held : That a lease can be terminated by mutual agreement between lessor and lessee and that a notarially attested document is not necessary to make the surrender of a lease effectual and valid.

Cases referred to : *Isohami vs Appuhamy* (1920–7 C.W.R. 290.)

N. E. Weerasooriya, for the appellant.

J. N. Vethevanam, for the respondent.

JAYAWARDENE, J.

In this action the plaintiff sued the defendants to recover a sum of Rs. 125/–, and further damages at Rs. 25/– per mensem till possession is yielded, alleging that the defendants were in wrongful and unlawful possession of an undivided 5/6 of the land called Gallaruwagawawatte which the plaintiff was entitled to. He also alleged that they had appropriated his share of the produce. The defendants filed answer denying that they were in possession of the plaintiff's 5/6 share and raising various other defences which are not material for the purpose of this appeal. At the trial the answer was amended by adding a paragraph to the effect that the plaintiff cannot have and maintain the action as he has no status in the present case. The objection is based on the fact that the plaintiff had leased his rights in the land to a man called Witana Hendrick Sinno by a notarial lease P1 dated 23rd May, 1924, for a period of five years. Upon this amendment to the answer an issue was framed as to the right of the plaintiff to maintain the action in addition to the issues dealing with the merits. The learned judge after evidence had been recorded and hearing argument upheld the objection of the defendants

and dismissed the plaintiff's action. He gave no definite finding on the 1st and 2nd issues which raised questions of fact although he expressed an opinion adverse to the plaintiff on the facts as proved before him. The plaintiff applied to this court for leave to appeal upon the findings on the facts. His application was refused on the ground that the judge had come to no final conclusion on them. The question involved in this appeal is, therefore, a question of law as to the plaintiff's right to maintain the action. The lessee was called, and he admitted that the lease in his favour had been cancelled. He produced the lease P1 which contains an endorsement by him to that effect. He says that he surrendered possession of the property as he lived some distance away, and thieves were taking the produce. It seems to me to be clear that as between lessor and lessee the lease must be regarded as terminated. I do not think that it is necessary to have a notarial document cancelling the lease. The question whether an informal surrender of a lease was sufficient under our law to justify the re-entry of a lessor into possession was discussed in the case of *Isohami vs Appuhamy* (1920–7 C.W.R. 290) and it was held by Shaw, J. that the law here is practically the same as in England, and that if there is an agreement between the lessor and the tenant that the lease should be at an end and the agreement has been acted upon by the tenant and the lessor, the lease must be held to be surrendered by operation of law. I entirely agree with that view, and I do not think that a lease need be terminated in the same formal manner in which it is created. Therefore, the plaintiff, the lessor, is entitled to possess the property, and was at the date of the ouster complained of entitled to the share of the produce from the land referred to in the plaint. If there had been a subsisting lease at the date the action was brought, then, of course, the plaintiff would not be entitled to recover damages, and the lessee would be the person who would be entitled to make such a claim. But in this case the plaintiff's rights are not fettered by any lease in operation, and he had every right to bring the action and to maintain it.

I would, therefore, set aside the dismissal of the plaintiff's action, and send the case back for the learned judge to adjudicate upon the other issues. The appellant will be entitled to the costs of this appeal. All other costs will be in the discretion of the Commissioner.

Set aside and sent back.

Present: KEUNEMAN, J. & JAYETILEKE, J.

HENDRICK APPUHAMY vs MATTO SINGHO

267 *D. C. Colombo No.* 12588.
Argued on 14th September, 1943.
Decided on 17th September, 1943.

Malicious prosecution—Complaint to Police by defendant—Prosecution by Police after investigation—Absence of proof as to the conduct of defendant—Liability of defendant.

Held : That in an action for malicious prosecution the fact that on information given by the defendant the Police unsuccessfully prosecuted the plaintiff after investigation is not sufficient to make the defendant liable in the absence of evidence as to the nature of the information given or the part played by him in the prosecution.

Cases referred to : *Saravanamuttu vs Kanagasabai* (43 N.L.R. 357)
Tewari vs Bhagat Singh ((1907–8) 24 T.L.R. 884)

H. V. Perera, K.C., with *Kingsly Herat*, for the defendant-appellant.
L. A. Rajapakse with *J. M. Jayamanne*, for the plaintiff-respondent.

KEUNEMAN, J.

This is an action for malicious prosecution. The prosecution was instituted by the Police. In the plaint it was alleged that the defendant wrongfully, falsely and maliciously made a complaint to the Police, and that as a result of the complaint the plaintiff was prosecuted by the Police. In his answer, the defendant, after a general denial of the allegations in the plaint, admitted that he gave certain information to the Police, which he denied was wrongful, false,

or malicious, and added that the Police, having made investigation into the information so given prosecuted the plaintiff. The principal issues with which we are concerned are issues 1 and 2, namely :

> " (1) Did the defendant on May, 21st 1939, make a complaint against the plaintiff to the Aturugiriya Police ?
>
> (2) As a result of the said complaint was the plaintiff prosecuted by the Aturugiriya Police in M.C. Colombo, Case No. 38,931, on a charge of having committed criminal intimidation and committed to stand his trial before the District Court of Colombo in D.C. 186 Criminal ? "

The learned District Judge held that it had to be proved, *inter alia*, that in addition to making a complaint or giving, information to the Police, the defendant either requested or directed the prosecution of the plaintiff. The District Judge held that there was sufficient evidence of this in the admission in the answer, and gave judgment against the defendant.

In appeal it is argued that there is no evidence to support the finding of the District Judge on this point. No evidence in fact has been given as to the actual information given to the Police by the defendant, nor as to the circumstances under which that information was given. No Police Officer has been called, and we do not know whether this was the first information given to the Police, and whether in giving the information, the defendant in fact formulated a charge against the plaintiff, based upon his own knowledge. The plaintiff said that, in the Magistrate's Court, the defendant gave evidence against him, but here again we do not know what that evidence was, and no attempt was made to put in the evidence of the defendant as contained in the magistrate's record. The District Judge thought that what the defendant told the Police can be gathered from the plaint P1 in the Magistrate's Court, but I do not think the District Judge was justified in drawing the inference that the defendant gave information to the Police in the form contained in P1. It seems clear from the proceedings that the plaint was filed not only on the information given by the defendant, but also as a result of further investigation by the Police. Nor does the fact that the defendant was the first witness called throw any light on the matter, as the District Judge thought it did. The District Judge depended also on a statement in cross-examination by the plaintiff, to the effect that his wife told him that the Police came in search of plaintiff to his house accompanied by the defendant and defendant's father. Plaintiff's wife was not called and it is impossible to hold that her statement even if it was made, was true. The District Judge should have dismissed from his mind this hearsay evidence which at the most could only have been utilized to explain the subsequent conduct of the plaintiff, who ran away from his village thereafter.

In a recent case, *Saravanamuttu vs Kanagasabai*,* Howard, C.J. after dealing with the previous cases, said :

> " The cases that I have cited establish as a clear principle of law that there must be something more than a mere giving of information to the Police or other authority who institutes a prosecution. There must be the formulation of a charge, or something in the way of solicitation, request or incitement of proceedings."

The decision in this case is, I think, very largely in conformity with the decision of the Privy Council, in *Tewari vs Bhagat Singh*, † cited to us on behalf of the plaintiff. I may cite this passage :

> " If a complainant did not go beyond giving what he believed to be correct information to the Police and the Police, without further interference on his part (except giving such honest assistance as they might require) though fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But, if the charge was false to the knowledge of the complainant, if he misled the Police by bringing suborned witnesses to support it, if he influenced the Police to assist him in sending an innocent man for trial before the magistrate, it would be equally improper to allow him to escape liability because the prosecution had not technically been conducted by him. The question in all cases of this kind must be — Who was the prosecutor ? and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion was not the criterion, the conduct of the complainant, before and after making the charge, must also be taken into consideration."

In the present case we do not know what information was given by the defendant to the Police. Whether it included the formulation of a charge, or was based upon his personal knowledge, or was believed by him we cannot say, because there is no evidence, either way on those points. There is nothing to show that he exercised any influence upon the actions of the Police. There is nothing to suggest that he suborned the witnesses. In this state of the evidence, I think there is an important and vital element missing in the case of the plaintiff. It is not possible on the whole of the evidence to hold that the defendant was the real prosecutor.

The appeal is allowed with costs, and the plaintiff's action dismissed with costs.

JAYETILEKE, J.

I agree.

Appeal allowed.

* 43 N.L.R. 357 † (1907-8) 24 T.L.R. 884

Present: JAYETILEKE, J.

INSPECTOR OF POLICE vs PEDRICK & ANOTHER

S. C. No. 867-68—*M. C. Gampaha No.* 18577.
Argued on 21st December, 1943.
Decided on 12th January, 1944.

Penal Code section 311 (*seventhly*)—*When does cutting into bone constitute grievous hurt.*

Held : That in the absence of evidence that the bone was either broken or cracked, so as to constitute a fracture within the meaning of section 311, the accused could not be convicted of grievous hurt.

Cases referred to : *Maung Po Yi vs Ma E Tin* (1937–A.I.R. Rangoon 253)
Abdullah & Another vs Emperor (1942–A.I.R. Patna 376)

S. Saravanamuttu, for the accused-appellant.
E. H. T. Gunasekera, Crown Counsel, for the complainant-respondent.

JAYETILEKE, J.

The 1st accused was convicted of voluntarily causing grievous hurt with a knife to one Jayakody and sentenced to six months' rigorous imprisonment. The medical evidence was to the effect that Jayakody had an oblique stab wound half an inch long in the left hip cutting into the hip bone.

The learned magistrate seems to have been of opinion that the injury caused by the 1st accused amounted to grievous hurt as the bone had been cut. The doctor has not told us to what extent the bone had been cut.

Under section 311 of the Penal Code an injury to a bone would not be considered grievous unless there is a fracture or dislocation of the bone. There is nothing in the medical evidence which suggests any dislocation of a bone in this case.

The only question is whether the injury to the bone is a fracture In *Maung Po Yi vs Ma E Tin* (1937–A.I.R. Rangoon 253)) Spargo, J. said :

> "The primary meaning of the word 'fracture' is 'breaking' though it is conceded that it is not necessary in the case of a fracture of the skull bone that it be divided into two separate parts because it may consist merely of a crack, but the point is that if it is a crack it must be a crack which extends from the outer surface of the skull to the inner surface."

This judgment was followed in *Sheikh Abdullah & Another vs Emperor* (1942–A.I.R. Patna 376). Meredith, J. said :

> "Where the evidence is merely that a bone has been cut and there is nothing whatever to indicate the extent of the cut whether deep or a mere scratch upon the surface, it is, in my opinion, impossible to infer from that evidence alone that grievous hurt has been caused within the meaning of the definition in section 320, Penal Code."

On the evidence before me I am unable to say that the hip-bone of Jayakody was fractured within the meaning of section 311. It may be that the bone was cut to some extent but there is nothing to indicate that it was broken or cracked.

I am, therefore, of opinion that the 1st accused could not have been convicted under section 317. I would alter the conviction of the 1st accused to one under section 315. The sentence imposed on him ought, I think, to be reduced to three months' rigorous imprisonment as the 2nd accused who has been convicted by the magistrate under section 315 has been sentenced to that term.

I see no reason to interfere with the conviction of the 2nd accused or the sentence passed on him.

Conviction and sentence altered.

Present: SOERTSZ, J., HEARNE, J. & JAYETILEKE, J.

GUNARATANA THERO vs JAYARATNE & ANOTHER

S. C. No. 104—*D. C. Kurunegala No.* 18780.
Argued on 30th December, 1943.
Decided on 19th January, 1944.

Service Tenures Ordinance—Sections 9, 10, 14 *and* 15—*Liability of tenants or* nilakarayas *—Nature of—Right of overlord to sue for dues—Joinder of other* nilakarayas—*When may prescriptive title to land belonging to a* pangu *be acquired.*

Held : (i) That the provisions of the Service Tenures Ordinance make it clear that the liability to perform services or to pay commuted dues in respect of a *pangu* in a *nindagama* is an indivisible obligation owned jointly and severally by the *nilakarayas* and are exigible from any of them subject to his or their right to claim contribution.

(ii) That where a party has acquired prescriptive title to lands belonging to a *pangu* as against the *nilakarayas* and their successors, the overlord is entitled to sue such party to recover the entire dues, without joining the other *nilakarayas* or their successors.

(iii) That no prescriptive title to a land belonging to a *pangu* can be acquired so long as some part of the dues has been recovered by the overlord in respect of a land belonging to that *pangu* within the last ten years.

Cases referred to : 1877 Ram pp. 131 and 395
Asmedale vs Weerasuriya (1905 – 3 Bal. Rep. 51)
Martin et al vs Hattana et al (1912 – 16 N.L.R. 92)
Appuhamy vs Menike (1917 – 19 N.L.R. 361)

H. V. Perera, K.C., with *E. B. Wickramanayake* and *H. Wanigatunga*, for the substituted-defendants-appellants.

N. E. Weerasooriya K.C., with *N. Nadarajah, K.C.*, *I. Misso* and *S. R. Wijayatilake*, for the plaintiff-respondent.

SOERTSZ, J.

The plaintiff who is the *viharadhipathi* and trustee of Maraluwa Vihara is seeking to recover from the defendants who are the present owners of the land known as Maraluwa Estate, the entire commuted dues fixed under the Service Tenures Ordinance as payable in respect of four *pangus* of a *nindagama* of which Maraluwa Vihare is the overlord, the plaintiffs' case being that some of the lands of those *pangus* are included in Maraluwa Estate.

In view of the admissions made at the trial, and of the judge's finding, it is clear that some of the lands of the four *pangus* are within Maraluwa Estate. But the defendant's case, as presented to us, is that even so, the plaintiff must fail, firstly, because his action is barred by section 24 of the Service Tenures Ordinance, the defendants and their predecessors not having paid any commuted dues for over ten years, or secondly, because, if they are liable, their liability is no greater than to pay in the proportion that the lands of these *pangus* which they hold bear to all the lands of those *pangus*, and that, therefore, the plaintiff's proper course was to sue all the *nilakarayas*.

These contentions raise once more questions which have been considered by this court on several occasions but, unfortunately with divergent results. This conflict of views is however, hardly surprising for, although the land tenures with which we are here concerned appear to have fitted naturally into the social and legal systems which called them into being, they are strange to Roman-Dutch law and the attempts made in some of the earlier cases to solve these questions on the analogy of Roman-Dutch law principles have proved unsatisfactory. They are attempts to put new wine into old bottles. For instance, in the earliest of cases cited to us 1877 Ram p.131 the argument of counsel for the successful appellants was based on the Roman-Dutch law principle that if solidity of obligation is intended, it should be expressly provided for, and that if it is not, the general rule applies that each of the persons bound is liable *pro rata*. Although the judgment of the court in that case does not expressly enunciate this proposition, it seems clear that the court took that to be the law when it said that " it was not aware of any law or custom in which one of several *nilakarayas* of a *panguwa* is liable to render services for a whole *panguwa*, that is to say, for himself as well as for his co-tenants," and thereby implied that in the absence of any law or custom relating to these tenures to the contrary, the Roman-Dutch law applies.

This ruling was followed by one of the judges who took part in that case in the later case reported at p. 395 of the same volume. But when the question

came up again, many years later, in the case of *Asmedde vs Weerasuriya* (1905 – 3 Bal. Rep. 51), Pereira, J. took a very different view. He held that "the liability of the tenants of a *panguwa* is a joint liability. At the same time, the services in their nature were indivisible and, therefore, the obligation to pay the commuted dues must be regarded as an indivisible obligation." This ruling was followed by Lascelles, C.J. in *Martin et al vs Hattana et al* (1912 – 16 N.L.R. 92); and by Ennis, J. in *Appuhamy vs Menike* (1917 – 19 N.L.R. 361). If I may say so with respect, this view that the obligation to pay the commuted dues is an indivisible obligation appears to me to be the correct view in the light of the provisions of the Service Tenures Ordinance itself, and not for the reason given by Pereira, J. that the services being indivisible, it necessarily followed that the alternative or secondary obligation was indivisible. Logically, that reasoning seems to me to involve a *non sequitur*, and as a general proposition of law, it is opposed to several instances to the contrary adduced by Pothier.

But as I have observed the Service Tenures Ordinance makes it sufficiently clear that the services as well as the dues are attached to the *panguwa* and are indivisible and owed jointly and severally by the *nilakarayas* and are exigible from any of them subject to his or their right to claim contribution. Sections 9 and 10 of the Ordinance provide for the ascertainment and registration of the nature and extent of the services in relation to each *pangu*. Sections 14 and 15 make it clearer still that the unit is the *pangu* and not the *nilakaraya*, for section 14 requires the application for commutation in the case of a *pangu* with several or many *nilakarayas* to be made or acquiesced in by a majority of those above 16 years of age and section 15 requires the Commissioner to ascertain as far as practicable whether all the *nilakarayas* above sixteen desired the commutation. Both these requirements would surely be out of place, if it were intended to leave it open to one or more of the *nilakarayas* to commute his or their services for a *pro rata* payment of dues. Section 15 goes on to say that once commutation has been determined and fixed "the *nilakarayas* shall be liable to pay the proprietors.....the annual amount of money payment due for and in respect of.....the services; and such commuted amount shall thenceforth be decided to be a *head rent* due *for and in respect of the pangu*." That, as I understand it, makes the *pangu* "the head" or the unit. This view is supported by the terms of section 25 which provides the remedy of a proprietor when there is default of payment of the commuted dues. It enacts that if the dues be not paid, they shall be recovered by seizure and sale of the crop or fruits on the *pangu*, or failing these, of the personal property of the *nilakaraya*, or failing both by a sale of the *pangu*. The crop and fruits in the whole *pangu*, and ultimately the whole *pangu* itself being made liable, it follows that the proprietors may seize and sell any part of the crop and fruits or any part of the *pangu*.

The question then is whether in a case such as this where the proprietor elects to go against a particular *nilakaraya*, and by so doing to limit his remedy to part of the fruits and crops on the *pangu* or to the personal property of that *nilakaraya*, and to the lands of the *pangu* in his possession, he must nevertheless join all the *nilakarayas* as co-owners. In regard to that question I do not think we need embarrass ourselves with it in this case for on the evidence accepted by the trial judge it seems clear that the defendants and their predecessors have acquired a prescriptive title to those lands of these *pangus* which *lie* within Maraluwa Estate as against the original *nilakarayas* and their successors. I am, therefore of opinion that the plaintiff was entitled to sue the defendants to recover the entire dues and to sue them in this instance, without joining the other *nilakarayas* or their successors.

The other question is that arising from the plea of prescription set up by the defendants as against the overlord. That plea must fail inasmuch as on the finding of the trial judge some part of the dues has been recovered by the overlord by action or otherwise in respect of lands of these *pangus* within the last 10 years, and, therefore the condition on which a successful plea of prescription against the overlord is made dependent is not satisfied.

I would dismiss the appeal with costs.

HEARNE, J.

I agree.

JAYETILEKE, J.

I agree.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present: MOSELEY, J. (President), HEARNE, J. & JAYETILEKE, J.

REX vs PONNASAMY & FOUR OTHERS

Applications Nos. 123–127 *of* 1943—*Appeals Nos.* 36–39 *of* 1943.
Fourth Western Circuit, 1943.
S. C. No. 56—*M. C. Matara No.* 43107.
Argued on 14th, 15th & 16th December, 1943.
Decided on 17th January, 1944.

Court of Criminal Appeal—Misjoinder of charges—Section 181 *of the Criminal Procedure Code—When may alternative charges in respect of distinct offences be joined—Irregularity in framing charges—When vitiates a conviction.*

When counsel should notify appearance at trial—Time at which an objection to the indictment may be taken.

In framing the indictment in this case the prosecution expected to be able to prove the following facts:

"That the deceased, one Hinni Appu, died owing to a rupture of the right auricle of the heart probably due to compression caused by direct violence; that shortly before death he had been conducted to a barrack room in Matara police station, where he was told by the 4th accused to undress and lean against a pillar; that the 2nd and 5th accused held his hands behind the pillar; that the fourth accused struck him on the chest, whereupon he fell to the ground; that while in that position the 3rd accused stamped upon his chest; that the 2nd, 3rd, 4th and 5th accused struck him with their fists; that the 1st accused then came into the room and ordered that the deceased be assaulted; and that there followed an assault by the 2nd, 3rd, 4th and 5th accused in which the 1st accused took part."

The prosecution were quite unable to say that the death was the result of the act of any one or more of the accused, but there was evidence that, whoever it was that struck the fatal blow, the others by their acts, aided the doing of it.

The indictment charged the five accused jointly with the murder of the deceased Hinni Appu; in the alternative that they abetted the said murder.

Objection was taken that there was a misjoinder of charges.

Held: (i) That the charges were properly joined under section 181 of the Criminal Procedure Code inasmuch as the prosecution was faced with a genuine doubt as to whether they could establish exclusively any one offence. (Hearne, J. *dissentiente*).

(ii) That even where the indictment is tainted with an irregularity, the appeal is liable to be dismissed, if it has not occasioned a substantial miscarriage of justice.

(iii) That appearance of counsel should be notified to court as soon as the case is called and before the accused has been called upon to plead.

(iv) That the proper time to raise an objection on the ground of misjoinder is before the accused has pleaded.

Cases referred to: *Barendra Kumar Ghosh* (1925 A.I.R. (P.C.) 1)
Sital vs Emperor (36 Cr. L.J. 1151)
Ganesh Krishna vs Emperor (12 Cr. L.T. 224)
Mohamed Rafiq vs Emperor (33 Cr. L.J. 41 at 42)
Subramania Ayyar vs King-Emperor (25 M.A.D. 61)
The Public Prosecutor vs Kottaparambath Maliyakkalkadiri Koya Raji (16 Cr. L.J. 593 (F.B.))
Rex vs John Harris (5 Cr.A.R. 26)
Rex vs Charles Cratchley (9 Cr.A.R. 232)
Rex vs Henry Beecham (16 Cr.A.R. 26)
Rex vs Arthur Edwards & Alfred Gilbert (8 Cr.A.R. 128)
Rex vs James Andrew Thompson (9 Cr. A.R. 252)

M. T. de S. Ameresekera, K.C., with *M. M. Kumarakulasingham*, and *G. Samarawickrema*, for the 1st accused.

C. S. Barr-Kumarakulasingham, with *V. Wijetunge*, for the 2nd accused.

Mackenzie Perera, with *J. Weeraratne*, for the 3rd accused.

H. W. Jayawardene, with *J. Fernandopulle*, for the 4th accused.

T. Kanapathipillai, for the 5th accused.

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

MOSELEY, J. (President)

The five accused were charged jointly with the murder of one Hinni Appu ; in the alternative, that they abetted the said murder. The last four were convicted of voluntarily causing grievous hurt, the first, of abetting that offence. The point is taken in appeal that there was a misjoinder of charges. Section 178 of the Criminal Procedure Code provides that for every distinct offence there shall be a separate charge and that every such charge shall be tried separately except in the cases mentioned in sections 179, 180, 181 and 184. The prosecution, in framing the charges now under consideration, relied upon the provisions of section 181 which is as follows :—

> " 181. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with all or any one or more of such offences and any number of such charges may be tried at one trial and in a trial before the Supreme Court or a District Court may be included in one and the same indictment ; or he may be charged with having committed one of the said offences without specifying which one.
>
> ILLUSTRATION
>
> A is accused of an act which may amount to theft or receiving stolen property or criminal breach of trust, or cheating.
>
> He may be charged with theft, receiving stolen property, criminal breach of trust, and cheating, or he may be charged with ' having committed one of the following offences, to wit, theft, receiving stolen property, criminal breach of trust and cheating.' "

The facts which the prosecution expected to be able to prove were that the accused died owing to a rupture of the right auricle of the heart probably due to compression caused by direct violence ; that shortly before his death he had been conducted to a barrack room in Matara police station where he was told by the fourth accused to undress and lean against a pillar ; that the second and fifth accused held his hands behind the pillar ; that the fourth accused struck him on the chest whereupon he fell to the ground ; that while in that position the third accused stamped upon his chest ; that the second, third, fourth, and fifth accused struck him with their fists ; that the first accused then came into the room and ordered that the deceased be assaulted ; and that there followed an assault by the second, third, fourth and fifth accused in which the first accused took part.

It is not disputed that the death of the deceased was the direct result of this series of attacks upon him, but the prosecution was quite unable to say that it was the result of the act of any one or more of the accused. There was ample evidence that, whoever it was who struck the fatal blow, the others by their acts aided the doing of it. The charge of abetment of murder was framed upon the footing that those of the accused who aided that one whose act caused the death of the deceased knew that the act thus abetted was likely to cause that effect. Section 106 of the Penal Code provides for such a case and it would seem that the facts set out above clearly constitute the offence of abetment of murder.

The position taken up by counsel for the first accused was that, in view of section 107 of the Penal Code, upon the facts which the prosecution expected to be able to prove, one of which was that the first accused was present for at least part of the time during which the offence was committed and that the others were present for the whole of the time, a charge of murder lay against them all. While the words of the section are that in such circumstances an accused person " shall be *deemed* to have committed such act or offence " it has been held by the Privy Council in *Barendra Kumar Ghosh* (1925 A.I.R. (P.C.) 1) that " the section is evidentiary, not punitory because participation *de facto* may sometimes be obscure in detail, it is established by the presumption *juris et de jure* that actual presence plus *prior* abetment can mean nothing else but participation. The presumption by section 114 (*i.e.* Ceylon 107) brings the case within the ambit of section 34 (Ceylon 32)." I have stressed the word " prior " in the above quotation from Lord Sumner's judgment, because it has been generally held that " abetment to come under the section must be one which is prior to the commission of the offence and complete by itself, and not an abetment which is done immediately before or at the time of the commission of the offence." *Sital vs Emperor* (36 Cr. L.J. 1151). The facts of the present case do not therefore, appear to come within the scope of section 107, and the citation by counsel for the first accused of these authorities seems to us to weaken his argument that the prosecution were in a position to frame a charge of murder against all the accused persons. That, however, was the position taken up by him and he argued that, since the abovementioned facts left the prosecution in no doubt but that the offence of murder had been committed, the provisions of section 181 of the Procedure Code did not apply, and that the addition of a charge in the alternative offended section 178.

It would seem, however, that the prosecution, being satisfied no doubt that the offence of abetment of murder was constituted by the facts, were satisfied that the offence of murder was also constituted, assuming that from those facts it can be inferred that a common intention existed on the part of the accused. Crown counsel contended that, upon the facts disclosed, the innocence of the accused was excluded, and that from those facts there were two possible inferences.

Numerous authorities have been brought to our notice, notably the case of *Ganesh Krishna*

vs Emperor (12 Cr.L.T. p. 224) which was cited by counsel for the accused and relied upon by counsel for the Crown. In that case section 236 of the Indian Criminal Procedure Code, which corresponds with our section 181, was under consideration. Pratt, J.C., after referring to section 403 (our section 330) arrived at the result " that an alternative charge cannot be framed in respect of distinct offences, nor even in respect of cognate offences when the difference is one of degree, *i.e.* as to the intention imputed to the accused or as to some circumstance of aggravation." That is to say, if I may with respect further amplify the learned J.C.s explanation in regard to cognate offences, alternative charges of murder and of grievous hurt may not be framed, nor alternative charges of stealing as a servant and of stealing. Pratt, J.C. continued: " In what cases then, is it permissible to frame an alternative charge ?..... It (section 236) applies only in those rare cases in which the prosecution cannot establish exclusively any one offence but are able on the facts which can be proved to exclude the innocence of the accused and to show that he must have committed one of two or more offences." This extract from the judgment of Pratt, J.C. was cited with approval in *Mohamed Rafiq vs Emperor* (33 Cr.L. J. p. 41 at p. 42).

In the same case Crouch, A.J.C. referred to the two classes of doubts which the prosecution has to anticipate in most cases " firstly, whether the evidence.....will be believed; secondly, what inferences will be drawn from the evidence, if believed....." It is clear from the opening words of section 236 that the doubts for which it seeks to provide are of the second class. The doubt which of several offences of the facts proved will constitute must arise from the very nature of the acts of which it is intended to offer evidence. The doubt is as to the inference which will be drawn by the court.

Now it seems to me that in the present case the prosecution was faced by a genuine doubt as to the inference which would be drawn by the court. It was not difficult to foresee that the inference might be drawn that each of the accused had abetted the murder of Hinni Appu, or, equally, that a common murderous intention existed. But can it be said that either of these possible inferences exclude the other ? The offences which are constituted by the inference from the facts are cognate, the difference between them is not one of degree but depends upon the nature of the intention which can be inferred. That being so, the charges seem to me to come within the ambit of Pratt, J.C.'s " rare cases." In the view of the majority of the court the charges were properly joined.

In view of the fact that the members of the court have been unable to arrive at complete agreement, and of the further fact that it appears to be conceded that an alternative charge should be framed only in rare cases it may be as well to express our view that, had we been of opinion that the point should be decided in favour of the appellants, we would have held that no miscarriage of justice has occurred and that the appeals should be dismissed. Assuming that there was a misjoinder of charges, Their Lordships of the Privy Council in *Subramania Ayyar vs King-Emperor* (25 M.A.D. 61) were unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity and one which could be cured by section 537 (Ceylon 425) of the Criminal Procedure Code. That section permits an appellate court to ignore *inter alia* certain irregularities unless a failure of justice has been thereby occasioned. The powers conferred upon this court by the Court of Criminal Appeal Ordinance (No. 23 of 1938) section 5 (1) proviso allow in those circumstances the dismissal of an appeal unless a *substantial* miscarriage of justice has actually occurred. We would seem to have a discretion somewhat wider than that conferred upon an appellate court by section 425 of the Procedure Code. Even in India it was held by Napier, J. in *The Public Prosecutor vs Kottaparambath Maliyakkalkadiri Koya Raji* (16 Cr.L.J. 593 (F.B.)) that the decision of the Privy Council did not go so far as to compel an appellate court to hold that in no case could a misjoinder of charges or a failure to try charges separately be an irregularity within the meaning of section 537.

There are numerous English cases which reveal no reluctance on the part of the court to apply the proviso to cases where no actual miscarriage of justice has occurred, such as where on a charge of sodomy, the trial judge did not warn the jury as to the manner in which they should treat the evidence of the accomplice, *Rex vs Charles Cratchley* (9 Cr.A.R. 232), and where an indictment for stealing omitted the words " take and carry away," *Rex vs John Harris* (5 Cr.A.R. 26). Again, in *Rex vs Henry Beecham* (16 Cr.A.R. 26) in which questions in cross-examination had been improperly allowed there had been an unsatisfactory summing-up, the appeal was dismissed by virtue of the proviso. In *Rex vs Arthur Edwards & Alfred Gilbert* (8 Cr.A.R. 128) the proviso was not applied because the objection (to improper joinder) had been taken in the court below. In that case, however, there were other reasons which influenced the court in quashing the conviction. In regard to the time at which an objection of this nature should be taken we think that the proper time is before the accused has pleaded. In the

case before us the objection was taken after the jury had been sworn. Counsel for the first accused sought to justify this procedure on the ground that he wishes the jury to be in retirement while he was addressing the court on the point and he claimed, moreover, that it has not been the custom in our courts for counsel to notify their appearances until after the accused has pleaded. There is no substance in the former contention since the whole panel of jurors might have been sent out of court. In regard to the second point, there is no logical reason why counsel should not notify his appearance as soon as the case is called and before the accused has been called upon to plead. We think it proper that he should do so. For the purpose of this case however, we are assuming that objection was made at the earliest opportunity.

The question of the application of the proviso was also considered in *Rex vs James Andrew Thompson* (9 Cr.A.R. 252) in which it was argued that the indictment was bad for duplicity inasmuch as more than one offence was charged in each of two counts of the indictment. In dismissing the appeal Isaacs, L.C.J. observed: "If we had thought that any embarrassment or prejudice had been caused to the appellant by the presentment of the indictment in this form, we should have felt bound to quash the conviction, whatever our views might be as to the merits of the case." But it appeared to the court in that case, as it does to us in the present case, that no embarrassment or prejudice was caused. In the present case the appellants had one set of acts alleged against them. If they had been able to disprove that they had committed these acts or raised a reasonable doubt in the minds of the jury that they had committed them they would have been entitled to acquittal, on each count of the indictment. Had it been necessary, therefore, we would have been prepared to apply the proviso.

There were also applications for leave to appeal on the facts. The points raised appear to us without substance.

The appeals and applications are dismissed.

Hearne, J.

Of the five persons who were found guilty in S. C. 56 M. C. Matara 43107 four have appealed on questions of law. One ground is common to all the appeals—that there was a misjoinder of charges.

The four appellants along with the 5th accused who merely applied for leave to appeal on the facts, had been charged with murder by causing the death of Hinni Appu and in the alternative, with abetment of murder of Hinni Appu.

The prosecution purported to frame the indictment in accordance with the provisions of section 181 of the Criminal Procedure Code and the question is whether it was justified in doing so. The circumstances in which it would be justified are set out in the section. "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused.....may be charged with having committed one of the said offences without specifying which one."

It is clear from an examination of the evidence what facts, prior to the framing of the indictment, the prosecution regarded as being capable of proof.

They were (1) that 2nd and 5th accused held Hinni Appu's hands and the fourth accused dealt him a fist blow on his chest; (2) that he fell to the ground and the 2nd, 3rd and 4th and 5th accused struck him "with hand and feet" the 3rd trampling him on his body; (3) that the 1st accused then arrived and said "assault him"; (4) that all the accused attacked him again; (5) that Hinni Appu died in consequence of the injuries he received.

The first charge implied that the acts were committed in furtherance of a murderous intention common to all the accused. This common murderous intention was no doubt regarded by the prosecution as a reasonable inference from (1) to (5) *supra*, and the medical evidence.

But, in the argument of Crown Counsel, the jury may not have inferred a murderous intention but only knowledge that the death of Hinni Appu was likely. Section 106 of the Penal Code enacts that:

> "When an act is abetted with the intention on the part of the abettor of causing a particular effect and an act for which the abettor is liable in consequence of the abetment causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect."

The alternative charge was, therefore, included in the indictment to provide for the case of any one of the accused who had no murderous intention, if the jury so found, but who knew that the acts of others which he abetted by his own act or acts were likely to cause death.

Witnesses at the trial deposed to certain acts which are undoubtedly acts of abetment. I refer to the holding of the deceased by the 2nd and 5th accused for the purpose of aiding the 4th accused in the initial assault. I also refer to the 1st accused's act of instigation when he said "assault him."

But what the prosecution has chosen to do is to regard acts of aggression on the part of all the accused, by which I mean acts of violence committed by them on the person of the deceased, as amounting in the case of each one of them to actual participation in a deed of violence *or* merely to abetment.

I have said that the prosecution regarded acts of violence as participation *or* abetment. Crown counsel argued the appeal on that footing. That, however, is not the way the learned trial judge viewed the matter. He said in his order: "In regard to the offence or offences of which the accused may be said to be guilty that is unpredictable at the time the indictment is framed and indeed till the end of the trial, and will depend on the inference drawn by the jury in view of all the matters before them as to the intention or knowledge imputable to the accused as a body or individually." In another passage he said: "In other words different verdicts are reasonably possible and that is only another way of saying that the acts are of such a nature that it is doubtful which of several offences the facts which can be proved will constitute." With the greatest respect I do not agree with either of these passages in the sense that neither of them can be said to justify alternative charges. In every case in which an accused is charged with murder, his intention or knowledge is not ascertained till the jury returns its verdict. Different verdicts are possible. They are unpredictable. He may be found guilty of murder, culpable homicide not amounting to murder or grievous hurt. But these considerations do not justify alternative charges.

With this aspect of the matter, the procedural aspect, I shall deal later. It depends upon the interpretation that is to be placed on section 181 of the Ceylon Penal Code. But the point I was emphasizing was, that the prosecution view that acts of violence may be regarded as participation *or* abetment does not appear to have been shared by the learned trial judge. That this is so is, I think, evident from his charge to the jury.

In dealing with the first charge he explained that it was necessary for the jury to ascertain who were the actual *assailants* of the deceased and if they found that the five accused attacked " with hand and feet " they could be found guilty on the first charge of offences which he specified in accordance with the intention or knowledge imputed to them.

When he dealt with the 2nd charge he instanced the case of the 1st accused. He told the jury " if you are satisfied that the 1st accused *did not himself take part* in the attack with hand and feet but that all he did was to give an order, take this man away and give him a good beating..... he would be liable for the grievous hurt caused, if you think when he said go and give this man a sound thrashing he knew that it might result in grievous hurt." In another passage he said " suppose you find that the first accused instigated the others to attack this man Hinni Appu, *he himself not contributing with his fists or feet, standing aloof in the sense that he takes no physical part in the attack*.....he would be liable as an instigator."

It is clear that the learned judge regarded that the first accused's words of instigation as capable of amounting to abetment and not his deeds, and in dealing with the other accused he did not suggest that their acts of violence could be construed an act of abetment.

Indeed it would have been most difficult, if not impossible, for the judge to have stated any principle of differentiation in accordance with which the jury could have been invited to say that, for instance, the acts of the 4th accused who fisted the deceased and attacked him again after he had fallen and the acts of the 3rd accused who attacked him on the ground and trampled on his body were acts of participation and not abetment *or* merely abetment and not participation. It seems to me that acts of violence contributing to a certain result, *viz.* death, even if they encouraged or incited others to similar acts of violence remain imputably acts of participation in the crime committed.

Whatever views may be held on the much debated provisions of section 181 of the Criminal Procedure Code the substantive law applicable to the facts of this case is, I venture to think, free from doubt. Mere presence at the scene of a crime does not in itself involve complicity in the crime or with the abetment of it. Where there is abetment *immediately* before, or at the time of the commission of the crime and the abettor, though present, does not participate in the crime, he is only liable as an abettor. Where there is abetment prior to the commission of the crime which is complete by itself and the abettor is present at the commission of the crime, he is liable to be charged with participation, even though he did not actually participate (section 107 Penal Code) 1925 A.I.R. P.C. 1. Finally, where, as in the present case, what are alleged to be acts of abetment are acts of violence, are indeed part of the means of the totality of the acts, whereby the crime was committed section 107 has no application. Participation is no longer a legal fiction. It is an actual fact. It is not dependent upon a presumption. It is dependent upon proof of the acts committed. The proper charge is a charge of participation, not a charge of participation or abetment. That, as it appears to me is the meaning and purpose of section 32 of the Penal Code. The acts of all who participated are evidentiary of the existence of the common intention. If a jury finds that there was no common intention nevertheless all who participated are liable for their participation (not for abetment) in accordance with the criminal intention or knowledge imputed by the jury to each individual participator. Section 33 of the Penal Code,

But let me adopt the arguments of Crown Counsel and see where they lead us. He argued that if any of the accused by his acts of violence abetted the infliction of harm on the deceased with *knowledge* that death was likely, he would be guilty of abetment of murder. If by his acts of violence he abetted the infliction of harm on the deceased with the *intention* that death should be caused he would be equally guilty, on Crown Counsel's argument of abetment of murder. But even if the acts of violence on the part of any one of the accused *may* be regarded as acts of abetment, not by instigation or conspiracy or aiding but by what I would call " vicious example " his participation in the assault which resulted in death with criminal *knowledge* or *intention* would render him liable to be charged in the former case with culpable homicide not amounting to murder and in the latter case with murder. The resultant position would not be murder and not abetment *or* abetment and not murder — that is the effect of the indictment — but abetment of murder in either event *and* murder or culpable homicide. Even accepting the argument of Crown Counsel the indictment should not and could not have been framed as it was framed.

I pass to a consideration of section 181 of the Criminal Procedure Code. The doubt which, it has been assumed, justifies the framing of alternative charges is doubt in regard to the *intention* of the accused individually or collectively and this doubt is not the kind of doubt that the section contemplates. Confusion of thought has arisen, I would respectfully suggest from an unfortunate identification of " acts " with " facts."

The two words are not used synonymously in the section. On the contrary they appear in sharp contrast. An act is a fact. But a fact is not necessarily an act. For instance, a state of mind, the intention of an accused is a fact but not an act. Section 181 is not applicable when the fact of intention, on the part of an accused, is in doubt. It is applicable only when the *acts* of an accused are of such a nature that legal difficulty arises on the question of which *one* of several offences the sum total of facts will constitute.

Quite apart from authority (12 Cr.L.J. 224) it seems to me that the prosecution must make up its mind, before an indictment is framed, in regard to " the facts which can be proved." The intention with which an accused acted is one of such facts. It is not possible, in the view I take to frame an indictment consisting (as in the present case) of alternative charges and to justify it on the ground that doubt is entertained as to whether a jury will accept a particular *fact* (the intention imputed) as having been proved.

To sum up : The acts of the accused are not ambiguous. It is difficult to conceive of acts less unambiguous than a joint assault by five bullies on the helpless victim of their choice ; and where the acts of the accused are unambiguous, the prosecution (*a*) by regarding acts of violence as acts of violence amounting to murder *or* alternatively as acts of abetment only (*b*) by imputing on the one hand an intention to cause death and by anticipating on the other a possible adverse verdict by the jury on the subject of intention, cannot arrive at two different results based on the *same unambiguous* acts of the accused ; and then, by translating those results into two offences, charge the accused with having committed one of them without specifying which one. I am satisfied in my own mind that section 181 does not sanction that procedure. In my opinion there was misjoinder.

I would add that it is with regret that I find myself in disagreement with the views of the President, my brother Jayetileke and the trial judge.

Appeal dismissed.

Present: Moseley, S.P.J., Hearne, J. & Wijeyewardene, J.

UKKUBANDA AMBAHERA ET AL vs SOMAWATHIE KUMARIHAMY

46 D. C. (Inty.)—Kurunegala No. 4402.

Argued on 3rd August, 1943.

Decided on 5th August, 1943.

Kandyan law—Adoption—Evidence necessary to prove valid adoption.

The petitioner, S, is a daughter of one Appuhamy a cousin of Edward Banda Korala, who was married to Bandara Menika. As Bandara Menika had no children, S, who was of the same caste was brought up by them. S's father and mother too lived in Edward Banda's house. Edward Banda died leaving widow Bandara Menika who continued to have under her S. Bandara Menika died and the question arose in this case as to whether S was the adopted daughter of Bandara Menika, deceased.

A Buddhist monk one Sangarakkita and an ex-aratchi gave evidence on behalf of S to the effect that Edward Banda told them that he was bringing up S for the purpose of inheriting him. The learned District Judge accepted this evidence and following the case of *Tikirikumarihamy vs Niyarapola* (2 C.L.J. 222) held that Edward Banda adopted S and that this was also an adoption on the part of his wife, Bandara Menika.

It was contended in appeal against this judgment (1) that there is no such thing as "joint adoption" in Kandyan law (2) that the evidence was not sufficient to indicate that the adoption was publicly declared.

Held : That the evidence of the Buddhist priest and the ex-aratchi to the effect, that Edward Banda stated to them that he was adopting S for the purpose of inheriting him, is sufficient to prove a valid adoption under the Kandyan law.

H. V. Perera, K.C., with *E. B. Wickramanayake*, for the appellants.
N. E. Weerasooriya, K.C., with *S. R. Wijayatilake*, for the respondent.

MOSELEY, S.P.J.

This appeal involves a point of Kandyan law in regard to adoption of children for the purpose of inheritance. The parties went to trial on the following issues :

1. Is Somawathie Kumarihamy, the petitioner, the adopted daughter of the deceased ?
2. If so, was she adopted for the purpose of inheritance ?

The learned District Judge in addressing his mind to the answering of these questions remarked that the law relating to the matter is clearly laid down in the case of *T. P. W. Tikirikumarihamy vs M. B. A. Niyarapola & Two Others.** In that case an exhaustive review of existing authorities was made and I am in respectful and full agreement with the conclusion at which the court arrived. In the light of that judgment the District Judge answered each of the issues in the affirmative. There is, in my view, ample evidence to support the finding in this case. *Ex abundanti cautela* perhaps, the District Judge went on to hold that an adoption by a husband, during their joint lives and during the subsistence of the marriage, is the adoption of the wife as well. Without expressing an opinion as to the correctness or otherwise of that view, I would merely say that such a finding is superfluous to the requirements of the present case.

The appeal is dismissed with costs.

HEARNE, J.
I agree.
WIJEYEWARDENE, J.
I agree.

Appeal dismissed.

Present: MAARTENSZ, J. & HEARNE, J.

TIKIRIKUMARIHAMY vs NIYARAPOLA ET AL

38 *D. C. Kandy No.* 5201.
Decided on 30th November, 1937.

Kandyan law—Adoption—Public declaration without formal announcement—Is it sufficient—Meaning of public declaration.

Held : (i) That to constitute a valid adoption under the Kandyan law, there must be a declaration to the public, as distinct from the members of the adoptive parents' household or relatives, that the child was adopted for the purpose of inheritance.
(ii) That it is not necessary that the declaration should be made on a formal occasion.

Cases referred to : *Loku Banda vs Dehigama Kumarihamy* (10 N.L.R. 100)
Tikiri Banda vs Loku Banda (2 Bal. Rep. 144)
Tikiri Kumarihamy vs Punchi Banda (2 Browne's Rep. 299)
Ukku vs Sinna (1 Bal. N.C. 75)
Pusumbahamy vs Keerala (2 C.L.R. 53)

N. E. Weerasooriya, K.C., with *S. W. Jayasuriya*, for the petitioner-appellant.
H. V. Perera, K.C., with *E. B. Wickramanayake* and *Cyril E. S. Perera*, for the respondents.

* 26 C.L.W. p. 105

MAARTENSZ, J.

The main question for decision in this appeal is whether the learned District Judge's finding that the added-respondents are the adopted children of Dingirikumarihamy, and her heirs as such, is correct.

The petitioner-appellant, the deceased's step-sister, applied in this suit for letters of administration as sole heir of the deceased. Her application was opposed by the respondent who claimed to be entitled to administer the estate as the deceased's husband.

The first added-respondent, referred to as Cyril in these proceedings, is said to be a son of the deceased's cousin or the son of respondent's cousin. It is possible that the deceased's cousin is or was the wife of the respondent's cousin and that both statements are correct.

The second added-respondent is a daughter of the deceased's sister. There is no evidence as to the circumstances in which the first added-respondent was adopted. But there is evidence that he lived in the deceased's house, that he went to school from there.....which is not rebutted.

The second added-respondent was born in the deceased's house. Her mother's evidence is to the effect that she agreed to give the child to be born to her to the deceased if the child were a girl. This suggests that having adopted a boy, the deceased, who was childless wished to adopt a girl.

There can, I think, be no doubt that the added-respondents lived with and were brought up by the deceased from their infancy. But that is insufficient to constitute a valid adoption according to the Kandyan law.

In the case of *Loku Banda vs Dehigama Kumarihamy** it was held—I quote the head-note—that "in order to constitute a valid adoption under the Kandyan law no particular formalities or ceremonies are required; but it is necessary that the parties should be of the same caste and that the adoption should be public and formally and openly declared and acknowledged, and it must also clearly appear that the adoption was for the purpose of inheriting the property of the adoptive parent."

We were referred in support of his contention to the case of *Tikiri Banda vs Loku Banda*† and the case of *Tikiri Kumarihamy vs Punchi Banda*.‡

In the former case there was evidence that the adoptive parent told the father of the girl to whom the alleged adopted child was proposed in marriage: "We have adopted the child intending to give all our property to him." The District Judge held that this evidence did not help the plaintiff who claimed adoption as it was merely a private conversation between the adoptive parent and the father of the girl.

Wood Renton, J. said, I take it, with regard to the evidence "neither adoption as a protege, nor a private assertion of an intention to adopt for purposes of inheritance will suffice," and observed that the fact of adoption must be proclaimed with a degree of publicity which may vary according to circumstances.

Hayley, in his book on Kandyan law at p. 207 states: "The numerous cases, however, in which the courts have refused to recognize adoption, although the intention to adopt seems to have been established, have apparently settled the law to the effect that there must be a public declaration; but what constitutes such a declaration has not been defined."

There are three cases in which the declaration of adoption was made on the occasion of a proposal of marriage. The first is D. C. Kandy No. 53,809 Grenier's Reports (1873 – Part III, p. 117 (4)) where the adoptive parent stated that he had adopted the first defendant, who claimed to be an adopted daughter, that he wished her to inherit his lands and objected to her being married in *deega*. This was held to be a formal declaration of adoption though it was not proved that it was made after a calling together of headmen or relations. What Sinhalese word was used for the word "inherit" does not appear in the judgment.

The next case is *Tikiri Kumarihamy vs Punchi Banda* (*supra*) where the adoptive parent said he had adopted his nephew and intended to give him his property. Bonser, C.J. said that the words "to give him his property" were not the same as "to inherit" and held that the nephew had not proved that the adoption was for the purpose of inheritance.

In the third case, *Tikiri Banda vs Loku Banda* (*supra*) already referred to, Wood Renton, J. emphasized the use of the words "to give" the property instead of "to inherit" the property, although the District Judge said the Sinhalese expression which was translated "to give" meant literally "to belong to" and thus meant "to inherit." The District Judge said that this statement was insufficient as it was made in the course of a private conversation. I presume he meant that it was not a formal declaration.

With all due deference, I think the learned judges in the last two cases have attached too much importance to the actual words used and not considered the circumstances in which they were used. A child may be brought up in a house as an act of charity or adopted for the purpose of inheriting the property of the adoptive parent. If an adoptive parent on an occasion, as a proposal of marriage, says "I have adopted the child to give him my property," I cannot see what other inference there can be but that the adoption of the

* 10 N.L.R. 100 † 2 Bal. Rep. 144 ‡ 2 Browne's Rep. 299

child was for the purpose of the child inheriting the property of the adoptive parent.

I am accordingly of opinion that the intestate's statement to the schoolmaster that she was bringing up the children and that she intended to give her property to the children was a declaration that she had adopted the children in order that they should inherit her property.

The next question is whether the statement to the schoolmaster and the 2nd added-defendant's mother was a public declaration. In my judgment, what Sawyer meant when he said that the adoption must be publicly declared was that there must be evidence of persons to whom the fact of adoption was expressed and that it could not be implied from the fact of a person being brought up in the adoptive parent's house and treated as a child of the house.

There remains the further question whether the adoption must be formally declared.

Solomons, in his Manual of Kandyan Law (page 6) lays down on the authority of three cases reported in Austin's Reports pages 52, 64 and 74, that the adoption must be formally declared and acknowledged. By formally I take it, is meant a special occasion arranged for the purpose of making the declaration. The cases cited by him no doubt indicate that the declaration should be made on a formal occasion such as a calling together of headmen or relations or neighbours. But the authority cited in these cases, for that proposition is Sawyer's Digest, page 26. I find, however, on reference to the Digest that Sawyer does not lay down that the adoption must be formally declared. What he says is " a regular adoption must be publicly declared and acknowledged." The necessity for a formal declaration is inconsistent with the earlier statement in Solomon's Manual that for the purpose of adoption " there were no prescribed formalities or ceremonies to be gone through."

I am accordingly of opinion that there is no authority for the statement that the adoption must be declared not only publicly, but also be formally declared.

I would, therefore, affirm the finding of the District Judge and dismiss the appeal with costs.

Hearne, J.

The appellant applied in the District Court of Kandy to be appointed administratrix of the estate of Dingiri Kumarihamy, a Kandyan woman, who, as was held by the District Court and affirmed by this court on appeal, had died intestate. In deciding the question of whether the appellant should be appointed administratrix or whether the husband of the deceased was entitled to letters of administration the judge addressed himself to the issue of whether the two added-respondents were adopted by the deceased. He held that they were adopted by the deceased for the purpose and with the intention that they were to inherit her property and this appeal turns on the question of whether he was right in so holding.

It has been strongly urged upon us that the declaration by an adoptive parent to the effect that she had adopted a child for the purpose of inheritance would, if made, as counsel for the appellant put it, " in casual conversation," fall short of the strict proof required by law.

I am unable to find any authority for the view that declarations made in the course of conversation do not amount to such declarations as a court of law would act upon. In the case of *Ukku vs Sinna*,* Ennis, J. acted upon declarations in conversation as proof of adoption while in *Tikiri Kumarihamy vs Punchi Banda* (*supra*), Bonser, C.J. did not rely upon the conversations deposed to in evidence not because they were mere conversations but for the reason that they did not amount to a declaration that the appellant in that case was to inherit the declarant's property. That Ennis, J. regarded the declarations in *Ukku vs Sinna* (*supra*) and *Tikiri Kumarihamy vs Punchi Banda* (*supra*) as no more than declarations in conversation is apparent from what he says : " In one case *Tikiri Kumarihamy vs Punchi Banda* (*supra*) where the evidence consisted of conversation as in this case, the decision was based on the use of the word ' give ' instead of ' inherit ' used in conversation by the deceased when speaking of the ultimate disposal of the property..... " In support of his submission counsel for the appellant relied upon the case reported in *Tikiri Kumarihamy vs Punchi Banda* (*supra*) and upon the case of *Tikiri Banda vs Loku Banda* (*supra*). The former I have dealt with. The latter is not an authority which supports him, for in this case it was held that " the intention to adopt the appellant as heir was not communicated to anybody."

In District Court Kandy No. 53,309 (1873 – Grenier's Reports 117 (4)) it was laid down that " while the law prescribes no particular formalities or ceremonies for a valid Kandyan adoption it is necessary that the parties should be of the same caste and that the adoption should be public and formally and openly declared and acknowledged " and further that " it should be clearly understood, that the child was adopted on purpose to inherit the adoptive parent's property." These tests were quoted with approval in *Loku Banda vs Dehigama Kumarihamy* (*supra*) and in several other cases decided by this court ; but unfortunately " the exact scope of the terms is not so easy to understand." 1 Bal. Notes of Cases 75.

In *Tikiri Kumarihamy vs Punchi Banda* (*supra*) Bonser, C.J. refers to "public" as being equivalent to "generally known." Moncrieff, J. in the same case refers to occasions "which would be described as public."

Dias, J. in *Pusumbahamy vs Keerala* * speaks of "a public declaration" being necessary, while Hutchinson, C.J. in *Loku Banda vs Dehigama Kumarihamy* (*supra*) seems to lay down that a "public and formal declaration" is indispensable. What can these terms connote? I find it difficult to understand the exact sense in which the word "formally" is used. If no particular formalities are necessary the declaration need not be according to a particular formula as long as it is clearly understood that the adoption was for purposes of inheritance; if no ceremonies are prescribed the declaration need not be made on a "ceremonious occasion." It is agreed that the declaration need not be made when members of the public are assembled together for the purpose of hearing the declaration or that the declaration need be made in a public place. What then is meant by a public declaration and what are occasions which can be described as public?

I take the rule that has been laid down by this court to be this: that the adoption must be public in the sense that it must be generally known and that publicity must have been given to the adoption for the purpose of inheritance as the result of an open declaration and acknowledgment on the part of the adoptive parent which need not be on a ceremonious occasion which may be made in the course of conversation, and which must be proved to have been made to members of the public as distinct from members of the adoptive parents' household or relatives or even persons interested in the question of the adoption. In the latter case it would be a private declaration and not a public one. It would appear from one of the reported cases that a statement made to a legal adviser would also fall in the latter class.

I agree to the proposed order.

Appeal dismissed.

Present: HEARNE, J.

SARAM vs SRI SKANDA RAJAH

(*In Revision*)

M. C. Colombo No. 12685.

This was an application to revise an order made by the Magistrate of Colombo.

Decided on 17th November, 1943.

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

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

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

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

F. W. Obeyesekara, for the petitioner.

N. Nadarajah, K.C., (with him *H. W. Thambiah* and *I. Misso*), for the respondent.

HEARNE, J.

E. M. P. Saram requested the magistrate of Gampaha to administer an oath to him in support of an affidavit which he desired to use in connection with an appeal to the Supreme Court. Alleging that "he refused to swear the affidavit" Saram as complainant, charged the magistrate as the accused, with criminal offences under sections 162 and 289 of the Penal Code. Process was refused and the former has petitioned this court to revise the order and to direct that process should issue.

In his formal complaint under section 148 of the Criminal Procedure Code which was filed in the Magistrate's Court of Colombo, the complainant alleged that the refusal on the part of the accused occurred between March 21 and 24, 1942, but when he was orally examined he fixed the date as the 21st March. The latter as will appear, is incorrect. It was probably to the knowledge of the complainant, untrue. According to a statement made by his counsel it could only have been the 23rd March.

In his examination the complainant further stated that the accused read through his affidavit

and remarked that all the contents were untrue. He altered this later when he said that "the accused stated the first few paragraphs were false."

The complainant had been charged in a criminal case before the accused, as the magistrate of Gampaha, and the opening paragraphs of the affidavit alleged that he had not been given an opportunity of calling his witnesses, and that he had been forced to stand his trial on a date on which he was only required to hand in his list of witnesses.

When at a summary trial, an accused pleads not guilty, the magistrate shall, "subject to the provisions of section 289 (5) either postpone the trial to a date to be then fixed or proceed forthwith to try the case." As the trial did not proceed forthwith it was the accused's duty to have fixed a date of trial and it is of interest to note that it was not alleged by the complainant that he did not do so. What he said was that, as he had pleaded not guilty on 12th February, he was "under the impression" that the next date, the 26th February, was the date on which he was required to file his list of witnesses. What or who gave him this impression is not disclosed.

It is clear that the accused, rightly or wrongly, took the view that there was no room for any misunderstanding, that the complainant was not speaking the truth when he suggested there was, and he declined to "swear the affidavit." In these circumstances an application may have been made for mandamus. If the writ was issued and an inquiry held, questions of law and of fact would have required to be determined.

But the complainant has charged the accused with a criminal offence, or rather two criminal offences under sections 162 and 289 of the Penal Code.

It was argued in support of the charges, that no Justice of the Peace had any discretion, by reason of the provisions of section 84 of the Courts Ordinance, to refuse "to swear an affidavit" on the ground that the contents of it were false; also that, if he did so, he committed a criminal offence. This is a startling proposition of law.

The Solicitor-General is a Justice of the Peace for the Island, and if he refuses to administer an oath in support of an affidavit which he knows to be false and which, on the face of it, is intended to be used for the purpose of perpetrating a fraud, his refusal would amount to a criminal offence! Similarly if a magistrate refuses to administer an oath in support of an affidavit which he knows to be false and which, on the face of it, is intended to mislead a court of law and to cause a possible miscarriage of justice, he is liable to be branded as a criminal under the Penal Code! The error into which counsel has fallen is that he has assumed and in effect maintained that any deponent is entitled, as of right, to depose to anything he chooses, irrespective of whether it is true or false. This is most emphatically not the law and the fostering of this pernicious view of the law may have most mischievous consequences. The law gives no person the right to depose to what is not true, whether it be for profit, the perversion of justice or any other purpose. If a Justice of the Peace honestly believes that an affidavit which it is proposed to swear before him is false, he may decline to administer an oath. If it can be shown that he had "no reasonable and probable cause for his belief" he may be required to do his duty. The remedy is by way of mandamus.

It is surprising that counsel did not pause to examine the implications of his argument. "Any person has the right to swear any affidavit, true or false" and a Justice of the Peace who dares to interfere with this right does so at his peril. What a right for counsel to assert! — the right of any citizen to be untruthful and to complain of a crime against the state if he is not allowed to be untruthful, the right to testify on oath to what is false!

The complainant and the accused are, of course at issue on the question of whether the affidavit is or is not true. It is difficult to see how the complainant can possibly substantiate his case. There is no presumption of law that when the complainant pleaded not guilty on the 12th February the accused fixed the date of trial. There is only a presumption that if a judicial act has been performed, it has been regularly performed. But as according to the complainant, the 26th February was mentioned and as according to the law, the accused was required to give a date of trial, there appears to be a strong presumption of fact that the accused fixed the 26th February as the date of trial. If this is so, the presumption can hardly be displaced by the complainant's "impressions."

To turn to another matter — the complainant, in his evidence, stated that "the accused had asked him to get the affidavit sworn to before the Additional Magistrate and that there was only one magistrate (the accused) at Gampaha at the time of this incident." This implied that to the knowledge of the accused, there was no other magistrate at Gampaha to whom the complainant could go. I ascertained from the Government Gazette, and so informed counsel for the complainant, that on March 23rd, 1942, Mr. Francis Perera had been appointed Additional Magistrate for the purpose of trying M. C. 11,820. I told him that I would take judicial notice of the appointment. It was after this that counsel informed me that, according to his instructions the complainant on the advice of the accused, in fact, went from the latter to Mr. Perera and was

told that he was not competent to administer an oath to him, as he had been appointed solely for the purpose of trying case 11,820. It follows that the date on which the complainant went to the accused was the 23rd March and not the 21st as he stated in his evidence.

I hope the complainant will not now be advised to charge Mr. Perera when I say that, in my opinion, he took a wrong view of his position in the matter. Section 428 of the Civil Procedure Code enacts that "subject to general rules an affidavit may be used in a criminal court if it is sworn.....before any magistrate" magistrate means "a magistrate appointed to a Magistrate's Court" and there is nothing in "general rules" so far as I am aware (certainly nothing was brought to my notice) which prevented Mr. Perera, as Additional Magistrate of Gampaha on 23rd March, from complying with the request of the complainant for the reason he gave.

It would appear that the complainant mentioned the 21st March in his evidence as he was aware that an Additional Magistrate was not available on that date and that when he said there was only one magistrate at Gampaha "at that time" (the 23rd, not the 21st) he was being deliberately untruthful. There was another magistrate to whose chamber or court he went.

It would also appear that when the accused advised the complainant to go to the Additional Magistrate he indicated quite clearly that he had no intention of acting oppressively. In particular it would appear that he had no intention of shutting out from the Supreme Court an affidavit merely because it contained allegations against him. His position, on the complainant's own showing, was "Go to a magistrate who knows nothing of the facts to which you propose to depose. I shall have nothing to do with the matter as I am aware that some of the so called facts are false." Even if the accused was wrong in thinking there were no grounds for misunderstanding on the part of the complainant, it is obvious that he did not act with an improper motive or with intent to cause injury or in abuse of his office. To suggest that in these circumstances he acted wilfully and criminally is sheer nonsence.

The application is dismissed.

Application dismissed.

Present: JAYETILEKE, J.

DE SILVA vs PEIRIS

134/*C. R. Panadura No.* 8855.
Argued on 3rd November, 1943.
Decided on 12th November, 1943.

Administration—Value of estate left by deceased—How to determine—Civil Procedure Code, section 519.

Held: That, in determining the value of the estate of a deceased person for purposes of section 519 of the Civil Procedure Code, allowance must be made for debts or encumbrances incurred or created *bona fide* for full consideration in money or money's worth solely for the deceased's own use and benefit.

Cases referred to: *Silva vs Lokumahatmaya* (22 N.L.R. 186)

H. W. Jayawardene, for the appellant.
C. P. J. Kurukulasuriya, with *V. Joseph*, for the respondent.

JAYETILEKE, J.

The original plaintiff died during the pendency of this action leaving property worth Rs. 5,000/– and debts to the extent of Rs. 3,500/–. The nett value of the estate is Rs. 1,500/–.

It is contended on behalf of the defendant that the estate of the deceased is one that requires to be administered and that the substituted-plaintiff cannot proceed with the action without obtaining letters of administration.

I do not think there is any substance in this contention as the estate does not amount to or exceed in value the sum of Rs. 2,500/– within the meaning of section 519 of the Civil Procedure Code. De Sampayo, J. said in the case of *Silva vs Lokumahatmaya* (22 N.L.R. p. 186) ".....the section provides, not for the case where the *property* of the deceased is below the value of Rs. 1,000/– but for the case where the *estate* of the deceased is below that value. The *estate* must be taken to be the nett estate....."

The schedule to the Stamp Ordinance (chapter 189) provides that the value of the estate shall be taken to be the value as determined for the purpose of estate duty. Under section 22 of the Estate Duty Ordinance (chapter 187) allowance has to be made for debts or encumbrances incurred or created *bona fide* for full consideration in money or money's worth solely for the deceased's own use and benefit in determining the value of the Ceylon Estate of a deceased person.

I would accordingly dismiss the appeal with costs.

Appeal dismissed.

Present: MOSELEY, S.P.J.

MUTHAI (P.S. 2059) vs SILVA & OTHERS

S. C. No. 664—*M. C. Negombo No.* 38197.
Argued on 17th December, 1943.
Decided on 5th January, 1944.

Defence (Purchase of Foodstuffs) Regulations, 1942—*Transporting country rice without permit—Regulation* 6 (*c*)—*Order of confiscation—Can both cart and bull be confiscated.*

Where, the owner of a cart and a bull, which had been used by another person to transport country rice without a permit, failed to show cause to the satisfaction of the magistrate that they were so used without his knowledge and consent an order was made under regulation 6 (*c*) of the Defence (Purchase of Foodstuffs) Regulations 1942 confiscating both the cart and the bull,

Held : That that part of the order confiscating the bull cannot be sustained.

H. W. Jayawardene, for the accused-appellant.
Walter Jayawardene, for the complainant-respondent.

MOSELEY, S.P.J.

This is an appeal against an order by the Magistrate, Negombo, for confiscation of a cart and bull belonging to the appellant. The said cart and bull were used by another party who was convicted on his own confession of transporting country rice from one district to another without a permit. Regulation 6 (*c*) of the Defence (Purchase of Foodstuffs) Regulations, 1942, provides that in such a case the vehicle or vessel in which certain produce has been transported may after notice to the owner of the vehicle or vessel be confiscated provided that no such order shall be made if the owner proves to the satisfaction of the court that the contravention of the Regulations was committed without his knowledge or consent.

In this case the appellant appeared to show cause and swore that he had lent the cart and bull to the accused in the case on a promise that they would be returned in the evening. They were not so returned and on the following morning the appellant was forced to send his children to school by rickshaw instead of in the cart which was the usual procedure. The appellant admitted he had not asked the accused where he was taking them when he borrowed them. The learned Magistrate was not satisfied with this explanation and refused to believe that he would have lent his cart and bull to the accused without inquiring for what purpose they were being borrowed. He held that the appellant's inactivity, when the accused failed to return the cart and bull as promised, indicated that he was aware for what purpose the cart was being used. He, therefore, ordered confiscation of both cart and bull.

I am unable to say that the learned magistrate erred in his failure to be satisfied with the ignorance of the appellant in the matter, but I am equally unable to hold that a bull, in the circumstances of this case, can be regarded as a vehicle or vessel. The order for confiscation in so far as it affects the cart is affirmed and that part of the order affecting the bull is set aside. Subject to the amendment of the order to that effect, the appeal is dismissed.

Appeal dismissed, subject to amendment of order.

Present: MOSELEY, S.P.J.

THE ATTORNEY-GENERAL vs PANIKKAM & ANOTHER

Application in Revision in M. C. Anuradhapura Nos. 9132 *and* 9141 (436).
Argued & Decided on 21st January, 1944.

Fauna and Flora Protection Ordinance chapter 325—*Section* 16 (2)—*Capture of elephant except under authority of licence.*

Held : An elephant captured except under the authority of a licence is the property of the Crown and a court has no power to order its delivery to the offending captor.

E. H. T. Gunasekera, Crown Counsel, in support.
No appearance for the 1st respondent.
N. E. Weerasooriya, K.C., with *Kanapathipillai,* for the 2nd respondent.

MOSELEY, S.P.J.

This is an application to revise the order of the learned magistrate made in two prosecutions under section 20 of the Fauna and Flora Protection Ordinance (chapter 325) for taking, in each case, an elephant in breach of the conditions of a licence.

In each case the accused pleaded guilty and a fine was imposed. In case No. 9132 the fine was paid by the accused in case No. 9141 who was then allowed to take the elephant which was the subject of the charge in case No. 9132. Similarly in case No. 9141 he was allowed to retain possession of the elephant which he had taken unlawfully.

Now section 16 of chapter 325 provides that an elephant taken in these circumstances shall be the property of the Crown. It would appear therefore that the order made in each case in regard to the disposition of the animals was illegal. That part of the order must therefore be deleted.

The accused in case No. 9141 is to produce the two animals, if they are still in his possession, before the magistrate of Anuradhapura on or before the 18th February, 1944. If the animals are no longer in his possession he should attend the court on that day and give information as to their whereabouts as far as they may be known to him.

Application allowed.

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

THE K. V. MOTOR TRANSIT CO. vs THE C.-R. OMNIBUS CO.

Application for conditional leave to appeal to the Privy Council against the order of the Supreme Court in respect of case stated under No. 3089 *by the tribunal of appeal under the Motor Car Ordinance No.* 45 *of* 1938.
Argued & Decided on 29th September, 1943.

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

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

Cases referred to : *Soertsz vs Colombo Municipal Council* (32 N.L.R. p. 62)
R. M. A. R. R. R. M. vs The Commissioner of Income Tax (37 N.L.R. 447)

H. V. Perera, K.C., with *D. W. Fernando and Stanley de Zoysa,* for the petitioner.
R. L. Pereira, K.C., with *E. A. G. de Silva,* for the respondent.
Walter Jayawardene, Crown Counsel, for the Commissioner of Motor Transport.

HOWARD, C.J.

We are of opinion that the preliminary objection must be upheld. We are bound by the two previous decisions, that is to say, the case of *Soertsz vs Colombo Municipal Council* (32 N.L.R. p. 62) and *R. M. A. R. R. R. M. vs The Commissioner of Income Tax* (37 N.L.R. 447). The other cases which have been cited by Mr. H. V. Perera, do not, in our opinion, apply. The application is therefore dismissed with costs.

JAYETILEKE, J.

I agree.

Application dismissed.

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