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VOLUME XII

WITH A DIGEST

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Held : (i) That the words " other than the owner or hirer of the lorry or of the goods carried therein or the servants or agents of the owner or hirer " in section 62 (3) of the Motor Car Ordinance amount to a specific exception.

(ii) That the onus of proving the exception was on the accused and not on the prosecution.

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(ii) That, even if the accused had been charged with carrying persons in his lorry in contravention of the terms of his licence, the burden of proving that they were persons he was entitled to carry would be on the accused.

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(ii) That the Ordinance contemplated, subject to the provisions of section 14 (5), that all tenants of any qualifying property should be qualified to be registered as voters.

Colombo Municipal Council (Constitution) Ordinance—Qualifications of a voter to have his name in register—Is residence in the ward in the voters' list, of which a voter seeks to have his name included, a necessary qualification—Interpretation Ordinance, section 5 (3).

Held : (i) That a person, who is entitled to be registered as a voter by virtue of his income qualification, must be entered in the list prepared for the ward in which he is resident.

(ii) That a person claiming to be registered as a voter under the provisions of section 14 of the Municipal Council (Constitution) Ordinance (except the owners of qualifying property who are not resident in the Municipality) must be registered as a voter for the ward in which he resides.

(iii) That the words " action, proceeding or thing pending " in section 5 (3) (c) of the Interpretation Ordinance must mean something in the nature of proceedings which are of a judicial or quasi-judicial nature.

(iv) That a notification, under section 21 (1) (c) of the Colombo Municipal Council (Constitution) Ordinance, that the revision of the lists of persons qualified to vote and to be elected would commence on a stated date, is not an " action, proceeding or thing" within the meaning of section 5 (3) (c) of the Interpretation Ordinance.

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Held : (i) That the land in question formed part of the assets of the partnership created by P27.

(ii) That the seven persons who formed the first partnership held the property in trust for such partnership.

(iii) That a further deed was not necessary to pass such beneficial interests to the second or to the third partnership.

(iv) That the beneficial interests of partners in partnership property may be said to be joint.

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Held : (i) That the Commissioner of Requests had no power, in the circumstances, to order the plaintiffs to be placed in possession of the 4th defendant's land.

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(ii) That the notice served by the Fiscal was not validly served, as the appellant had failed to obtain an order, under rule 5A of the Privy Council Appeal Rules, that the notice be served on the attorney of the Bank.

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Held : (i) That, where a person is referred to and described by his initials, extrinsic evidence can be led to shew who the individual described was intended to be.

(ii) That the note contains all the necessary essentials of a promissory note.

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Promissory Note—Bills of Exchange Ordinance, section 84 (1).

Held : That the writing cannot be regarded as a promissory note, and that the plaintiff was not entitled to sue on it.

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Public Servants' (Liabilities) Ordinance No. 2 *of* 1899, *section* 4—*Joint promissory note by husband and wife—Husband a public servant—Is an action on the note maintainable against the wife.*

Held : That the proceedings were not void as against the wife (2nd defendant) inasmuch as she was not a public servant.

Public Servants' (Liabilities) Ordinance—Unregistered sub-overseer of the Public Works Department—Is he entitled to the benefit of the Ordinance—Does a break in the continuity of service prevent the benefit of the Ordinance being claimed while in service.

Held : (*Keuneman, J. dissentiente*) (i) That an unregistered sub-overseer of the Public Works Department, employed on the terms on which the defendant served, was entitled to claim the benefits of the Public Servants' (Liabilities) Ordinance.
(ii) That the defendant was, in spite of the break in the continuity of his service, entitled to claim the benefit of the Ordinance in an action brought while in service in respect of a debt contracted when he was serving in the Public Works Department.

Public Servants' (Liabilities) Ordinance—Joint and several promissory note executed by public servant and his mistress—Action against both—Plea that action does not lie against the public servant—Can the action proceed against the public servant's mistress alone.

Held : That the plaintiff was entitled to proceed with his action against the other defendant who is not entitled to the benefit of the Public Servants' (Liabilities) Ordinance.

Quo Warranto

Writ of Quo Warranto—Application in respect of appointment of Revenue and Works Inspector of Urban District Council—Local Government Ordinance No. 11 of 1920—Sections 23 and 47—Does the writ lie to question the validity of such appointment.

Held : (i) That the validity of the appointment of Revenue and Works Inspector of an Urban District Council cannot be questioned by an application for the Writ of Quo Warranto.
(ii) That any appointment made under section 47 of the Local Government Ordinance is not an appointment of a permanent nature.

Writ of Quo Warranto—Does the writ lie in respect of the office of Secretary of Urban District Council—Are members of the Council necessary parties.

Held : (i) That the Writ of Quo Warranto does not lie in respect of the office of Secretary of an Urban District Council.
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(ii) That a right of way granted to the owner of a tenement personally does not necessarily go with the tenement.
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Stamp Ordinance

Stamp Ordinance—Stamping of pleadings and documents in civil proceedings—Value of action—Agreement, in the course of proceedings, limiting the value of claim—No formal amendment of pleadings—How should the documents and pleadings be stamped.

Held : (i) That the value of the action, for purposes of stamping, was rightly regarded Rs. 7,000/-, after the agreement.
(ii) That the agreement, though not followed by a formal amendment of pleadings, can be taken into account for determining the value of the action for purposes of stamping.

Stamp Ordinance—Proceedings under section 112 of the Trusts Ordinance—How should the pleadings and documents be stamped.

Held : The proceedings under section 112 of the Trusts Ordinance do not fall under the special item provided under head "Miscellaneous" in Schedule B Part II of the Stamp Ordinance and should be stamped with *ad valorem* duty.

Stamp Ordinance, section 36—Written acknowledgment of debt and interest thereon—Document not stamped—When may such a document be admitted in evidence.

Held : That the document should have been admitted in evidence subject to the proof of its execution and the payment of a penalty, if any, under section 36 of the Stamp Ordinance.

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Words and Phrases (Meanings)

Present: MOSELEY, J.

WIJESINGHE (S.I. Motor Patrol) vs DHANAPALA

S. C. No. 182—*P. C. Kalutara No.* 33408.
Argued on 11th & 13th July, 1938.
Decided on 20th July, 1938.

Motor Car Ordinance section 31 *and* 62 (3)—*Driver of lorry carrying passengers and goods contrary to the terms of his licence—Exception in favour of the servants or agents of the owner or hirer of the lorry or of the goods carried therein—On whom lies the burden of proof of this exception.*

The accused was called upon to answer a charge of carrying passengers and goods in a lorry, contrary to the terms of section 62 (3) of the Motor Car Ordinance. The licence contained authority for "the carriage of goods and persons up to a total weight of 6552 lbs., such persons being the servants or agents of the owner or hirer of the lorry or of the goods carried therein."

In appeal, it was contended that the onus of proving that the passengers were not "servants or agents of the owner or hirer of the lorry or of the goods carried therein" was on the prosecution.

Held : (i) That the words "other than the owner or hirer of the lorry or of the goods carried therein or the servants or agents of the owner or hirer" in section 62 (3) of the Motor Car Ordinance amount to a specific exception.

(ii) That the onus of proving the exception was on the accused and not on the prosecution.

Colvin R. de Silva for accused-appellant.
Jansze, Crown Counsel, for complainant-respondent.

MOSELEY, J.

The appellant was charged that he, being the driver of a certain lorry, carried goods and four passengers in contravention of the conditions or other provisions lawfully inserted in the licence, in breach of section 31 of Ordinance No. 20 of 1927 (The Motor Car Ordinance, 1927). The licence authorises the carriage of goods and persons up to a total weight of 6,552 lbs., such persons being the servants or agents of the owner or hirer of the lorry or of the goods carried therein.

It will be observed that the terms of the licence bear a strong resemblance to the provisions of section 62 (3)of the Motor Car Ordinance. The learned Magistrate, in fact, held that the charge actually came under that section, and he convicted the appellant of an offence against that section. That was one of the grounds of appeal urged before me, namely, that the learned Magistrate was wrong in recording a conviction under section 62 (3), seeing that the charge was laid under section 31. I expressed the view that the accused was in no way prejudiced thereby, and that ground of appeal was not pressed. As a matter of fact, the alteration was in favour of the accused, since the conditions of the licence make no exception in favour of

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the owners or hirers of the lorry, but only in favour of their respective agents or servants. So, but for the alteration, it would have been of no avail to the accused to prove that the alleged passengers held the status of hirers.

The appeal was then argued on the ground that the learned Magistrate was wrong in holding that the onus of proof, that the persons carried in the lorry were owners or hirers of the lorry or of the goods carried therein or the servants or agents of the owner or hirer, was on the accused. I do not know what is meant by the expression " hirer of the goods," but I have set out the words as they appear in section 62 (3). That is, however, beside the point. The only point to be decided in this case is upon whom does the burden of proof lie. The learned Magistrate's finding is as follows :—

> " Once the prosecution proves that besides goods there were men travelling in the lorry, it is for the accused to prove in what capacity such men travelled in the lorry."

I take it that he meant to say:

> " It is for the accused to prove that each of them is a hirer or owner of the lorry, or servant or agent of one of such persons."

Counsel for the appellant relied upon the case of *Nair v. Saundias* (37 N.L.R. 439), where a Full Bench held that, where it is sought under section 80 (3) (*b*) of the Motor Car Ordinance, 1927, to render the owner of a motor car liable for an offence committed in his absence by his driver, in which case his liability does not arise if the offence is committed without his consent, it is for the prosecution to prove that the offence was committed with his consent. In such a case the gravamen of the charge is that the owner consented and the reasons underlying the decision can be, and I say so with respect, readily appreciated.

It was further contended for the appellant that section 62 (3) describes a class or classes of persons who may be lawfully carried in a lorry, and that this description is expressed in negative form merely for the sake of convenience; an ingenious but not convincing argument.

I was also referred to the case of *Dias v. Marcian* (10 C.L.W. 57), where, in the case of a prosecution under section 63 (3) of the Motor Car Ordinance, it was held by Keuneman A.J. that the onus of proof that all passengers carried were adults was on the prosecution. Here again it is an affirmative proposition which the prosecution seeks to establish.

Counsel for the respondent referred me to the following passage in Archibold's *Criminal Pleading* (30th Edn.) p. 356 :—

> " Negative averments, it seems, must formerly have been proved, in all cases, by the prosecutor (see *Over v. Harwood* (1900) 1 Q.B. 803, 806; 69 L.J. (Q.B.) 272, Channell, J; but the present rule upon the subject appears to be that, in cases where the subject of such averment relates to the defendant personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the defendant, as a matter of defence;....."

He further cited the case of *Perkins v. Devadasen* (10 C.L.W. 141), where a person was prosecuted for that he " not being a medical practitioner"

did practise for gain. In that case, de Kretser A.J. held that the Ordinance provided an exception in favour of a medical practitioner and that a person who claims the benefit of such an exception must prove that he comes within it.

In the case of the *Mudaliyar, Pitigal Korale North, v. Kiri Banda* (12 N.L.R. 304) the question of the burden of the proof in a prosecution under section 21 of the Forest Ordinance (No. 16 of 1907) was considered. The relevant part of the section is as follows :—

> "No person shall clear, set fire to, or break up the soil of.....any forest not included in a reserved or village forest....."

It was held by a Bench of Three Judges that :

> "Once the Crown has proved the fact that a clearing has been effected in a *forest*, it rests with the accused to defeat that charge, if he can, by showing that it is a reserved or village forest."

The words "not included in a reserved or village forest" were held to be an exception within the meaning of section 105 of the Evidence Ordinance.

So, here I am satisfied that the words "other than the owner or hirer of the lorry or of the goods carried therein or the servant or agent of the owner or hirer" amount to a specific exception contained in the law defining the offence. The burden of proof was, therefore, upon the appellant.

For this reason the appeal is dismissed.

Appeal dismissed

Present: POYSER, S.P.J., KEUNEMAN, J. DE KRETSER, A. J.

IN RE RATNAYAKE

IN THE MATTER OF A RULE ISSUED UNDER SECTION 51 OF THE COURTS ORDINANCE 1889.

Argued and Decided on 11th May, 1938.

Contempt of Court—Letter written to District Judge regarding proceedings before him by a person unconnected with proceedings—Request that a person against whom a warrant had been issued should be given a date to appear in Court.

The respondent to this rule wrote the following letter to the District Judge of Kandy regarding one Rankotgedera Somadu, who had applied to be appointed curatrix of the property of her minor children, and against whom a warrant had been issued on failure to appear in Court on summons.

> Sir,
>
> I am given to understand that Rankotgedera Somadu is in delicate health, being pregnant, and is expecting a child at any moment. The Aratchi, I understand, has sent a certificate to that effect.
>
> I shall be grateful to you if you can grant a date to enable her to appear in Court in response to the summons.
>
> I am, Sir,
> Your Obedient servant,
> (Sgd.) A. RATNAYAKE.

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The respondent, who is an Advocate and a Member of the State Council, was not counsel in the case. In answer to the following rule issued on him he showed cause.

GEORGE THE SIXTH BY the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith.

In the Supreme Court of the Island of Ceylon.

In the matter of Ratnayake Mudiyanselagedera Abeyaratne Ratnayake of Kahalla, Katugastota, and In the matter of Section 51 of the Courts Ordinance 1889.

Upon reading the letter of the District Judge, Kandy, dated the 15th March 1938, and the letters of the 12th March, 1938, and 24th March, 1938, written by the said Ratnayake Mudiyanselage Abeyratna Ratnayake, addressed to the District Judge, Kandy, it is ordered that the said Ratnayake Mudiyanselegedera Abeyratne Ratnayake do appear in person and show cause before Us, at Our Court at Hultsdorp, on the 11th day of May, 1938 at 11 o'clock of the forenoon, why he should not be punished for the offence of the contempt committed by him against and in disrespect of the authority of the District Court, Kandy, in that he, the said Ratnayake Mudiyanselegedera Abeyratne Ratnayake, did by his letter dated the 12th March, 1938, addressed to the District Judge, Kandy, attempt improperly to influence the said District Judge in the exercise of the functions of the said District Judge in District Court Kandy Curatorship case No. 2161.

It is further ordered that this Rule be served by the Fiscal of the Central Province.

Witness the Honourable Sir Sidney Solomon Abrahams, Knight, Chief Justice, at Colombo the 20th day of April, in the year of our Lord 1938 and of our reign the second.

Sgd. P. W. VAN LANGENBERG,
for Registrar, S. C.

Held : That the respondent's letter amounts to an attempt to influence the Judge upon a matter publicly before him, and that the respondent's conduct in writing the letter amounted to a contempt of Court.

R. L. Pereira, K. C., with *H. V. Perera, K. C.*, and *E. A. P. Wijeratne* and *Aluwihare*, for party noticed.

E. A. L. Wijewardena, K. C., Attorney-General, with *Douglas Jansze*, amicus curiae.

POYSER, S.P.J.

In this matter, one Ratnayake Mudiyanselegedera Abeyratne Ratnayake of Kahalla, Katugastota, has been called upon to shew cause why he should not be punished for the offence of contempt of Court committed by him against and in disrespect of the authority of the District Court of Kandy.

The following are the facts :—Proceedings were initiated in the District Court of Kandy on the 25th day of October, 1937, by one R. Somadu who moved that she be appointed curatrix of the property of her minor children. Her application was allowed on the 15th November, 1937, and various directions were given. On the 20th January, 1938, it appears that the stamps that were necessary for the certificate of curatorship had not been supplied, and notice was served on the applicant; but she did not appear and, consequently, warrant was issued for her appearance on the 31st March. On the 12th March the respondent writes the following letter to the District Judge, Kandy :—

Sir,

I am given to understand that Rankotgedera Somadu is in delicate health, being pregnant, and is expecting a child at any moment. The Aratchi, I understand, has sent a certificate to that effect.

I shall be grateful to you if you can grant a date to enable her to appear in Court in response to the summons.

I am, Sir,
Your obedient servant,
(Sgd.) A. RATNAYAKE.

The District Judge reports the receipt of the letter to the Supreme Court, and also calls upon the respondent for an explanation. He asks him whether such a letter was written in his capacity as an Advocate or in his capacity as a State Councillor. In answer to that letter, the respondent states that he did not write that letter in either of such capacities, but that he wrote it as he felt it his duty, as an ordinary citizen, to bring to the notice of the Court that the person who had been summoned and against whom a warrant was issued was in a delicate state of health and was incapable, without danger to herself and to her unborn child, to be able to attend the District Court, Kandy.

Various affidavits have been filed and there is no reason to doubt that the facts are as stated by the respondent, namely, that the woman was in a delicate state of health at the time she was called upon to appear before the District Court of Kandy, that she did make an attempt to bring her condition to the notice of the Court, but that such attempt was not successful; and, subsequently, her brother approached the respondent and, in consequence of what her brother told the respondent, the letter which is the subject-matter of this Rule was written. I have no doubt that the sending of this letter does constitute a contempt of Court. No doubt, it is only a technical contempt, but the important fact is that the respondent not only brings to the notice of the District Judge that Somadu is in delicate health, but goes on to ask the Judge for an adjournment in the following words :

> "I shall be grateful to you if you can grant a date to enable her to appear in Court in response to the summons."

Various authorities have been cited in regard to what does or does not constitute a contempt of Court, and I think, for the purposes of this case, I need only quote a passage in the judgment of Lord Chancellor Cottenham in the case of *In Re Dyce Sombre*.....(41 English Reports p. 1209).

> "Every private communication to a Judge, for the purpose of influencing his decision upon a matter publicly before him, always is, and ought to be, reprobated; it is a course calculated, if tolerated, to divert the course of justice, and is considered, and ought more frequently than it is, to be treated as, what it really is, a high contempt of Court....."

As I said earlier, the contempt is not a serious one, but it amounts to an attempt to influence the Judge upon a matter publicly before him, and it is

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very necessary, in my opinion, that such a course as the respondent has taken should be the subject of judicial action, and it is of great importance in this particular case, where the respondent is not only an Advocate but is a member of the State Council. Persons in the position of the respondent must be made to realise that they cannot interfere with the course of justice, and that if they do so interfere, or attempt to interfere, they will be punished.

However, Mr. R. L. Pereira, K.C., at the close of his argument appreciated that the letter, written in the form it was, should not have been sent by his client, and tendered an apology. In view of that fact, I think the Rule may be discharged with a warning to the respondent.

KEUNEMAN, J.

I agree.

DE KRETSER, J.

I agree.

Rule discharged with a warning.

Present: MAARTENSZ, ACTING S. P. J. & KOCH, J.

ADIKAPPA CHETTIAR vs LETCHUMANAN CHETTIAR

S. C. No. 290—*D. C. Negombo* 10207.

Argued on 6th & 7th July, 1938.

Decided on 13th July, 1938.

Promissory Note—Payee denoted by his vilasam—Admission of extrinsic evidence to prove the owner of the vilasam—Requisites of a note—Endorsement.

The plaintiff, as endorsee, sued the defendant on a promissory note made in Tamil which translated reads as follows :—

Sivamayan

" Credit of Pana Lana Nawanna Suna Pana of Negombo.

" Debit of Ana Nana Theeanna Leyna of above place.

" The balance amount due, less amount paid on the letter for Rs. 3,000/–, given by me to Rawanna Mana Nana Rawanna Mana Adaikkappen on 6th November, 1930, as for this day is Rs. 3,525/–. I shall pay to your order on demand, the said sum of Rupees three thousand five hundred and twenty five together with interest thereon at ½ per centum per month and take back this letter."

(Signed in Tamil on a 6 cts. Stamp.)

The endorsement was as follows :—

" 11th day of '*Aipasi*' (October) of '*Pawa*' year.

The principal and interest herein-mentioned shall be collected from the herein signed Ana Nana Theeanna Leyna by Rawanna Mana Nana Rawanna Mana Adaikkappa Chettiar of Nattarasankottai."

(Signed in Tamil.)

The District Judge entered judgment for the plaintiff. In appeal it was contended that:

(*a*) the document sued upon is not a promissory note for two reasons:—

(i) that the name of the payee does not appear nor has the payee been indicated with reasonable certainty; and

(ii) that, in other respects, the document does not conform to the requirements necessary to constitute it a promissory note;

(*b*) if the document is found to be a promissory note, the endorsement is defective and does not give the plaintiff a right to sue.

Held: (i) That, where a person is referred to and described by his initials, extrinsic evidence can be led to shew who the individual described was intended to be.

(ii) That the note contains all the necessary essentials of a promissory note.

(iii) That the endorsement is valid as a restrictive endorsement.

N. E. Weerasooria, with *W. W. Muthurajah* and *Chandrasena*, for defendant-appellant.

N. Nadarajah, with *Chitty*, for plaintiff-respondent.

KOCH, J.

The plaintiff, as endorsee, sued on a document which he alleged was a promissory note made by the defendant. There was no defence on the merits. The learned District Judge entered judgment for the plaintiff. The defendant has appealed.

The argument put forward on behalf of the appellant was confined to two points, namely,

(1) that the document sued upon is not a promissory note for two reasons—(*a*) that the name of the payee does not appear nor, has the payee been indicated with reasonable certainty, and (*b*) that, in other respects, the document does not conform to the requirements necessary to constitute it a promissory note; and

(2) that if the document is found to be a promissory note, the endorsement is defective and does not give the plaintiff a right to sue.

The document is in Tamil and it was agreed that the translation D6 should be accepted as correct.

Mr. Weerasooria's argument is that the document can only be regarded as an account stated coupled with a promise to pay.

Now, assuming for the purposes of the argument that the document is an account stated, each of the parties to it must have known who the other was. The document commences with the words, "Credit of Pana Lana Nawanna Suna Pana of Negombo; Debit of Ana Nana Theeana Layana of the above place." Then follows the words referring to payment of Rs. 3,000/– and stating that the balance on this day, the 1st of April, 1934, was Rs. 3,525/–. Immediately after this are the words, "I shall pay to your order on demand that said sum of Rupees Three thousand five hundred and twenty five, together with interest thereon at 1/2 per centum per month, and take back this letter." The document is signed by A. N. T. L. Letchumanan, the defen-

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dant. This shows that the words, "debit of," were regarded as meaning debtor and the initials, Ana Nana Theeana Layna, referred to Letchumanan.

Applying the same reasoning, the words "credit of" should be regarded as meaning creditor and the initials P. L. N. S. P. must have been intended by the signatory to also refer to the individual who was known by these initials. It is a common practice among chetties to refer to a member of their community by his initials which he obtains from his father's name, and sometimes from his grandfather's name as well.

Two cases, namely *Green v. Davies* * and *Sibtree v. Tripp* † were cited, the former by the appellant's and the latter by the respondent's counsel. I do not think that it is necessary to comment on either of these decisions as the language in the documents dealt with in these cases was different from that in the document before us.

> Section 7 (1) of the Bills of Exchange Act, 1882, runs—"Where a bill is not payable to bearer, the payee must be named or otherwise indicated with reasonable certainty."

In *Willis v. Barrett* ‡ the bill was payable to "the order of J. Smythe." It was held that evidence was admissible to show that T. Smith was intended to be described thereby.

I cannot therefore see why in the case before us, in a transaction between chetties where in the document a chetty is referred to and described by his initials by another chetty, extrinsic evidence cannot be led to shew who the individual described was intended to be. I therefore hold that the payee on the document sued upon has been indicated with reasonable certainty. Moreover, it is admitted that the person referred to was Suppramaniam Chettiyar—vide paragraph 3 of the answer.

On the next point, I am of opinion that the words I have quoted from the document, read in conjunction with the context, contain all the necessary essentials of a promissory note, and that it was intended by the parties that the document should operate as a note, the payee being P. L. N. S. P.

The value of the stamp which has been affixed is six cents—just what is necessary for an "on demand" note. Had the document been intended to be an account stated, the stamp value would have been considerably higher. The words "pay to your order" mean "pay to you or to your order." *In Willis v. Barrett* (supra) the words were, "to the order of Smythe," and it was held that the document was a bill

The remaining point is whether the endorsement is in order.

On the reverse side of the document are the words, "The principal and interest herein-mentioned shall be collected from the therein signed Ana Nana Theeana Layana by Rawanna Mana Adaikkappa Chettiar of Nattarasankottai," and immediately below this is the signature of P. L. N. S. P. Suppramaniam.

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* 4 B. & Cr. 235. † 15 M. & W. 23.

‡ 1816 — 2 Stark 29.

Now, the Bills of Exchange Act to which I have referred provides for various kinds of endorsements, and one of them is what is known as "a restrictive endorsement." Section 35 (1) refers to such a type of endorsement and defines it as one *inter alia* which expresses that it is a mere authority to deal with the bill as directed e.g. for collection. Sub-section (2) states that a restrictive endorsement gives the endorsee the right to receive payment on the bill and to sue any party that the endorser could have sued.

I therefore hold that the bill has been duly endorsed by the payee as a restrictive endorsement, and that the endorsee for collection is Rawanna Mana Nana Rawanna Mana Adaikkappa Chettiar, who can rightly sue. He is the plaintiff in the case. I wish to point out that in this endorsement Letchumanan Chetty, the maker, is referred to only by his initials, once again shewing the chetty practice of referring to a member of the community by his initials.

The appeal is dismissed with costs.

MAARTENSZ, J.

I agree.

Appeal dismissed.

Present: MOSELEY, J. & FERNANDO, J.

MUTHUKUMARU AND ANOTHER vs VAITHY AND TWO OTHERS

S. C. No. 281—*D. C. Jaffna No.* 6883.

Argued on 22nd, 23rd and 24th November, 1937.

Decided on 1st December, 1937.

Trusts Ordinance No. 9 *of* 1917, *sections* 101, 102 *and* 112—*Hindu Temple—Proceedings for vesting order and directions for control and management of trust—Failure to comply with requirements of section* 102—*Effect of such failure.*

The plaintiff in these proceedings who claimed to be the manager of a Hindu Temple prayed:

(*a*) That a vesting order be made in his favour under the Ordinance; and

(*b*) That directions be made as to the proper control and management of the trust and for its succession.

The Court granted the plaintiff's prayer and entered decree in terms of section 102 of the Trusts Ordinance. No objection was taken at the trial to the procedure adopted. In appeal, objection was taken to the order on the ground that the provisions of section 102 had not been complied with.

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Held : That the plaintiff was not entitled to obtain the relief he claimed without complying with the requirements of section 102 of the Trusts Ordinance.

Per MOSELEY, J. "It is, however, contended on his behalf that, if he is not entitled to an order under section 102, he may apply to the Court for a vesting order under section 112 (1) (i). Such an order may be made when it is uncertain in whom the title to any trust property is vested. The plaintiff has not alleged any such uncertainty nor has it been shown that any exists. His claim in this respect must therefore fail. Nor is it clear that the Court, except in a proceeding under section 101 or section 102, can make a vesting order under section 112 itself. If it is the intention of the Ordinance to confer such a power upon the Court, it is strange that it does not indicate the procedure to be adopted for the purpose."

H. V. Perera, K.C., with *N. Nadarajah* and *E. B. Wickremanaike*, for added parties-appellants.

S. Subramaniam, with *S. Mahadeva*, for plaintiff-respondent.

MOSELEY, J.

This is an appeal against an order purporting to be made under section 102 of the Trusts Ordinance No. 9 of 1917, whereby certain properties belonging to a Hindu temple were vested in the plaintiff as trustee. At the trial a number of issues were framed but none of these was specifically answered, and the case seems to have been treated as a contest for the management of the temple between the plaintiff on the one hand and the 1st defendant backed by the other parties on the other. The latter were added after the plaintiff's case had been in progress for some time. They claimed proprietary rights in the temple and the land on which it stands, and asked that the 1st defendant should be declared the manager of the temple subject to their control and direction.

The plaintiff did not, in the plaint, specify the section or sections of the Trusts Ordinance, the aid of which he invoked. His prayer was :—

(*a*) that a vesting order be made in his favour under the Ordinance ;

(*b*) that directions be made as to the proper control and management of the trust and for its succession.

I think it must be conceded that these are both matters in respect of which relief may be sought under section 102 of the Ordinance, and it may be inferred, from the fact that the decree purports to be in accordance with the provisions thereof, that it was taken for granted by the Court and the parties that the plaintiff relied upon that section. It should be observed that the regularity of the procedure, in this respect, was not questioned at the trial.

Section 102 provides the machinery for suits by persons interested in religious trusts with respect to a variety of matters connected with such trusts. It enables any five persons so interested to institute an action, subject to a report by a duly appointed commissioner, *inter alia*, that the subject-matter of the plaint is one that calls for the consideration of the Court.

Similarly, section 101 provides for the institution of actions in connection with charitable trusts. This section is mentioned merely because it contains a saving clause which applies equally to sections 101 and 102 (per Bertram C.J. in *Karthigesu Ambalavanar et al. v. Subramaniar Kathiravelu* et al. 27 N.L.R. 15 at p. 21). The saving clause reserves the rights of a trustee or author of a trust to apply to the Court under the general provisions of the ordinance for the purpose of regulating the administration of the trust and succession to the trusteeship. The object of this clause would appear to be to exempt a trustee or author of a trust from the somewhat cumbrous procedure prescribed by these sections.

Now, it is abundantly clear that the plaintiff has not complied with the requirements of section 102, seeing that he has not joined four other persons with him as plaintiffs, nor has he obtained the necessary report from the commissioner.

It is, however, contended on his behalf that he comes within the meaning of " trustee " in the saving clause and is, consequently, entitled to apply to the Court as therein provided. His counsel has drawn our attention to section 92 of the Indian Code of Civil Procedure (Act No. V of 1908), which corresponds very nearly with the first part of section 101, the relevant portion of which deals with the removal of trustees. He has cited several decisions of the Indian Courts which are to the effect that, while the section is directed against trustees, a suit lies against a trustee of an express or constructive trust, and whether such trustee be *de jure* or *de son tort*. The reasoning seems sound, since it would be illogical to expose a properly constituted trustee to a liability against which a trustee *de son tort* would claim immunity. Counsel argued that, if such a wide interpretation is given to the word " trustee " in one part of the section, the same interpretation must of necessity be given to the word where it appears elsewhere in the section. This, undoubtedly, would be so if in each case the section were imposing a liability upon a trustee. The saving clause, however, confers a privilege upon a trustee and it would not be so logical to hold a trustee *de son tort* equally entitled to that privilege.

Counsel further relied upon an observation of Bertram C.J. in *Karthigesu Ambalavanar et al. v. Subramaniar Kathiravelu et al.* (supra), where, in discussing the saving clause in section 101, the learned Chief Justice held that it was open to the plaintiffs " as persons claiming to be trustees, to apply to the Court for such directions as the Court may deem equitable for the purpose of regulating the administration of the trust and the succession to the trusteeship." In that case the plaintiffs, although they were described as mere *de facto* trustees of the temple, had in fact been appointed trustees by a formal deed executed by the head of one of two rival branches of the family which had originated the trust. They were, therefore, at least in a position to claim to be trustees. I think that that is the proper inter-

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pretation to be placed upon the words of the learned Chief Justice. No such claim is made by the plaintiff in this case. He merely alleges in the plaint that, after the death of his father and another person, his brother and then he himself had managed the temple.

For these reasons, I do not think that the plaintiff is entitled, by virtue of the saving clause in section 101, to relief provided by section 102.

It is, however, contended on his behalf that, if he is not entitled to an order under section 102, he may apply to the Court for a vesting order under section 112 (1) (i). Such an order may be made when it is uncertain in whom the title to any trust property is vested. The plaintiff has not alleged any such uncertainty, nor has it been shown that any exists. His claim in this respect must therefore fail. Nor is it clear that the Court, except in a proceeding under section 101 or section 102, can make a vesting order under section 112 itself. If it is the intention of the Ordinance to confer such a power upon the Court, it is strange that it does not indicate the procedure to be adopted for the purpose.

As I have already observed, the plaintiff has not complied with the requirements of section 102, and is not entitled to the immunity conferred upon a trustee. In my opinion, therefore, the District Court had no jurisdiction to entertain the plaintiff's application.

I would, therefore, allow the appeal and set aside the order of the District Court. The appellants will have their costs here and in the Court below.

FERNANDO, J.

I agree.

Appeal allowed.

Present: MOSELEY, J.

CANAGARATNE AND ANOTHER vs CHELLIAH AND TWO OTHERS

S. C. No. 7—C. R. Jaffna No. 11357.

Argued on 28th July, 1938.

Decided on 3rd August, 1938.

Set-off—Principal debtor and sureties sued by liquidators of a cheetu company for money due on agreement—Claim to set off money due to one of the sureties—Is surety entitled in law to claim such benefit.

The plaintiffs, in their capacity as liquidators of a *cheetu* company, sued the 1st defendant as principal and 2nd and 3rd defendants as sureties for a sum of Rs. 70/- due under an agreement. The second defendant claimed that he was entitled to set off against the amount claimed a sum of Rs. 105/- which he had contributed to the plaintiff company.

After trial, the learned Commissioner held that the 2nd defendant was entitled to the set-off claimed and gave judgment against the 1st defendant, judgment against the 3rd defendant having gone already by default. He further ordered that, if the 1st defendant failed to satisfy the decree, the 2nd defendant should set off against the decree the sum due to him from the company and the 3rd defendant too should enjoy the benefit of such set-off.

The plaintiffs appealed and it was contended on their behalf (1) that the two demands were not of such a character as would permit one to be set off against the other; (2) that a set-off, in this case, would amount to giving a creditor in a winding up preferential treatment.

Held : That the Commissioner was wrong in allowing the set-off, inasmuch as it would amount to giving a creditor in a winding up preferential treatment.

Followed: Provincial Bill Posting Co. v. Low Moor Iron Co. 78 L.J. (N.S.) K.B. and Bankruptcy p. 702.

W. W. Muthurajah for plaintiffs-appellants.

No appearance for defendants-respondents.

MOSELEY, J.

The plaintiffs (appellants), in their capacity of liquidators of a *cheetu* company, sued the defendants (respondents), the 1st defendant as principal and the 2nd and 3rd defendants as sureties, for the sum of Rs. 70/- due under an agreement in respect of a *cheetu* purchased by the 1st defendant.

Judgment went by default against the 3rd defendant. The 2nd defendant claimed that he was entitled to set off against the amount claimed a sum of Rs. 105/- which he had contributed to the plaintiff company, and the case went to trial on that issue.

The learned Commissioner held that the 2nd defendant was entitled to set off as claimed, and gave judgment against the 1st defendant as prayed, and ordered that, if the judgment was not satisfied by the 1st defendant, the 2nd defendant should set off against the decree the amount due to him by the company, and that the 3rd defendant as a joint and several guarantor should enjoy the benefit of the said set-off.

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Moseley, J.

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The plaintiffs appealed on the ground that the 2nd and 3rd defendants are not entitled to a set-off.

Counsel for the appellants argued that in a question of set-off it is essential that the two demands should be of such a character that the general principles of set-off apply (Buckley—*The Law & Practice under the Companies Acts*, 11th ed. page 442), that is to say, that they must be due to and from the same persons in the same right (Leake on *Contract*, 8th ed. p. 782). In the case of *In re Pennington and Owen Ltd.* (1925 Ch. Div. at p. 831) it was held by Pollock M.R., that "a joint debt cannot be set off against a separate debt nor a separate debt against a joint debt....."

In my view, however, the most cogent argument against allowing a set-off in this case is that to do so would amount to giving a creditor in a winding up preferential treatment.

In the case of *Provincial Bill Posting Co. v. Low Moor Iron Co.* (78 L. J. (N.S.) K.B. and Bankruptcy p. 702) the plaintiffs sued the defendants for damages for tort and the defendants claimed to set off a sum due to them by the plaintiffs under a contract. Buckley L.J., in the course of his judgment said :—

> "In these circumstances, if we were to allow a set-off, the result would be that a particular creditor of the plaintiff company would receive 20 shillings in the pound in respect of his debt, and would thus be preferred to the other creditors. That being so, it seems to me that we ought not to allow the set-off."

I prefer to decide this appeal on the authority just mentioned. In my view, the learned Commissioner was wrong in allowing the set-off.

I would, therefore, allow the appeal with costs. The judgment of the Court of Requests is set aside and judgment will be entered for the plaintiffs, as prayed in the plaint, with costs. It is open for the 2nd defendant to prove in the liquidation for the amount which he claims in reconvention.

Appeal allowed.

Present: MAARTENSZ, J.

DE MEL AND ANOTHER vs AMARASINGHE

S. C. No. 37—C. R. Panadura No. 6485.

Argued & Decided on 29th July, 1938.

Action for use and occupation—Agreement to purchase land—Occupation pending completion of sale—Absence of evidence of definite repudiation of the agreement—Can the owner of the land maintain an action for use and occupation.

Plaintiffs' father (plaintiffs being minors), acting on their behalf, verbally agreed in January, 1935, to sell the property in question to the defendant. The purchase was to be completed within two months, and defendant was placed in occupation in the meantime.

The sale did not take place and the defendant continued occupying the premises. In June, 1937, the plaintiffs gave notice to the defendants to quit and give peaceful possession, which the defendant failed to comply with. Thereupon, the plaintiffs brought the present action for the recovery of reasonable compensation for use and occupation of the premises. The defendant admitted the circumstances in which he came into occupation but denied that he agreed to pay any rent, and further stated that he was ready and willing to complete the sale. In giving evidence, plaintiffs' father expressed his willingness to sell the premises to the defendant even at that time.

Held : That, in the circumstances, the defendant was not liable on an action for use and occupation as the facts did not constitute an implied contract to pay rent.

G. P. J. Kurukulasuriya, with *Gilbert Perera,* for plaintiffs-appellants.
D. W. Fernando for defendant-respondent.

MAARTENSZ, J.

This is an appeal from a decree dismissing the plaintiffs' action for the recovery of a sum of Rs. 375/– alleged to be due from the defendant for use and occupation of the premises bearing assessment No. 208, Horana.

It appears that the father of the plaintiffs, acting on their behalf, verbally agreed to sell the property in question to the defendant. The purchase was to be completed in two months, and the defendant was placed in occupation of the premises pending completion of sale. The defendant denied liability to pay rent while admitting the circumstances in which he was placed in possession, and further stated that he was ready and willing to complete the sale.

The learned Commissioner, in dismissing the case, relied on the case of *Isla Maricar v. Andris Appu,* (10 N.L.R. page 178). In that case it was held that an action for use and occupation will not lie unless there has been a contract, expressed or implied, between the parties. There, the plaintiff sued for rent on a parol lease. The Commissioner held that the parol lease had not been proved, but gave the plaintiff judgment in a certain sum as compensation for use and occupation. That decision was clearly wrong because the defendant had denied the plaintiff's title, and the plaintiff was not entitled to recover except on the footing that the defendant had agreed to pay rent. In this case, however, the defendant admits the title of the plaintiffs and he would be liable to pay compensation for use and occupation unless he was placed in possession in circumstances from which it could be inferred that he was to be in possession free of rent.

In the case of *Winterbottom and others v. Ingham,* (7 Queen's Bench Reports 1845, page 611) it was held that, where the vendee of an estate sold by auction had been allowed to enter upon and hold the premises while the title was under investigation, and where the contract had afterwards been determined for want of title, that the vendor cannot, on these grounds only, recover for use and occupation, although a jury found that the occupation had been beneficial.

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Maartensz, J.

De Mel & Another *vs* Amarasinghe

In a South African case, *Wepner v. Schrader* (1903) (T.S. 629), the report of which is not available, it was held that a person who was allowed use and occupation on the understanding of a future purchase, will not be liable for use and occupation on an action brought by the person, who put him in possession, as the facts did not constitute an implied contract to pay rent, but that the plaintiff was entitled to eject the defendant on refunding to him the sum of money paid in advance.

I think these decisions are applicable to the facts of the present case. It is clear from the evidence of the plaintiffs' father that the defendant was willing to purchase the property till January, 1937. He also stated that he was still prepared to sell the premises even now to the defendant if his wife will agree. The defendant says that he is still ready and willing to purchase the premises.

The plaintiffs are, therefore, not entitled to succeed in this appeal. They have received a certain amount of compensation because the defendant has not claimed the sum of Rs. 200/- which he had paid as an advance, and I understand he has given up possession of the premises.

The appeal is dismissed with costs.

Appeal dismissed.

Present: MAARTENSZ, J.

JOSEPH (Sub Inspector of Police) vs SUGATADASA

S. C. No. 232—*P. C. Dandagamuwa No.* 2744.
Argued on 13th & 14th July, 1938.
Decided on 22nd July, 1938.

Motor Car Ordinance No. 20 *of* 1927, *sections* 31, 62 (3) *and* 84— *Driver of lorry carrying passengers contrary to terms of his licence—Exception in favour of owner or hirer of the goods carried therein, or servant or agent of the owner or hirer—Burden of proof of this exception—Offence against more than one section.*

The accused was convicted on a charge of carrying two passengers inside the lorry, being neither the owner nor hirer of the lorry or of the goods carried therein or the servant or agent of the owner or hirer, in breach of section 62 (3) of the Motor Car Ordinance. There were three passengers in the lorry, besides the driver and cleaner, one of whom was the owner of the lorry. The prosecution led no evidence as to who the other passengers were nor did the accused. The licence authorised the carriage of goods and persons being the servant or agent of the owner or hirer.

In appeal, it was contended: (*a*) that the burden of proving that the passengers in question did not come within the exception was on the prosecution; (*b*) that the accused should have been charged under § 31 of the Motor Car Ordinance and, in such a charge, the burden to prove that the accused contravened the conditions of his licence would be on the prosecution.

Held : (i) That, it is for the accused to prove that the passengers in the lorry were persons to whom the exception applied.

(ii) That, even if the accused had been charged with carrying persons in his lorry in contravention of the terms of his licence, the burden of proving that they were persons he was entitled to carry would be on the accused.

(iii) That the prosecution is entitled to select the section under which to prosecute if the accused appears to have committed a breach of more than one section.

Followed: The Mudaliyar, Pitigal Korale North, v. Kiri Banda. 12 N.L.R. 304.
Distinguished: Nair v. Saundias Appu 37 N.L.R. 439.

J. R. Jayawardena for accused-appellant.
E. H. T. Gunasekera, Crown Counsel, as *amicus curiae.*

MAARTENSZ, J.

The accused-appellant was convicted on the following charge, that he did on the 5th February, 1938, being the driver of lorry No. X 9413, carry two passengers inside the lorry being neither the owner nor hirer of the lorry or of the goods carried therein, or the servant or agent of the owner or hirer, in breach of section 62 (3) of Ordinance No. 20 of 1927, an offence punishable under section 84 of the said Ordinance.

There were three passengers in the lorry, besides the driver and the cleaner, one of whom was the owner of the lorry. The prosecution led no evidence as to who the other passengers were, nor did the accused.

The question for decision in this appeal is whether the burden of proving that the other two passengers did not belong to the category of persons who could be carried in a lorry was on the prosecution or on the accused.

In support of the appellant's contention that the burden was on the prosecution, I was referred to the decision of the Divisional Court in the case of *Nair v. Saundias* (1936) 37 N.L.R. 439.* In that case "the owner of a motor car, which was licensed for private use only, was charged under section 80 (3) (*b*) with permitting the car to ply for hire, the owner not being present at the time," and it was held "that the burden was on the prosecution to prove that the owner did consent to the commission of the offence or that the offence was due to an act or omission on his part or that he did not take all reasonable precautions to prevent the offence." It was also held that "section 80 (3) (*b*) does not cast upon the accused the burden of proving an exception within the meaning of section 105 of the Evidence Ordinance."

Section 80 enacts as follows :—

> "(1) If any motor car is used which does not comply with or contravenes any provision of this Ordinance or of any regulation, or of any order lawfully made under this Ordinance or any regulation ; or
>
> "(2) If any motor car is used in such a state or condition or in such a manner as to contravene any such provision ; or
>
> "(3) If anything is done or omitted in connection with a motor car in contravention of any such provision ; then, unless otherwise expressly provided by this Ordinance,—

* 6 C. L. W. p. 1

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

Abrahams, C.J. pointed out that there is a differentiation between the responsibility of an owner who is present when an offence is committed and an owner who is absent, and stated that when a charge is made against an owner who is absent the charge must allege that the owner consented to the commission of the offence or that it was due to an act or omission on the part of the owner or that he did not take all reasonable precautions to prevent the said offence, as the case may be. He, accordingly, held that the excusatory circumstances were essential elements of the offence and not exceptions to which the rule laid down in section 105 of the Evidence Ordinance applied.

I respectfully agree; but I do not think that that decision is applicable to the offence defined by section 62 (3) of the Motor Car Ordinance. I agree with the learned Magistrate that the section contains a total prohibition of the carrying of any person in a lorry and then makes an exception in favour of the owner, etc., and that it is for the accused to prove that the passengers in the lorry were persons to whom the exception applied.

The decision applicable to this case is the case of *The Mudaliyar, Pitigal Korale North, v. Kiri Banda* (1909) 12 N.L.R. 304, where it was held that in a prosecution under section 21 of the Forest Ordinance, 1907, which prohibits the clearing, etc. of any forest not included in a reserved or village forest, the burden of proving that the forest is not included in a reserved or village forest lies on the accused.

It was next argued that the accused should have been charged for a contravention of the conditions of his licence under section 31 of the Motor Car Ordinance, and that in such a charge the burden of proving that the accused contravened the terms of his licence lies on the prosecution.

The licence authorises the carriage of goods and persons, being the servant or agent of the owner or hirer. In my judgment, if the accused had been charged with carrying persons in his lorry in contravention of the terms of his licence, the burden of proving that they were persons he was entitled to carry would be on him.

Moreover, I think that the prosecution is entitled to select the section under which to prosecute if the accused appears to have committed a breach of more than one section.

I dismiss the appeal.

Appeal dismissed.

Present: KOCH, J.

BARON APPUHAMY vs TIVANAHAMY

S. C. No. 50—C. R. Badulla No. 8755.

Argued on 30th June, 1938.

Decided on 4th July, 1938.

Civil Procedure Code—Order setting aside a judgment by default—Does an appeal lie from such an order—Courts Ordinance sections 39 and 80.

Held : That an appeal does not lie from an order of a Commissioner of Requests setting aside a judgment by default.

P. Thiagarajah for plaintiff-appellant.

W. E. Abeykoon for defendant-respondent.

KOCH, J.

Judgment by default was entered in this case against the respondent who later appeared before the Court, and, having shewn cause, succeeded in obtaining an order setting aside the judgment so entered. An appeal has been preferred from that order on two grounds :—

(1) that the judgment against the respondent was not one by default but entered *inter partes*, and that, therefore, the Court had no power to vacate it ;

(2) that the cause shewn by the defendant was insufficient in law to excuse his default.

A preliminary objection has been taken by the respondent's counsel that no appeal lay from the order setting aside the judgment by default, as this order was not final. He cited the case of *Lebbe v. Appuhamy* (14 Ceylon Law Recorder 14). I think that there is substance in the objection, although the case cited does not appear to deal with a situation such as has arisen in this case.

Under sections 39 and 80 of the Courts Ordinance No. 1 of 1889, an appeal is permitted from a final judgment or order or from any order having the effect of a final judgment pronounced by a Court of Requests. But judgment by default can scarcely be considered to be a final judgment not only by reason of the fact that the defendant is permitted by section 823 (3) of the Civil Procedure Code to appear within reasonable time, and, on sufficient cause shewn, to have such judgment set aside and to open up proceedings afresh in the Court of Requests itself, but also in view of the express denial to the defaulting defendant of the right of appeal by reason of section 823 (6) of the Civil Procedure Code.

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Koch, J.

Baron Appuhamy *vs* Tivanahamy

It was argued in *Nonohamy v. Divunhamy* (25 N.L.R. 414) that, as a judgment by default was not a final order, no appeal lay from an order refusing to set aside such judgment, but it was held that an appeal would lie as the effect of a refusal to set aside such a judgment was to invest such judgment with finality.

The present is the converse case. Here the Commissioner has set aside the judgment by default and the question for consideration is whether this order setting aside the judgment by default partakes of the character of a final order or not.

It has been held in *Karonchihamy v. Angohamy* (5 N.L.R. 193) that a "final judgment has been variously interpreted," and in *Vairavan Chetty v. Ukku Banda* (27 N.L.R. 65) Jayawardena A.J. held that it was impossible to give a comprehensive definition of the term "final judgment," and that what such a judgment is must depend on the circumstances of the case. It may, however, be sometimes possible to apply a rough and ready test, namely, has the actual matter in dispute between the parties been finally concluded ?

Applying this test, it is clear that the effect of the order of the Commissioner setting aside the judgment by default, far from introducing finality to the proceedings, permits the defendant to put his defence before the Court. Finality, in these circumstances, will be reached only when after trial a decree is entered.

For these reasons, therefore, I am of opinion that an appeal will not lie from the order setting aside the judgment by default. The appeal is dismissed with costs.

Appeal dismissed.

Present: DE KRETSER, J.

MOHAMED BAI vs MRS. DIYAWA AND TWO OTHERS

S. C. No. 179—*C. R. Kandy No.* 21757.

Argued on 23rd May, 1938.

Decided on 27th June, 1938.

Court of Requests—Leave to appeal—Application to Supreme Court not filed within seven days—Leave granted by the Supreme Court—Objection taken at the hearing on the ground that appeal did not lie as the application for leave to appeal had been filed out of time—Has the Supreme Court power to vacate its order granting leave to appeal—Is the appeal in order.

Judgment was delivered on 30th June, 1937. Application for leave to appeal was refused by the Commissioner on the same day. On the 8th July, application for leave to appeal was made to the Supreme Court, and later it was allowed. At the hearing of the appeal, objection was taken that the application to the Supreme Court was not filed within seven days of Commissioner's refusal.

Held: (i) That the application to the Supreme Court for leave to appeal was made out of time.

(ii) That the order granting leave to appeal by the Supreme Court was not valid, as the application for leave had been entertained *per incuriam*.

(iii) That, in the circumstances, the Court had power to vacate the order granting leave.

Cases referred to:—1. *Boyagoda v. Mendis* 30 N.L.R. 321.
2. *Arnolis v. Lewishamy* 2 N.L.R. 222.
3. *Goonewardena v. Orr* 2 A.C.R. 35.

N. Nadarajah for plaintiff-appellant.

H. A. Wijemanne for 2nd defendant-respondent.

DE KRETSER, J.

Judgment in this case was delivered on the 30th June, 1937. An application for leave to appeal was refused on the same day.

On the 8th of July, an application to this Court for leave to appeal was filed. The journal entry describes it as a petition of appeal against the Commissioner's refusal of leave to appeal.

This Court allowed the application. The appeal came on for hearing in due course.

Counsel for respondent then took the objection that the appeal was not in order as leave to appeal had been granted without jurisdiction, inasmuch as the application had not been filed within 7 days of the Commissioner's refusal. He relied upon section 7 of the Interpretation Ordinance for the computation of the period of time, and, according to that section, Sundays are not excluded in the reckoning.

Appellant's counsel conceded that the application was out of time, and he contended that this Court, having granted leave to appeal, could not now reject the appeal; and that the period had possibly been reckoned in accordance with a prevailing practice and that this ought not to be disturbed. He cited *Boyagoda v. Mendis* (30 N.L.R. 321).

With regard to the first objection, it is, in my opinion, not entitled to succeed. The first order was obtained *ex parte* and the respondent had then no opportunity of objecting. This Court has repeatedly held that an application to set aside an *ex parte* order should be made to the Court making the order, and that such a Court had power to set aside such an order.

The cases apply to orders made by Courts of first instance, but I do not see why the principle they embody should not be extended to orders made by this Court.

There is another way of looking at the matter. The appellant had no right of appeal except in terms of Ordinance No. 12 of 1895, and this Court had jurisdiction to grant leave to appeal only when the case fell within the provisions of that Ordinance. The Court ought, therefore, to have power to vacate an order made without jurisdiction and cannot extend the rights of one party at the expense of the other. There can be no doubt that this Court would not have granted leave had it known that the application was out of time, and that its order was made *per incuriam*.

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de Kretser, J.

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vs
Mrs. Diyawa and Two Others

The objection to the constitution of the appeal is, in my opinion, sound. There remains the question as to whether a *cursus curiae* exists to the contrary and whether such *cursus* should be allowed to affect the question.

By letter dated the 26th of May, 1938, the Registrar addressed the different Courts in the Island, and 26 out of the 33 had replied by the 20th of June. The delay in giving judgment was due to these replies being awaited. No replies were received from Galle, Matara, Kalutara, Panadura, Nuwara Eliya, Manaar and Mullattivu, and I do not propose to wait for them. Badulla reported that no application for leave to appeal had ever been made in that Court, and Kandy, Ratnapura and Point Pedro include Sundays and follow the Interpretation Ordinance.

There is, therefore, no uniformity in the prevailing practice, nor any evidence as to the length of time during which the existing practice has prevailed. The circumstances, in this case, are quite different from those in *Boyagoda v. Mendis.*

This case comes from Kandy, and in that Court the practice is to include Sundays. The application to this Court for leave to appeal was, therefore, out of time.

The erroneous practice in some Courts is due either to confusion of such an application with regular appeals or to the mistaken notion that it is in itself an appeal.

Originally, an appeal lay from every final order of a Court of Requests, but in 1895 appeals from actions for debt, damage or demand were prohibited except on leave allowed. Having before it the provision with regard to the computation of time in filing regular appeals, the legislature made no similar provision regarding the applications for leave to appeal, and there may have been good reason for its doing so.

Section 13 of Ordinance No. 12 of 1895 did not specify within what time applications should be made to the Commissioner for leave to appeal, but it allowed an appeal with such leave, and, clearly, the appeal so allowed had to be filed within seven days of the judgment, in terms of section 756 of the Code. This point was decided in *Arnolis v. Lewishamy* (2 N.L.R. 222) and *Goonewardene v. Orr* (2 A.C.R. 35). By implication, therefore, an application to the Commissioner would have to be made within the appealable period. Now, such an application might be made even on the last day of the appealable period and the unsuccessful applicant was given a further period of time within which to apply to this Court for leave to appeal. The decree, therefore, remained liable to be suspended for this period and it is scarcely likely that the legislature, which contemplated curtailment of the right of appeal, intended to extend the period of seven days beyond its natural limit.

Whatever may have been its intention, that definition can be gathered only from the provisions in the Ordinance, and there is no power in this Court to extend the period.

The objection is upheld and the appeal dismissed with costs.

Appeal dismissed.

Present: MAARTENSZ, J.

ALLANOOR BAI vs. MARY MARGARET EDWIN

S. C. No. 62—*C. R. Kurunegala No.* 10377.

Argued on 3rd August, 1938.

Decided on 4th August, 1938.

Public Servants' (Liabilities) Ordinance No. 2 of 1899, section 4—Joint promissory note by husband and wife—Husband a public servant—Is an action on the note maintainable against the wife.

The plaintiff sued the defendants, husband and wife, on a joint promissory note made by them. At the trial, the learned Commissioner upheld the contention of the defence that the note and all the proceedings were void under section 4 of the Public Servants' (Liabilities) Ordinance, inasmuch as the 1st defendant was admittedly a public servant, and dismissed the action against both defendants.

The plaintiff appealed against the dismissal of the action against the 2nd defendant.

Held : That the proceedings were not void as against the wife (2nd defendant) inasmuch as she was not a public servant.

E. B. Wickremanaike, with *D. W. Fernando* and *A. E. R. Corea*, for plaintiff-appellant.

N. E. Weerasooriya, K.C., with *Stanley de Zoysa*, for 2nd defendant-respondent.

MAARTENSZ, J.

This is an action for the recovery of the balance amount due on a joint note made by the defendants in favour of the plaintiff.

The defendants, who are husband and wife, set up various defences, but the only one which appears to have been pressed at the trial was that " the first defendant having been a public servant at the date of the execution of the promissory note in suit, the said promissory note and these proceedings are void in law, and the plaintiff is not entitled to have and maintain this action." The first defendant was, admittedly, a public servant.

The learned Commissioner upheld this defence and dismissed the action against both defendants.

The plaintiff appeals from the dismissal of the action against the 2nd defendant.

The defence put forward by the defendants is based on the provisions of section 4 of the Public Servants' (Liabilities) Ordinance, 1899. The Ordinance enacts that no action shall be maintained against a public servant upon, *inter alia*, any promissory note made by him ; and the relevant

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portion of section 4 reads as follows: "All proceedings and documents in or incidental to an action in contravention of this Ordinance shall be void."

I am not prepared to dissent from the decision in the case of *Narayan Chetty v. Silva* (1933) 35 N.L.R. 210, that the promissory note sued on is a document of the description referred to in section 4.

The question for decision, therefore, is whether the 2nd defendant, who is not a public servant, can plead the provisions of section 4 of the Ordinance. This question is not covered by authority and must be determined by first impressions. The section, it is true, is expressed in very general terms; but, I am of opinion that these terms are restricted by the purpose for which the Ordinance was enacted.

It was enacted, according to the preamble, "To protect public servants from legal proceedings in respect of certain liabilities," and I cannot conceive that the legislature ever intended that persons who were not public servants should be protected by any of the provisions of the Ordinance. I, accordingly, hold that the promissory note sued on is not void as against the 2nd defendant.

Another plea was raised in appeal, namely, that the note sued on being a joint note, the plaintiff's appeal cannot succeed as he has not appealed against the dismissal of this action against the 1st defendant. I do not think the plea can be referred to any principle of law. The case of *Reddiar v. Mohamed* (1937) 10 C.L.W. 44, where it was decided that, if judgment is taken against one of the makers of a joint note, judgment could not be entered against the other or others has no application; nor has the case of *Pirie v. Richardson* (1927) 1 K.B. 448, where it was held that "a successful defence by one joint contractor, which is common to the whole contract, enured for the benefit of the others whether they have pleaded it or not," for the successful defence of the first defendant is not one which is common to the whole contract, but to himself personally.

I am, accordingly, of opinion that this plea also fails. I set aside so much of the decree as directs a dismissal of plaintiff's action against the 2nd defendant and enter judgment for plaintiff against the 2nd defendant, as prayed for, with costs in both Courts.

Appeal allowed.

Present: MAARTENSZ, J. & MOSELEY, J.

EMILY WIJESEKERA vs VAITHIANATHAN

S. C. No. 367—*D. C. Colombo No.* 316.

Argued on 18th, 19th, 20th, 21st and 25th July, 1938.

Decided on 2nd August, 1938.

Servitude—Roadway by boundary of land—Grant of land without grant of roadway—Access to allotment granted available from a public road—Is the grantee entitled to use the roadway—Mortgage Ordinance No. 21 *of* 1927, *section* 10.

The plaintiff brought this action to obtain a declaration that the defendant is not entitled to use a roadway to her land, which roadway formed a boundary of the defendant's land. The defendant had access to his land from a public road. The defendant's land, the roadway and the plaintiff's land were all at one time owned by the plaintiff's father, who made a grant of the roadway and the land claimed by the plaintiff to his daughter the plaintiff. The defendant purchased his allotment at a sale under a mortgage decree against the plaintiff's father, who had mortgaged the land to the defendant's predecessors in title.

Held : (i) That the defendant was not entitled to the roadway in question.

(ii) That a right of way granted to the owner of a tenement personally does not necessarily go with the tenement.

(iii) That the effect of section 10 (2) of the Mortgage Ordinance is to give the transferee a title to the property mortgaged superior to that of every party to the action, and not inclusive of it.

Per MAARTENSZ, J.—"I think the words 'for every servitude must belong to a person' concisely and cogently dispose of the argument that a dominant tenement is a person which can acquire a real servitude so as to become a quality of it transferable to, and exercisable by, every person in possession of the land.

"A right of way may, I take it, be granted to a person personally. For instance, the owner of a land may grant the lessee or owner of an adjoining land a right of way for his personal use'; or, it may be granted of a right of way to the owner of a land and his heirs and successors creating a praedial servitude exercisable by the grantee in respect of the land of which he is owner."

H. V. Perera, K.C., with *N. Nadarajah*, for defendant-appellant.

Hayley, K.C., with *E. G. P. Jayatilleke, K.C.*, and *J. L. M. Fernando*, for plaintiff-respondent.

MAARTENSZ, J.

The defendant, in this action, appeals from a decree of the District Court of Colombo declaring the plaintiff entitled to the strip of land called Road Reservation, 20 feet wide, more fully described in the schedule to the decree, and that the defendant has no right to the said road, and restraining the defendant from using the said road.

The strip in dispute forms part of the land depicted in plan P4 which the plaintiff's father, Mr. D. D. Pedris, purchased in 1908 on deeds P2 and P3 and divided up into parcels. The houses "Medway," "Bowness," "Siriden," "Glenford" and "Cestria" shown in plan Y, filed with the plaint, were built by Mr. Pedris. The strip of land lies between "Medway," "Bowness" and "Siriden" on one side, and "Glenford" and "Cestria" on the other.

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By deed No. 1969 (D3), Mr. D. D. Pedris gifted "Medway" to the plaintiff on the 31st July, 1929. It is described as lot A in plan No. 3235, bounded on the east by lot C (in the plan) being premises called and known as "Glenford" and a passage or reservation for a road 20 feet wide. The grant included, among the easements, servitudes and appurtenances, "the full and free right and liberty of way and passage in, over and along the reservation for a road 20 feet wide leading from the high road called Edwin's Drive to the said premises."

On the same date, by deed No. 1968 (P5) Mr. Pedris gifted "Glenford" to the plaintiff, bounded on the west by a passage or reservation for road 20 feet wide along lots B and A, lot A being "Medway."

There was a right of way granted over the reservation in the same terms as in D3.

By bond No. 372 (P6) dated 1st July, 1930, Pedris mortgaged "Siriden" as described in plan No. 3686, bounded on the east by the passage in question.

It appears from the evidence of Mr. de Saram that Pedris first offered to mortgage "Siriden" (lot Y in plan D2) exclusive of the portion X to the east of "Bowness." There was a hedge between X and Y. Then X was offered as additional security, and Mr. de Saram went to it by the strip in dispute. There was no building on it at the time, but Mr. de Saram says it was offered as a building site. Then a plan amalgamating "Siriden" and X was brought to him.

After the bond was executed, Pedris by deed D12 dated 28th March, 1931, gifted "Siriden" (as depicted in plan 3686) to his grand-daughter Virginia Fernando. The grant of the easements included the right of way in, over and along the reservation for a road 20 feet wide forming the eastern boundary.

The bond was sued on in case No. 51511 of the District Court of Colombo. The defendants were Pedris and Virginia Fernando. Whether she was a necessary party or not does not appear from the proceedings.

The decree has not been read in evidence. In default of payment of the decree, the premises mortgaged were sold by an auctioneer on the order of the Court and purchased by the mortgagees, Messrs. Joliffe and de Saram, and the Secretary of the Court executed the conveyance No. 2282 (P8) dated 19th September, 1933, in their favour.

The deed recites that D. D. Pedris, "seised and possessed" of the premises described in the schedule, mortgaged the property by bond No. 372 and gifted it by deed No. 212 to Virginia Fernando subject to the mortgage.

That bond No. 372 was put in suit, in action No. 51511 of the District Court of Colombo, against the 1st defendant for the recovery of the amount due to the plaintiffs, and also against the 2nd defendant "for a declaration that the said property and premises be sold for the recovery of the said sum, interests and costs, freed from her rights and interests, in the event of the 1st defendant making default in the payment of the same."

That the District Court of Colombo, on 30th March, 1933, entered a mortgage decree whereby it was ordered and decreed that the 1st defendant do pay to the plaintiffs the sum of Rs.....

That, by the said decree, the said property and premises were declared specially bound and executable for the payment of the said sum of Rs..... on the footing of the said bond No. 372.....freed from the rights and interests of the 2nd defendant.

That the decree further ordered that, in default of payment of the said sum.....that the said property be sold, freed from the rights and interests of the 2nd defendant, and the proceeds applied in payment of the said sum, interests and costs.

That, the 1st defendant having made default in the payment of the amount of the said decree, the property was put up for sale and purchased by the plaintiff.

The operative clause reads as follows (I quote the relevant portion):

> "NOW KNOW YE and these presents witness that the said Secretary of the District Court of Colombo, in pursuance of the said orders and directions made in the said action No. 51511 of the said District Court and by virtue of the authority granted as aforesaid and for and in consideration of the said sum of Rupees.....in terms of the order of Court as aforesaid, and in exercise of every right, power and authority vested in him or in any wise enabling him in this behalf, doth hereby grant, convey, assign, transfer, set over and assure unto the plaintiffs.....the said property and premises in the schedule hereto fully described, freed from the rights and interests of the 2nd defendant, together with all buildings, trees and plantations thereon and all rights, privileges, easements, servitudes and appurtenances whatsoever to the said property and premises belonging or in any way appertaining to or used or enjoyed therewith or reputed or known as part and parcel thereof, and all the estate right, title, interest, property, claim and demand whatsoever and howsoever of the first defendant into, out of, or upon the same, and together with all the deeds, documents and other writings therewith held, or relating thereto."

The grantees, by deed No. 473 (P9) dated 22nd August, 1934, sold the property to the defendant. The property is depicted in plan No. 3686 (P 7) made by Mr. M. G. de Silva, dated 21st May, 1929. The plaintiff disputed the defendant's right to use the strip in question as a road, and the plaintiff purchased it from Mr. D. D. Pedris upon deed No. 856, dated 2nd October, 1934. The plaintiff, apparently, forestalled the defendant who had approached Mr. Pedris with a view to purchasing from him the right to use the strip as a road or way to the land he purchased.

The defendant insisted on his right of way over and along the strip in question, and the plaintiff brought this action for a declaration that she was entitled to the strip, that the defendant has no right to use the said road, and for an order restraining the defendant from using it.

The defendant pleaded that the lane was a public lane, or, if it was not a public lane, that it was constructed for the benefit of the premises Nos. 15 and 17 (the property he purchased from Joliffe and de Saram), that it was an appurtenance to the premises, and that he had acquired by prescription a right of way over the strip of land.

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The action was tried on a number of issues arising from these pleadings. In appeal, however, the right of the appellant to a right of way over the strip was pressed on two grounds.

The first ground on which the right of way was claimed was based upon the deed of gift D3, executed by D. D. Pedris in favour of his daughter Virginia Fernando. It was contended that the deed of gift created a praedial servitude of way over the strip of land, owned by the donor, which attached to the dominant tenement gifted to Virginia Fernando, and that the defendant was entitled to the right of way so created as an accessory of the property mortgaged, or as a right which passed to his vendors under the conveyance P8 executed to give effect to the sale in execution of the mortgage decree, and from them to him by deed No. 473 (P 9), or because the deed of gift was accepted on behalf of the mortgagees by Virginia Fernando.

In support of the first branch of the contention, it was strenuously argued that the servitude created by the deed was something real which attached itself to the dominant tenement ("Siriden"), which I shall hereafter refer to as "Siriden," and was exercisable by any owner or possessor of "Siriden." It became, it was submitted, a quality of the dominant tenement. In support of this submission, we were referred to (*a*) Voet, Book VIII, title 1, article 2 which reads thus :—

> "Servitudes are real, when indeed one thing is subservient to another and so loses some of its own rights whilst it increases those of another. By our laws, such servitudes have also been styled praedial servitudes ; for the reason that the constitution and the exercise of such servitudes it is necessary that there should be a dominant tenement, in the position of creditor, and a servient tenement, in the position of the debtor, of these servitudes ; and they have no existence apart from immovable property. For what else, asks Celsus, are the rights attaching to immovable property, *but the qualities which they possess as for instance excellence, healthfulness, extent*, and rights advantageous to him who possesses them but injurious to him who owes them ; so that the possessor of a farm burdened with a servitude, cannot sell the same unburdened."

Particular reliance was placed on the dictum of Celsus, which I have underlined.

(*b*) The passage in *Roman Law and Common Law* by Buckland and Mc Nair, page 102, which reads :—"In fact, praedial servitudes seem to have been regarded rather as accidental characteristics or qualities of the and, like relative fertility."

I find considerable difficulty in giving to either of these passages the wide meaning defendant's counsel sought to attach to them, for, if a servitude became in all respects a quality of the dominant tenement, the owner of the dominant tenement could not extinguish it by surrendering it. But that is what the owner of the dominant tenement could do both under the Roman Law and Roman-Dutch Law. The passages must, in my judgment, be limited to the servitude being a quality of the dominant tenement, while it is in existence.

It was also submitted that the servitude was analogous to the right which the owner of a land acquired in a building constructed on his land, or a plantation made on his land by another person, or in land added to his property by alluvium. This is, I think, a false analogy, for a building or plantation is a concrete fact which the owner of the soil cannot take away from the soil except by breaking it down or pulling it up. He cannot, for example, surrender the building or plantation without the soil to the builder or planter. He can only give up the materials. A servitude, on the other hand, is an abstract right which can be surrendered, apart from the soil of the dominant tenement.

It was also argued that, as regards real servitudes, the dominant tenement is in law a person. In support of this argument, we were referred to Salmond on *Jurisprudence*, page 460, where he states that a servitude appurtenant (real) runs with the dominant and servient tenement into the hands of successive owners and occupiers ; Austin on *Jurisprudence*, lecture 50, where he says with reference to real servitudes that these rights of servitudes are said to reside in giving things and not in the person holding them ; hence, we have such terms as " servitus rerum ;" Markby's *Elements of Law*, page 207, where he says in a case of praedial servitude " besides the *res aliena* over which the right is exercised, there is another *res* to which the right is attached ; and the enjoyment of the servitude always accompanied the ownership of the second thing, though it is of course not merged in it.

These passages are referable to the Roman Law regarding servitudes. The passage in Sohm's *Institutes of Roman Law*, page 342, that in the case of real servitudes they do not exist only for this or that owner but for every owner of the *praedium dominans* and that " it is in this sense that one piece of land is said to serve another ;" and Buchland's *Manual of Roman Law*, page 153, that the essential difference, expressed in the name, is that praedial servitudes are regarded as attaching to the property itself rather than to the owner of it, were also relied on.

Reference was also made in this connection to a passage in Hunter's *Roman Law* which reads : " A praedial servitude is attached to the land in this sense, that it cannot be transferred by the owner of the dominant land to the owner of another land. Until extinguished in one of the ways hereafter enumerated, a servitude passes with the land to every possessor."

Hunter, however, in his commentary on personal servitudes, page 394, at page 395 says with reference to the right of *usufruct* and the right of way :—

> " The distinction between these two classes of servitudes is described by the Roman jurists from a different and less satisfactory point of view. Marican says that servitudes belong either to persons as *usufruct*, or to things, as urban and rural servitudes (servitutes personarum, servitutes rerum or praediorum). *But for the solecism of attributing servitudes to things (for every servitude must belong to a person)* the language might be thus defended."

The rest of the passage is not material.

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I think the words " for every servitude must belong to a person " concisely and cogently dispose of the argument that a dominant tenement is a person which can acquire a real servitude so as to become a quality of it transferable to, and exercisable by, every person in possession of the land.

A right of way may, I take it, be granted to a person personally. For instance, the owner of a land may grant the lessee or owner of an adjoining land a right of way for his personal use ; or it may be granted of a right of way to the owner of a land and his heirs and successors creating a praedial servitude exercisable by the grantee in respect of the land of which he is owner.

This right, the grantee can surrender to the grantor, or he can exclude it when selling the property. The result will be the same, for the purchaser of the property has not acquired the right, and the grantee cannot exercise it because he has divested himself of the land and the right to possess it. He may, possibly, be entitled to exercise it if he remained in possession notwithstanding the sale.

The burden on the servient tenement will pass to the grantor's successors in title. He cannot, of course, any more than a mortgagee can by any provision in the grant, relieve the grantee of the burden on the land.

It was suggested that, if the right was not an interest in the land, a person who purchased the land could not complete the period of adverse possession commenced by his predecessor in title for acquiring a servitude by a prescriptive title, if the servitude was not expressly transferred. In most cases, the terms of a transfer would include the transfer of such a right. I do not think it necessary to discuss or decide what would be the position if the right of servitude was not transferred or excluded, as the question does not arise.

In my opinion, the praedial servitude of way created by the deed of gift P 12 was granted to Virginia Fernando and belonged to her and not to " Siriden." It, therefore, did not become an accessory of the property mortgaged. The defendant is, therefore, not entitled to exercise the right unless he was her successor in title, or unless she accepted the gift on behalf of the mortgagees.

This brings me to the second branch of the contention. I shall first deal with the argument that the right of way was acquired by Virginia Fernando on behalf of the mortgagees. This argument was based on the passage in Voet, Book VIII, title IV, article 10, which reads :—

> " But since by law of the present day a man can make a valid stipulation not for himself merely but also for another, it follows that one joint owner can acquire a servitude for the joint estate, and a stranger for another's estate."

This is, however, a very summary statement of the law referred to.

Under the Roman-Dutch Law, a stipulation in a contract in favour of a third party is valid, but it is only actionable by the third party if he has accepted it. *Jinadasa v. Silva* (1932; N.L.R. p. 344).*

In this case, I cannot by any process of reasoning find any stipulation in the deed of gift in favour of the mortgagees, nor, if there was one, that the mortgagees accepted it. The argument therefore fails.

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* 34 N.L.R. p. 344.

The contention that the purchasers at the execution sale, namely, Messrs. Jolliffe and de Saram, were the successors in title of Virginia Fernando is, in my opinion, absolutely inconsistent with the terms of the decree in D. C. Colombo No. 51511 as recited in the Secretary's conveyance and the terms of the deed itself.

I have already set out what I considered the portions of the deed material to the question argued in appeal. I need only point out that the passage in the operative clause, conveying the property to the purchasers, expressly conveys it to them from the rights and interests of Virginia Fernando. I find it impossible to accede to the argument that the words " freed from" mean inclusive of the rights and interests of Virginia Fernando.

The deed embodies the effect given to a conveyance executed in pursuance of a sale in execution of a mortgage decree by section 10 of the Mortgage Ordinance No. 21 of 1927.

Sub-section 2 enacts that, subject to rights having priority, " the conveyance shall, unless otherwise expressed therein, operate to convey the property sold for such estate and interest therein as is the subject of the mortgage, freed from the interests, mortgages and rights of, *inter alia*, every party to the action."

In my judgment, the effect of the sub-section is to give the transferee a title to the property mortgaged superior to that of every party to the action and not inclusive of it. In short, that the mortgage decree and subsequent transfer rendered the title of Virginia Fernando null and void as against the title of the transferee. If not, defendant's title is defective, for, clearly, Virginia Fernando's title under the deed of gift was not transferred by deed P8.

It was suggested, in the course of the arguments on this branch of the contention, that what was sold in execution was the land mortgaged and not the right, title and interest of the mortgagor. I confess I could not follow the distinction counsel sought to draw between the sale of a land and the sale of the owner's interest. The mere delivery of the land to the vendee will not give him title unless his vendor had title. The main purpose of the argument was, however, to establish that the sale carried with it the right of way. As I have held that the right of way did not form part of the land, I need not discuss the argument further.

I am, accordingly, unable to uphold the contention that the defendant is entitled to exercise the right of way as the successor in title of Virginia Fernando or as the successor in title of the mortgagees, because Virginia Fernando acquired the right of way on their behalf.

The second ground relied on, in support of the defendant's claim to a right of way over the strip in question, is that there was an express or implied grant of the right of way to Messrs. Jolliffe and de Saram under the mortgage bond (P6) and the deed of sale (P8) as the property was mortgaged and conveyed " together with.....all rights, privileges, easements,

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servitudes and appurtenances whatsoever to the said property and premises belonging, or in any wise appertaining to or used or enjoyed therewith or reputed or known as part and parcel thereof."

It was argued that the general words must be construed according to the meaning given to them in the English decisions in analogous cases. It was also contended that Voet's dictum in Book XIX, title I, article 6, which reads :—

> " If the owner of two houses has sold them separately to different persons, or has sold one and kept the other for himself, and one received the droppings from the eaves of the other, or a beam, or a projection from the roof, or the like, to which there is no liability in the absence of a servitude, the better opinion is that such premises have not to be transferred to purchasers with rights of this kind with the advantages to the one and disadvantages to the other, unless either a servitude has been expressly imposed, or the houses are sold with the clause 'as they are now,' " (Berwick's Trans. p. 168),

is not applicable to an instrument in which phraseology of an entirely different character had been used, and it was also argued that the general words relied on had the same effect as the words " as they are now."

The principle laid down in the English cases was summarised by Fry L.J. in *Bayley v. Great Western Railway Co.* (1884; 26 L.R. 434 at page 457) thus :—

> " If one person owns both Whiteacre and Blackacre, and if there be made a visible road over Whiteacre, and that has been used for the purpose of Blackacre in such a way that if two tenements belonged to several owners there would have been an easement in favour of Blackacre or Whiteacre, and the owner aliened Blackacre to a purchaser, retaining Whiteacre, then the grant of Blackacre either 'with all rights usually enjoyed with it' or 'with all rights appertaining to Blackacre,' or probably the mere grant of the Blackacre itself, without general words, carries a right of way over Whiteacre."

This principle, applicable to made and defined roads, was extended to cases where there was no formed or defined road if the grant of way was necessary for the reasonable enjoyment of the quasi-dominant tenement — *Rudd v. Bowles* (1912; 2 Chancery 60); *Hansford v. Jago* (1921; Law Reports 322).

The rules in these cases result, it is observed, in Gale on *Easements*, page 165, independently of section 5 of the Conveyancing Act, 1881, and evidence of actual enjoyment.

Now, the property mortgaged and sold to the mortgagees is the parcel of land depicted in plan No. 3686 (P7) made by Mr. M. G. de Silva. According to this plan, the property is a defined portion, marked B2, within definite boundaries of several lots of land. In the bond, the land is described as bearing assessment No. 1084/7, and in the conveyance to the mortgagees as 1084/7, presently bearing assessment No. 9. When it was sold to the defendant, it was said to bear two assessment numbers, namely, No. 9, 31st Lane and No. 15, 30th Lane.

It is obvious that access to the parcel of land mortgaged was from Edward's Drive and Charles' Place. No other way was necessary for the

" reasonable and convenient " enjoyment of what is termed in the English case " the quasi-dominant tenement " when it was mortgaged and sold to the mortgagees.

To establish the claim set up by the defendant, recourse is had to the evidence of Mr. de Saram, which I have already referred to, that what was first offered as security for the loan was lot Y in plan D2, and that when he considered lot Y insufficient he was shown X in plan D2, which was separated from it by a hedge, and to his evidence that he went to X by the lane numbered 30th Lane.

The case for the defendant is that, what was in fact mortgaged and sold were two parcels of land X and Y in plan D2, both of which were severed from the rest of Pedris' land, namely, 30th Lane. As regards parcel Y, there was, and is, access to it from Charles' Place and Edward's Drive. As regards lot X, the access to it from Edward's Drive was, and is, by the 30th Lane, and that therefore the defendant is entitled to a right of way over X over 30th Lane. In short, that lot X is the quasi-dominant tenement and 30th Lane the quasi-servient tenement.

This case, in my judgment, involves a considerable expansion of the rule A laid down in *Bayley v. Great Western Railway Co.* and *Hansford v. Jago* (ubi supra).

In those cases, considerable stress was laid on the fact that the easements claimed, if not rights of necessity, were necessary for the reasonable and convenient use of the buildings standing on the quasi-dominant tenement when it was severed from the quasi-servient tenement. There is, in this case, some evidence that there was a cattle shed on lot X, occupied by a dairyman who used 30th Lane for taking his cattle to and from the shed. The shed has disappeared, and it was not mortgaged or conveyed to the mortgagees after their purchase at the sale in execution, nor does the defendant claim the right of way as necessary for the reasonable and convenient use of the shed. In *Bayley v. Great Western Railway Co.*, the stable, in respect of which the right of way was claimed by the railway, was conveyed to the company, and it was held that the company was not precluded from claiming the right of way so long as the premises were used as a stable. This case is, therefore, not an authority which supports the defendant's claim to the right of way in question, even if the evidence that it was used by the dairyman is true.

It is clear, from the plans filed in the case, that Mr. Pedris had the land he purchased blocked out and surveyed by Mr. M. G. de Silva on various dates. " Glenford " and " Medway " were depicted in plans 3237 and 3235 made on 11th May, 1926, and 30th Lane provided as a means of access to " Glenford " from Edward's Drive, and incidentally to "Medway." " Siriden," comprising lots X and Y, was surveyed and plan No. 3686 (P7) made on 21st May, 1929, more than a year before the mortgage was executed and before the loan was applied for by Mr. Pedris, and lots X and Y were mortgaged and sold as one parcel of land depicted in plan 3686.

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Neither the mortgagees nor the purchaser at the sale in execution had any reason to think that two parcels of land were mortgaged and sold. The fact that Mr. de Saram saw a hedge between one portion of the parcel and another portion of it does not convert the parcel into two. Lots X and Y had no existence as separate parcels until this case, and the defendant is, in my opinion, not entitled to claim a right of way to the public road on the ground that X was a separate parcel of land.

This is not a case where an owner of two tenements has sold one, nor the case where the owner of a parcel of land has sold a part of it with the result that access from the parcel to the highway, or a way necessary for its reasonable and convenient use, has been cut off.

On the contrary, the owner has sold a defined parcel of land which has all reasonable and necessary access to the road, and the buyer is not entitled to claim a right of way to some particular point of it. Even if lots X and Y consisted of two parcels, it is quite open to an owner to amalgamate them and sell them as one parcel by reference to a plan made for the purpose, or by description, and a buyer who purchases the lots as one parcel is not entitled to say, " I must have another way of access to a portion of it, which by reason of the configuration of the land I can use as a separate portion."

Again, where the immediate purchasers have not claimed or made use of a right of way in dispute, it is, in my opinion, doubtful whether a subsequent purchaser could claim it as on an implied grant. But it is not necessary to decide that point.

I am of opinion that the defendant cannot, by reason of the fact that he purchased " Siriden " as one parcel of land, claim from Mr. Pedris or the plaintiff a right of way to lot X. It is, therefore, not necessary to discuss the evidence that it was used by a dairyman in going to and from the parcel now marked X, nor to decide whether that evidence is true or false.

In the result, the second ground upon which the right of way was claimed fails, and I dismiss the appeal with costs.

MOSELEY, J.

I agree.

Appeal dismissed.

Present: MAARTENSZ, J. & MOSELEY, J.

DE FONSEKA vs CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA

S. C. No. 260.

Application for Conditional Leave to appeal to the Privy Council in S. C. No. 357—*D. C. Colombo* (*Final*) *No.* 6388.

Argued on 18th & 19th July, 1938.

Decided on 27th July, 1938.

Privy Council Appeal Ordinance—Service of notice of appeal on Incorporated Bank—How effected.

The appellant served notice of his application, for conditional leave to appeal to the Privy Council, on the respondent, an incorporated bank carrying on business in Ceylon with its Head Office outside Ceylon, in the following manner :—

(*a*) A notice was sent by post addressed to: The Chartered Bank of India, Australia and China, Colombo ;

(*b*) A second notice was served by the Fiscal on "The Manager, Chartered Bank of India."

For the respondent, objection was taken to the application on the ground that no valid notice had been served on the Bank.

Held : (i) That the notice sent by post was not served on the Bank, as it had not been sent to its registered office.

(ii) That the notice served by the Fiscal was not validly served, as the appellant had failed to obtain an order, under rule 5A of the Privy Council Appeal rules, that the notice be served on the attorney of the Bank.

J. E. M. Obeysekera, with *Christie Seneviratne*, for petitioner.

N. K. Choksy for 1st defendant-respondent.

MAARTENSZ, J.

The application of the plaintiff-appellant for conditional leave to appeal to His Majesty the King in Council from the judgment of this Court dated 16th June, 1938, is opposed by the 1st defendant-respondent, the Chartered Bank of India, Australia and China, on the ground that the Bank was not served with notice of the intended application as required by rule 2 of the rules in Schedule 1 of the Appeals (Privy Council) Ordinance, 1909.

The appellant relies on two notices. The first was sent by post addressed to the Chartered Bank of India, Australia and China, Colombo. It was produced by counsel who appeared for the Bank and is marked X.

The second was a notice Y served by the Fiscal on, according to the return of the process server, "The Manager, Chartered Bank of India."

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I do not think the second notice superseded the first, as the first notice intimated that the appellant intended to apply on the 30th day of June, 1938, "or so soon thereafter as may be convenient," and is not inconsistent with the second notice which intimated that the application would be made on the 11th of July, 1938, "or on such date thereafter for which the said matter may be adjourned."

The main contention is that the notices were not served on the Bank as the notice sent by post was addressed to the Colombo branch of the Bank, and the notice served by the Fiscal was, in fact, served on a sub-accountant named Skinner and not on the Manager. It was also submitted that, even if it was served on the Manager, it was not a good service.

For the appellant, it was argued that a notice addressed to the Colombo branch of the Bank was a good notice as the Colombo branch should have transmitted it to its Head Office. We were not referred to any authority in support of this proposition, and I am unable to accept it. In my judgment, where it is sought to serve notice by post on a bank, such as the defendant Bank, it must be posted to the registered office. I, accordingly, hold that the notice sent by post has not been served on the Bank.

As regards the notice served by the Fiscal, the appellant obtained an order under rule 5 of the rules made by the Appellate Procedure (Privy Council) Order, 1921, that notice of his intention to apply for conditional leave to appeal to His Majesty the King in Council be issued and served through the Court. But he did not obtain an order under rule 5A that the notice be served on the attorney of the Bank. The notice of the intended application would, therefore, not have been properly served on the Bank even if it was served on the Manager and the Manager was an attorney of the Bank or authorised to accept legal process and notices. See the case of *Fradd v. Fernando* (1934) 36 N.L.R. 132 and *Wijesekera v. Norwich Life Insurance Company* (1936) 6 Ceylon Law Weekly 121.

It is, therefore, unnecessary to decide whether the notice was served on the Manager, as stated by the process server, or on Mr. Skinner as sworn by him.

In the result, the application for conditional leave must be refused with costs on the ground that notice of the intended application was not served on the Bank.

Before leaving the case I should, I think, say that provision should be made in the rules to facilitate the service of notices required to be served under the Ordinance and the rules.

MOSELEY, J.

I agree.

Application refused.

Present: KEUNEMAN, J.

HODSON (Government Agent) vs CASSIM

S. C. No. 395—*P. C. Kandy* 58439.

Argued on 26th August, 1938.

Decided on 30th August, 1938.

Motor Car Ordinance section 30 (1)—*Offence of possessing a car without a licence—Nature of the evidence necessary to the offence.*

The accused was the registered owner of a motor car for which no licence had been taken out for the year 1938. He had not given notice of non-user nor had the registration been cancelled. The accused admitted ownership of the car but stated, although he was the registered owner, that he had not used it and that it had been in the garage from the date he bought it.

Held : (i) That the accused was guilty of the offence of possessing a car without a licence.

(ii) That the accused can rebut the presumption of possession in any way he wishes, and not necessarily by establishing compliance with sections 22 or 24 of the Motor Car Ordinance.

Per KEUNEMAN, J. "I agree with Justices Garvin and Dalton that the mere production of the register and proof that the accused's name appears there as the registered owner is not sufficient to prove that the accused possessed or used the vehicle in question. But, where it has been proved that application has been made for the registration of the vehicle in the name of the accused by the accused himself or at his instance, I think different considerations apply, and that it is possible in such circumstances to presume, *prima facie*, that the accused possessed the vehicle thereafter."

Jansze, Crown Counsel, for complainant-appellant.

No appearance for accused-respondent.

KEUNEMAN, J.

This is an appeal by the complainant with the sanction of the Solicitor-General. The accused-respondent was charged with possessing or using on or about 1st January, 1938, motor car D 1393 for which a motor car licence was not in force, in contravention of section 30 (1) of the Motor Car Ordinance No. 20 of 1927, an offence punishable under section 84 of the Ordinance. The learned Police Magistrate, after trial, discharged the accused.

The evidence in the case is very short. The Licencing Clerk of the Kandy Kachcheri gave evidence that the accused was the registered owner of the car D 1393 from 17th December, 1937, and had obtained no licence for 1938, and that no notice of non-user was given and registration had not been cancelled. This clerk had no knowledge of possession or user.

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The accused also gave evidence and stated that, from the time he bought the car, the car had been in the garage, and it had not been used at all on the road. In cross-examination, the accused stated that he was the registered owner of the car, that the car was registered in his name, that he had not sold it to anyone, but that he had not used it.

I have been referred to a number of authorities. In *G. A., Central Province, v. Beeman* (33 N.L.R. 343) Drieberg J., after considering sections 18, 22 and 24 and Form 2 in the third schedule of the Ordinance, held that " once a person has been registered as owner of a car on his declaration that he is entitled to the possession of it, he must be regarded as the person in possession of it, unless there has been a transfer of possession in the manner provided for in the Ordinance, or unless by the cancellation of the registration it ceases to be a car which can be the subject of possession for the purposes of the Ordinance."

This decision was followed by McDonell C.J. in *De Silva v. Rosen* (2 C.L.W. 98) and by Soertsz, A.J. in *Misso v. De Zoysa* (4 C.L.W. 81).

In *Government Agent, Western Province, v. Bilinda* (3 Cr. A.R. 38) decided by Garvin, J. there was evidence that, though the accused in the case had bought a car at a garage and though he was registered as the owner of it, he never took possession of it at all. In that case, a Motor Licencing Clerk produced a register, which showed that the car in question appeared in the register and that the name of the owner of the car set out in the register was the name of the accused. Apart from these entries in the register, there was nothing to show that the accused had possessed or used the car. The accused was acquitted. Garvin, J. held that there was no evidence of possession.

In *Chairman S. B. Jaffna v. Sebamali* (16 C.L.Rec. 6) decided by Dalton, J. the only evidence was that of a licencing clerk who produced the certificate of registration, showing that the bus in question was registered in the name of the accused woman from the 9th December, 1935, and that the bus had not been licenced for 1936. The accused, in that case, gave evidence on her own behalf, and stated that she had never used or possessed the bus in question and did not know anything about it. The accused, in this case also, was acquitted.

These cases are not easy to reconcile, but I think it is possible to do so. I agree with Justices Garvin and Dalton that the mere production of the register and proof that the accused's name appears there as the registered owner is not sufficient to prove that the accused possessed or used the vehicle in question. But, where it has been proved that application has been made for the registration of the vehicle in the name of the accused by the accused himself or at his instance, I think different considerations apply, and that it is possible in such circumstances to presume, *prima facie*, that the accused possessed the vehicle thereafter. The signing of the declaration in accordance with Form 2 of the third schedule to the effect that the applicant " is entitled to possess " the vehicle has been emphasized by Drieberg, J.

himself. With deference, however, I do not think that the presumption of possession can only be displaced by a compliance with sections 22 or 24. Certainly, the declaration is only to the effect that the applicant is "entitled to possess" the vehicle, and not that the applicant is in actual possession of the vehicle. I think the presumption of possession may be rebutted by the accused in any way he wishes, for example, by such facts as were established by the accused in the case of *The Government Agent, W. P., v. Bilinda.*

It now remains for me to apply these findings of law to the facts of the present case. Had the only evidence in this case been the evidence for the prosecution, I think I should not have interfered with the order of discharge. The witness for the prosecution did not produce the register and made no attempt to produce the application for registration. The case, however, did not rest there, for the accused himself gave evidence. He stated that he was the registered owner and that the car was registered in his name. He admitted that he had bought the car and had not sold it, but said that since he bought the car, the car had been in the garage. It is not clear, on this evidence, whether the car was in the accused's garage or in some other garage and, if in another garage, under what circumstances it remained there. On this evidence, I think it may be presumed that the accused was in possession of the car, and that the presumption of possession has not been rebutted.

I set aside the order of discharge and convict the accused under section 30 (1) of possessing the car for which a motor car licence was not in force. In the circumstances of the case, I think a fine of Rs. 35/– viz., the amount of the licence fee due for 1938 under section 30 (3) is sufficient, and I accordingly impose that sentence.

Accused convicted.

Present: KEUNEMAN, J.

ROGUS vs TISSERA

S. C. No. 335—*P. C. Puttalam No.* 24631.

Argued and Decided on 26th August, 1938.

Criminal Procedure—Charges under sections 314 *and* 332 *of the Penal Code—Charge under section* 314 *referred to Village Tribunal—After evidence completed, charge under section* 314 *again added—Acquittal on charge under section* 332—*Conviction under section* 314—*Can conviction be sustained.*

The accused and another were charged under sections 314 and 332 of the Penal Code. On an objection taken by the accused that the charge under section 314 came within the exclusive jurisdiction of the Village Tribunal the Magistrate referred the complainant to the Village Tribunal and confined himself to the other charge. After evidence of both parties was led, the Magistrate decided to hear both charges on the ground that they formed part of the same transaction, and offered the witnesses for cross-examination. The Magistrate, thereafter, convicted the accused under section 314 and acquitted him on the other charge.

Held : (i) That, in the circumstances, it was not open to the Magistrate to add the charge under section 314.

(ii) That the conviction under section 314, (being an offence within the exclusive jurisdiction of the Village Tribunal) cannot be sustained, since the accused was acquitted on the charge in respect of which the Magistrate had jurisdiction.

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Keuneman, J.

Rogus *vs* Tissera

W. E. Abayakoon, with *Subramaniam*, for 1st accused-appellant.

No appearance for complainant-respondent.

KEUNEMAN, J.

This is an appeal by the 1st accused against a conviction under section 314 of the Ceylon Penal Code.

This accused and another were charged, under section 314 and section 332 of the Code, with assault and wrongful restraint. In the course of the proceedings of the 5th May, 1938, objection was taken on the part of the accused against the charge under section 314 on the ground that the Police Court had no jurisdiction to inquire into that charge. The learned Police Magistrate on that day decided that the Police Court had no jurisdiction as regards the charge under section 314 and referred the complainant to the Village Tribunal in respect of that charge, and confined himself to the charge under section 332. Thereafter, evidence was led on behalf of the complainant and also of the accused. After the evidence of both these parties had been completed, the Police Magistrate made this order, " At this point, I decide that both charges must be considered to form part of the same transaction and that, accordingly, this Court has jurisdiction to hear and decide upon the first charge in conjunction with charge No. 2. Accordingly, I inform both accused that the original charges under sections 314 and 332 are to stand. I offer all witnesses to them for cross-examination. Mr Corea informs me that he does not wish to re-examine the witnesses." Thereafter, the learned Police Magistrate found the 1st accused only guilty under section 314 and sentenced him to pay a fine of Rs. 25/–, or, in lieu thereof, two weeks' rigorous imprisonment.

I may say that it was not open to the Police Magistrate to add once again this charge under section 314 in the circumstances in which he did, and, on that ground alone, this appeal must be allowed, but the ground on which the Judge acted is also incorrect.

There are a number of cases, *Weerakkody v. de Silva* (29 N.L.R. page 321), *Nadar v. Fernando* (6 Ceylon Law Recorder, page 176), and the *Inspector of Police, Negombo, v. M. Jacolis and Others*, (Ceylon Law Journal Notes, page 44), in which it has been held that, where a charge has been made under section 314 which is within the exclusive jurisdiction of the Village Tribunal, and also on another section of the Code in respect of which the Police Magistrate has jurisdiction, then it is not open to the Magistrate to acquit on this latter charge and convict only upon the charge under section 314.

In view of these authorities, the conviction in this case cannot stand and I, accordingly, set aside the conviction and order that these proceedings be remitted to the Village Tribunal.

I understand from Counsel that the 1st accused has already paid the fine of Rs. 25/–. If this is the case, the 1st accused would be entitled to a refund of that amount.

Conviction set aside

Present: MAARTENSZ, J.

PANDITHA vs DAWOODBHOY

S. C. No. 83—*C. R. Colombo No.* 35170.
Argued and Decided on 3rd August, 1938.

Civil Procedure Code—Action, under section 247, *by unsuccessful claimant—Is judgment-debtor a necessary party.*

Held : That the judgment-debtor is not a necessary party to an action brought by an unsuccessful claimant for the purpose only of section 247 of the Civil Procedure Code.

P. Tiyagarajah for plaintiff-appellant.
J. E. M. Obeyesekera for defendant-respondent.

MAARTENSZ, J.

This is an action brought by an unsuccessful claimant, under the provisions of section 247 of the Civil Procedure Code, to establish that he is the owner of the property seized by the judgment-creditor.

The action was brought within the time prescribed by section 247. At the trial, objection was taken to the constitution of the action on the ground that the judgment-debtor was not a party to the action. Plaintiff's counsel, thereupon, moved to make the judgment-debtor a party. The Court held that the application was made too late, and dismissed the plaintiff's action with costs.

It is contended in appeal by the plaintiff-appellant that the judgment-debtor is not a necessary party to the action. There is, certainly, nothing in the provisions of section 247 of the Civil Procedure Code which requires that the judgment-debtor should be made a party to an action brought by an unsuccessful claimant. The only local cases I am aware of, in which the judgment-debtor was held to be a necessary party, were in : (1) a case where a claim in the nature of a Paulian action is joined to an action under section 247 of the Civil Procedure Code, or set up in a defence to an action under section 247 by a successful judgment-creditor; (2) where the judgment-creditor sought to prove that the judgment-debtor had a title by prescription. The reasons for holding that the judgment-debtor was a necessary party in such an action were in no way connected with the provisions of section 247.

Counsel for the respondent has referred me to the case of *Ghasi Ram v. Mangal Chand and Another*, (1905), reported in I.L.R. Allahabad series, Vol. 28, page 41. At page 43, the Judges say that " If an unsuccessful claimant brings a suit and he seeks to establish his claim against both the decree holder and the judgment-debtor, the latter is of course a necessary party." That observation is *obiter* to the question to be decided and no

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reasons are given for it. I myself can see no reason why the judgment-debtor should be made a party to an action brought by an unsuccessful claimant, for it is quite open to him to admit the title of the plaintiff, and, on the other hand, it is quite open to the judgment-creditor, if he so chooses, to consent to judgment after having filed answer. In the former case, the admission made by the judgment-debtor would not bind the judgment-creditor. In the latter case, the fact that the judgment-creditor consented to judgment would not act as *res judicata* on the judgment-debtor's title to property.

I am of opinion that the judgment-debtor is not a necessary party to an action brought by an unsuccessful claimant for the purposes only of section 247 of the Civil Procedure Code.

I set aside the order appealed from, with costs in both Courts, and remit the case for re-trial in due course. The costs of the second trial will be in the discretion of the Commissioner.

Order set aside and sent back.

Present: MAARTENSZ, J.

PALANIAPPA CHETTIAR vs WEERASINGHE AND ANOTHER

S. C. No. 78—C. R. Matara No. 22097.
Argued and Decided on 2nd August, 1938.

Promissory note given for money due as survey fees—Absence of marginal particulars—Note endorsed to 3rd party as security for loan—Action by endorsee—Applicability of section 10 of the Money Lending Ordinance, 1918.

A gave a promissory note to B on account of survey fees due to B, but failed to fill in the marginal particulars. B endorsed the note to C as security for a loan already advanced. C sued A and B. The learned Commissioner dismissed the action on the ground that the particulars required by section 10 of the Money Lending Ordinance were not separately and distinctly endorsed on the note when negotiated to C as security for a loan, although such particulars were not necessary between A and B.

Held : That section 10 of the Money Lending Ordinance did not apply to the transaction inasmuch as the note was not given originally as security for a loan.

Followed: Sanithamby v. Nogan (1924) 26 N.L.R. 217.

C. V. Ranawaka, with *Kottegoda*, for plaintiff-appellant.
No appearance for defendant-respondent.

MAARTENSZ, J.

Plaintiff appeals from a dismissal of his action for the recovery of a sum due on a promissory note dated 19th December, 1931, made by the 1st defendant in favour of the 2nd defendant and endorsed by the latter to the plaintiff.

The 1st defendant contested the claim and the action was tried on the following issues :—

1. What amount, if any, is due to the plaintiff by way of principal and interest ?
2. Is the writing sued upon valid as a promissory note ?
3. If not, is the assignment regular ?
4. Is the cause of action prescribed ?

The action was brought just within 6 years and the claim was, therefore, not prescribed.

The learned Commissioner dismissed the action because the note did not comply with the provisions of section 10 (1) of the Money Lending Ordinance of 1918, in that it did not separately and distinctly set forth on the document the capital sum actually borrowed, and the amount, if any, deducted as interest, premium, charges or advance, and the rate of interest payable in respect of the loan.

Now, section 10 is applicable to a promissory note given as security for the loan of money. It is clear, however, from the evidence of the 2nd defendant in this case, that the note was given to the 2nd defendant not as security for the loan but because the 1st defendant owed him about Rs. 55/50 on account of survey fees.

The learned Commissioner therefore held, and I entirely agree with him, that the absence of marginal particulars did not invalidate the note as between the two defendants. He, however, further held that the note was endorsed by the 2nd defendant as security for a loan already advanced and that the particulars required by section 10 should have been separately endorsed on the note, and therefore dismissed the plaintiff's action. I am not inclined to agree with that view of the learned Commissioner. It is clear that the particulars required by section 10 should be set forth on the note when it is made as security for a loan. But, if it was not given as security for a loan, section 10 does not apply and it will not apply even when the note is endorsed over, although the endorsement had been made as security for a loan, from the endorsee to the payee. The reason is this : that the endorsee of a note is entitled to recover from the maker the amount payable on the note regardless of the amount which he gave to the endorser—see the case of *Sanithamby v. Nogan* (1924) 26 N.L.R. p. 217. In that case, the note was made for a sum of Rs. 400/– in consideration of paddy supplied to the value of Rs. 210/–. The payee endorsed the note to the plaintiff. It was held that the Money Lending Ordinance did not apply to this transaction, and that the Court could not inquire into the question of the adequacy of consideration and grant relief under the Ordinance, and that the plaintiff was entitled to judgment for the full amount of the note.

The judgment appealed from is, therefore, set aside and judgment entered for plaintiff against the 1st defendant, as prayed for, with costs.

Appeal allowed.

Present: MOSELEY, J. & FERNANDO, J.

MOHIDEEN MARIKAR AND THREE OTHERS vs KOWLA UMMA

S. C. No. 99—*D. C. Colombo No.* 3962.

Argued on 22nd and 25th October, 1937.

Decided on 2nd November, 1937.

Action to enforce debt due under a foreign judgment—Judgment of Court in British territory—How proved—Evidence Ordinance, sections 78, 74, 76 (6) *and* 82.

This is an action brought to recover a sum of money due on a judgment obtained in the Subordinate Court of Tuticorin. The District Judge decided in favour of the plaintiff. In appeal, objection was taken to the District Judge's finding *inter alia* that the judgment of the Subordinate Court had not been duly proved. The copy of the judgment produced in evidence had neither the seal of the Subordinate Court of Tuticorin nor the signature of the Judge of the Court.

Held : (i) That the judgment was wrongly admitted in evidence.

(ii) That the copy of judgment of a Court in British territory cannot be admitted in evidence unless it is sealed with the seal of the Court to which the original document belongs or, if the Court has no seal, unless it is signed by the Judge or one of the Judges of the Court.

(iii) That, where the Court has no seal, the Judge signing the copy of the judgment must attach to his signature a statement in writing on the copy that the Court has no seal.

N. Nadarajah, with *Mahadeva*, for defendant-appellant.

A. L. J. Croos Dabrera for plaintiffs-respondents.

MOSELEY, J.

The plaintiffs obtained judgment, against one Thana Mohamed, in the Subordinate Court of Tuticorin on the 29th November, 1928, for Rs. 1,100/– together with interest and costs. The defendant died in 1929, and this action was brought in 1935, in the District Court of Colombo, against the executrix of his estate, for the amount due under the said judgment. The parties went to trial on certain issues, all of which were answered in favour of the plaintiffs for whom judgment was given. Against that judgment the defendant appeals on several grounds, of which, in view of the order which we propose to make, I need only refer to one. That ground of appeal is that the judgment of the Subordinate Court of Tuticorin, marked P1 in the proceedings, was wrongly admitted in evidence as it was not duly proved.

The learned District Judge held that it could not be disputed that judgment had gone against the defendant in the Subordinate Court of Tuticorin;

that P1 was a duly certified copy of the judgment of that Court and was therefore admissible in evidence under sections 74 and 76 of the Evidence Ordinance (No. 14 of 1895).

Now, section 74 of that Ordinance defines what are public documents, among which, according to sub-section (1) (*c*), are documents forming the Acts or records of the Acts of public officers, legislative, judicial and executive, whether of the Colony or of any other part of His Majesty's dominions, or of a foreign country. Section 76, the aid of which was invoked by the District Judge and, together with section 77, by counsel for the respondents, before us, provides for the certification of public documents, but the wording of the section makes it quite clear that the only public documents contemplated are the Acts or records of the Acts of public officers of the Colony. That this is so is evident at the outset where the section imposes a duty upon a public officer to give a copy, on payment of fees, of a public document which he has in his custody. The section, obviously, cannot impose a duty on a public officer other than of the Colony. Any virtue, therefore, with which the section subsequently clothes such a document, is limited to public documents of the Colony. In my view, the District Judge was wrong in holding that the document was admissible under sections 74 and 76. Section 77 merely provides for the production of certified copies in proof of the contents of such public documents.

The certification of public documents of this nature of a "foreign country" is provided for by section 78 (6), but this obviously is not intended to apply to public documents of any other part of His Majesty's dominions, since the section requires certification under the seal of "a notary public or of a British consul or diplomatic agent." It seems, therefore, that the section which provides for the admission of a document of this nature, if properly certified, is section 82. This section is as follows :—

> "82. When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular, in any Court of justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims.
>
> "And the document shall be admissible for the same purpose for which it would be admissible in England or Ireland."

It is necessary, therefore, to consider what documents, by the law in force in England or Ireland, would be admissible in the Courts of those countries without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed. Judicial proceedings of colonial Courts may be proved in any Court of justice in England by an authenticated copy of such judgment

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(Halsbury Vol. XIII, p. 664.) Section 7 of the Evidence Act, 1851, provides that the authenticated copy of the judgment of a Court of any British Colony must purport either to be sealed with the seal of the Court to which the original document belongs or, if the Court has no seal, to be signed by the Judge or one of the Judges of the Court who must attach to his signature a statement in writing on the copy that the Court has no seal. Therefore, before a judgment of an Indian Court can be received in evidence in a Court of the Island, it must satisfy one or other of those requirements.

The document in question, P1, does in fact bear a seal on the reverse side, but it is not the seal of the Subordinate Court of Tuticorin. It also bears the words " True copy; (signed illegibly) Superintendent of Copyists." Thus, neither of the alternative requirements has been fulfilled. The judgment was therefore, in my view, wrongly admitted in evidence.

It would seem to be due to an oversight on the part of the Indian Court that the plaintiffs were not furnished with a document which could be proved in the Courts of the Island. It would fall somewhat hardly on them if their action were to be dismissed. I think that the proper order would be to allow the appeal, with costs here and in the District Court, to set aside the judgment of that Court and send the case back for trial before another Judge. In these circumstances, it is unnecessary to advert to the other grounds of appeal.

FERNANDO, J.

I agree.

Appeal allowed.

Present: KEUNEMAN, J.

HINNIHAMINE vs DON ALFRED

S. C. No. 228—*P. C. Galle No.* 18181.

Argued & Decided on 30th August, 1938.

Maintenance Ordinance—Question of paternity of child—Offer made by respondent to marry the applicant after discovery of her pregnancy—In what circumstances may such offer be regarded as corroboration of applicant's evidence.

The applicant claimed maintenance from the respondent in respect of an illegitimate child whose father, she alleged, was the respondent.

The respondent denied paternity. The respondent's mother gave evidence to the effect that, when it was discovered that the applicant was pregnant, the defendant told her that he was prepared to marry the applicant. The defendant did not admit, at the time, that he had intercourse with the applicant.

Held : That an offer, by the respondent to an application for maintenance, to marry the applicant can be regarded as corroboration of the applicant's story although such offer is not coupled with an admission of intercourse with the applicant.

Colvin R. de Silva for the applicant-appellant.

N. Nadarajah, with *L. A. Rajapakse*, for the defendant-respondent.

KEUNEMAN, J.

This is an appeal, by the applicant in a maintenance case, against the order of the learned Magistrate dismissing her application.

At the close of the applicant's case, the learned Magistrate thought that it was unnecessary for him to call upon the defence because there was no corroboration of the applicant's story. What was offered as corroboration of her story was, first of all, a statement alleged to have been made to Miss Speldewinde, the mistress of the applicant, with regard to the paternity of the child. But this statement was made long after the period of conception, and the learned Magistrate quite correctly held that that could not be regarded as corroboration in view of the decisions of the Supreme Court.

There is, however, another matter which was mentioned by the learned Magistrate, and that is the evidence of the applicant's mother to the effect that, after the Doctor discovered that the applicant was pregnant, the defendant told the mother that he was prepared to marry the applicant.

It appears that, at the time, the defendant did not admit that he had intercourse with the applicant.

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I have been referred to the case of *Angohamy v. Kirinelis Appu*, reported in 15 N.L.R. p 232. In that case, Wood Renton J. held that there was independent corroboration of the applicant's story in the following circumstances, namely, that the defendant in that case, while denying the paternity of the child, was prepared to negotiate with a view to marry the mother, that such negotiations took place, and that the negotiations only broke down because of a failure to arrive at an agreement on the question of dowry. Wood Renton, J. said that such evidence was, in his opinion, relevant evidence corroborating the mother of the child in respect of the question of paternity.

The learned Magistrate has recorded no finding as to whether such an offer of marriage as is spoken to in the present case was, in point of fact, made by the defendant. He appears to have thought that, even if such a promise had been made, that would not have amounted to corroboration within the meaning of section 7 of the Maintenance Ordinance. There, I do not think, he is correct, and in the circumstances, I must set aside the order of dismissal and send the case back for further proceedings to be taken and for a determination of the question whether there is corroboration of the applicant's story on the lines which I have indicated.

I set aside the order of dismissal and send the case back for further proceedings.

Order set aside and sent back.

Present: KEUNEMAN, J.

WIJEGOONASINGHE vs GUNASEKERA

S. C. No. 3—*C. R. Galle* 17696.

Argued on 31st August, 1938.

Decided on 6th September, 1938.

Cause of action—Seizure of immovable property under writ—Seizure not registered—Alienation of the property two days before sale in execution—Plaintiff, purchaser at the sale—Action to recover damages from judgment-debtor—Has plaintiff a cause of action—Effect of sections 237 *and* 238, *of the Civil Procedure Code, on alienation of such property.*

In execution of a writ issued against the defendant (the seizure under which was not registered) certain premises were sold by the Fiscal and purchased by the plaintiff who obtained a Fiscal's conveyance in his favour. The plaintiff alleged that, after seizure of the property and two days prior to the sale, the defendant had fraudulently conveyed the said premises to his son G, and that, in partition action D. C. Galle 35217, G became owner of the said premises before plaintiff obtained his transfer. The plaintiff claimed Rs. 150/– as damages from the defendant, but G was not made a party to the action. The defendant denied that sale to G was fraudulent and that he was liable to pay any sum to the plaintiff.

The learned Commissioner held that the deed in favour of G was for valuable consideration, and dismissed the action on the ground that plaintiff had no cause of action.

The plaintiff appealed, and it was contended on his behalf that once a seizure is effected, even though it is not registered, there is a statutory obligation imposed on the judgment-debtor, under section 238 of the Civil Procedure Code, not to part with his title and, if he alienates the premises, there is a breach of a statutory duty sounding in damages.

Held : (i) That, in the circumstances, the plaintiff has no cause of action against the judgment-debtor.

(ii) That either in section 237 or in section 238 there is no absolute prohibition against alienation on the part of the judgment-debtor.

(iii) That section 238 of the Civil Procedure Code does not affect alienations made after seizure but before the registration of the seizure.

Cases referred to:—

1. *Hendrick Singho v. Kalanis Appu* 23 N.L.R. 80.
2. *Wickramaratne v. Gunasekera* 1 S.C.C. 80.
3. *Abdul Cader v. Pata Muttu* 2 S.C.C. 158.
4. *Sankaralinga Reddi v. Kandasami Tevan* I.L.R. 30 Madras 414.
5. *Quinn v. Leathen* L.R. 1901 A.C. 495.

N. Nadarajah, with *Pandita Gunawardena*, for plaintiff-appellant.

E. B. Wickremanayake, with *Jayasundera*, for defendant-respondent.

KEUNEMAN, J.

The plaintiff-appellant alleged in his plaint that, in execution of a writ issued in D. C. Galle 28731 against the defendant, certain premises described in the schedule to the plaint were sold by the Fiscal on the 27th June, 1936, and purchased by the plaintiff, that the sale was confirmed, the

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full amount of the purchase price paid and the Fiscal executed a transfer of the premises in favour of the plaintiff.

The plaintiff further alleged that, after seizure of the property and two days prior to the sale, the defendant had fraudulently conveyed the said premises to his son E. K. Gunasekera and that, in partition action D. C. Galle 35217, E. K. Gunasekera became owner of the said premises before the plaintiff could obtain his transfer and claim the premises. Fiscal's transfer P 5 was actually obtained on the 12th October, 1936.

E. K. Gunasekera was not made a party to the action and no claim was made against him. The plaintiff claimed damages to the extent of Rs. 150/- from the defendant.

The defendant denied that the sale to E. K. Gunasekera was fraudulent, or that any damages were caused to the plaintiff, or that he was liable to pay any sum to the plaintiff.

The following issues were framed at the trial :—

1. Was land seized and sold by the Fiscal fraudulently convey d by defendant to his son after seizure and before sale by the Fiscal ?
2. If so, what damages did the plaintiff suffer ?
3. Was land seized and sold by Fiscal identical with the land sold by the defendant ?
4. Has plaintiff any cause of action ?
5. Was there a valid seizure ?

After trial, the learned Commissioner dismissed the plaintiff's action on the ground that he has no cause of action; and the plaintiff appeals.

As regards the issue of fraud, the learned Commissioner held on the documentary evidence that the premises in question were subject to a mortgage, that E. K. Gunasekera, the defendant's son, has long previously agreed to pay the mortgaged debt and had, in point of fact, paid it, and that the defendant, by deed D6 of the 25th June, 1935, duly registered, had sold the premises to Gunasekera. The learned Commissioner held that the sale was for valuable consideration and answered the issue in the negative. Accordingly, the action as constituted failed.

In appeal, it was argued by appellant's counsel that once a seizure is effected, even though it is not registered (and that appears to have been the case in this instance) there is a statutory obligation imposed on the judgment-debtor not to part with his title, and that there is a breach of a statutory duty sounding in damages if the judgment-debtor alienates the premises.

Counsel for the appellant depended on section 238 of the Civil Procedure Code. This section, as amended, runs as follows :—

> " Where a seizure of immovable property is effected under a writ of execution and made known as provided by section 237 and notice of the seizure is registered .....any sale.....made after the seizure and registration, and while, registration remains in force, is void against a purchaser from the Fiscal selling under writ of execution and as against all persons deriving title under or through the purchaser."

Now, this section is directly aimed at alienations made after the registration and while the registration remains in force. The section does not affect alienations made after seizure but before the registration of the seizure. The effect of section 238 was specifically considered in another connection in *Hendrick Singho v. Kalanis Appu* (23 N.L.R. 80) decided by a Divisional Court. Bertram C.J. there says :—

> " We are not concerned with the general principles of law governing property *in custodia legis*. Our Code is a complete Code. In declaring that certain transactions alone, viz., alienations after registration of seizure, shall be affected by the seizure, it in effect declares that other transactions shall be unaffected."

De Sampayo, J. added " If the seizure is not registered, the necessary implication is that a *bona fide* private alienee is *statim securus*."

No doubt, the learned Judge in this case was considering specially the position of the alienee. But, on the other hand, the only effect of section 238 is to render alienations void where the alienation has been made after the registration of the seizure. I cannot read into section 238 or section 237 any absolute prohibition against alienation on the part of the judgment-debtor.

Even if there is any such prohibition, to what extent can a subsequent purchaser claim damages in respect of it ? It is clear, in this case, that the plaintiff's rights as purchaser accrued after the alienation by the defendant. I think some light is thrown on this point by the judgment in *Wickremaratne v. Gunasekera* (1 S. C. C. 80). The allegation, in that case, was that the defendant had pointed out to the Fiscal, for seizure, a certain property which belonged to another person. Phear, C.J. made the following comment :—

> " Substantially, the plaintiff's case is that, it must be implied in the defendant's pointing out the property to the Fiscal for sale, that at the Fiscal's sale of the same property, which was afterwards effected, he, the defendant, undertook with the purchaser that he had title, or, in other words, covenanted with the purchaser that he had title. It seems, however, very plain in the first place that these facts alone are not sufficient to establish any privity between the judgment-debtor and the subsequent purchaser in respect to the factum of pointing out the property.....At most, it would seem to amount to a misleading of the judgment-creditor through the Fiscal's officer, which might or might not give him, the judgment-creditor, cause of complaint, but could not be availed of by the purchaser."

And later he adds :—

> " A purchaser at such a sale buys solely at his own risk and calculates his price accordingly. The principle *caveat emptor* is applicable without qualification and, if he gets nothing by his bargain, still he cannot ask to have his money back from either the judgment-creditor or the judgment-debtor."

In a similar case, *Abdul Kader v. Pattu Mutu* (2 S.C.C. 158) Berwick, J. said " Everyone knows that no warranty of title passes at a Fiscal's sale—that a purchaser merely buys the debtor's interest—good, bad or indifferent,"

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These cases, though they do not specifically decide the point raised in the present case, show that the purchaser does not stand in the shoes of the judgment-creditor for all purposes, and that actions which may be available to a judgment-creditor are not necessarily available to a purchaser. In the present case, I cannot find any ground for holding that the purchaser, who bought the property two days after the alienation, has any cause of action against the judgment-debtor. The fraud which has been alleged has, in any event, been negatived. It is not necessary to consider what the position would have been had fraud on the part of the judgment-debtor been established.

The case of *Sankaralinga Reddi v. Kandasami Tevan* (I.L.R. 30 Madras 414) cited by appellant's counsel, does not appear to have any application to the present case. That was an action by plaintiffs who were attaching creditors against the defendants for cutting and carrying away crops attached by them. The defendants, in the case, were certain parties who had claimed the property, but whose claims had been dismissed. It was held, in the case, that by virtue of the attachment, the plaintiffs acquired a right to have the whole of the attached property applied in satisfaction of their debt and, in any case, to have a ratable proportion so applied, and that, in that sense, the attaching creditor is said to have a charge on the attached property. It was further held that, the attaching creditors had a legal right to have the attached property kept in *custodia legis* for the satisfaction of their debt. The action of the defendants was an interference with this legal right and, accordingly, an action accrued to the plaintiffs against the defendants on the principle laid down in *Quinn v. Leathen* (L.R. 1901 A.C. 495 at 498).

This case does not go further than to hold that the attaching creditors have rights of action against trespassers on the property attached. It does not decide any of the questions which have been raised in the present case. In any event, this case does not deal with the right of a purchaser as distinct from that of a judgment-creditor.

In my opinion, the plaintiff's action fails; and I dismiss the appeal with costs.

Appeal dismissed.

Present: KEUNEMAN, J.

RODRIGO (Sanitary Inspector) vs SYLVESTER

S. C. No. 283—*M. C. Colombo* 15733.

Argued on 1st September, 1938.

Decided on 5th September, 1938.

Municipal Councils Ordinance sections 190, 197 *and* 236—*Is the offence under section* 190 *a continuing offence.*

Held : That the failure to comply with a requisition under section 190 of the Municipal Councils Ordinance is not a continuing offence.

N. M. de Silva for accused-appellant.

L. A. Rajapakse, with *J. R. Jayawardena*, for complainant-respondent.

KEUNEMAN, J.

The accused was charged, under sections 190 and 197 of Ordinance No. 6 of 1910, with neglecting to construct a water closet on the premises No. 429, Skinner's Road, after written notice by the Chairman requiring him to construct this had been served on the 10th June, 1937. The main defence in the case was prescription under section 236 of the same Ordinance, inasmuch as the complaint was made on the 10th November, 1937, more than 3 months after the offence. The learned Magistrate held that the offence was a continuing offence, and that section 236 did not afford a defence. He convicted the accused and sentenced him to a fine of Rs. 10/–, in default, 10 days' simple imprisonment. The accused appeals from this conviction.

The relevant words of section 190 are as follows :—

> " In case the Chairman shall be of opinion that any privy or water closet .....shall be necessary.....for any house.....the owner of such house .....shall within 30 days after notice in this behalf by the Chairman, cause such privy or water closet to be constructed in accordance with the requisition contained in such notice."

The section continues to the effect that, where the requisition has not been complied with, the Chairman can cause the privy or water closet to be built, and the expenses incurred are to be payable by the owner.

Section 197 of the same Ordinance states that, whoever contravenes any provisions under the chapter in which section 190 occurs, is liable on summary conviction to a penalty; and that whoever continues to contravene any such provision, after the expiry of one week from such conviction, is guilty of a continuing offence and liable on conviction to a further penalty.

It is clear that the accused is not guilty of a continuing offence under the latter portion of section 197, as there is no previous conviction in this respect in existence,

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It is, however, argued for the respondent that the offence committed by the accused is, in its nature, a continuing offence, and that section 236 has no application; and I am referred to the case of *Bartholomeusz v. Ismail* (37 N.L.R. 301) which was a prosecution under section 156; to *Zakia v. Usoof Ismail* (32 N.L.R. 172) a prosecution under section 33; to *The Chairman M. C., Colombo, v. Silva* (4 C.W.R. 150) a prosecution for carrying on a certain business without a licence.

In each of these cases, the learned Judge considered the nature of the offence and held that the offence was a continuing one, and that section 236 did not afford a defence. I think these cases throw no light on the question whether the offence under section 190 is a continuing offence or not. It will be necessary for me to consider that question by determining the true construction to be given to section 190.

Under section 190 of Ordinance No. 6 of 1910, the Chairman is empowered to give notice in writing to the owner of any premises requiring the building of a privy or water closet. After receipt of such notice, the owner must, within 30 days, cause the privy or water closet to be constructed in accordance with the requisition. If the owner fails to do so within the 30 days, he " contravenes the provisions " of this section within the meaning of section 197. I think the offence is complete where the owner fails to carry out the terms of the requisition within 30 days, and that it would be no defence to a prosecution for the owner to aver that he has complied with the requisition after the 30 days. The imposition of the time limit is important, and I am of opinion that the offence cannot be regarded as a continuing offence.

In this case, the Chairman's notice was served on the 10th June, 1937. On failure by the owner to complete the work required within 30 days thereafter, he committed an offence. Proceedings against the owner were not initiated until the 10th November, 1937, more than 3 months after the commission of the offence. Accordingly, under section 236 the owner cannot be made liable to any fine or penalty.

I have also been referred by counsel for the respondent to *Chepstow Electric Light and Power Co. v. Chepstow Gas & Coke Consumers Co.* (L.R. 1905, 1 K.B. 198 at 210), but I think this deals with a different question. In that case, there was no time limit placed on obedience by the requisition, and Lord Alverstone, C.J. expressed his doubt as to whether " the time of limitation can be said to begin to run where persons are continuing to disobey an order, which is always operative until it is obeyed." The learned Chief Justice, under these circumstances, discusses but does not decide the question as to the point of time when the disobedience of the order was of such a character that the offence could be said to have become complete.

I set aside the conviction and acquit the accused.

Conviction set aside.

Present: KEUNEMAN, J.

RANHOTTY (Excise Inspector) vs POORANAM

S. C. No. 327—*P. C. Chavakachcheri No.* 13979.

Argued and Decided on 29th August, 1938.

Evidence—Confession by accused to Excise Inspector—Ordinance No. 18 *of* 1928—*Section* 3—*Inadmissibility—Failure of Magistrate to rule out such confession—Possibility of Magistrate's mind being prejudiced against the accused.*

The accused, a woman, was charged with the sale of arrack, without a licence from the Government Agent, in contravention of the Excise Ordinance.

In the course of his examination-in-chief, the prosecuting Inspector stated that he found a marked coin with the accused which he had handed to the decoy previously and that, when he showed the marked coin and asked her how she came to have it, the accused admitted that she sold the arrack to the decoy and begged for mercy.

The defence objected to this evidence. The Magistrate did not rule out this evidence but permitted certain cross-examination on the point, in the course of which the prosecuting Inspector stated that he knew that confessions by accused were not admissible and that he made the statement through inadvertence. The Magistrate convicted the accused and wrote in his order that the confession was inadmissible.

Held : (i) That the Magistrate should have ruled out the confession led in evidence as being inadmissible under section 3 of Ordinance No. 18 of 1928.

(ii) That there was a fair possibility of the Magistrate's mind being influenced against the accused by this inadmissible confession.

H. W. Thambiah for accused-appellant.

Jansze, Crown Counsel, for complainant-respondent.

KEUNEMAN, J.

In this case the accused, who is a woman, was charged with the sale of arrack, without a licence from the Government Agent, in contravention of the Excise Ordinance.

The accused was convicted and fined Rs. 75/– or, in default, two months' rigorous imprisonment. Certain objections are taken to the judgment of the learned Magistrate. The first point urged is that Excise Inspector Ranhotty, in the course of his examination-in-chief, stated that he found a marked coin, namely, a fifty-cent piece which had been handed previously by him to the decoy, and that he showed the marked coin to the accused and asked the accused how she came to have it, and that the accused then said that she sold arrack to the decoy and begged for mercy. The defence immediately objected to this evidence. The learned Judge noted the objection but did not, at that point, say whether he regarded this evidence as admissible or not. There can be no doubt that the confession to the Excise Inspector is inadmissible evidence by virtue of section 3 of Ordinance

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No. 18 of 1928. The learned Magistrate should immediately have ruled out this evidence. Instead of doing that he, apparently, permitted certain cross-examination on this point and, in the course of that cross-examination, the Excise Inspector stated that he knew that confessions by accused were not admissible, but through inadvertence he made that statement.

I do not think this explanation of the Excise Inspector is a satisfactory one. That evidence was given not in reply to a question in cross-examination but in examination-in-chief itself, and it is, at any rate, a fair possibility that this piece of evidence may have influenced to some extent the mind of the learned Magistrate and may have predisposed to accept the story of the prosecution as true. It is perfectly true that, when the learned Magistrate came to write his order, he stated that the confession by the accused was inadmissible. It is not possible to say, however, exactly how this may have influenced the mind of the learned Magistrate.

As regards the rest of the facts, the finding of the learned Magistrate is not a very strong one. What he says is that "Quite apart from the confession, there is sufficient evidence to prove the charge; and the case strikes me as true." The evidence of the sale is entirely the evidence of the decoy who was sent by the Excise party.

It appears that Excise Inspector Ranhotty and another Excise Inspector, Perera, met the decoy and the Excise Guard, Selvadurai, at about 4.20 p.m. at a particular junction. A marked fifty-cent coin was given to the decoy and, after search, certain coins which the decoy previously had were taken from him together with a box of matches. Thereafter the decoy appears to have gone towards the house of the accused. The meeting with the Inspectors took place at 4.20; but the actual raid did not take place until about an hour later, i.e. till about 5.15 or 5.20 p.m.

It is said that Excise Guard Selvadurai had instructions to follow the decoy. The Excise Guard himself says that he did follow the decoy and that he saw the decoy getting into the accused's house. He does not speak as to what happened during the course of that hour apart from the fact of the decoy having got into the house of the accused.

When the raid was made, the Inspectors say they found the decoy seated down with an empty glass in his hand which, they said, smelt of arrack. On searching the woman, a marked fifty-cent coin was found on her. On a further search of the premises, in a different room, some empty bottles and a bottle containing five drams of arrack were found.

It has been suggested for the accused that the fifty cents was handed over by the decoy to the accused in payment of an earlier debt. It is admitted by the decoy that prior to this he owed the accused the sum of one rupee for the hire of a cart, and the suggestion made on behalf of the accused is that, on this occasion, he handed over the fifty cents and another twenty-five cents in payment of that debt.

I do not think the learned Magistrate has analysed the evidence sufficiently. He should have scrutinised much more closely than he did the evidence of this decoy. He does not definitely say that he accepts his evidence, but merely that the case strikes him as true. I think myself the evidence of the decoy should not have been accepted in this manner and that there are doubts which arise as regards this evidence which has been given by the decoy.

There is no need for me to refer to the authorities which deal with the position of a decoy but, in view of the fact that an inadmissible confession had been led in evidence, I think there is sufficient reason for me to set this conviction aside and acquit the accused.

Conviction set aside.

Present: HEARNE, J. & WIJEYEWARDENE, A.J.

BALASUBRAMANIAM PILLAI vs VALLIAPPA CHETTIAR

Application for Conditional Leave to Appeal to the Privy Council in S. C. 286 D. C. Colombo 4520. (238).

Argued on 25th August, 1938.

Decided on 31st August, 1938.

Appeal—Privy Council—Notice of intention to make an application for conditional leave to appeal—Should application be filed only after notice has reached the respondent.

On 8th June, 1938, the plaintiff's proctor sent by post a letter to the defendant intimating to him the plaintiff's intention to appeal to the Privy Council, and forwarded therewith the copy of an application he intended to file. On the same day, after posting the letter, the plaintiff's proctor filed the application. The respondent received the letter after the application had been filed. Objection was taken to the application on the ground that the notice did not comply with Rule 2 of the Privy Council Appeal Rules, as the application had been filed at the time the notice reached the respondent.

Held : That the notice was in order.

H. V. Perera, K.C., with *S. Subramaniam*, for the petitioner.

Gratiaen, with *J. A. T. Perera*, for the respondent.

HEARNE, J.

This is an application for conditional leave to appeal to the Privy Council.

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Hearne, J.

Balasubramaniam Pillai *vs* Valliappa Chettiar

Judgment was entered by this Court on 27th May, 1938, in S. C. 286 (F) D. C. Colombo 4520, the judgment was a final judgment and the matter in dispute on appeal is over Rs. 5,000/– in value.

Two communications which, it is claimed, gave the opposite party notice of the applicant's intention to apply to this Court for conditional leave, were sent to the respondent.

The first notice (A) was sent by registered express delivery post on 30th May, 1938, and was delivered to the respondent on the same day. It is, in my opinion, doubtful that this notice can be construed as a notice of intention to apply to this Court for conditional leave, but I do not decide the question as, in the view I take of the second notice, it is unnecessary.

The second notice (D), which, admittedly, was a notice of intention to apply to this Court for conditional leave, was posted on the 8th June, 1938, and addressed to the respondent at his address at 295, Galle Road, Colpetty. The respondent left Colombo on 9th June at 4 a.m. and received D on the 10th June on his return. The notice was, presumably, delivered by post at his house on 9th June. On the evening of the 8th June, the applicant filed his application for conditional leave.

The notice D was, admittedly, posted and received by the respondent within 14 days from the date of the judgment appealed from, but it is argued that, as the respondent did not receive the notice before the applicant filed his application, the provisions of Rule 2 of Schedule 1 of the relevant Ordinance have not been complied with (Vol. 4. p. 422).

The Rule is as follows :—

> " Application to the Court for leave to appeal shall be made by petition within thirty days from the date of the judgment to be appealed from, and the applicant shall, within fourteen days from the date of such judgment, give the opposite party notice of such intended application."

In *Wijeyesekera v. Corea* (1931) 33 N.L.R. 349, Drieberg J. said " The form of notice adopted in practice includes an intimation of the day on which the petitioner will move in the Supreme Court, and this is absolutely necessary in order that the respondent may be present or arrange for his representation on the day stated or any other day to which the hearing is adjourned."

Poyser, S.P.J. & Koch, J. dissented from this view in *Pathmanathan v. Imperial Bank of India* (1937) 39 N.L.R. 103. " Apart from the fact " Poyser, J. said, " that the rule does not specifically state that the day shall be named upon which the application will be made, in practice it would be impracticable to name any such day. The day on which the application will be heard would be decided by the Registrar in accordance with the usual practice. Further, in my experience, the practice in this Court has been for the applicant to apply in the first place *ex parte* for a notice of his application to be served on the respondent, and that would appear to be the most convenient practice."

It would appear from this passage in Poyser J's judgment, which I respectfully adopt, that the object of the notice required to be given by the applicant to the respondent is, in practice, not to give him an opportunity of appearing when mere notice to the opposite party is in the first place asked for in Court. He will have the opportunity of raising whatever objections he has when he is before the Court after notice has been served on him. It is, I think, merely to apprise him within a reasonable time of the fact that the litigation is not at an end, and that the unsuccessful party has the intention of applying to the Court for leave to take the subject-matter in dispute between the parties to the Privy Council.

Apart from this, I would not, in the absence of express language to that effect, construe Rule 2 to mean that there must be an interval of time between the effectuation of service of the notice of intention to apply for leave and the filing of an application in that behalf.

In the circumstances of this case, as application for leave to appeal was made within 30 days and notice of intention to apply to the Court for leave was posted to and received by the respondent within 14 days, I am of the opinion that the applicant has complied with the provisions of Rule 2.

Leave to appeal will, therefore, be granted subject to the usual conditions. Costs to applicant.

WIJEYEWARDENA, A.J.

In this case, the plaintiff has made an application for conditional leave to appeal to the Privy Council from a judgment of this Court delivered on May 27th, 1938.

On June 8th, 1938, the plaintiff's Proctor sent by post a letter to the defendant intimating to him the plaintiff's intention to appeal to the Privy Council, and forwarded with the letter a copy of the application which the plaintiff intended to file in this Court.

On the same day, after posting the letter to the defendant, the plaintiff's Proctor filed the application in the Supreme Court Registry. The defendant received the letter and the copy of the application on 10th June, 1938.

The defendant's counsel objects to this Court entertaining the application on the ground that the notice of the application was received by the defendant after the application was, in fact, filed in the Registry. He argues that the provisions of Rule 2 in Schedule 1 to the Appeals (Privy Council) Ordinance require that the party noticed should receive notice of an intended application and not of an application already filed in Court.

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Wijeyewardena, A.J.

Balasubramaniam Pillai *vs* Valliappa Chettiar

The Rule in question reads :—

> " Application to Court for leave to appeal shall be made by petition within thirty days from the date of the judgment to be appealed from, and the applicant shall, within fourteen days from the date of such judgment, give the opposite party notice of such intended application."

It is argued that the Rule speaks of notice of an intended application being given and not of such notice being issued, and that, therefore, at the time the notice is received by the opposite party, the applicant should merely have an intention of making an application, and should not have carried such intention into effect by making the application.

In my opinion, this contention of the defendant's counsel fails to give full effect to the words " *The applicant* should give notice." The giving of a notice must necessarily involve the sending of a notice which ultimately reaches the party to be noticed. The action involved in giving notice must be considered with reference to the applicant who gives the notice and not with reference to the opposite party who receives such notice. It appears to me, therefore, that the material point of time before which the application shall not be made is when the *applicant* gives notice or, in other words, when the applicant sends notice. An applicant who sends a notice and then files his application before the notice reaches the opposite party is an applicant who gives notice of his intended application for, at the time he sent the notice, he had not made the application but had only formed the intention of making such an application.

The plaintiff has, in my opinion, complied with the requirements of Rule 2, and leave to appeal will be therefore granted to him, subject to the usual conditions. The applicant is entitled to the costs of the application.

Objection overruled.

Present : HEARNE, J. & WIJEYEWARDENE, A.J.

JAINAM BEEBEE AMMAL & TWO OTHERS vs IBRAHIM & OTHERS

S. C. No. 341—*D. C. Badulla No.* 5808.

Argued on 25th, 26th, 29th, 30th, 31st August, and 1st & 2nd September, 1938.

Decided on 13th September, 1938.

Partnership—Purchase of property by partners—Death and retirement of some partners—Settlement of claims due—New partnership by remaining partners and another—Property purchased treated as assets of partnership—Death of two partners of second partnership—Third partnership formed treating such property as partnership property—Rights of heirs of original partner who was also a partner of second and third partnerships—Is such property held in trust for the partnership—Can such heirs maintain an action for partition of such property—Is a conveyance necessary for acquisition of beneficial interests—Ordinances No. 22 *of* 1866 *and* 7 *of* 1840.

The plaintiffs brought this action for the partition of a land called Kandewatta, alias Childer's land, situated at Haputale, alleging that they were jointly entitled to 11/63 shares of the said land. They traced their title in the following manner.

By deed P3 of 1st May, 1902, one J. L. Devar conveyed the property in question to seven persons A, B, C, D, E, F, G "trading as K. Abram Saibo & Co., to their successors and assigns." Their partnership agreement was dated 4th April, 1902, (P27). B died intestate in 1906 leaving, as his heirs, his widow and a daughter on whom B's 1/7 share devolved. The said widow and her daughter, together with F, sold and conveyed by deed No. 361 of 14-5-12 (P9) their 1/7+1/7 or 2/7 shares to nine persons of whom E was one, who thus became entitled to further 2/63 shares. E died intestate in 1915.

The plaintiffs, who are the widow and the two sons of E, claimed the said 2/63 shares plus 1/7 share which E was entitled to under P3.

The defendants pleaded, *inter alia*, that plaintiffs cannot maintain this action and sought to establish:—

(*a*) that the land in question was partnership property and was treated as part of the assets of the branch at Haputale;

(*b*) that on the death of B in 1906, his heirs were paid his share of the capital and profits;

(*c*) that F retired from the partnership and was paid his share of the capital and profits;

(*d*) that the remaining five partners, together with one Batcha Saibo, formed a new partnership to carry on the same business under P28 of 1906;

(*e*) that, during the second partnership, A and F died and A's share in the business was allotted to some of his heirs, and F's heirs were paid his share of the capital and profits;

(*f*) that the remaining four partners and five others formed a new partnership in 1912, (P29), the land and premises in question being treated as partnership property;

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(*g*) that, in terms of the powers conferred by P29, two of the partners sold the entirety of the land to the 7th & 8th defendants by P21 in 1917.

The three partnership deeds P27, P28, and P29 contained recitals showing that the immovable property formed part of the assets of the various partnerships. The deed P9 abovesaid referred to the property in question as an asset of the partnership of K. Abram Saibo & Co.

The learned District Judge ordered a partition on the ground that the rights of the vendees on P3 did not vest in the partnership but that they must be taken to be for the exclusive benefit of the vendees in the absence of any notarial document to vest the property in the second or the third partnerships.

Held : (i) That the land in question formed part of the assets of the partnership created by P27.

(ii) That the seven persons who formed the first partnership held the property in trust for such partnership.

(iii) That a further deed was not necessary to pass such beneficial interests to the second or to the third partnerships.

(iv) That the beneficial interest of partners in partnership property may be said to be joint.

(v) That, in the circumstances, plaintiffs were not entitled to maintain an action for partition.

PER HEARNE J. (*a*) "The law of partnership in Ceylon is the same as that in England ; but the introduction into Ceylon of the law of partnership obtaining in England does not introduce into Ceylon any part of the law of England relating to the tenure or conveyance or assurance of, or succession to any land or other immovable property, or any estate, right or interest therein (Ordinance No. 22 of 1866)."

(*b*) "Further, as on the death of a partner it is only to an accounting and a share that his representatives would be entitled, the beneficial interest in land belonging to the partnership would remain in the members of the partnership for the time being, and, if not required to be sold for the purpose of paying partnership debts, could, by agreement, form one of the assets of a second partnership and thereafter, subject to the same conditions, of a third."

Distinguished: Ammal vs. Ibrahim (1937) 39 N.L.R. 105.

Approved: Narayanan Chetty vs. James Finlay & Co. 29 N.L.R. 65.

H. V. Perera, K.C., with *N. E. Weerasooriya, K.C.*, and *E. B. Wickremenaike*, for the 7th–16th defendants-appellants.

L. A. Rajapakse, with *Kariapper*, for plaintiffs-respondents.

HEARNE, J.

The action filed by the plaintiffs was one for the partition of land at Haputale.

It is common ground that the land in question was conveyed by P3 on 1st May, 1902, to (1) Kawana Kadar Ibrahim Rawther (2) Ana Mohamadu Kanny Saibo (3) Kawanna Cader Ibrahim Saibo (4) Pawana Shiek Adam Saibo (5) Pawana Ibrahim Saibo (6) Ena Usoof Saibo and (7) Kana Ahamadu Saibo.

These seven persons had become partners upon an agreement dated 4th April, 1902, (P27), and the conveyance under P3 was executed during the currency of the partnership.

Pawanna Ibrahim Saibo died intestate in 1915. It is claimed by the plaintiffs that under P3 he was entitled to an undivided 1/7 plus 2/63 shares on a deed of conveyance No. 361 dated 14th May, 1912, and that he thus left 11/63 shares to which his widow (the 1st plaintiff) and his sons (the 2nd and 3rd plaintiffs) became entitled, the former to 11/504 or 22/1008 shares and the latter each to 77/1008 shares.

The history of the 2/63 shares is traced by the plaintiffs in this way.

Ana Mohamadu Kanny Saibo (the 2nd partner) died on 2nd August, 1906, leaving as his heirs his widow Ameer Beebee Ammal, who became entitled to an undivided 1/4 of 1/7 *i.e.* 1/28 shares, and his daughter Hamida Beebee Ammal who became entitled to the remaining 3/28 shares.

Ameer Beebee Ammal, Hamida Beebee Ammal and Ena Usoof Saibo (the 6th partner) sold and conveyed their 1/28, 3/28 and 1/7 shares respectively, a total of 2/7 shares, to 9 persons of whom Pawanna Ibrahim Saibo was one. Ibrahim Saibo thus became entitled to 1/9 × 2/7 or 2/63 shares. The defendants admit the execution of deed of conveyance No. 361.

The facts pleaded by the defendants may be summarised thus.

The land at Haputale was partnership property and was treated as part of the assets of the branch there. Ana Mohamadu Kanny Saibo (the 2nd partner) died in August, 1906, and his heirs were paid his share of the capital and profits. Ena Usoof Saibo (the 6th partner) retired from the partnership and was paid his share of the capital and profits. (It is through these two that the plaintiffs traced their 2/63 shares). The remaining five partners i.e. Kawanna Kader Ibrahim Rawther, Kawanna Cader Ibrahim Saibo, Pawanna Sheik Adam Saibo, Pawanna Ibrahim Saibo and Kuna Ahamadu Saibo, together with Ena Kadar Batcha Saibo, formed a new partnership constituted by P28 dated 17th September, 1906, " the land and premises at Haputale being treated as part of the assets of the said partnership." During the subsistence of the second partnership, Kawanna Kadar Ibrahim Rawther (the 1st partner in the first and second partnerships) and Kuna Ahamadu Saibo (the 7th partner in the first and the 5th partner in the second partnership) died. The heirs of the latter were paid their share of the capital and profits, the value of the land and buildings at Haputale being taken into account, while some of the heirs of the former were allotted his share in the business. The remaining four partners and five others formed a new partnership constituted by P29 dated March, 1912, the land and premises at Haputale again being treated as partnership property. In terms of the powers conferred by P29, two of the partners sold the entirety of the land and premises to the 7th and 8th defendants and K. K. Ibrahim Saibo and Kawanna Ibrahim Saibo in April, 1917, (P21), and it is under P21 and subsequent conveyances that the 7th to 16th defendants claim that " they are the lawful owners of the entirety of the land."

Apart from a question of *res judicata*, which Counsel for the respondents raised but later abandoned, it was agreed that the determination

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of this appeal involved the consideration of three questions, two of law and one of fact.

On the question of fact, viz. whether the land at Haputale was partnership property, Counsel for the appellants admitted that, assuming it was held that it was not, the appeal must fail.

But even assuming that it was held that it was, two questions of law were required to be answered in his favour before the appellants could succeed.

The first was this : did the grantees under P3 become, as the plaintiffs-respondents say, co-owners of the land or, as the defendants-appellants say, was the legal title only in them and was the beneficial title in the partners *qua* partners. The second was whether, assuming the beneficial title was in the partners *qua* partners, their beneficial title could pass to a second set of partners and then to a third without a conveyance.

In the arguments addressed to the Court, reference was made to the case of *Ammal vs. Ibrahim* (1937) 39 N.L.R. 105, and the view was pressed upon us by Counsel for the respondents that the questions of law involved in this appeal were decided in the case referred to. It appears to me, on a perusal of the judgment in that case, that it was decided on a question of fact, viz. that the land in dispute was not partnership property, and that the Judges who heard the appeal did no more than express their doubts that the law, as propounded by Counsel for the appellants in this appeal, is the law of Ceylon.

On the first question of law, Fernando, J. who wrote the judgment of the Court said :—

> " It may of course happen that a person, who is not himself a partner, may hold property in trust for the partners, while the legal title is in the grantee, but it is *difficult* to see how such a position can arise as the result of a deed which, *ex facie*, transfers the property to the partners themselves."

On the second question of law, he said :—

> " It *seems*, therefore, that this judgment (*Narayanan Chetty vs. James Finlay & Co.*, 29 N.L.R. 65) is no authority for the proposition that the *cestui que* trust can transfer his interest to a total stranger without any writing whether notarial or otherwise. It seems inconvenient, to say the least, that the interests of a *cestui que* trust can pass by mere consent of parties and quite unknown to the trustee himself, because it would be difficult for the trustee at any particular time to ascertain who was the *cestui que* trust in whom the beneficial interest vested.
>
> " In the case before us, however," he went on " the conduct of the parties themselves appears to indicate that each of the seven grantees was regarded as the full owner of his one-seventh share....."

He then considered the facts and, on a finding regarding the facts favourable to the appellants, the appeal was allowed.

I do not think the Judges intended that the doubts they expressed were to be regarded as an authoritative pronouncement of the law.

The facts, in the present appeal, and the construction of the documents lead me strongly to the view that the land in dispute was partnership property and was treated as such, and the questions of law which I have stated must, therefore, be categorically answered.

The law of partnership in Ceylon is the same as that in England; but the introduction into Ceylon of the law of partnership obtaining in England does not introduce into Ceylon any part of the law of England relating to the tenure or conveyance or assurance of, or succession to, any land or other immovable property or any estate, right or interest therein (Ordinance No. 22 of 1866).

The decision of the first legal question, solely with reference to the law of partnership in England, presents, I venture to think, no difficulty. If one partner purchased property in his own name and it was paid for out of partnership moneys, he would be deemed to hold the property in trust for the partnership; and, if the property was purchased, as in this case, in the names of the seven persons who alone constituted the partnership, they would also hold the property in trust for the partnership; or, to use the language employed here in this connection, the beneficial title in the property would be in the partnership. Having regard to the law of partnership, what the term "beneficial title" connotes is not that any particular partner has a right to take away any portion of the partnership property and to say that it is exclusively his, but that he is entitled to a share in his proportion of the partnership assets after they have been realised and converted into money and all the partnership debts and liabilities have been paid and discharged. For these reasons, the beneficial interest of partners in partnership property may be said to be joint.

The doubt expressed by Fernando, J. was whether "the beneficial interest in land could vest in a firm or partnership as such without a conveyance expressly in favour of the firm or partnership." The deed Fernando, J. was there considering was one in which one partner purported to convey to himself and six others as co-partners trading under the name of "K. Abram Saibo & Co." and their respective heirs, executors, administrators and assigns, all his estate, possession, right, title etc. in certain land. It is unnecessary for me to state whether, in my view, the question of a further conveyance in that case did in fact arise. For, on a consideration of the deed relevant in this case in which a third party conveyed the land in dispute to seven persons trading as K. Abram Saibo & Co., their successors (a significant word) and assigns, there is, in my opinion, no doubt that the deed vested the property in the partnership, that is to say that, the beneficial title was in the partners as such, and that no further conveyance was necessary in order to satisfy the requirements of our law.

I come to the second point of law.

It is claimed by the appellants that, on the death of the 2nd partner in the first partnership and the retirement of the 6th, an accounting with the heirs of the former and with the latter having taken place, the beneficial

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interest in the property, for the purposes of the partnership business, was in the remaining five. These five did not thereafter realise all the partnership property and divide the proceeds of sale in the proportion to which each was entitled. They formed a second partnership consisting of themselves and a sixth person. The latter made certain contributions and the beneficial interest in the land which was brought into the second partnership became the beneficial interest of the second partnership for the purpose of the business of that partnership : that is to say, each member of the second partnership was entitled, on a dissolution, to a share in the proportion of the partnership assets, including the land, after they had been realised and converted into money and all partnership debts had been paid. Similarly, on the death of two of the partners of the second partnership, the remaining four, instead of realising all the partnership assets and dividing the proceeds of sale after paying the debts and accounting with the heirs of the deceased partners, formed a third partnership consisting of themselves and five others, and the beneficial interest in the land enjoyed by the second partnership became the beneficial interest of the third partnership for the purpose of the business of that partnership.

I have said that the beneficial interest of the partners in partnership property is, in my opinion, joint in the sense I have indicated. Further, as on the death of a partner it is only to an accounting and a share that his representatives would be entitled, the beneficial interest in land belonging to the partnership would remain in the members of the partnership for the time being, and, if not required to be sold for the purpose of paying partnership debts, could, by agreement, form one of the assets of a second partnership and thereafter, subject to the same conditions, of a third. This frequently happens.

As is pointed out in Lindley on *Partnership* (8th Ed. at p. 424):

> " Where a change occurs in a firm by the retirement of one or more of its members, nothing is more common than for the partners to agree that those who continue the business shall take the property of the old firm and pay its debts, or that part of the property of the old firm shall become the property of those by whom its business is to be continued, whilst the rest of the property shall be otherwise dealt with."

The objection raised by counsel for the respondents was, that the interests in land, which the appellants assert passed by agreement from the first partnership to the second and from the second to the third, could not and did not so pass in the absence of a conveyance ; while the argument of Counsel for the appellant was, that a deed was not necessary for the acquisition of beneficial interests.

In *Narayanan Chetty vs. James Finlay & Co.* (supra) it was held, according to the headnote, that " there is nothing in section 2 of Ordinance No. 7 of 1840 repugnant to the proof, by parol evidence, of the transfer of equitable interests in land arising out of a trust created by operation of law." It was submitted, by Counsel for the respondents, that that case decided that the grantee of land subject to a trust could acquire the interests

of the *cestui que* trust without a notarial instrument, and that the decision must be confined to the particular facts of that case. The Judges who heard the appeal in *Narayanan Chetty vs. James Finlay & Co.* (supra) examined at length the provisions of section 2 of Ordinance 7 of 1840 and concluded that the Ordinance must be read as limited to acts of parties which are directed to affect the legal estate, and that it is not concerned with equitable interests in regard to which it has made no provision. Even if, as has been suggested, the case was decided on a wider principle than was necessary, I would respectfully adopt the views of the law as set out in the judgments of Garvin & Dalton JJ.

In my view, the two legal questions involved in this appeal must be answered in favour of the appellants.

I would point out that Fernando, J. did not say that the case of *Narayanan Chetty vs. James Finlay & Co.* " was not an authority that the *cestui que* trust can transfer his interest to a total stranger without any writing notarial or otherwise," but only that it seemed to him to be so.

In regard to the facts, the trial Judge appears to have misconceived the position of the defendants when he said that, even if the property was purchased with the funds of the firm, " their purchase in the name of all the partners must be taken to be for their exclusive benefit and not for the benefit of the partnerships that may or may not be constituted by the partners in future." Again, he does not appear to have considered the main question of fact in detachment from the questions of law. It is true that he says, " on the oral and documentary evidence before me, I am of the opinion that the rights of the vendees on P3 did not vest in the third partnership ; " but this appears to have been (and I use the word in no way derogatory to him) coloured by his view that " in the absence of an effectual vesting of the property in the second partnership according to the law of the country, I fail to see how this property came to be considered part of the assets of it." It appears to me that if he had fully taken into account the documents in the case, he could not have decided the matter without an examination in his judgment of the implications, contrary to his finding, of such documents as P3 and P9. I have had the advantage of reading my brother's judgment on the question of fact involved in this appeal, and I agree with the conclusions at which he has arrived.

If, as I hold, the beneficial title is in the appellants, the plaintiffs-respondents have made out no case for partition, even on the assumption that they have legal title in the shares set out by them.

I would allow the appeal with costs and dismiss the plaintiffs' action with costs.

WIJEYEWARDENE, A.J.

The plaintiffs-respondents instituted this action under Ordinance No. 10 of 1863 for the partition of a land called Kandewatte, alias Childer's Lot, situated at Haputale. The 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th,

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and 16th defendants-appellants filed answer claiming the property exclusively and stating that the property was originally partnership property belonging, to the branch business of the firm known as K. Abram Saibo & Co. carrying on a business at Haputale, and that, by certain deeds, the property has now devolved on them subject to certain rights of the plaintiffs in the legal estate in respect of the property. The first six defendants have not filed an answer.

It is necessary to set out in detail the various transactions with regard to the partnership and the property, as they have an important bearing on the questions of fact and law which arise in this case.

By Indenture P27 of April 4, 1902, the following seven persons formed themselves into a partnership for the purpose of " establishing and opening boutiques, shops, stores, bakeries and carrying on a supply of contract business as well as any other partnership business under the style and firm of.....K. Abram Saibo & Co....." for three years or a longer period at the discretion of the principal partners K. Ibrahim Rawther, Mohamadu Saibo, Kader Ibrahim Saibo, Sheik Adam Saibo, P. Esubu Saibo and A. K. Ahamed Saibo.

By deed P3 of 1st May 1902, one J. L. Devar sold the property in question to these seven individuals " trading in Ceylon as K. Abram Saibo & Co."

During the pendency of this partnership, the second partner died and the sixth partner retired from the business. The estate of the second partner was administered in the District Court of Kandy. P7 of 1909 is the inventory filed by the administrator.

By Indenture P28 of 17th September, 1906, the 1st, 3rd, 4th, 5th and 7th partners of the earlier partnership and one Kader Batcha Saibo agreed to carry on the same business, as under P3, for a term of 3 years from 6th August, 1906, or " for a longer period not exceeding six months."

The first and seventh partners of the first partnership, who were also partners of the second partnership, died in 1911 and 1909 respectively. Their estates were administered in the District Court of Kandy. P4 and P6 of 1914 are the inventory and administrator's deed in respect of the estate of the first partner, while P14 of 1912 is the inventory in respect of the estate of the seventh partner.

By the Indenture P29 of March, 1912, the 3rd, 4th & 5th partners of the first partnership, some of the heirs of the first partner of the first partnership including Ibrahim Saibo, Kader Batcha Saibo, who was a partner of the second partnership, and some others agreed to carry on a business similar to the business of the first partnership under the old name of K. Abram Saibo & Co. for a period of forty months, commencing from November 19, 1911. The deed also provided for a continuance of the partnership for a period not exceeding twelve months.

By P9 of May, 1912, P. Esubu Saibo (the 6th partner of the first partnership) and the heirs of Mohamadu Kani Saibo, (the second partner of

the first partnership) sold their interests in the property to the several partners of the third partnership carrying on business as K. Abram Saibo & Co.

The deed of partnership P29 empowered Kader Ibrahim Saibo (the third partner of the first partnership) Sheik Adam Saibo (the fourth partner of the first partnership) and K. Abram Saibo (who were partners of the third partnership), or any two of them, to sell the immovable property and buildings " now belonging or which may hereafter, at any time during the continuance of this partnership, become the property of the said partnership business." Purporting to act in the exercise of this power, two of the partners so authorised, with some of the other partners, conveyed the property in question by P21 of 1917, and the rights of the vendees under that deed have now devolved on the appellants.

Before the execution of P21, P. Ibrahim Saibo (the fifth partner of the first partnership) who was a partner of all the three partnerships, died in 1915, leaving as his heirs the plaintiffs-respondents.

A study of the various documents filed in the case leaves no doubt in my mind that the property in question was regarded by the vendees on P3 and their representatives in interest as partnership property until the present dispute arose. The deed P3 itself shows that the purchase by the seven individuals named in the deed was not for the purpose of holding the property as co-owners but for the purposes of the partnership established shortly before by P27.

The vendees are described in the deed as persons trading under the name of K. Abram Saibo & Co., and the notary who has drawn the deed has made a significant departure from the usual formula employed in deeds of conveyance in referring to the representatives of the vendees as " Successors and Assigns " and not as " heirs, executors, administrators and assigns."

The deed P9 of 1912 is, as previously stated by me, a deed of conveyance executed by a retired partner and the heirs of a deceased partner of the first partnership. The vendees were all the partners of the third partnership including P. Ibrahim Saibo under whom the plaintiffs claim.

This deed refers to the property in question as an asset of the partnership of K. Abram Saibo & Co. and purports to be a conveyance to the vendees " carrying on business under the name and style of K. Abram Saibo & Co." under deed P29. Though the entire consideration is mentioned in the body of the deed as Rs. 20,000/- the attestation clause shows that only sums of Rs. 3,055/58 and Rs. 8,871/41 were paid in the presence of the notary to the heirs of the deceased partner and the retired partner, and that these payments were made by cheques issued by P. Abram Saibo & Co. The notary does not mention that the vendors acknowledged the payment of the balance sums to them before the execution of the deed.

According to the appellants, the partners looked into the accounts of the partnership, including Kandevatte as an asset of the partnership, and found that the shares of Mohamadu Kani Saibo (the deceased partner

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of the first partnership) and P. Esubu Saibo (the retired partner of the first partnership) amounted to Rs. 3,055/58 and Rs. 8,871/41. The recitals in the deed P12 of 1912 show that the accounts of the partnership have been looked into before the execution of P12, while D1 and D5 show that the immovable properties were included among the assets of the partnership. On paying out the shares of Mohamadu Kani Saibo and P. Esubu Saibo, the second partnership desired to obtain a conveyance of the interest of these partners in the legal title of Kandewatte and other immovable properties and, for that purpose, the deed P9 was executed. The oral evidence on this point is strongly supported by the statements in the deeds P9 and P12 and the documents D1 and D5.

Though the respondents have questioned the genuineness of D1 and D5 I see no reason to reject them, and it appears to me to be distinctly unfair to expect the appellants to lead more cogent evidence than they have been able to adduce with regard to transactions which took place over 25 years ago. The document D1 bears the signature of P. Ibrahim Saibo, the predecessor in title of the plaintiffs, and the witnesses called by the defendants have sworn to the fact that the document was signed by P. Ibrahim Saibo. As against this evidence, there is only the statement of the 3rd plaintiff, son of P. Ibrahim Saibo, who was a boy of 13 when his father died in 1915. He says that he does not think that the signature on D1 is the signature of his father. He does not state that he has seen his father signing any documents, nor has any attempt been made to place before the Court the evidence of any witness who has compared the admitted signatures of P. Ibrahim Saibo with the signature on D1. The plaintiffs also seek to throw doubt on the signature on D1 by pointing to the fact that P. Ibrahim Saibo was ill for some time before his death in 1915 and that he, therefore, could not have signed D1 at Haputale in 1911. The evidence of the plaintiffs, however, discloses the fact that P. Ibrahim Saibo was ill for less than two years prior to his death in India in 1915, and I am not prepared to reject the positive evidence led on behalf of the appellants merely on the suggestions made by the plaintiffs. In view of the fact that one of the vendees on P9 is the predecessor in title of the plaintiff, this document militates very strongly against the contention of the plaintiffs that the property in question was not regarded as partnership property.

The three deeds of partnership P27, P28 and P29 contain recitals which shew that immovable property formed part of the assets of the various partnerships, and the appellants, I think, are entitled to rely on these recitals as supporting their plea that the property in dispute is an asset of the partnership in view of the failure of the respondents to show that any property other than this property formed an asset of the partnership.

The inventories P4, P7 and P14 and the administrator's deed P6 which is based on P4, no doubt, appear to support the plaintiffs' contention that the immovable properties were not assets of the partnerships, as these inven-

tories mention, in addition to a share of the partnership business, an undivided share of the immovable properties. One cannot, however, ignore the fact that these inventories are generally prepared on the deeds handed by the parties concerned to their lawyers, and the person responsible for the preparation of the inventories may well have thought that he was required, by the provisions of section 538 of the Civil Procedure Code 1889, to include a share of the immovable properties in view of the deed of transfer P3. Whatever may be the reason for the inclusion of the shares of immovable properties in these inventories, they do not afford any ground for drawing any inference that the parties concerned did not regard this property as partnership property. The administrator, in whose name P4 was prepared, filed a motion D10 in Court a month afterwards, asking the sanction of Court to sell the undivided shares of the immovable properties, stating that these properties formed part of the assets of the partnership. The document D10 shews that it is unsafe to draw an inference adverse to the appellants from the fact that the inventories mention the shares of the immovable properties as separate assets.

The oral evidence led in this case shews that the value of the property was taken into account in assessing the shares due to the retired and deceased partners, and I do not see any reason for not accepting such evidence as it is supported by the documents produced in the case. Moreover, the learned District Judge has not stated in express terms that he rejects the oral evidence adduced in support of the appellants.

On the oral and documentary evidence in that case, I have reached the decision that Kandewatte was acquired on account of the firm of P. Abram Saibo & Co., and for the purposes, and in the course of, the first partnership.

I am further of opinion that this property has always been regarded by the original purchasers and their representatives in interest as partnership property.

It now remains to consider whether this property became in law the partnership property of the second and third partnerships.

Ordinance No. 22 of 1866 introduced the English law of partnership into Ceylon subject, however, to the limitation that " nothing therein contained shall be taken to introduce into this Colony any part of the law of England relating to the tenure or conveyance, or assurance of, or succession to, any land or other immovable property, or any estate, right, or interest therein."

The relevant provisions with regard to the transfer of interests in land are contained in section 2 of Ordinance No. 7 of 1840 which reads :—

> " No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase

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of any land or other immovable property, shall be in force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorised by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses."

By deed P3, the legal estate in the property was vested in the three persons named therein, but the property was to be held subject to the condition imposed by the operation of law that it should be available for the payment of the debts of the partnership and that, after such payment, the balance, if any, of the proceeds of sale should be distributed among the surviving partners according to the terms of the partnership deed, at the winding up of the business and affairs of the firm. The result would then be that, while the legal estate was vested in the seven purchasers, the beneficial estate would be in the partnership as indicated by me. The question of law that now arises for consideration is whether this beneficial estate of the first partnership could have been transferred to the second partnership and later on to the third partnership except by notarial documents executed according to section 2 of 1840. In *Narayanan Chetty vs. James Finlay & Co.** the Court had to consider the scope of this section. On a comparison of our Ordinance with the English Statute of Frauds (29 Car. 11 c. 3) Garvin, J. and Dalton, J. held in that case that Ordinance No. 7 of 1840 should be read as limited to the acts of parties which are directed to affect the legal estate in immovable property and should not be extended to apply to equitable interests.

I am unable to agree with the view of Fernando, J. in *Ammal et al. vs. Ibrahim et al.*† that the decision in *Narayanan Chetty vs. James Finlay & Co.* (supra) is applicable only to the special facts in that case and should not be regarded as an interpretation of the scope of section 2 of Ordinance 7 of 1840 on the question whether the Ordinance regulates and governs the assignment of equitable interests created by operation of law.

On my findings on the question of fact and law, the position is that, while the respondents are entitled to the legal estate in certain undivided shares of the property, the beneficial estate in the entire property is now vested in the appellants who do not desire the property to be dealt with under Ordinance No. 10 of 1863. I hold, therefore, that the plaintiffs are not entitled to maintain the present action and that the action shall therefore be dismissed with costs. The appellants are entitled to the costs of this appeal.

Appeal dismissed.

* (1927) 29 N.L.R. 65. † (1937) 39 N.L.R. 105.

Present : HEARNE, J. & WIJEYEWARDENE, A.J.

APPUHAMY vs PERERA AND OTHERS

S. C. No. 54—D. C. Colombo No. 7349.

Argued on 12th September, 1938.

Decided on 16th September, 1938.

Inheritance—Matrimonial Rights and Inheritance Ordinance, sections 30 and 36—Death of person of illegitimate birth intestate—Who may inherit such person's property in case such person leaves no surviving mother.

The appellant was the husband of the deceased, one Lucia Moraes, a person of illegitimate birth. Her mother predeceased her. The other illegitimate children of Lucia Moraes' mother and their descendants claimed the entire property. As against them, the deceased's husband claimed the entire inheritance.

Held : That, in the circumstances, the husband of the deceased was entitled to succeed to the exclusion of all others.

Per WIJEYEWARDENE, A.J. "The correct legal position appears to be that section 30 should be read subject to section 37. The provisions of sections 26 to 36 of the Ordinance, no doubt, regulate the succession to the intestate estate of a person whether such person is an issue of a regular or irregular union ; but, where the intestate is an 'illegitimate person' or the heirs are 'illegitimate children' within the meaning of section 37, the earlier provisions are modified by section 37."

H. V. Perera, K.C., with *N. E. Weerasooria, K.C.*, and *Senaratne*, for petitioner-appellant.

Hayley, K.C., with *Tiruchelvam*, for 1st and 2nd respondents.

J. E. A. Alles, with *Ranatunge*, for the 4th respondent.

Peter de Silva, with *A. P. de Zoysa*, for 3rd respondent.

HEARNE, J.

This appeal concerns the rights of succession to an intestate of illegitimate birth.

The intestate, Lucia, was the wife of the appellant and the daughter of Podihamy who had predeceased her. Podihamy had other illegitimate children, and these children are represented by the respondents.

The relevant law is contained in Ordinance No. 15 of 1876. By virtue of the provisions of section 26 of that Ordinance, the Judge held that the appellant was entitled to one half of the estate of the deceased and, following the view of Lyall Grant, J. in *Chelliah vs. Kadiravelu* (1931) 33 N.L.R. 172, that "the succession of a surviving spouse of a bastard is not expressly dealt with in Ordinance No. 1 of 1911 or in that of 1876," decided that, according to the principles of Roman-Dutch Law, the remaining half "should go to the other children of deceased's mother" and their representatives.

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In the case of *Chelliah vs. Kadiravelu* (supra) it was held that where a woman of illegitimate birth, subject to the Thesawalamai, died intestate leaving her husband and no issue, the legitimate issue of the mother of the intestate was entitled to succeed to her dowry property to the exclusion of her husband.

Drieberg, J. considered the effect of section 37 of Ordinance No. 1 of 1911 which reads:—

> " When an illegitimate person leaves no surviving spouse or descendants, his or her property will go to the mother, and then to the heirs of the mother so as to exclude the Crown."

The corresponding section in Ordinance No. 15 of 1876—it is the second part of section 37—is as follows :—

> " Where an illegitimate person leaves no surviving spouse or descendants, his or her property will go to the heirs of the mother, so as to exclude the Crown."

Drieberg, J. held that section 37 of Ordinance No. 1 of 1911 did not mean that, on the failure of descendants, the husband of a wife of illegitimate birth would take the entire estate to the exclusion of her mother and the mother's heirs ; it meant that the rights of the mother of an illegitimate child were subject to the rights of the deceased's children and the rights of her husband, that is to say, " the right of the children to succeed to the entirety and the right of the husband to a separation of a half of her acquired property."

With that view, if I may say so with respect, I am in complete agreement. It was a statement of the statutory law, in so far as it was necessary for the determination of the appeal which Drieberg, J. was considering. As the deceased left no issue, as the husband had been given a half share of her acquired property, and as the mother's rights were only subject to the rights of descendants (if any) and the rights of the husband to particular property, viz. to a half of the after acquired property, the mother, and failing her, her heirs, were entitled to succeed to the dowry property to the exclusion of the husband. No further difficulty arose. The mother of the deceased was dead, but her heirs were legitimate issue; and a consideration of section 36 of Ordinance No. 1 of 1911 did not arise. It is to be noted that Drieberg, J. did not seek the aid of the principles of Roman-Dutch Law ; for, in his opinion, the point he had to decide was covered by the statutory law.

In the present case, however, there is an added difficulty. Lucia's mother is dead and, as it appears to me, the rights of her mother's other illegitimate children to succeed to any part of Lucia's property are barred by statutory law. The first part of section 37 of Ordinance No. 15 of 1876 reads :

> " Illegitimate children inherit the property of their intestate mother, but not that of their father or that of the relatives of their mother."

The relationship between a mother and her illegitimate child is well recognised in our law, and the consequence is that the respondents must fail. This being the case, and all other persons enumerated in the sections prior to

section 36 also failing, in the sense that there are no such other persons in *esse*, the entire inheritance, in my opinion, must devolve under section 36 of the Ordinance upon the appellant as the surviving spouse.

I would, therefore, allow the appeal and declare the petitioner-appellant entitled to the entirety of his deceased wife's estate with costs in both Courts.

WIJEYEWARDENE, A.J.

In this case certain questions of law arise with regard to the succession to the property of a bastard who died intestate in 1935, without leaving any descendants.

The deceased, Lucia Moraes, was the wife of the petitioner-appellant. She was an illegitimate child of one Podihamy, who was also the mother of six other illegitimate children. Podihamy herself is dead.

The respondents fall into two groups :

(*a*) illegitimate children of Podihamy;

(*b*) descendants of the deceased illegitimate children of Podihamy.

The petitioner's claim to the entire estate of Lucia Moraes was contested in the District Court by the respondents, who claimed the entirety themselves as brothers and sisters of the deceased. The learned District Judge held that the petitioner was entitled to one half and the respondents to the other half. The present appeal is by the petitioner. The respondents have not preferred an appeal against the order of the District Judge.

I propose to consider first the question of law whether the respondents have a right to succeed to any share of the estate of the deceased. I think it convenient, while discussing this question, to refer only to the rights of the respondents who are the children of Podihamy, and that it is not necessary to refer to the rights of the respondents who are the children of any deceased child of Podihamy as the last mentioned group of respondents cannot have greater rights than the other group.

The respondents' claim to a half-share of the estate is based on section 30 of Ordinance No. 15 of 1876 which reads :

> " Father and mother both failing, the property of the intestate goes to his brothers and sisters, whether of the whole or half blood, and their children and other issue by representation."

It is argued on behalf of the respondents that the section does not require that the persons described in that section as " brothers and sisters " and the " intestate" should be the issue of a legitimate union and that, in any event, the respondents could claim to be " brothers and sisters of the half blood " as they are the children of Podihamy, the mother of the intestate. The soundness of this contention could be tested by considering the following simple case—X and Y are the illegitimate sons of a woman A who is dead. Could X succeed to the estate of Y who dies intestate, leaving a spouse and no children ? Now, Y, who is an illegitimate son of A, is a relative of A. If X could succeed to any share of the intestate estate of Y under section 30 on the ground that he is a " brother " or " half brother "

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of Y, the result is that X, an illegitimate child, inherits the property of Y a relative of his mother. This right to inherit the property of a relative of the mother is denied by section 37 to illegitimate children. The portion of section 37, relevant to the present question, is as follows :—

> " Illegitimate children inherit the property of their intestate mother, but not that of their father or that of the relatives of the mother."

The correct legal position appears to be that section 30 should be read subject to section 37. The provisions of sections 26 to 36 of the Ordinance, no doubt, regulate the succession to the intestate estate of a person whether such person is an issue of a regular or irregular union ; but, where the intestate is an " illegitimate person " or the heirs are " illegitimate children " within the meaning of section 37, the earlier provisions are modified by section 37.

In view of the argument put forward on behalf of the respondents that, in the absence of any clear provisions to the contrary, Ordinance No. 15 of 1876 should not be so interpreted so as to make the law of succession under the Ordinance differ from the law which governed the devolution of estates prior to the Ordinance, I think the decision of the Supreme Court in *Sinno Appu vs. Abeywickrema* (1898) 4 N.L.R. 242 is not without some interest. In that case, the Court had to consider the succession to the intestate estate of a bastard who died before the Ordinance, leaving him surviving his mother and a " brother " and " sister " who were two " illegitimate " children of his mother. It was there held that, whether the question was decided under the North Holland Law of Inheritance or the South Holland Law of Inheritance, the " brother " and the " sister " were not entitled to claim any share of the estate.

I think, therefore, that the respondents do not inherit any share of the estate of the deceased.

It remains to consider the further question as to the rights of the petitioner. It is conceded by the respondents' Counsel that the petitioner, as spouse, gets a half share under section 26 of the Ordinance. The remaining half share also, I think, devolves on the petitioner by virtue of section 36 which reads :

> " All the persons above enumerated failing, the entire inheritance goes to the surviving spouse, if any, and if none, then to the next heirs of the intestate *per capita*."

In the case of Lucia Moraes " all the persons above enumerated " have failed within the meaning of section 36. As she was a bastard, she could not have a father entitled to succeed to her estate. Her mother predeceased her. She left no descendants. As stated by me earlier, in view of section 37, she could not have any brother, sister, grandfather or other relative entitled to succeed to her estate under the earlier provisions of the Ordinance.

I hold that the petitioner is the sole heir of the estate of the deceased, and allow the appeal with costs. The petitioner will be entitled to the costs of the inquiry in the lower Court.

Appeal allowed.

Present : HEARNE, J. & KEUNEMAN, J.

LITTLE'S ORIENTAL BALM AND PHARMACENTICALS LTD. vs USSEN SAIBO

D. C. Colombo No. 6217.

Argued on 5th & 6th September, 1938.

Decided on 9th September, 1938.

Stamp Ordinance—Stamping of pleadings and documents in civil proceedings—Value of action—Agreement, in the course of proceedings, limiting the value of claim—No formal amendment of pleadings—How should the documents and pleadings be stamped.

The plaintiff brought an action in respect of the infringement of a trade mark. He claimed no damages but valued his action at Rs. 1,000/–. The defendant counterclaimed Rs. 30,000/– as damages. Later, the plaintiff amended his plaint by adding a prayer that he be awarded damages. The parties, thereafter, agreed that the value of the damages should be Rs. 6,000/– in the event of either party succeeding in the claim for damages. The documents and pleadings were, thereafter, stamped in the Rs. 7,000/– class.

The agreement was not followed by an amendment of the pleadings. It was therefore contended that, for purposes of stamping, the value of the action should be Rs. 30,000/–.

Held : (i) That the value of the action, for purposes of stamping, was rightly regarded Rs. 7,000/–, after the agreement.

(ii) That the agreement, though not followed by a formal amendment of pleadings, can be taken into account for determining the value of the action for purposes of stamping.

Kariapper, with *C. E. S. Perera*, for defendant-appellant.

Hayley, K.C., with *C. X. Martyn*, for plaintiff-respondent.

Schokman, Crown Counsel, for Attorney-General.

KEUNEMAN, J.

This matter has been referred to us by the Registrar to determine a question relating to stamps.

The action was in respect of an infringement of a trade mark. The plaint prayed for an injunction and accounting of profits made by defendant by sales etc. and delivery of documents and labels. No damages were claimed. The subject-matter of the action was valued at Rs. 1,000/–.

The defendant, in his answer, counterclaimed the sum of Rs. 30,000/– as damages sustained by reason of the injunction issued against him.

On the authority of *Vellasamypulle vs. The Uplands Tea Estates of Ceylon Ltd.* (1 C.A.C. 108), all pleadings, documents etc. were stamped according to the Rs. 30,000/– class. That decision was to the effect that the stamp duty leviable was to be calculated upon the value of the claim in convention and reconvention, whichever happens to be the larger, and not on the aggregate amount of both the claims.

On the 20th December, 1937, during the framing of the issues, Counsel for the plaintiff moved to amend the prayer of his plaint by adding the words

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"and that the plaintiff be awarded damages." No objection was taken, and the amendment was allowed. It is to be noted that the amount of the damages claimed did not appear in the amendment.

Immediately after, an agreement was recorded as follows :—

"It is agreed that, in the event of the plaintiff succeeding in proving the infringement or the passing off, that the defendant be condemned to pay a sum of Rs. 6,000/– as damages. Likewise, it is agreed that, if the defendant succeeds in proving that he is entitled to claim damages on account of the wrongful issue of the injunction, he would be entitled to claim Rs. 6,000/– as damages."

These amendments were not incorporated in the pleadings, but, by the agreement recorded by the District Judge, the plaintiff was entitled thereafter to claim damages of Rs. 6,000/– in the event of his succeeding ; and also the defendant's claim of damages was reduced from Rs. 30,000/– to Rs. 6,000/– in the event of his proving his case.

It is contended that the Registrar need not consider this agreement for the purpose of stamping, and that the value of the case can only be varied by an amendment of the pleadings. Reliance is placed on *Perumal vs. Terrunanse* (1 N.L.R. 213). In that case, it was held that where a plaintiff, by reducing his claim by amendment of the plaint, reduces the class of the case, the stamp duty payable on proceedings after such amendment is as on an action in the lower class.

This case, however, did not lay down the rule that such a result can only be achieved by the amendment of pleadings. I agree that amendment of pleadings is the most formal and appropriate method of varying a claim, and that it is advisable, in cases such as the present, to have the alterations embodied in the pleadings. But an agreement, entered into by the parties and formally recorded by the District Judge, would be binding in an action for all other purposes; and I do not see it does not amount to an alteration of the claims of the parties, which would have effect on the questions of stamping, equivalent to an amendment of the pleadings.

I, accordingly, hold that after the recording of the agreement the defendant's claim for damages was Rs. 6,000/–.

There is one further matter. Before he claimed damages, the plaintiff valued his action at Rs. 1,000/–. Later, by virtue of the amendment of the pleadings and the recorded agreement, he added a claim for damages of Rs. 6,000/–. On the authority of *Sinapoo vs. Theivanai* (9 C.L.W. 82) to ascertain the value of the plaintiff's action, these two claims must be aggregated, and the total value of the plaintiff's claim was, accordingly, Rs. 7,000/–. This amount is larger than the amount in reconvention now reduced to Rs. 6,000/–.

I hold that stamping should be on the footing of a suit for Rs. 7,000/–.

I do not think any other matter arises before us except the decision of the question referred. Any further action which may be necessary may be taken by the Registrar or by the parties.

HEARNE, J.

I agree.

Present : KEUNEMAN, J.

THE KING vs APPUHAMY alias GOLUWA

P. C. Avissavella No. 17963.
Argued on 9th September, 1938.
Decided on 15th September, 1938.

Evidence—Evidence Ordinance section 17—*Deaf and dumb accused—Signs made by—Impression conveyed by such signs to a witness—Can the witness's interpretation of the signs be admitted in evidence.*

The accused, who is both deaf and dumb, was charged with committing mischief by setting fire to a school building. The only evidence against him was that of a witness who said that the accused woke him up at 1 a.m. in the morning of the day in question and made certain signs, from which he gathered that the accused had set fire to the school building because the school children had teased him and also because the Aratchi had failed to take any action against certain persons who had assaulted him.

Held : (i) That a witness's interpretation of the signs made by a deaf and dumb accused is not admissible in evidence.

(ii) That the signs made by an accused are admissible in evidence to prove that a particular sign or signs were made on a particular occasion.

D. W. Fernando as *amicus curiae.*
Marshall Pulle, Crown Counsel, for Attorney-General.

KEUNEMAN, J.

This is a reference by the learned Magistrate under section 288 of the Criminal Procedure Code. The accused in the case was deaf and dumb from birth and is unable to read or write, and it has not been found possible to make him understand the nature of the proceedings or to find anyone who can interpret to him the evidence in the case. The accused was undefended. The charge is causing mischief by fire. The evidence, so far as it goes, appears to negative insanity, but there is no medical evidence in the case. The accused has been committed for trial in the higher Court.

I set the matter down for hearing as I was not satisfied that there was legal evidence on which the committal could be made, and I am indebted to Counsel who appeared as *amicus curiae* and for the Crown for their help in elucidating this matter.

The only evidence to justify the committal, as far as I can see, is the evidence of Ukkuhamy, the elder brother of the accused. " On the 6th June, 1938, at about 1 a.m., this accused came to my house when I was asleep and put me up by shouting aloud, and by means of signs he made me understand that he had set fire to the school, and called me to accompany him to the Kuruwita Police Station. He also made me understand that he had set fire to the school as the boys in the school were teasing him,

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as his hair had been cropped very short..... Accused also made me understand that he set fire to the school owing to another reason viz. because the Aratchi had failed to take any steps in the case where he had been assaulted. This is what I understood from his signs, as far as I was able to do so."

The point for consideration is whether this evidence is admissible evidence. The only evidence tendered is that a particular witness interpreted the signs made in a particular manner, but there is no evidence that the witness reproduced these signs in Court, or that the Court made any attempt to interpret these signs. I do not think that the interpretation of the signs given by Ukkuhamy is admissible evidence. In *Alisandiri vs. The King* (38 N.L.R. 257)* Soertsz, J., in dealing with a different matter viz. signs made by a dying person in answer to a question put to him, ruled that, evidence as to the signs made in reply to the question was admissible, but that statements of witnesses as to what interpretation they put on the signs were not admissible. The Privy Council did not differ from or criticize the correctness of this finding.

The further question is whether evidence of signs made by the accused would amount to an "oral" statement within the meaning of section 17 of the Evidence Ordinance. Section 17 (1) speaks of an admission being a statement "oral or documentary." Section 17 (2) states that a confession is an admission.

In *Alisandiri vs. The King* (supra) the Privy Council had to interpret not section 17 but section 32. They held that a sign made by a dying person in response to a question was a "verbal" statement under section 32. They added, "It is to be observed that, in the section, the word used is 'verbal' and not 'oral' which is used elsewhere in the Ordinance e.g. in section 3 and section 119 in reference to evidence given in Court. It is unnecessary to decide whether the question put 'was it Alisandiri ?' and the nod of assent would have constituted an oral statement made by the deceased; but their Lordships are clearly of opinion that it constituted a verbal statement made by her."

In *Queen Empress vs. Abdulla* (1 L.R.I. All. 385) Petheram, C.J. said, "'Verbal' means by words. It is not necessary that the words should be spoken. If the term used in the section was 'oral' it might be that the statement must be confined to words spoken by the mouth. But the meaning of 'verbal' is something wider."

In this case, there is a complete absence of evidence as to what the 'signs' made by the accused to his brother were. It does not appear likely that the statement of the accused was 'oral' in the sense of 'words spoken

* 7 C.L.W. p. 11 (Edd.)

by the mouth.' Even if ' oral ' can be given an extended meaning, there is no evidence of ' signs ' which can come within such extended meaning.

Crown Counsel has referred me to section 8 of the Evidence Ordinance, and argued that the ' signs,' if proved, may be conduct within the meaning of that section and admissible as such.

In this case, I cannot see that the conduct of the accused is relevant, once the alleged ' statement ' is shut out, or points, with any reasonable certainty, to his guilt.

I think the accused in this case is entitled to a discharge, and I order that he be discharged.

Accused discharged.

Present : HEARNE, J. & KEUNEMAN, J.

VANDERPOORTEN vs RANASINGHE

S. C. No. 130A—*D. C. (Inty.) Colombo No.* 889.

Argued & Decided on 6th September, 1938.

Contempt of Court—Giving false evidence in the course of proceedings in a Civil Court.

Held : That a person should not be convicted for contempt of Court by giving false evidence unless it is clear from the evidence that the false evidence was given with a contumacious intent.

Hayley, K.C., with *N. M. de Silva,* for appellant.

HEARNE, J.

On the conclusion of the case No. 889, District Court Colombo, the Judge, who apparently formed the impression that the Fiscal's Server had given false evidence, called upon him to show cause why he should not be punished for contempt of Court in giving false evidence by stating that he affixed the summons and the notice of a decree *nisi* to a house which had no number, whereas in fact he affixed it to a house bearing No. 22. Whatever may be said or thought of the rest of the evidence of the Fiscal's Server, it would appear to me that, in regard to that portion of his evidence which was selected by the Judge, there is no evidence to the contrary that the Fiscal's server was not in fact speaking the truth. There is evidence in the case of the existence of a house which is referred to as No. 22, but no specific evidence that there is a house which bears No. 22 upon it.

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On the question of whether perjury as such, in the absence of a finding of contumacious intention on the part of the person who, it is thought, has committed perjury, is punishable as a contempt of Court, I would refer the Judge to the case of *Asanar vs. Andrew* (15 N.L.R. p. 406). It would appear that there should be a specific finding of contumacious intent.

In the circumstances, I would allow the appeal and set aside the finding of contempt and direct that the fine of Rs. 50/- imposed should be refunded to the appellant.

KEUNEMAN, J.

I agree.

Appeal allowed.

Present : MOSELEY, J.

SEETI vs MUDALIHAMY

P. C. No. 171—*P. C. Avissavella No.* 16203.
Argued on 11th July, 1938.
Decided on 27th July, 1938.

Maintenance—Dismissal of application on merits—Is it a bar to a further application.

Held : That, once an application for maintenance is dismissed on its merits, a fresh application in respect of the same claim cannot be entertained.

Colvin R. de Silva for applicant-appellant.
H. V. Perera, K.C., with *J. A. T. Perera*, for defendant-respondent.

MOSELEY, J.

The appellant instituted proceedings against the respondent for maintenance in respect of her four children of whom, she alleged, he was the father. At the hearing, Counsel for the respondent took the point that a previous application by the appellant (in P. C. Avissavella No. 13836) had been dismissed and that, in the circumstances, fresh proceedings could not be instituted. The facts relating to the previous application are as follows. When the case came on for hearing, the applicant intimated, according to the journal entry, that she had no witnesses present who could prove that the defendant was the father of the children. The Magistrate thereupon dismissed the application. Subsequently, the applicant petitioned the Magistrate, who re-opened the case. The defendant admitted paternity and left it to the Court to fix the amount of maintenance. He was ordered to pay Rs. 40/- per mensem.

This appears to have shocked the defendant, who appealed against the validity of the proceedings and the amount of maintenance ordered.

The appeal was argued before Abrahams, C.J. who, in dismissing the appeal, made the following observations :—

> " It is obvious that the learned Magistrate had no power to re-open a case once dismissed, whatever might be his anxiety to do justice. Counsel for the respondent admits that this re-hearing was illegal, but makes the somewhat faint submission that the appellant cannot complain as he accepted the jurisdiction of the Court in the matter and, indeed, offered to abide by the decision of the Magistrate as to the amount of maintenance, which he agreed to pay. But the agreement of parties to submit to the decision of a Court which has no jurisdiction cannot confer jurisdiction. He then makes the ingenious suggestion that the proceedings should be treated, not as a re-opening of the case, but as fresh proceedings in maintenance, and cites the case of *Beebi vs. Mahmood* (1921 23 N.L.R. 123) where Shaw J. held that fresh proceedings in maintenance could be instituted even by a party whose case had been dismissed, provided that the case had not been dismissed on the merits But the respondent's case had been dismissed on the merits as she admitted she had no witnesses to support her claim—not that she had no witnesses but had been unable to bring them on the day of trial, whereas in *Beebi vs. Mahmood* (supra) it would appear that there were witnesses, but they had not been brought. The implication in the petition that the respondent had witnesses, but had been induced by the appellant's promises not to bring them, ought not to be permitted to prevail over the statement in the first case that she had no witnesses present. Had she intended to inform the Magistrate that there were witnesses but that she had not brought them for some reason or other, she would surely have said as much. Further, the request of the respondent in her petition was, not for the grant of a maintenance order, but for some order or direction to the appellant calculated to cause him to fulfil his promise to pay money and to transfer a piece of land." (17 Ceylon Law Recorder 108.)*

Thereupon, the present proceedings were instituted and, as I observed at the outset, the point was taken that, the previous application having been dismissed, fresh proceedings could not be instituted. The learned Magistrate was referred to the judgment of Abrahams, C.J. (17 C.L.R. 108).* The question which he set himself to answer was whether the previous order of dismissal was made without enquiry into the merits. He found that the question had already been answered by the Chief Justice in unmistakable terms in the negative, that is to say, that the case had been dismissed on the merits.

The application was, accordingly, dismissed; and against that order of dismissal the applicant now appeals.

Counsel for the appellant contended that the learned Magistrate has erred in considering himself bound by observations of the learned Chief Justice, which, says Counsel, are merely *obiter dicta*, and were unnecessary for the decision of the appeal. He says that the only point for decision

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* 9 C.L.W. p. 86

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was whether the proceedings had been rightly re-opened, and that, once it had been held that the Magistrate had no power to re-open the case, there the matter ended. But the propriety of re-opening the proceedings was not the only point for decision. As will be seen from the judgment of Abrahams, C.J. which I have quoted above, it was at the request of Counsel for the respondent (the present appellant) that the proceedings challenged should be treated, not as a re-opening of the case, but as fresh proceedings. In support of his request, he cited the case of *Beebi vs. Mahmood* (23 N.L.R. 123) as authority for the proposition that there is no bar to a fresh application where an application for maintenance is dismissed without going into the merits. It seems to me that it was then incumbent upon the learned Chief Justice to find whether the application had in fact been dismissed without enquiry into the merits, and he proceeded to find that there had been such an enquiry. That was a finding of fact which was necessary for the decision of the appeal.

The present appeal was fully argued from every angle, but. in view of the opinion which I have just expressed, no further consideration is necessary.

The appeal is dismissed.

Appeal dismissed.

Present: HEARNE, J., KEUNEMAN, J. & WIJEYEWARDENE, A.J.

MUTTUCARUPPEN CHETTIAR AND ANOTHER vs VELUPILLAI

S. C. No. 61—*D. C. Kegalle No.* 97.

Argued on 5th September, 1938.

Decided on 14th September, 1938.

Public Servants' (Liabilities) Ordinance—Unregistered sub-overseer of the Public Works Department—Is he entitled to the benefit of the Ordinance—Does a break in the continuity of service prevent the benefit of the Ordinance being claimed while in service.

The defendant, an unregistered sub-overseer of the Public Works Department, was sued on a promissory note executed in 1930 while he was a sub-overseer. He was discontinued, as a measure of retrenchment, in 1933, and re-engaged as an unregistered sub-overseer in 1935.

The action was filed after the defendant had been re-engaged.

Held : (*Keuneman, J. dissentiente*) (i) That an unregistered sub-overseer of the Public Works Department, employed on the terms on which the defendant served, was entitled to claim the benefits of the Public Servants' (Liabilities) Ordinance.

(ii) That the defendant was, in spite of the break in the continuity of his service, entitled to claim the benefit of the Ordinance in an action brought while in service in respect of a debt contracted when he was serving in the Public Works Department.

N. Nadarajah, with *D. W. Fernando* and *H. W. Thambiah*, for plaintiffs-appellants.

S. Nadesan, with *C. Renganathan*, for defendant-respondent.

HEARNE, J.

This appeal, which was originally before a Bench of two Judges, has been referred to one of three Judges.

The defendant was employed by the Public Works Department, in the capacity of an unregistered sub-overseer, from 1926 to 1933, during which period, viz. in 1930, he executed a promissory note in favour of the plaintiffs. In 1933, he was retrenched and was re-engaged in the same capacity in June 1935, and it is agreed that the defendant had rejoined the Public Works Department when the action was instituted.

Two questions require to be answered. Is an unregistered sub-overseer a public servant for the purposes of the Public Servants' (Liabilities) Ordinance 1899 ; and, secondly, if so, did the defendant, within the meaning of sub-section 3 of section 3, execute the promissory note sued upon prior to the date when he became a public servant.

In regard to the second question, assuming that an unregistered sub-overseer is a public servant, it is clear that, in relation to the period subsequent to the defendant's re-engagement (1935), the execution of the

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promissory note was before he became a public servant, and that, in relation to the period 1926-1933, the execution of the promissory note was after he became a public servant. In construing sub-section 3 of section 3, I assume that the legislature was aware of the fact that there are persons who become public servants, cease to be public servants and, later, become public servants again. Bearing this in mind and noting that there is no differentiation in the Ordinance between such a person and one who has been continuously in Government service, that is to say, with no broken periods of service, I would interpret the phrase "a liability contracted by a person prior to the time when he became a public servant" to mean "a liability contracted by a person at a time when he was not a public servant," and, in this view, the defendant did not execute the promissory note at a time prior to the date when he became a public servant.

It may, at first sight, appear anomalous that the plaintiffs, between 1933 and June 1935, could sue the defendant, and that, after the latter date, they could not do so; but I think the apparent anomaly vanishes when one considers the purpose of the Ordinance which is the protection not of the individual but of the public.

The next question is whether an unregistered overseer is employed in the service of the Government. He is given work when work is available and is paid only for the days on which he works. The provision of work only when available and the payment for such work at a daily rate do not, in my opinion, determine the question. The tests that have been applied by this Court are continuity of service and obligation to work. An unregistered overseer is under an obligation to present himself from day to day, for he cannot absent himself without leave; he is liable, while he is an unregistered overseer in the books of the Public Works Department, to be called upon to perform work at any time at the option of that Department, and he is bound to discharge the work he is called upon to do. The conditions of his employment, in my opinion, satisfy the tests both of continuity of service and of obligation to work.

The District Judge found in favour of the defendant and dismissed the plaintiffs' action. I would, therefore, dismiss the appeal with costs.

WIJEYEWARDENE, A.J.

The plaintiffs-appellants sued the defendant-respondent for the recovery of an amount due on a promissory note made by him in April, 1930.

The defendant was employed as an unregistered sub-overseer in the Public Works Department from 1926 to 1933, when his services were dispensed with owing to the policy of retrenchment then adopted in the Government Departments. He was re-employed in June, 1935, as an unregistered sub-overseer, and continues to be so employed up to date. The present action was instituted after the defendant's re-employment in June, 1935.

This case has come before a Bench of three Judges for the determination of the following questions of law:

1. Is an unregistered sub-overseer in the Public Works Department a Public Servant within the meaning of "The Public Servants' (Liabilities) Ordinance of 1899?

2. Is the defendant debarred from claiming the benefit of the Public Servants' (Liabilities) Ordinance 1899 by reason of the fact that he was not a Public Servant from 1933 to June, 1935?

The first question of law is covered by authority. In *Weerasinghe v. Wanigasinghe* * it was held by Drieberg J. and Akbar J. that an unregistered sub-overseer in the Public Works Department was entitled to claim the benefit of the Ordinance as a "Public Servant" within the meaning of the Ordinance. If I may say so, I agree with the learned Judges who gave decision in that case, and answer the first question in the affirmative.

The argument of the appellants' Counsel on the second question of law turns on the construction of section 3 (3) of the Ordinance. This sub-section provides that the protection afforded by the Ordinance does not extend to a "liability contracted by a person prior to the date when he became a Public Servant." It was argued for the appellant that the note in question was made before June, 1935, when the defendant became a "Public Servant" on his re-employment, and the defendant was not, therefore, entitled to claim the benefit of the Ordinance as "the date" mentioned in the sub-section could refer only to the date of re-employment and not to the date of the earlier employment.

It appears to me that the construction sought to be placed by the appellants' counsel necessitates the reading of the sub-section as if in place of the words "when he became a Public Servant" the legislature has used the words "when he became *such* Public Servant."

It was, then, argued that, if it was possible for the sub-section to be so interpreted as to make the "date" refer to the date of the first employment, such an interpretation would result in giving protection to the defendant even in respect of a promissory note made by him during the period of unemployment between 1933 and June 1935, as such a document would then be a document executed subsequent to the date when he became a "Public Servant." This was, however, effectively met by the respondent's Counsel who submitted that, in whatever way sub-section 3 was construed, sub-section 1 made it clear that a "Public Servant" could claim a benefit under the Ordinance only in respect of liabilities incurred by him when he was a "Public Servant" and, therefore, the defendant would in no case be protected from liability on a promissory note made by him between 1933 and June 1935.

I think that the interpretation of this sub-section should be considered in the light of the other provisions of the Ordinance. The Ordinance seeks to protect Public Servants from certain liabilities enumerated in section 3 (1). The other sub-sections of section 3 are in the nature of exceptions

* (1932) 34 New Law Reports 185, 1 C.L.W. p. 316.

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engrafted to the general enactment which has been passed to prevent the Public Service from being obstructed as a result of legal proceedings against Public Servants. These sub-sections should not, therefore, be given an extensive interpretation tending to defeat the purpose of the Ordinance. A study of the provisions of the whole Ordinance shows that the Ordinance does not invalidate any document made by a "Public Servant." The object of the Ordinance is only to prohibit an action being instituted against a "Public Servant" in certain circumstances, and this is brought out clearly by section 4, which penalises the person who brings an action in contravention of the Ordinance, by providing that the document, in respect of which the action was brought, would become void as a result of the institution of the action.

In *Narayanan Chetty v. Samarasinghe* † it was held that the Ordinance did not prevent a person who had ceased to be a "Public Servant" from being sued on a note made by him when he was a "Public Servant."

In *Samsudeen Bhai v. Goonewardena* ** it was held that a "Public Servant," who, when sued, failed to plead the benefit of the Ordinance, was not debarred from raising the plea in execution proceedings against him in the same action, even though he had ceased to be a "Public Servant" at that stage.

The combined effect of these decisions is that the Ordinance prohibits proceedings against persons who are "Public Servants" at the time of the institution of such proceedings and if the proceedings are for the enforcement of certain liabilities enumerated in the Ordinance, provided that such liabilities were incurred by a "Public Servant" at a time when he was a "Public Servant."

I am, therefore, of opinion that section 3 (3) does not exempt the note in question from the operation of the Ordinance, as the note was in fact made after the defendant first became a "Public Servant" in 1926. If the note had been made during the intervening period of unemployment, an action could have been brought on the note as the provisions of section 3 (1), which is the main section dealing with actions against Public Servants, do not apply to such an action.

I answer the second question in the negative, and hold that the appeal should be dismissed with costs.

KEUNEMAN, J.

This is an action on a promissory note brought by plaintiffs against defendant. A number of issues were framed, among them the following :—

(4) Is the defendant a Public Servant ?

(5) If so, is the action maintainable against him ?

(4*a*) Was the defendant a Public Servant at the date of the execution of the promissory note filed of record ?

(5*a*) If not, is he entitled to plead the Public Servants' (Liabilities) Ordinance?

On the application of both Counsel, the issues (4) and (5) and (4a) and (4b) were tried first, and the learned District Judge held, on these issues, in favour of the defendant, and dismissed the action with costs.

† (1907) 3 Balasingham's Reports 243.
** (1935) 37 New Law Reports 367.

The defendant, in this case, is an unregistered overseer employed by the Public Works Department. He was first employed in 1926. His employment was terminated in June, 1933, but he was re-employed in June, 1935, before the date of the present action. The promissory note was executed by him in April, 1930, during his first period of employment.

There is a distinction in the Public Works Department between a registered and an unregistered overseer. The unregistered overseer is appointed with the approval of the Provincial Engineer, and his services can be terminated with the consent of the Provincial Engineer. He is paid on the basis of a daily paid servant and gets payment only for the days he works. He is entitled, after continued service for two years, to sick leave with pay for about seven days. He is entitled to casual leave and compulsory leave. He is not entitled to pension, but he is entitled to a gratuity after fifteen years' service. He is not entitled to holiday warrants. He cannot keep away from work without the permission of the District Engineer. He can be discontinued when there is no work for him. There is no obligation on the part of Government to find him work. He is not on the permanent establishment of Government.

The registered overseer, on the other hand, derives his appointment from the Director of Public Works and cannot be dismissed without the approval of the Director. He can obtain leave with pay. He is entitled to holiday warrants, and to a pension. He is paid by the month.

Both classes of overseers are in charge of stores, *i.e.* tools and other material, and, according to the defendant, even an unregistered overseer has to provide security in a sum of Rs. 150/- in respect of the stores, this sum being made up by contributions to Government of $4\frac{1}{2}\%$ of his pay.

The defendant is now in the position of an unregistered overseer, paid at the rate of Rs. 1/75 a day.

Two questions have been referred to us for decision:

> (1) Is an unregistered overseer, in the position of the defendant, a Public Servant within the meaning of Ordinance No. 2 of 1899 ?
>
> (2) If (1) is answered in the affirmative, does the fact that defendant was a Public Servant at the time he executed the promissory note and at the time he was sued, enable him to plead Ordinance No. 2 of 1899, in spite of the fact that there has been a break in his service between those dates ?

As regards the first question, there is a direct authority in *Weerasinghe v. Wanigasinghe* (34 N.L.R. 185) which the learned District Judge followed. In that case, Drieberg, J. and Akbar, J. held that an unregistered overseer is a Public Servant under Ordinance No. 2 of 1899. We have to consider whether this case was rightly decided. Section 2 of Ordinance No. 2 of 1899 defines "Public Servant" as "a person employed in the service of the Government of the Colony....." This is a very wide definition and makes no reference to permanency or fixity of service, or to receipt of salary or remuneration. The section does, however, imply that there must be a contract of service.

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In *Palaniappa Chetty v. Fernando* (1 A.C.R. 27), Grenier A.P.J. held that a tide-waiter was not a Public Servant, on the ground that he held no fixed appointment but was a person who did job work for which he was paid a daily wage, getting 37½ cents a day when he worked and, if he chose not to work, he could stay away. The fact that he was paid out of Government funds did not make him a Public Servant.

In *Perera v. Perera* (13 N.L.R. 257), Wood Renton J., in a case where the defendant was paid by the day and was fined if he absented himself without leave, held that the defendant was a Public Servant and, apparently, that he held a fixed appointment.

In *Saibo v. Punchirala* (18 N.L.R. 249), De Sampayo A.J. held that a person holding the office of a Aratchi and Police Headman was a Public Servant, although he was not in receipt of a salary. He added, "The servant, in order to be entitled to the benefit of the Ordinance, must no doubt have a fixed appointment, but the appointment need not have a salary attached to it."

I have already pointed out that the words "fixed appointment" do not occur in section 2. Those words, however, are to be found in section 3 (2) which excludes from the operation of section 3 (1) a public servant "who, at the time the liability sought to be enforced is contracted, is in receipt of a salary in regard to his fixed appointment of more than Rs. 300/– a month."

I am not clear why the words "fixed appointment" have been singled out for emphasis, nor why these words have been imported into the definition of the term "Public Servant." It is, however, possible that, in view of the nature of this Ordinance which interferes with the right of contract between individuals, as strict a definition as possible should be given to the words "employed in the service of Government." In considering what amounts to "service," I think we are justified in excluding service which is merely casual, and does not imply an obligation to perform the service on the part of the servant.

In *Weerasinghe v. Wanigasinghe* (34 N.L.R. 185),** one test which has been applied by Drieberg J. is continuity of service. He states, "The conclusion to be drawn from the evidence is that, an unregistered overseer would ordinarily continue in the service of Government just as a registered overseer would. His services could be discontinued, if that be necessary, for such a reason as retrenchment; but, so can the service of any public officer; but, otherwise, he would look to continuing service, and Government would not terminate his services so long as he was satisfactory."

This test of continuity of work was also applied in *Jayasinghe v. Jayatilleke* (35 N.L.R. 369)* to the case of a Registrar of births, deaths and marriages, and Dalton A.C.J. thought that such a person failed to satisfy the test. See also *Saravanamuttu v. Saravanamuttu* (37 N.L.R. 98) where, applying this test of continuing service, Akbar J. held that a pay-agent under the Medical Department was a public servant.

** 1 C.L.W. 316 (Edd) * 2 C.L.W. 322

I take it that a person who is employed by Government for a fixed term of continuous service would fall within the definition of a "Public Servant." The fact that the service is for an indefinite period would, I think, make no difference, provided the service is continuous and that there is an obligation on the part of the person employed to render continuous service.

Applying this test, I hold that the defendant, as unregistered overseer, is a "public servant."

The second question referred to us depends on an interpretation of section 3 (1) and section 3 (3).

Section 3 (1) states, "No action shall be brought against a public servant....." This certainly requires that the person sued should be a public servant at the time the action is brought. It does not extend to a person who, once having been a public servant, has ceased to fill that character—*Narayan Chetty v. Samarasinghe* 3 Bal. Rep. 243. It has been argued before us that, under section 3 (*a*) (*b*) and (*c*), the person must have been a public servant at the time the liability was incurred; but I cannot read such a construction into these clauses. I am of opinion that section 3 (1) merely requires that the person sued should be a public servant at the date of action.

Section 3 (3) says, "This section shall not apply to a liability contracted by a person prior to the date when he became a public servant."

The question, in the present case, is whether that date is 1926 or June 1935 for the purposes of the Ordinance, in other words, the date of the first appointment or the subsequent appointment. The liability was contracted in 1930, between these two dates.

It was argued by Counsel for the appellant that, the words "the date" in section 3 implied that the date referred to the date of appointment as such public servant. I think the use of the definite article may have some importance, but I prefer to rest my decision on another ground.

There have been in this case two dates on which defendant became a public servant. The plaintiffs have established that the liability was incurred before the date when the defendant became a public servant in June, 1935, and that is sufficient to give the plaintiff the right to claim that the case falls outside the Ordinance. With regard to an Ordinance like the present, where the ordinary rights and liabilities under contracts are interfered with, I do not think we should strain the language of the Ordinance to secure immunity for the public servant. No doubt, the immunity was created for the benefit of the public, but, as the preamble of the Ordinance shows, this immunity was "in respect of certain liabilities."

I do not think this interpretation is opposed to the spirit of the Ordinance. Clearly, the defendant could have been sued at any time after he ceased to be a public servant and before June 1935, and I do not think he should be allowed to escape a liability which was in existence at the time he became a public servant in June 1935.

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Further, if we were to hold that the date mentioned in section 3 (3) was the date of the first appointment of the defendant, viz. 1926, the result would be that even liabilities contracted between June 1933 and June 1935, when defendant was not a public servant at all, cannot be put in suit as long as he remains a Public Servant. I do not think this is in accordance with the policy of the Ordinance.

It was contended that, because defendant was a Public Servant in 1930 when the liability was contracted and also was a public servant when he was sued, the Ordinance applies. I cannot see any language in section 3 (3) which warrants such an interpretation. If such had been the intention of the Ordinance, I think clear words would have been employed to express that intention. The difficulty in interpreting the Ordinance, I think, arises from the fact that the draftsman never contemplated more than one appointment which continued from the date when the liability was contracted until the date of action.

I hold that the defendant is not entitled to avail himself of Ordinance No. 2 of 1899 and I, accordingly, set aside the order of dismissal of the action and send the case back for trial of the other issues. The appellant is entitled to the costs of the enquiry in the Court below and of the appeal. All other costs will be costs in the cause.

Appeal dismissed.

Present: HEARNE, J. & WIJEYEWARDENE, A.J.

THAMBIAH vs KASIPILLAI

S. C. No. 65—*D. C. Jaffna T. R.* 45

Argued on 20th September, 1938.

Decided on 23rd September, 1938.

Stamp Ordinance—Proceedings under Section 112 *of the Trusts Ordinance—How should the pleadings and documents be stamped.*

Held : The proceedings under section 112 of the Trusts Ordinance do not fall under the special item provided under head, Miscellaneous in Schedule B Part II of the Stamp Ordinance and should be stamped with *ad valorem* duty.

PER WIJEYEWARDENE, A.J. " It may become necessary, when the occasion arises, to examine more closely the view expressed by the learned Judge in *Sathasivam v. Vaithianathan* (supra) that all actions relating to public charities under Chapter 10

of the Trusts Ordinance are chargeable as of the value of Rs. 1,000/–. It is not unlikely that the view may be taken that this special provision applies only to actions under the first paragraph of section 101, which was enacted in place of Chapter 45 of the Civil Procedure Code. But, as I am of opinion that the present proceedings do not fall under Chapter 10 of the Trusts Ordinance, it is not necessary to pursue this question further."

H. V. Perera, K.C., with *N. Nadarajah, E. B. Wickremanaike* and *C. J. Ranatunga*, for petitioner-appellant.

Hayley, K.C., with *H. W. Thambiah*, for respondent.

HEARNE, J.

The plaintiff, claiming to be the hereditary trustee and Manager of a Hindu Temple, petitioned the Court to make a vesting order in his favour in terms of section 112 of the Trusts Ordinance No. 9 of 1917. His petition was dismissed; and he has appealed. The subject-matter of the petition was valued at Rs. 20,000/–. If it is on the basis of this valuation that the petition of appeal required to be stamped, it is understamped to the extent of Rs. 5/–; and, similarly, the tender of stamps for the Supreme Court decree and the certificate in appeal falls short of Rs. 5/– of the requirements of the Stamp Ordinance. In these circumstances, Counsel for the respondent, on a preliminary objection, asked for the appeal to be dismissed.

Schedule B of the Stamp Ordinance (No. 22 of 1909), as re-settlde in 1919, provided that " actions relating to public charities under Chapter XLV of the Civil Procedure Code shall be charged as of the value of Rs. 1,000/–." Chapter XLV of the Code has, however, been repealed in 1917 by the Trusts Ordinance (No. 9 of 1917), and has been re-enacted by certain sections in Chapter X of the Trusts Ordinance. In order to give effect to the intention of the Legislature which has been lost or, at least, obscured by this inadvertence, it was held in *Sathasivam v. Vaithianathan* (1922) 24 N.L.R. 94, that " actions relating to public charities under Chapter X of the Trusts Ordinance are chargeable as the value of Rs. 1,000/–." Counsel for the appellant sought to extend the application of that decision to a petition under section 112 of the Trusts Ordinance.

Chapter XLV of the Code makes provision for particular proceedings to be taken for certain specified purposes by or with the consent of the Attorney-General, and I am unable to give the benefit of the provision in Schedule B of the Stamp Ordinance (supra) to a person initiating proceedings under the Trusts Ordinance unless these proceedings are under one of the sections of the Trusts Ordinance which re-enacted Chapter XLV of the Code; and section 112 is not one of those sections.

It was argued that the proviso in section 101 of the Trusts Ordinance attracted to and, in effect, incorporated in that section which is contained in Chapter X, section 112 which is not in Chapter X. I cannot uphold this contention. The proviso referred to is merely a saving clause. It saves actions elsewhere available under the Ordinance.

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Counsel for the respondent raised another objection to the constitution of the appeal on the ground that the petition of appeal and security had been signed by a proctor by virtue of a power of attorney which had not been stamped. It is unnecessary to examine this objection.

I would dismiss the appeal with costs.

WIJEYEWARDENE, A.J.

The present appeal arises in respect of a petition filed by the appellant, in the District Court of Jaffna, claiming to be the hereditary manager and trustee of a Hindu Temple. He avers that the respondent wrongfully claimed to be the manager of the temple and was preventing him from exercising "his rights as sole manager and trustee of the temple and its temporalities." In paragraph 10 of the petition, he sets out the purpose of his petition as follows :—

> "In order to enable the petitioner more effectually to manage the said temple and its temporalities, it is necessary that a vesting order should be entered in terms of section 112 of Ordinance No. 9 of 1917 vesting the temple, referred to above, and the temporalities, described in the schedule annexed hereto in the petition, as sole hereditary manager and trustee."

He values the subject-matter of the petition at Rs. 20,000/–.

The District Judge held that the dispute between the petitioner and the respondent, as regards the managership and the trusteeship, should first be settled by a regular action before the petitioner asks for a vesting order under section 112 of the Trusts Ordinance 1917 ; and dismissed the application of the petition.

The petitioner appeals against this order.

Counsel for the respondent has raised the following preliminary objections against the appeal being entertained by this Court :

1. The stamps tendered for the decree of this Court and the certificate in appeal are insufficient.
2. The petition of appeal is insufficiently stamped.
3. The proxy given by the petitioner to his proctor is not stamped and, therefore, the petition of appeal and the security bond, both of which are signed by the proctor, cannot be acted upon.

I shall deal with the first two objections as, in view of the decision I have reached with regard to them, it is not necessary for me to consider the third objection.

"The Property and Trustees Ordinance 1871" (Ordinance No. 7 of 1871) provided, *inter alia*, for the nomination of trustees by District Courts and the vesting of property in such trustees. It further provided that, all appeals to the Supreme Court from the orders made under the Ordinance by any District Court "shall be subject to the same rules, regulations and practice as exist with respect to interlocutory appeals from District Courts." This Ordinance was held to be applicable to public charitable trusts. (*Muttiahvillai v. Sanmugam Chetty* *).

The Civil Procedure Code 1889 enacted in Chapter 45 that, in case of any alleged breach of a trust created for public charitable purposes, or whenever

* (1900) 14 New Law Reports 15

the direction of the Court was deemed necessary for the administration of any such trust, the Attorney-General, or two or more persons interested in the trust (with the written consent of the Attorney-General) could institute an action for the purpose of obtaining a decree.

(*a*) Removing any trustee and, if necessary, appointing new trustees.
(*b*) Vesting any property in the trustee.
(*c*) Declaring the properties in which its objects are entitled.
(*d*) Authorising the whole or any part of the property to be sold or otherwise dealt with.
(*e*) Settling a scheme of management; or
(*f*) Granting any other relief.

Ordinance 22 of 1909 provides that instruments and documents shall be chargeable with duty of the amount indicated in schedule B of the Ordinance. Now, schedule B contains in Part ii "the Duties on Law Proceedings," and has, under the heading "Miscellaneous," the following provision :—

"Actions relating to public charities under Chapter 45 of the Civil Procedure Code shall be charged as of the value of Rs. 1,000/–."

The position, therefore, until 1917 (when the Trusts Ordinance was passed) was that, while actions under Chapter 45 of the Civil Procedure Code were chargeable with stamp duty as actions of the value of Rs. 1,000/–, other actions in respect of charitable trusts falling, for instance, under Ordinance No. 7 of 1871, should have been chargeable with an *ad valorem* duty as provided in that portion of schedule B Part ii of the Stamp Ordinance, 1909, which contained the "Duties on Law Proceedings."

The Trusts Ordinance No. 9 of 1917 repealed Ordinance No. 7 of 1871 and Chapter 45 of the Civil Procedure Code, 1889. Sections 99 to 109, constituting Chapter 10 of the Trusts Ordinance, 1917, refer to charitable trusts. The first part of section 101 is a re-enactment with some slight modifications of the provisions of Chapter 45 of the Civil Procedure Code.

Now, by virtue of section 10 of the Interpretation Ordinance 21 of 1901, the reference to Chapter 45 of the Civil Procedure Code, in the special provision under the heading "Miscellaneous" in schedule B Part ii of the Stamp Ordinance 1909, would have been read as a reference to the first paragraph of section 101 of the Trusts Ordinance 1917. The position, then, with regard to the duty which actions in respect of public charitable trusts attracted, was that actions under the first paragraph of section 101 of the Trusts Ordinance would be charged as of the value of Rs. 1,000/–, while all other actions in respect of such trusts would be chargeable with an *ad valorem* duty as indicated in Schedule B Part ii of the Stamp Ordinance.

In 1919 and later, the Schedule B of the Stamp Ordinance was repealed and re-enacted with some alterations, but, by an oversight on the part of the draftsman, it continued to contain a reference under the heading "Miscellaneous" to actions under Chapter 45 of the Civil Procedure Code, though at that time this Chapter had been repealed by the Trusts Ordinance 1917.

In this state of the legislation on the subject, this Court decided in *Sathasivam v. Vaithianathan* † the question of the stamp duty leviable in

† (1922) 24 New Law Reports 94

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respect of proceedings connected with charitable trusts. After considering section 116 of the Trusts Ordinance, Bertram, C.J. and Schnieder, J. held in that case :

(*a*) That actions relating to public charities under Chapter 10 of the Trusts Ordinance were chargeable as of the value of Rs. 1,000/–.

(*b*) That section 116 (3) was a special enactment referring to proceedings of a special nature by petitions under sections 35, 74 and 76 and other sections of the Trusts Ordinance.

It may become necessary, when the occasion arises, to examine more closely the view expressed by the learned Judge in *Sathasivam v. Vaithianathan* (supra) that all actions relating to public charities under Chapter 10 of the Trusts Ordinance are chargeable as of the value of Rs. 1,000/–. It is not unlikely that the view may be taken that this special provision applies only to actions under the first paragraph of section 101, which was enacted in place of Chapter 45 of the Civil Procedure Code. But, as I am of opinion that the present proceedings do not fall under Chapter 10 of the Trusts Ordinance, it is not necessary to pursue this question further.

The learned Counsel for the respondent argued that the present proceedings were under Chapter 10, and referred to the second paragraph of section 101 in support of his argument. This paragraph reads :—

> " Nothing contained in this, or the next succeeding section, shall be deemed to preclude the trustee or author of any charitable trust from applying to the Court, by action or otherwise, for such direction or relief as he may be entitled to obtain under the general provisions of this Ordinance, or for the purpose of invoking the assistance of the Court for the better securing of the objects of the trusts, or for regulating its administration or the succession of the trusteeship ; and, upon any such application, the Court may make such order as it may deem equitable."

This paragraph, it is clear, does not create a new action. It only saves actions available under other provisions of the Ordinance. Such actions would therefore be actions under other provisions of the Ordinance and not under section 101. The present action, which contains a specific reference to section 112 and that section alone, cannot be regarded as an action under section 101 or any other section of Chapter 10 but as an action purporting to be under section 112 which falls outside Chapter 10.

The present proceedings, therefore, would be chargeable with an *ad valorem* duty and, according to the provisions of the Stamp Ordinance 1909 as amended by Ordinance 19 of 1927, the petition of appeal should bear a stamp of Rs. 15/– and stamps of the value of Rs. 45/– should have been tendered for the judgment of this Court and the certificate in appeal. The petitioner has, however, affixed only a stamp of the value of Rs. 40/– only for the judgment of this Court and the certificate in appeal.

I uphold the first two objections raised by the respondent's Counsel and follow the decision in *Sathasivam v. Cadiravelchetty* ** and *Ramalingam Pillai v. Wimalaratne*††. I dismiss the appeal with costs.

Appeal dismissed.

** (1919) 21 New Law Reports 93

†† (1934) 36 New Law Reports 52. [2 C.L.W. 410 (Edd.)]

Present: POYSER, S.P.J.

FERNANDO vs GRERO

S. C. No. 554—M. C. Colombo No. 1.

Argued on 26th September, 1938.

Decided on 3rd October, 1938.

Colombo Municipal Council (Constitution) Ordinance, sections 2 (2) a and 14—Residence as a qualification to have a person's name placed on the list of voters—More residences than one.

Objection was taken to the inclusion of the appellant's name in the list of voters for the Modera Ward on the ground that he did not reside in that ward. The appellant is a medical practitioner. He claimed that he resided in that ward inasmuch as he spent three or four nights a week in his dispensary in that ward where he chiefly practised his profession. The appellant's wife and family lived in Mayfield Lane, Kotahena, a place outside the Modera Ward.

Held : (i) That the appellant had a residence in the Modera Ward which entitled him to have his name included in the list of voters of that Ward.

(ii) That a person can have more than one residence at the same time.

(iii) That there was no legal objection to a person having a residence within a particular ward with the object of acquiring the residential qualification requisite for having his name on the voters' list of that ward.

H. V. Perera, K.C., with *Shelton de Silva* and *H. A. Chandrasena*, for the appellant.

N. E. Weerasooria, K.C., with *J. E. M. Obeyesekera* and *Kariapper*, for the objector-respondent.

POYSER, S.P.J.

In this case, the objector-respondent objected to the appellant being included in the list of voters for the Modera Ward on the ground that he was not resident on the 1st of May, 1938, at No. 205, Modera Street, or in any other qualifying property in the Modera Ward. The facts are as follows. The appellant's wife and family reside in Mayfield Lane, Kotahena, which is in another Ward. The appellant, however, has a dispensary at No. 205, Modera Street, in which locality his practice principally is, and he has a sleeping apartment at the dispensary and spends three or four nights a week there. The Magistrate considered that the appellant's residence at No. 205, Modera Street was not *bona fide*. To use his own words, he says, " It was a colourable residence of three or four nights out of the week for the mere purpose of gaining a qualification." I am unable to agree with the Magistrate. A person may have more than one residence. Many persons do. Under the Colombo Municipal Council (Constitution) Ordinance No. 60 of 1935 section 2 (2) (*a*), "a person shall be deemed to reside in, or to be a

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resident of, any place, if he has, and from time to time uses, a sleeping apartment in any dwelling-house therein." I have already, in *S. C. No. 573, M.C. Colombo No. 2,** expressed the opinion that a dwelling house means a house in which any person or persons dwell, and that the house need not be one that is used exclusively for residential purposes. The appellant, the Magistrate finds, used the sleeping apartment at No. 205, Modera Street, three or four times a week ; that is as much or more than he uses the sleeping apartment in his other house.

In regard to the Magistrate's opinion that the respondent's residence at No 205, Modera Street, is not *bona fide* but a colourable residence, I would refer to the case of *Etherington v. Wilson* (1875, 1 Ch. Div. p. 160). In that case, a person took a house temporarily and became a parishioner with the object of qualifying his son for admission to a certain school. Vice-Chancellor Malins held that the person in question was not a *bona fide* householder and parishioner and his qualification as such was colourable. It was held on appeal, reversing this decision, that if the law enabled a man to qualify for any particular thing, he was entitled to do so; and that no Court had a right to attach any condition or modification of such qualification; and if it was intended to put any restriction upon such qualification, that restriction must be put by special enactment or by other special provision. James L.J., in the course of his judgment, pointed out that a man constantly acquired qualifications for voting. He instanced the case of a man who buys a 40s. freehold for the sole purpose—the undisguised purpose—of giving himself a vote in a county with which he has not, and does not mean to have, any other connection whatever. Another passage in this judgment which is material in this case is as follows : —

> " A man has a right to give himself, if he can, a qualification. If he does so, then he is qualified and there is no equity to deprive a man of that qualification which the law entitles him to get."

In regard to the use of the word " colourable," this word was used by Vice-Chancellor Malins in his judgment, and James L.J. considered that the fallacy of that judgment arose from the use of that word. He pointed out that if a man never did take a house but only got some person to put up his name over the door or something of that kind, then his occupation would have been colourable as it would have been a sham. In this case, I think there is a similar fallacy in the Magistrate's order. The appellant only did what the law permits him to do. If for any purpose he wishes to be qualified as a voter in any particular Ward, he is entitled to obtain such qualification, and it is immaterial for what purpose he does so. I, therefore, consider the Magistrate was wrong in upholding the objection to the residential qualification of the appellant.

On appeal, a further point was raised that the appellant was not a tenant within the meaning of section 14 (3) of the Ordinance. The point appears to have been raised before the Magistrate, but the latter in his order has not dealt with such point. The grounds in support of this other objection are, that there was evidence that the appellant was not a tenant but a

* Vide 12 C.L.W. p. 109.

sub-tenant. The appellant, in his evidence before the Magistrate, stated that the landlord of the Modera Street house was Mr. K. S. Fernando. The objector in his evidence stated that the latter person had transferred this property to a certain Dr. de Silva, and Dr. de Silva had leased the same premises to Mr. K. S. Fernando from the 1st of November, 1937. However that may be, I do not think that, on appeal, one can go into a question of the ownership of any qualifying property when such question has not been adjudicated on by the Magistrate. In the absence of such adjudication, it must be assumed that the appellant paid the rent of the premises in question to the owner.

I would further add that, in this case, as in S. C. No. 573 M.C. Colombo 2,* the Magistrate held that Ordinance No. 14 of 1938 which amended the Colombo Municipal Council (Constitution) Ordinance No. 60 of 1935, was not applicable as the proceedings were initiated before such amending Ordinance came into force. If the provisions of the amending Ordinance were applicable, it is conceded that, on the latter point, there would be no grounds for upholding the objection. As I think that the appellant is entitled to be registered as a voter for this Ward under the principal Ordinance, it is unnecessary to consider whether the Magistrate's view was correct or otherwise.

I allow the appeal, and set aside the order of the Magistrate deleting the appellant's name from the list of voters for Modera Ward. The objector-respondent will pay the appellant the costs of the inquiry and of the appeal.

Appeal allowed.

Present: DE KRETSER, J.

GOONESINGHE vs THE MUNICIPAL COMMISSIONER

Application by Mr. A. E. Goonesinghe for a Writ of Mandamus on the Municipal Commissioner, Colombo, (389).

Argued on 3rd October, 1938.
Decided on 5th October, 1938.

Interpretation Ordinance—Meaning of "action, proceeding or thing" in section 5 (3) (c)—Amendment of Municipal Council (Constitution) Ordinance—Notification published before amendment came into operation—To what extent may the repealed provisions be regarded as alive after the amendment came into operation.

The Municipal Commissioner published a notification under section 23 (4) of Ordinance No. 60 of 1935, hereinafter referred to as the principal Ordinance, before the date on which the amending Ordinance No. 14 of 1938 came into operation. It was argued that all the steps subsequent to the notification should, by virtue of section 5 (3) (*c*) of the Interpretation Ordinance, be taken under the provisions of the principal Ordinance as they stood before the amendment.

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*Vide 12 C.L.W. p. 109.

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Held : That section 5 (3) (*c*) of the Interpretation Ordinance kept alive only the notification, and that all steps following on the notification after the date on which the amending Ordinance came into operation should be taken according to the provisions of the principal Ordinance as amended.

C. V. Ranawaka, with *D. D. Athulathmudaly* and *V. F. Gooneratne*, for the petitioner.

L. A. Rajapakse for respondent.

DE KRETSER, J.

This is an application for Mandamus by a petitioner who is a duly qualified voter of the Municipality of Colombo and a member of the Municipal Council, representing the Maradana South Ward, and who seeks to have his place of residence transferred from the list of voters for the Colpetty Ward to the list of voters of the Cinnamon Garden Ward.

He purported to act under section 22 of Ordinance No. 60 of 1935 and alleged that the list of voters was thrown open to public inspection on the 18th June, 1938, and that, on his making his application on the 2nd July, the Commissioner rejected his application on the ground that the last date for making such an application was the 1st July, 1938. Mr. Rajapakse who appeared for the respondent, and who was of great assistance to the Court, stated that he could not support the decision of the Commissioner on the ground given by him. It was clearly contrary to both local and English Law. By section 9 of the Interpretation Ordinance No. 21 of 1901, the use of the word " from " is sufficient to make it plain that the first in a series of dates has to be excluded in the computation of time. Therefore, the 18th June had to be excluded, and under section 23 (3) of Ordinance No. 60 of 1935, the applicant could make his application within a period of two weeks thereafter, that is not later than the two weeks allowed. Mr. Rajapakse sought to justify the Commissioner's order on other grounds. He submitted, but not with much conviction, that the writ applied for should not be allowed because there has been delay, the present application not having been made till the 22nd of September. It would appear that the applicant had no real reason for alarm until, in another matter, the Municipal Magistrate ordered that his name should be erased from the list of voters for the Colpetty Ward. That other matter is the subject of an appeal to this Court and I only allude to it because it has this bearing on the present application. The result of the Municipal Magistrate's order erasing the applicant's name would be that his name appeared on no list and that he would, therefore, cease to be qualified to be a Municipal Councillor. I do not think that the present application should be dismissed on the score of delay. That brings me to the point which was urged with considerable vigour by Mr. Rajapakse. It was this—that the only person who could apply under section 25 was the person who had duly made his application under section 21 and who, having made that application, found that his name did not appear in the list or had not been transferred from one list

to another as desired by him. Mr. Ranawaka for the applicant accepted this contention, but met it by alleging that the applicant had, in fact, sent in his application before the 31st of May and that it had, through some oversight or some such thing, failed to receive attention and that, therefore, he had to make application under section 23. According to him, the Commissioner returned the papers to the applicant and Counsel was in possession of them. Mr. Rajapakse contested this statement of fact and there is certainly nothing in the petition now before the Court to suggest that any such application had been made. Section 21 (*h*) authorised the Commissioner to 'disregard' all applications which reached him after the 31st day of May, but it did not justify him in returning such applications. I should say that his proper duty would be to date the receipt of the application and to keep it (the application) on his file. The matter, however, is one of little interest since the Amending Ordinance No. 14 of 1938 has done away with clauses (*e*) to (*h*) of section 21.

To decide the question of fact, further evidence would have been necessary, and I should have allowed such an inquiry in the interests of justice, even though I should have been departing from the point on which the present application came up before this Court, had I found it necessary to do so.

Mr. Ranawake's second contention was that the Amending Ordinance had amended section 23 in such a way as to permit of the present application, that is, that the qualification that an applicant should have made a previous application, under section 21, to the Commissioner has been done away with. Mr. Rajapakse admitted that this was so, but argued that the Amending Ordinance did not affect the present proceedings. The Amending Ordinance came into operation on the 12th April, 1938. On the 9th April, the Commissioner had given the notice required by section 21 (*e*) and (*f*). Section 5 (3) (*c*) of the Interpretation Ordinance says :—

> "Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected any action, proceeding, or thing pending or incompleted when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal."

He, accordingly, argued that once the Commissioner took action under the old Ordinance and published his notification, the old Ordinance continued to govern all matters following on that notification up to finality. With that contention, I find myself unable to agree. It is conceded that there was no action or proceeding pending, and it is argued that these words refer to proceedings of a judicial nature and that the word 'proceeding' covers something more than is covered by the word 'action,' and that the word 'thing' has an even wider scope. Assuming this line of argument, what was the thing that was pending on the 12th of April ? It was only the notification. The Amending Ordinance casts the duty on the Commissioner to prepare the list, a duty which I think lay on him even previously. There

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is no obligation on him to give notice, but one cannot conceive of any objection to his doing so; and the mere fact that such a notification was in existence cannot keep alive anything more than the notification itself.

The rights of voters to have their names entered or transferred, and the procedure which they have to follow, would be governed by the new Ordinance after the 12th April. The result is that the respondent's objections fail and that petitioner's application must be allowed with costs. I desire only to say that I must not be considered as associating myself with the argument advanced by Mr. Rajapakse on section 23, before the Ordinance was amended, even though that contention has been acquiesced in by Mr. Ranawake. In the circumstances, it is not necessary for me to go deeper into the matter.

Application allowed.

Present: POYSER, S.P.J.

DEEN vs RAJAKULENDRAM AND OTHERS

Application for a Writ of Quo Warranto to have the proceedings of a meeting of the Urban District Council, Nawalapitiya, of 11th April, 1938, expunged and declared null and void. (S.C. No. 208).

Argued and Decided on 27th September, 1938.

Writ of Quo Warranto—Application in respect of appointment of Revenue and Works Inspector of Urban District Council—Local Government Ordinance No. 11 of 1920—Sections 23 and 47—Does the writ lie to question the validity of such appointment.

Held : (i) That the validity of the appointment of Revenue and Works Inspector of an Urban District Council cannot be questioned by an application for the Writ of Quo Warranto.

(ii) That any appointment made under section 47 of the Local Government Ordinance is not an appointment of a permanent nature.

Per POYSER, S.P.J.—"I can see nothing in either the Ordinance or the by-law or in any of the cases that have been cited to indicate that any member of the Council who is present at any meeting may not withdraw from such meeting at any time he desires.

In my opinion, he can so withdraw, although he may have been present at the discussion on a resolution he is not bound to vote, if he withdraws before the voting takes place."

C. V. Ranawake, with *M. M. I. Kariappar*, for petitioner.

H. V. Perera, K.C., with *J. R. Jayawardena*, for 1st and 9th respondents.

C. Renganathan for 2nd, 3rd, 4th, 5th and 8th respondents.

G. P. J. Kurukulasuriya for 7th respondent.

Gilbert Perera for 6th respondent.

S. J. C. Schokman, Crown Counsel, for Attorney-General, on notice.

POYSER, S.P.J.

This is an application for a Writ of Quo Warranto to have a resolution passed at a meeting of the Urban District Council, Nawalapitiya, held on the 11th of April, 1938, expunged and declared null and void ; and a declaration that the added respondent is disqualified from acting as the Revenue and Works Inspector of the said Council.

The petitioner, Mr. A. B. Deen, is a duly elected member of the Urban District Council of Nawalapitiya. He states that at a special meeting of the Council held on the 11th of April, 1938, all the members, namely, nine in number, were present and that the Council had met to decide on the appointment of a person to perform the duties of Revenue and Works Inspector. The previous holder of this post had retired on the 31st of December, 1937.

Various candidates were considered by the Council and, eventually, the added respondent, A. J. Setunga, was declared to be appointed to the post. The voting was four members in favour of Mr. Setunga and four members in favour of another candidate, Mr. Weerasinghe. Mr. Jansz, who is an *ex officio* member of the Council, by virtue of his position as District Engineer, did not vote, the entry in the minutes being "Mr. P. D. Jansz, D.E. was neutral." As there was an equality of votes, the Chairman, in accordance with the provisions of section 23 of the Local Government Ordinance No. 11 of 1920, in addition to giving his own vote, gave the casting vote in favour of Mr. Setunga.

Mr. H. V. Perera, who appeared for the first and ninth respondents, has raised certain preliminary objections to this application, viz. that the writ will not lie as the person who has been appointed Revenue and Works Inspector does not hold an office of a public nature and is not an officer appointed by the Crown or under any statute. He also argued that there was no material before the Court to prove that the added respondent was actually acting in such appointment, and further argued that, in any event, the first to the eighth respondents were improperly made parties to the proceedings as it was not alleged that they had usurped any office.

In regard to the material set out in the petition and the alleged irregularity of the appointment of Mr. Setunga, he was not called upon to argue as I considered that these preliminary points should first be disposed of.

The Writ of Quo Warranto will only lie "for usurping any office, whether created by charter alone, or by the Crown with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others."

The above is an extract from an opinion delivered by Tindal, C.J., in the House of Lords, in the case of *Darley v. The Queen* (12 Cl. & F. 537), which was quoted with approval by Lord Reading in the case of *Rex v.*

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Speyer, Rex v. Cassel (1916. I K.B. Dp. 609). Lord Reading, further in the course of this judgment laid down, "the test to be applied is whether there has been usurpation of an office of a public nature and an office substantive in character, that is, an office independent in title."

In this matter, the Council were acting under the powers conferred on them by section 47 of the Local Government Ordinance No. 11 of 1920. The material part of that section is as follows :—

> "For the purpose of the discharge of its duties under this Ordinance, a District Council (without prejudice to any other powers specially conferred upon it) shall have the following powers :
>
> (*a*) To appoint all necessary officers and servants and from time to time to remove any such officer or servant, and to assign to any office or service such salary, allowances, or remuneration as to the Council may seem fit. Provided that in any case in which any such salary, allowance, remuneration, either separately or in aggregate shall exceed in value the rate of one hundred rupees per month, the approval of such assignment by the Local Government Board shall have been previously obtained."

It will be seen that the Council are given powers, subject to certain restrictions, to appoint officers and servants from time to time and to remove such officers and servants. It certainly does not appear that any appointment made under that section is an appointment of a permanent nature, for it is an appointment which can be determined at any time by the body responsible for the original appointment, and there is ample authority that the Writ of Quo Warranto will not lie in respect of such appointments. (*Rex v. Fox* 8 E. & B. 929. *Ex parte Richards*. L.R. 3 Q.B.D. 368).

Therefore, I think, that the first preliminary objection taken by Mr. Perera must succeed, and that the issue of this writ cannot be allowed. It is unnecessary to consider the further point raised in regard to whether Mr. Setunga had in fact taken up the position to which he had been appointed. There was an affidavit filed to the effect that he had, but such affidavit is only dated today and was apparently only served on the first respondent's proctor this morning. Mr. Perera, therefore, had no opportunity of meeting the allegations that were made in that affidavit.

However, as the material that is contained therein has not affected my decision, it is unnecessary to consider it.

Mr. Schokman, who appeared for the Attorney-General, also supported Mr. Perera's argument that this writ would not lie in regard to officers and servants appointed by an Urban District Council under the provisions of section 47 of the Local Government Ordinance.

Mr. Ranawake, who supported this application, has raised a number of points. Apart from his arguments in regard to the preliminary objections, he has also in support of the petition argued that, having regard to the provisions of section 23 of the Ordinance, the appointment of Mr. Setunga was invalid as Mr. Jansz abstained from voting. That section is as follows:—

> "All acts whatsoever, authorised or required by virtue of this or any other Ordinance to be done by any Council, may and shall be decided upon and done by the majority of members present at any duly convened meeting thereof,

such members being not less than the quorum prescribed by any by-law to be made by the Council as hereinafter provided, or, in the absence of such by-law, not being less than two-thirds of the members of the Council. Provided that when the votes of the members present in regard to any question shall be equally divided, the presiding officer shall, besides his vote as a member, have a casting vote."

In regard to the provisions contained in that section, that the members present at any duly convened meeting should vote on any matter coming before such meeting, he has referred to certain English cases in which members of a Council or a body were present at a meeting and did not vote. In the case of *Rex v. Griffiths* (17Q.B. 164) the Chairman of a meeting held for the election of an officer did not vote although he continued to preside over the meeting. It was held that, as he had not withdrawn from the meeting, the election was void.

In the case of *Laboucherer v. Earl of Wharncliffe* (13 Chan. Div. p. 346) it was held that, if at a general meeting of a club certain members did not vote on a resolution for the expulsion of a member and did not withdraw from the meeting, that their presence must be taken into account in the consideration of whether two-thirds of the members present voted for such expulsion.

Mr. Ranawake invited me to express an opinion as to whether a resolution passed at a meeting of any Municipal Council, at which one or more members although present did not vote, was in fact invalid. Actually, what happened in this particular case was that Mr. Jansz, the District Engineer, preferred not to vote, although it is not clear whether he withdrew from the Council Chamber or not. I can see nothing in either the Ordinance or the by-law or in any of the cases that have been cited to indicate that any member of the Council who is present at any meeting may not withdraw from such meeting at any time he desires.

In my opinion, he can so withdraw, although he may have been present at the discussion on a resolution he is not bound to vote, if he withdraws before the voting takes place.

There is a further matter. It has been suggested, in the course of the argument, that the proceedings in regard to the appointment of Mr. Setunga were not only irregular but were in fact corrupt, and that improper motives have actuated the Chairman and, presumably, those members who supported the appointment of Mr. Setunga. These allegations are not supported by the facts, and I am unable to find any evidence of any irregularity or of any injustice. It is true that the District Engineer, according to the minutes, appeared to consider Mr. Weerasinghe a more suitable candidate than Mr. Setunga. He did not actually use those words but he stated that if T. P. Hunt was omitted (this candidate withdrew) he would place Weerasinghe first and Setunga second. On the other hand, according to the affidavit that was filed this morning, the person appointed to this post would, not only have to perform duties in connection with public

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works, but would also be largely responsible for the collection of municipal revenue.

Presumably, the District Engineer was best qualified to express an opinion in regard to a candidate's qualifications as Works Inspector, but he would not necessarily be best qualified to express an opinion in regard to a candidate's qualifications in regard to the collections of revenue. The fact that he recommended the appointment of Mr. Weerasinghe in preference to Mr. Setunga is not, therefore any evidence of any improper or irregular conduct on the part of those who supported Mr. Setunga. The Chairman certainly did propose that Mr. Setunga be appointed, and he also gave the casting vote in his favour; but then, the law permits him to do so.

I mention these matters as although I am of opinion that the Writ of Quo Warranto will not lie, yet, assuming it did, the Court always has a discretion, according to the facts and circumstances of the case, whether it will grant its issue. The Court has refused to grant such writ where its issue will be futile and where there is a remedy equally appropriate and effective—see Halsbury, Vol. 9 p. 810 and the cases therein cited. In this case there is a remedy, assuming that there was anything irregular in the appointment of Mr. Setunga. In the first place, it was stated in the course of the argument that he is at present only on probation, and whether he is so or not the Council have powers under section 47 to terminate his appointment at any time. It is not a case such as is visualised by Lord Reading in the case of *Rex v. Speyer, Rex v. Cassel* (supra) " where to refuse the issue of the writ might be to perpetuate an illegality."

For the above reasons, the application must be refused. The petitioner and the sixth and seventh respondents who supported the application will pay the costs of all the other respondents.

Application refused.

Present: POYSER, S.P.J.

KASINATHER (Police Vidane) vs AIYAM

S. C. No. 319—*P. C. Mallakam No.* 17688.

Argued on 28th September, 1938.

Decided on 30th September, 1938.

Criminal Procedure Code—Five persons charged with unlawful assembly and offences under sections 146, 314, 315 *and* 380—*Acquittal of four persons—Adjournment of trial of the other—Failure to frame fresh charge—Conviction under section* 315—*Is failure to frame fresh charge a fatal irregularity.*

Appellant and four others were charged under sections 140 and 144 of the Penal Code with being members of an unlawful assembly. They were also charged under sections 146, 314, 315 and 380 of the Penal Code. At the trial, all accused except the appellant were acquitted. The Magistrate held that a *prima facie* case had been made against the

appellant and the case was adjourned for his defence. On the adjourned date, no fresh charge was framed; but the Magistrate, after hearing the defence, convicted the appellant under section 315 of the Penal Code.

Held : (i) That the Magistrate should have framed a fresh charge against the appellant.

(ii) That the failure to frame a fresh charge was an irregularity which cannot be cured under section 425 of the Criminal Procedure Code.

S. Nadesan, with *H. W. Thambiah*, for accused-appellant.

D. Jansze, *Crown Counsel*, for respondent.

POYSER, S.P.J.

The appellant and four other persons were charged, under sections 140 and 144 of the Ceylon Penal Code, with being members of an unlawful assembly. They were further charged as such members with offences under sections 146, 314, 315 and 380.

The trial commenced on the 14th of March, 1938, and the accused, with the exception of the appellant, were acquitted. In regard to the appellant, the Police Magistrate held that a *prima facie* case had been made out, and the case was adjourned to the 29th of March for his defence. On the latter date, no fresh charge was framed; but the Police Magistrate, after hearing the evidence, called for the defence and convicted the appellant under section 315 of the Penal Code.

On appeal, it was pointed out that the appellant was only charged with being a member of an unlawful assembly and as such member committing various offences. He was not charged in his individual capacity with any offence.

It was argued that, when the other accused were acquitted, a fresh charge should have been framed. This is undoubtedly the case, for the appellant has been convicted of an offence with which he was not charged, and a Full Bench have decided (*Ebert v. Perera*, 23 N.L.R. p. 362) that that is an irregularity which cannot be cured under section 425 of the Criminal Procedure Code.

There was evidence that it was the appellant who did stab the person, and he was convicted of stabbing ; but, on the other hand, the whole prosecution case up to the acquittal of the other accused and, necessarily, the defence was directed to the question of unlawful assembly.

Apart from the question of the omission to frame another charge, the appellant does not seem to have been given the opportunity to have the prosecution witnesses recalled, and in view of the alteration in the charge this opportunity should have been given him.

As the accused may have been prejudiced by the nature of the trial, I think this appeal must be allowed and the case must be sent back for a fresh trial before another Magistrate. Actually, this is the order Mr. Nadesan asked for.

Appeal allowed.

Present: HEARNE, J. & WIJEYEWARDENE, A.J.

JAYASINGHE vs ALWIS

Application by Mrs. Juliet Matilda Jayasinghe to revise the proceedings in D. C. Colombo No. 2574 (Special) (329).

Argued & Decided on 14th September, 1938.

Revision—Application to District Court for consent to marry minor—Notice to minor's mother—Mother consents—Later, application by mother to vacate order—Refusal—Does the remedy by way of revision lie.

On a notice issued to the petitioner by the District Court of Colombo to show cause why consent should not be granted for the marriage of her daughter (a minor) with a certain party, she appeared and stated that she consented to the marriage. Accordingly, order was made granting the application. Subsequently, the petitioner moved the Court to vacate the said order on the ground that her consent was given originally under compulsion. The Court refused this application and the petitioner moved the Supreme Court by way of revision.

Held : That, in the circumstances, the remedy by way of revision does not lie.

Followed:—

Fernando vs Fernando 5 C.W.R. 156.

D. D. Athulathmudali for the petitioner.

E. B. Wickremanayake for the 1st respondent.

HEARNE, J.

In this application in revision, it appears to me that no remedy by way of revision lies. I follow the authority of *Fernando v. Fernando* (5 Ceylon Weekly Reporter p. 156). I think that the reasons given by the Judges in that case apply equally to appeals as to applications in revision. Apart from this view of the law, however, I am not satisfied of the correctness of the facts put forward by the petitioner in her application in revision, namely, that she had originally consented to the marriage of her daughter under compulsion.

I dismiss the application with costs.

WIJEYEWARDENE, A.J.

I agree.

Application dismissed.

Present : POYSER, S.P.J.

REYAL vs ASSAN

S. C. No. 573—M. C. Colombo No. 2.

Argued on 26th September, 1938.

Decided on 3rd October, 1938.

Colombo Municipal Council (Constitution) Ordinance, sections 2 (2) (a) and 14 (3) (c)—Meaning of dwelling-house—Can a joint tenant of qualifying property be registered as a voter.

The respondent was the tenant of certain premises which he occupied, with the exception of two rooms. These rooms were used as offices by certain others. The respondent slept in these premises and had his meals there.

Objection was taken to the insertion of the respondent's name in the voters' list on the grounds that:—

(*a*) he did not reside in a dwelling-house as contemplated by section 2 (2) (*a*) of the Colombo Municipal Council (Constitution) Ordinance;

(*b*) that, assuming he did, he was not responsible to the owner for the payment of the rent of the qualifying property within the meaning of section 14 (3) of the Ordinance, as there were more than one tenant of the qualifying property but no joint tenancy as contemplated by section 14 (5).

Held : (i) That to constitute a building a dwelling-house, it is sufficient if some person dwells in the building, and it is not necessary that the house should be used exclusively for residential purposes.

(ii) That the Ordinance contemplated, subject to the provisions of section 14 (5), that all tenants of any qualifying property should be qualified to be registered as voters.

H. V. Perera, K.C., with *J. E. M. Obeyesekera* and *M. M. I. Kariapper* for the objector-appellant.

L. A. Rajapakse, with *J. E. A. Alles*, for the respondent.

POYSER, S.P.J.

The appellant, a registered voter in the San Sebastian Ward of the Colombo Municipality, objected to the respondent's name being included in the list of voters for that Ward on the grounds that he was not a tenant of qualifying property situated within the limits of that Ward, and that he was not resident in such Ward on the material date. The Commissioner referred this objection to the Municipal Magistrate and the latter, on the 27th of August last, held that the objection was unsound and dismissed it.

The facts are as follows. The respondent was the tenant of the premises No. 130, Hultsdorf Street, with the exception of two rooms used as offices. He slept there and had his meals there. The premises in question satisfy the provisions of section 14 (3) of the Colombo Municipal Council (Constitution) Ordinance No. 60 of 1935 for they are assessed at Rs. 600/–

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a year. The respondent was residing in these premises on the material date, namely, the 1st of May, 1938, and had been residing there since May, 1936.

On behalf of the appellant it was contended (1) that the respondent did not reside in a dwelling-house as contemplated by section 2 (2) (*a*) of the Ordinance; (2) that, assuming he did, he was not responsible to the owner for the payment of the rent of the qualifying property within the meaning of section 14 (3) (*c*) of the Ordinance, as there was more than one tenant of the qualifying property but no joint tenancy as contemplated by section 14 (5).

I do not think there is any substance in the first contention that was raised; in fact, it was not pressed. A dwelling-house is not defined in the Ordinance. Under certain English Acts there is such a definition, for example, in section 5 of 41 and 42 Victoria, Chapter 26, it is defined as including any part of a house separately occupied as a dwelling. In my opinion, to constitute a dwelling-house, some person must dwell in the house, and it is not necessary that the house should be used exclusively for residential purposes. A number of houses can be used, and are used, for business purposes and partly for residential purposes, as these premises were; and I can see nothing in the Ordinance which lays down, or from which it can be inferred, that " dwelling-house " means a house which is exclusively used for residential purposes. For these reasons, the appellant is not, in my opinion, entitled to succeed on this ground.

In regard to the second point, the Ordinance, in my opinion, contemplates both separate and joint tenancies of qualifying property. When section 14 (3) (*c*) and section 14 (5) are read together, I do not think there can be any doubt on this point. It was argued that the words in section 14 (5) " be deemed to be a tenant of the qualifying property, notwithstanding the fact that the qualifying property is jointly tenanted " indicated that the Ordinance only contemplated a person who was the sole tenant of the qualifying property or was a joint tenant. I do not think this is so, or that it was intended to restrict the operation of this section to persons who were joint tenants as recognized under the English Law, that is, who had an interest in real property passed by the same conveyance or claim. I think the Ordinance contemplated, subject to the provisions of section 14 (5), that all tenants of any qualifying property should be qualified to be registered as voters.

The appeal will therefore be dismissed. I would, however, add that if the provisions of Ordinance No. 14 of 1938, which amended the Principal Ordinance, were applied, these objections could not arise, for, in section 2, the word " building " is now substituted for the word " dwelling-house," and the definition of " tenant " in section 14 (*b*) is amended and it now includes any person in possession or occupation of any qualifying property whether as lessee, sub-lessee, tenant or sub-tenant. The Amending Ordinance came into force on April the 12th, 1938. The Magistrate, however, considered that this objection was unaffected by the amendments introduced

by the Amending Ordinance, as the matter of the revision of the lists was a pending matter when such Amending Ordinance came into force and, consequently, having regard to the provisions of section 5 (3) of the Interpretation Ordinance, 1901, had to be carried on and completed as if no such Amending Ordinance existed. Because I am upholding the Magistrate's decision, it must not be assumed that I agree with his decision on this latter point. For the purpose of this appeal, I think the objection fails if only the Principal Ordinance is taken into account, and it is therefore unnecessary to consider whether the Amending Ordinance can be applied or not.

The appeal is dismissed. The appellant will pay the respondent the costs of the appeal and of the inquiry before the Magistrate.

Appeal dismissed.

Present: POYSER, S.P.J.

SUMANASURIYA vs FERNANDO & OTHERS

Application for a Writ of Quo Warranto by K. S. Sumanasuriya to have the appointment of P. D. H. de Silva (13th respondent) as Secretary of the U.D.C., Ambalangoda, declared null and void (S. C. No. 235).

Argued on 27th September, 1938.

Decided on 30th September, 1938.

Writ of Quo Warranto—Does the writ lie in respect of the office of Secretary of Urban District Council—Are members of the Council necessary parties.

Held : (i) That the Writ of Quo Warranto does not lie in respect of the office of Secretary of an Urban District Council.

(ii) That the members of the Urban District Council are not necessary parties to an application for a Writ of Quo Warranto questioning the validity of an appointment made by the Council.

C. V. Ranawake, with *M. M. I. Kariapper*, for petitioner.

H. V. Perera, K.C., with *G. P. J. Kurukulasuriya*, for 13th respondent.

J. L. M. Fernando, with *N. M. de Silva*, for 2nd, 4th and 10th respondents.

M. M. Kumarakulasingham for 7th respondent.

J. R. Jayawardene, with *N. M. de Silva*, for 1st, 3rd and 11th respondents.

R. M. E. Rajapakse for 9th respondent.

Kottegoda for 12th respondent.

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This application raises substantially the same question as I decided in S. C. No. 208 * viz. whether the writ of Quo Warranto will lie in respect of the office of Secretary to the U. D. C. of Ambalangoda. Mr. Perera relied on the same arguments that he adduced in the other application, but Mr. Ranawake argued that the Secretary of a District Council is on a different footing to other Council officers, as his duties or some of them are set out in the Local Government Ordinance.

I can see no distinction between this application and the previous one. The Secretary is appointed by the Council and can be dismissed by them and, consequently, for the reasons stated in the previous application, I think this application also must be refused.

There is a further objection to this application. It does not appear that, at the date it was made, the 13th respondent had assumed office. According to the petition and the affidavit filed in support of this application in June of this year, the 13th respondent then was only acting as additional Secretary without remuneration; and, if that is the case, the writ will not lie.

There is one other matter; all the members of the Council have been made respondents—they are not proper parties to these proceedings. (See *Ukku Banda v. Government Agent, Southern Province*, 29 N.L.R. p. 168).

The writ lies only against a person who has wrongfully usurped an office. The application is refused, and the petitioner will pay the costs of all the respondents.

Application refused.

Present : MAARTENSZ, J. & MOSELEY, J.

SILVA vs CUMARANATUNGA

S. C. No. 350—*D. C. Colombo No.* 1334.

Argued on 4th April, 1938.

Decided on 11th April, 1938.

Appeal—Revocation of proxy granted to proctor—Petition of appeal not signed by the proctor who was proctor on record on the day petition filed—Is this fatal to the appeal—Relief—Meaning of the words "some..... proctor" in section 755 of the Civil Procedure Code.

The appellant filed the petition of appeal on the 12th November, 1937. By a motion dated 11th November, 1937, appellant's proctor, Mr. Van Rooyen, moved to revoke the proxy granted to him by the appellant. This motion was received in the District Court on the 13th November, 1937, and was allowed on the 15th of November, 1937. Mr. Van Rooyen did not sign the petition of appeal.

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* 12 C.L.W. 102

At the hearing of the appeal, a preliminary objection was taken by the Counsel for the respondent that the petition of appeal had not been signed by the proctor who was the proctor on record on the day the appeal was filed.

Held : (i) That the petition of appeal should have been signed by the proctor on the record, who was Mr. Van Rooyen.

(ii) That the words "some.....proctor" in section 755 of the Civil Procedure Code mean the proctor whose proxy is on record when the appeal is filed.

(iii) That, in the circumstances, no relief should be granted to the appellant.

Per MAARTENSZ, J.—"The *ratio decidendi* in the old cases, with which I respectfully agree, was that this Court cannot recognise two proctors appearing for the same party in the same case."

N. E. Weerasooriya for plaintiff-appellant.

H. V. Perera, K.C., with *M. C. Abeywardena*, for defendant-respondent.

MAARTENSZ, J.

A preliminary objection was taken to our hearing this appeal on the ground that the petition of appeal is not signed by the proctor who was proctor on the record on the day the appeal was filed, the 12th of November, 1937.

The facts are as follows. The plaintiff-appellant's proctor, Mr. M. A. Van Rooyen, by a motion dated 11th November, 1937, moved to revoke the proxy granted to him by the plaintiff. The plaintiff's consent to the revocation is endorsed on the motion. I may say incidentally that it was the plaintiff who should have moved for revocation with the consent of the proctor.

The motion was, according to the date stamped on it, received by the District Court on the 13th of November, 1937. It was brought on the roll and allowed by the Court on the 15th of November, 1937.

It is, undoubtedly, not signed by the proctor who was on the record on the 12th of November, 1937. The relevant section of the Civil Procedure Code (section 755) enacts that " all petitions of appeal shall be drawn and signed by some advocate or proctor....."

The first question for decision is whether the words " some..... proctor " are restricted to the proctor whose proxy was on the record when the appeal was filed.

It was contended that the case of *Assauw vs. Billimoria* (1892) 2 C.L.R. 86 was a decision to that effect, by which we were bound as it was the decision of three Judges. I do not think it is. Burnside C.J., it is true, said in the course of his judgment " Now, we have held that the proctor who signs the petition must be the proctor on the record....." but he cited no authority and the statement was *obiter* to the question for decision in that case which was whether a petition of appeal, signed by one proctor for another who was the proctor on the record, complied with the provisions of section 755 of the code. It was held it did not.

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Maartensz, J.

Silva *vs* Cumaranatunga

This question is, however, covered by authority. In the case of *Wace vs. Angage Helena Hami* (1881) 4 S.C.C. 48 and *Romanis Baas vs. Ravenna Kader Mohideen and Another* (1881) 4 S.C.C. 61, it was held under Rule 2 of the Rules and Orders of 12th December, 1843, that the petition of appeal must be signed by the proctor on the record. The relevant passage in Rule 2 is in exactly the same terms as the passage I have cited from section 755 of the Code, and the cases are therefore authorities applicable to section 755.

Ennis J., in *Reginahamy vs. Jayasundera* (1917) 4 Ceylon Law Reports 390, rejected an appeal which was not signed by the proctor on the record.

The *ratio decidendi* in the old cases, with which I respectfully agree, was that this Court cannot recognise two proctors appearing for the same party in the same case. I, accordingly, hold that the petition of appeal should have been signed by the proctor on the record, who was Mr. Van Rooyen.

The next question is whether we should dismiss the appeal or give the plaintiff relief, if it is in our power to do so.

In the two later cases I have referred to, the appeals were rejected. In the case of *Fernando vs. Perera and Others* (1909) 1 Current Law Reports page 51, the Supreme Court remitted the petition of appeal to the District Court to be signed by the proctor on the record, but the authority for this procedure is not stated in the judgment and I do not think it should be followed. Besides, in this case, the proxy of the proctor, who was the proctor on the record when the record was filed, has been revoked, and he cannot now be asked to sign the petition of appeal.

I am, accordingly, of opinion that the objection must be upheld and the appeal dismissed with costs.

MOSELEY, J.

I agree.

Preliminary objection upheld.

Present : POYSER, S.P.J.

PELPOLA vs GOONESINGHE

S. C. No. 500—*M. C. Colombo No.* 3.

Argued on 22nd & 23rd September, 1938.

Decided on 7th October, 1938.

Colombo Municipal Council (Constitution) Ordinance—Qualifications of a voter to have his name in register—Is residence in the Ward in the voters' list, of which a voter seeks to have his name included, a necessary qualification—Interpretation Ordinance, section 5 (3).

The appellant was a voter whose name was on the list of voters for the Colpetty Ward. At the time his name was inserted in the list, he was resident in Colpetty but, later, he moved to Rosmead Place, a place in the Cinnamon Gardens Ward. Objection was taken to his name being on the list for Colpetty on the ground, *inter alia*, that he was not resident there.

Held : (i) That a person, who is entitled to be registered as a voter by virtue of his income qualification, must be entered in the list prepared for the Ward in which he is resident.

(ii) That a person claiming to be registered as a voter under the provisions of section 14 of the Municipal Council (Constitution) Ordinance (except the owners of qualifying property who are not resident in the Municipality) must be registered as a voter for the Ward in which he resides.

(iii) That the words " action, proceeding or thing pending " in section 5 (3) (c) of the Interpretation Ordinance must mean something in the nature of proceedings which are of a judicial or quasi-judicial nature.

(iv) That, a notification under section 21 (1) (e) of the Colombo Municipal Council (Constitution) Ordinance that the revision of the lists of persons qualified to vote and to be elected would commence on a stated date, is not an " action, proceeding or thing " within the meaning of section 5 (3) (c) of the Interpretation Ordinance.

F. A. Hayley, K.C., with *C. V. Ranawake*, *D. D. Athulathmudali* and *V. F. Gunaratne* for appellant.

H. V. Perera, K.C., with *J. E. M. Obeyesekera* and *M. I. M. Kariapper*, for objector-respondent.

POYSER, S.P.J.

The respondent, a registered voter in the Colpetty Ward of the Colombo Municipality, objected to the appellant being included in the list of voters for the said Ward on the following grounds (*a*) that he was not resident at 324 Colpetty Road ; (*b*) that he was not the tenant of qualifying property situated within the said Ward ; (*c*) that he was not resident in Colpetty Ward on the 1st of May, 1938. The Commissioner referred this objection to the Municipal Magistrate, and the latter held that the objection was sound and entitled to succeed, and directed that the appellant's name be expunged from the list of voters for Colpetty Ward. It is against that order that this appeal is lodged.

The following are the facts. The appellant, on the 22nd of May, 1936, applied for registration as a voter (O I) by virtue of his tenancy of " Shanklin," Colpetty, House No. 324. He was duly registered as a voter and has remained so registered up to the date of the Magistrate's order. At the end of June, 1936, the appellant left " Shanklin," Colpetty, and went to reside at " Fern Lodge," Rosmead Place, which is in the Cinnamon Gardens Ward. The appellant did not, prior to the 31st of May, 1938, apply to have his name transferred to another list in accordance with the provisions of section 21 (1) (f) of the Colombo Municipal Council (Constitution) Ordinance No. 60 of 1935. He did, on the 2nd of July of this year, make an application for the alteration of his address, but such application was refused by the Commissioner on the ground that it was out of time.

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Poyser, S.P.J.

Pelpola vs Goonesinghe

Whether the Commissioner was correct in his decision or not did not arise on this appeal but was the subject of another application to this Court, namely, *Application by A. E. Goonesinghe for a Writ of Mandamus on the Municipal Commissioner, Colombo.* * Such application has been granted by de Kretser, J. and, under these circumstances, it would be unnecessary to deal with all the points that have been raised but for the fact that similar points arose in another appeal and it was agreed that such appeal should be determined in accordance with my finding in this appeal.

At the hearing of the objection, the appellant, while admitting that he no longer resided in Colpetty Ward, contended that he was entitled to be registered as a voter in such Ward, not by virtue of residence therein, but by virtue of the amendment to section 14 of the Principal Ordinance effected by Ordinance No. 14 of 1938, which came into force on the 12th of April, 1938. The amendment which he relied on is contained in section 3 (1) (*b*) (3) and the effect is that a person, possessing an income of not less than Rs. 15/- a month, is entitled to be registered as a voter. It is admitted that the appellant had an income of over Rs. 15/- a month, but the Magistrate rejected this contention on the ground that the publication of the notice (O 6) on the 8th of April, 1938, in accordance with the terms of section 21 (1) (e) of the Ordinance, was a step in the matter of the revision of the lists ; that such revision was pending at the date when the Amending Ordinance came into force; and that, in view of the provisions of section 5 (3) of the Interpretation Ordinance, only the provisions of the Principal Ordinance could be considered in dealing with this objection.

The material part of section 5 (3) is as follows :—

> " Whenever any written law repeals, either in whole or part, a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected :—
>
> (*a*) .....
>
> (*b*) .....
>
> (*c*) Any action, proceeding or thing pending or incompleted when the repealing written law comes into operation, but every such action, proceeding or thing may be carried on and completed as if there had been no such repeal."

In view of this finding, and as it was admitted that the appellant had no residential qualification, the Magistrate upheld the objection.

On appeal, Mr. Hayley argued as follows. (1) That the Magistrate was wrong in holding that the Amending Ordinance was inapplicable to the case as the notice (O 6) was not an " action, proceeding or thing pending;" (2) that, as the appellant had an income qualification, his name should have remained on the Colpetty Ward list, and his place of residence was immaterial ; (3) in the alternative, that the Magistrate should, on ascertaining the facts, have transferred his name to the Cinnamon Gardens list ; (4) that the Supreme Court, under the provisions of section 25 of the Ordinance, should direct such a transfer.

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* 12 C.L.W. p. 99

I am in agreement with Mr. Hayley's argument on the first point as I do not consider the notice (O 6) is an " action, proceeding or thing pending " when Ordinance No. 14 of 1938 came into operation. The words " action, proceeding or thing pending " must mean something in the nature of proceedings which are of a judicial or a quasi-judicial nature. The notice in question was only a notification that the revision of the lists of persons qualified to vote and to be elected as Councillors would commence on May 1st 1938. The "action, proceeding or thing" that we are now dealing with was the objection lodged by the respondent on the 1st of July, 1938. I think it is unnecessary to deal with all the arguments that were adduced on this point, for I have come to the conclusion that the appellant's name should be erased from the list of voters for Colpetty Ward, whether the amendments effected by Ordinance No. 14 of 1938 are taken into account or not.

It is interesting, however, to note that my brother, de Kretser, in *Application by A. E. Goonesinghe for a Writ of Mandamus on the Municipal Commissioner, Colombo,* * came to a similar conclusion on this point. I will therefore decide this appeal as if the provisions of Ordinance No. 14 of 1938 applied.

To deal with the other points that Mr. Hayley raised, the amendment to section 14 (2) of the Ordinance providing for an income qualification does not specifically lay down anything in regard to residence. Section 14 (6) of the Principal Ordinance, however, is as follows :—

> " 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."

The amendment to this sub-section, effected by the Amending Ordinance, does not in any way modify these clear directions. I think, therefore, that a person who is entitled to be registered as a voter by virtue of his income qualification must be entered in the list prepared for the Ward in which he is resident. In the case of *Maha Kannu Meeranpillai vs. Asby Lebbe Marikar* (7 Ceylon Law Weekly p. 71) the Chief Justice held that the person who can object that a voter is disqualified must be a voter in the same Ward.

I respectfully agree with that finding and, *a fortiori*, a person claiming to be registered as a voter under the provisions of section 14 of the Ordinance (except the owners of qualifying property who are not resident in the Municipality, section 14 (2) (g) (iv)) must be registered as a voter for the Ward in which he resides.

In regard to the other points raised by Mr. Hayley, I do not consider that this Court can, under section 25 of the Ordinance, direct the transfer of the appellant's name to the list for the Cinnamon Gardens Ward. Section 25 only gives the Court power to make such an order where there is a claim for a transfer.

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* 12 C.L.W. p. 99

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Poyser, S.P.J.

Pelpola *vs* Goonesinghe

In this matter, there was no such claim. I do not either think the Magistrate had the power to effect such a transfer under section 21 (1) (i). The matter before him was the respondent's objection, not the preparation or revision of lists.

The appeal will, accordingly, be dismissed. The respondent is entitled to the costs of the inquiry and of the appeal.

Appeal dismissed.

Present : HEARNE, J. & WIJEYEWARDENE, A.J.

CHARLES vs JAYASEKERA

S. C. No. 32—*D. C.* (*Inty.*) *Colombo* 1274.

Argued on 27th September, 1938.

Decided on 30th September, 1938.

Civil Procedure Code—Section 348—*Case settled in terms of consent motion—Judgment for plaintiff—Undertaking, in consent motion, by surety to pay the amount of decree due if defendant failed to satisfy decree—Failure of defendant to satisfy decree—Application, under section* 348, *for writ against surety—Can plaintiff proceed against such surety in the same action—Is a surety bond necessary for proceedings under this section.*

This action, which was for recovery of money due on a promissory note, was settled on terms embodied in a consent motion as follows :—

> " We move that judgment be entered for plaintiff, as prayed for, with costs payable as follows — a sum of Rs. one hundred (Rs. 100/–) to be paid this day and the balance to be paid by monthly instalments of Rs. 30/–, commencing from the 16th of November, 1936.
>
> " If the defendant make default in any payment of instalments, or if writ issues in any other case against the defendant, writ to issue in this case without any notice to the defendant for the balance then due."

This motion bore the following endorsement :—

> " We the undersigned K. D. Kamalawathie, K. A. Piyadasa and D. C. E. Jayasekera of Second Division Maradana, Colombo, jointly and severally promise to pay the plaintiff the amount of the decree or any sum that is due to the plaintiff if the defendant fails to satisfy the decree as stipulated in the decree."

The defendant having made default, the plaintiff, under section 348 of the Civil Procedure Code, applied for writ of execution against the three persons who undertook to satisfy the decree if defendant made default. One of them, the appellant, opposed the application, but the learned District Judge made order allowing it. The appeal was from this order and it was contended on behalf of the appellant : (*a*) that section 348 of the Civil Procedure Code did not permit the plaintiff to proceed, in the same action, against the appellant, and that he should seek relief by separate action ; (*b*) that the provisions of section 348 do not apply where the surety has not entered into a bond ; (*c*) that, in the absence of a bond in favour of the Court, no proceedings could be taken under this section ; (*d*) that the appellant was not a surety.

Held : (i) That the judgment-creditor (the plaintiff) was entitled, under section 348 of the Civil Procedure Code, to proceed against the appellant in this action.

(ii) That there is no need for any bond, inasmuch as there is an express guarantee in the consent motion to satisfy the decree.

L. A. Rajapakse, with *A. C. Z. Wijeratne* and *O. L. de Kretser* (*Jnr.*), for petitioner-appellant.

N. E. Weerasooriya, K.C., with *H. A. Wijemanne*, for plaintiff-respondent.

WIJEYEWARDENE, A.J.

The plaintiff instituted this action against the defendant for the recovery of a sum due on a promissory note. When the defendant was served with summons, the proctors for the plaintiff and the defendant prepared the following consent motion to be filed in Court :—

> " We move that judgment be entered for plaintiff, as prayed for, with costs payable as follows — a sum of Rs. one hundred (Rs. 100/–) to be paid this day and the balance to be paid by monthly instalments of Rs. 30/–, commencing from the 16th of November, 1936.
>
> " If the defendant make default in any payment of instalments, or if writ issues in any other case against the defendant, writ to issue in this case without any notice to the defendant for the balance then due."

This motion bore the following endorsement :—

> " We the undersigned K. D. Kamalawathie, K. A. Piyadasa and D. C. E. Jayasekera of Second Division Maradana, Colombo, jointly and severally promise to pay the plaintiff the amount of the decree or any sum that is due to the plaintiff if the defendant fails to satisfy the decree as stipulated in the decree."

D. C. E. Jayasekera, mentioned in the endorsement, is the present appellant.

The motion was filed in Court and decree was entered in terms of the motion. The decree, however, did not incorporate the undertaking contained in the endorsement.

The defendant made some payments as set out in the decree and, thereafter, made default.

The plaintiff, thereupon, applied for writ against the defendant and on February 17, 1937, the Court ordered writ to issue returnable on February 17, 1938.

On November 4, 1937, the plaintiff applied under section 348 of the Civil Procedure Code, 1889, for execution against K. D. Kamalawathie, K. A. Piyadasa and the appellant who, he alleged, were " sureties as aforesaid for the recovery of the balance claim and costs." The appellant filed an affidavit opposing this application. He pleaded that execution should not issue against him " as the decree entered in the case did not bind him," and he stated further that the plaintiff induced him to make the endorsement on the motion as a " guarantor " and gave him an assurance that the " signatures were obtained merely to ensure the defendant paying the instalments regularly."

The learned District Judge made an order allowing the plaintiff's application, and the present appeal is against the order. The order of the District Judge shows that there was no decree entered against him, and that

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Wijeyewardene, A.J.

Charles *vs* Jayasekera

his promise was merely a guarantee on which the plaintiff should bring a separate action.

The Counsel for the appellant has argued that section 348 did not permit the plaintiff to proceed in this action against the appellant, and that the plaintiff should seek relief by way of a regular action. I am unable to uphold this contention. The provisions of the section indicate clearly that a judgment-creditor could proceed in the same action against a surety. The section states that the decree may be entered against the surety " after application made by the judgment-creditor to the Court, for that purpose, by a petition to which the person sought to be made liable as surety shall be named respondent." This section corresponds to section 253 of the Indian Code of 1889 and to section 145 of the Indian Code of 1908. Section 253 of the old Indian Code did not contain the provisions which I have cited from our section and, even then, there was a diversity of judicial opinion in India on the question whether a surety could not be proceeded against summarily under that section. The question was, however, set at rest when the Indian Code of 1908 was passed containing section 145 which, like section 348 of our Code, expressly provides for the adoption of summary procedure against a surety, (vide Sarkar's *Civil Procedure Code* 7th edition Vol. 1 p. 817).

The appellant's Counsel urged, for the first time at the hearing of this appeal, the following further arguments against the order of the District Court:—

(i) That the provisions of section 348 do not apply where the surety has not entered into a bond.

(ii) That, in the absence of a bond in favour of the Court, no proceedings could be taken under this section.

(iii) That the appellant was not a surety.

In my opinion, the first two propositions cannot be sustained without reading into section 348 certain words of limitation which are not there. Moreover, under our law, all that is required for a contract of suretyship is a writing signed by the party making the same (vide section 21 of Ordinance 7 of 1840). The decision of the Calcutta High Court in *Joyman Bawa vs. Easin Surkar* * is a direct authority against the contention of the appellant's Counsel. It was held, in that case, that there was no warrant for the proposition that only a security bond in favour of the Court be executed under section 145 of the Indian Code 1908, and that there was no need for any bond, provided there was an express contract guaranteeing the performance of any of the obligations set out in the section.

With regard to the objection that the appellant is not a surety, I need only state that this objection appears to ignore the plain meaning of the endorsement on the motion, and is directly in conflict with the position taken by the appellant in the District Court.

I dismiss the appeal with costs.

HEARNE, J.

I agree.

Appeal dismissed.

* A.I.R. (1926) 877

Present : HEARNE, J.

KATHIRGAMER (UDAIYAR) vs WALLIAMMAI alias AMMAH

S. C. No. 381—*P. C. Point Pedro No.* 15293.

Argued on 5th October, 1938.

Decided on 10th October, 1938.

Penal Code section 183—*Obstruction to a public servant in the execution of his duty—Duty performed in execution of an illegal order—Is it an offence to obstruct the execution of such order.*

In a Court of Requests case, it was decreed " that the plaintiffs be, and they are hereby declared, entitled to discharge the rain-water which collects in their land called 'Vittanai,' and more fully described in schedule A hereto, through the 4th defendant's land described in schedule B hereto." It was further ordered that " the obstacles to the said flow of water be removed."

The obstacles were not removed as decreed, and the plaintiffs obtained a writ commanding the Fiscal " without delay to enter the 4th defendant's land and to cause the said plaintiffs to have possession of the same." The 4th defendant refused to allow the writ to be executed, and the present charge of obstructing a public servant in the execution of his duty was brought against the said 4th defendant.

Held : (i) That the Commissioner of Requests had no power, in the circumstances, to order the plaintiffs to be placed in possession of the 4th defendant's land.

(ii) That obstruction to an act which, in the circumstances of the case and in law, is without justification, is not an illegal obstruction punishable under section 183 of the Penal Code.

P. Tiyagarajah with *I. Misso* for accused-appellant.

S. Sabapathipillai with *Rajasingham* for complainant-respondent.

HEARNE, J.

This is an appeal from a conviction of obstructing a public servant in the discharge of his public functions under section 183 of the Penal Code.

In C. R. Point Pedro No. 29444, it was ordered and decreed " that the plaintiffs be, and they are hereby declared, entitled to discharge the rain-water which collects in their land called 'Vittanai,' and more fully described in schedule A hereto, through the 4th defendant's land described in schedule B hereto."

It was further ordered that " the obstacles to the said flow of water be removed." It was, presumably, intended that the obstacles should be removed by the 4th defendant. She did not do so; and, on the plaintiffs making an application to the Court, a writ was issued to the Fiscal commanding him " without delay to enter 4th defendant's land and to cause the said plaintiffs to have possession of the same." According to the Udaiyar, " he read the writ of possession to the accused " and " she would not allow me to execute the writ of possession." An overt act on her part, amounting to obstruction, was proved. No violence was alleged.

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Hearne, J.

Kathirgamer (Udaiyar) *vs* Walliammai alias Ammah

The plaintiffs had obtained in their favour a declaration of certain rights and they were entitled to ask the Court, which passed the decree, for an appropriate order to enforce those rights ; but they had no right, flowing from the decree, to ask to be placed in possession of 4th defendant's land and the Court had no power to issue a writ for this purpose.

This being the case, the conviction of the accused cannot be upheld. For, where an act sought to be done is one which, in the circumstances of the case and in law, is without justification, an obstruction to the doing of the act is not an illegal obstruction.

In an Indian case, where a Magistrate issued a warrant to recover money paid to an accused as compensation and the revenue peons sent to attach his property were resisted, it was held that, as the issue of such warrant was justifiable under no law, the resistance offered could not be punished, as the peons who went to execute an illegal warrant could not be said to be discharging their public functions.

In a local case, *Sappathypillai vs. Alagaratnam*, 4 Ceylon Law Recorder 172, it was held that the order which a public servant is seeking to execute must be a lawful order, and " that resistance to an order which is *ultra vires* cannot form the basis of a criminal prosecution for resisting it."

I allow the appeal and acquit the accused.

Appeal allowed.

Present : HEARNE, J.

GUNAWARDENE vs GUNATILLAKE

S. C. No. 358—*P. C. Balapitiya No.* 32195.

Argued on 3rd October, 1938.

Decided on 5th October, 1938.

Ordinance No. 11 *of* 1887, *section* 2—*Escaping from custody of Fiscal's process server—Failure to observe formalities regarding warrant of arrest—Effect of—Civil Procedure Code, section* 219.

The accused was charged with escaping from the custody of a Fiscal's process server when he had been lawfully arrested on a warrant issued in a civil case under section 219 of the Civil Procedure Code. The formalities prescribed by law had not been observed in the issue of the warrant.

Held : (i) That the arrest was not lawful as the warrant did not comply with the formalities prescribed by law.

(ii) That, escape from the custody of a process server executing a warrant, which had not been issued in accordance with the formalities required by law, was not an offence under section 2 of Ordinance No. 11 of 1887.

J. R. Jayawardene for 1st accused-appellant.

No appearance for complainant-respondent.

The appellant was charged and convicted of the offence of " escaping from the custody of a Fiscal's process server when he had been lawfully arrested on a warrant in D. C. Galle 34010," section 2 of Ordinance No. 11 of 1887.

In his judgment, the Magistrate says " I hold the complainant held 1st accused by hand and showed him the warrant and told him he was under arrest. I hold that he escaped from custody after he was arrested." He did not, however, analyse all the circumstances which led to the separation of the accused from the person who claimed to have effected his arrest, or consider whether that separation was brought about by an overt act on the part of the accused. According to the evidence of P. C. Deen, the complainant told the accused, who was on a bus, there was a warrant against him ; the accused said there was no warrant ; he (P. C. Deen) told the driver to stop, and the owner of the bus, objecting to a scene on his bus, instructed the driver to proceed, which he did. I do not regard the conviction as satisfactory without a full consideration of the effect of this evidence.

But there is another question to be considered. Had the accused been lawfully arrested ? The warrant was issued under section 219 of the Civil Procedure Code. The rule as to the proper observance of formalities applies whether the warrant of arrest is issued in a civil or a criminal action (*Deputy Fiscal, Kegalle, vs. Tikiri Banda*, 1928, 29 N.L.R. 443 at p. 445). In the present case, the warrant was not directed to the Fiscal or any headman, constable or officer of police (section 355 of the Civil Procedure Code) but to the Fiscal's Marshall, and it was endorsed not by the Fiscal (section 360 C. P. C.) but by a person whose signature is illegible " for the Fiscal." In my opinion, there was an absence of compliance with the necessary formalities to make the arrest lawful.

I allow the appeal and acquit the appellant.

Appeal allowed.

Present : HEARNE, J. & WIJEYEWARDENE, A.J.

DE SILVA & OTHERS vs DE SILVA & OTHERS

S. C. No. 69—*D. C.* (*Inty.*) *Colombo No.* 41268.
Argued & Decided on 27th September, 1938.

Partition action—Costs—Cursus curiae as to.

Held : That costs in partition actions should, apart from incidental contentions, ordinarily be borne by the co-owners *pro rata.*

N. E. Weerasooriya, K.C., with *E. B. Wickremanayake*, for plaintiffs-appellants.

No appearance for defendants-respondents.

WIJEYEWARDENE, A.J.

The plaintiffs-appellants, two of whom are minors, instituted this action under Ordinance 10 of 1863. There was no contest with regard to the main devolution of title, except with regard to 2/84th shares between the 5th defendant and the 2nd and 11th defendants.

The District Judge held in favour of the 2nd and 11th defendants, and ordered the 5th defendant to pay costs of the contest. The District Judge, thereafter, entered decree for the sale and made the following order with regard to the costs : " The costs of the two plans and the two decrees will be borne by the parties *pro rata*. There will be no other costs." The plaintiffs-appellants have appealed against this order.

The learned District Judge has given no reason for departing from the general practice, according to which the costs in partition cases other than those in respect of contentious matters are borne by parties *pro rata.*

In *Juan Appu vs. Pelo Appu*,* Wood Renton C.J. observed, " A *cursus curiae* has arisen in regard to the costs in partition actions which we have no right to ignore, namely, that, apart from incidental contentions, the costs of suit should be borne by the co-owners *pro rata.*"

I see no reason why the practice referred to should not be followed in this case.

I direct that the costs of this action, excluding the costs of contest, should be borne by the parties *pro rata.*

The order made by the learned District Judge, with regard to costs of contest, will stand. There will be no costs of this appeal.

HEARNE, J.

I agree.

Order set aside.

* 19 N.L.R. 272

Present : POYSER, S.P.J. & WIJEYEWARDENE, A.J.

IBRAHIM SAIBU vs THE COMMISSIONER OF STAMPS AND ESTATE DUTY

S. C. No. 64—D. C. Kandy No. 5176.
Argued on 13th October, 1938.
Decided on 14th October, 1938.

Estate Duty Ordinance No. 8 of 1919—Section 32—Can the correctness of an assessment, which should have been questioned by way of appeal under section 22 (3), be questioned in proceedings under section 32.

Held: That the correctness of an assessment, which should have been questioned by way of appeal under section 22 (3) of the Estate Duty Ordinance No. 8 of 1919, cannot be questioned in proceedings under section 32 of the Ordinance.

H. V. Perera, K.C., with *P. Sunderam*, for appellant.
Schokman, Crown Counsel, for respondent.

WIJEYEWARDENE, A.J.

This is an appeal by an administrator from an order made against him under section 32 of the Estate Duty Ordinance No. 8 of 1919 in respect of the estate of one Y. M. Ibrahim Saibu, who was a partner of the firm of K. Abram Saibu & Co. In July, 1933, the appellant, who had applied for letters of administration, delivered a statement of assets and liabilities of the estate to the Commissioner of Stamps under section 21. Among the assets, he included:

i.	" Amount at credit at Messrs. K. Abram Saibu & Co. to 31st October, 1928 "	Rs. 105,250.50
ii.	" Amount at interest at Messrs. K. Abram Saibu to 31st March, 1931 "	,, 8,094.15
		Rs. 113,344.65

The Commissioner of Stamps made, what he called, a " provisional assessment of duty " in August, 1933, accepting the statement of assets as correct and disallowing the liabilities for the purposes of the provisional assessment. To this assessment was appended the following note :—

> " This assessment is provisional and is liable to revision after verification of the assets and liabilities of the estate. It is granted to enable the executor (sic) to obtain Letters of Administration expeditiously."

The estate duty was provisionally fixed at Rs. 5,426/35, and the administrator paid the amount and applied for Letters of Administration.

After obtaining the Letters of Administration, the appellant filed action No. 46937 in the District Court of Kandy against K. Abram Saibu & Co. for the recovery of Rs. 113,344/65 due to the estate. It is alleged that

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the administrator filed the amount due as Rs. 113,344/65 without an examination of the books of account of the firm, which were not made available to him by the partners of the firm. It is further stated that, at the trial, the lawyers examined the books and found that the sum due in fact was only Rs. 25,473/52, and a consent decree was entered on 27th July, 1936, for Rs. 26,000/– in favour of the estate. By his letter A3 of September 14th, 1936, the administrator intimated to the Commissioner of Stamps the result of the sale and desired him to reduce to Rs. 26,000/– the two assets valued in his declaration at Rs. 113,344/65. In the meantime, the Commissioner of Stamps served on the appellant on August 18th, 1936, what was called an " Additional Assessment Duty " showing that he has increased the nett value of the estate adopted for the provisional assessment by Rs. 77,293/– and claiming an additional amount of Rs. 5,221/23 as additional estate duty. On September 28th, 1936, the Commissioner of Stamps replied to A3 refusing to accept the decree of consent entered in D. C. Kandy 46937 as sufficient evidence of the correct value of the two assets in question, and intimating that the assessment of 18th August, 1936, has now become final.

On the appellant making default in the payment of the additional estate duty of Rs. 5,221/23, the Commissioner of Stamps obtained a citation against him, and the District Judge, after inquiry, directed writ to issue against the appellant for that amount. The present appeal is from that order of the District Judge.

The learned Counsel for the appellant contends that no assessment has been made as required by section 22 of the Ordinance and that, as there was no occasion for him to appeal under section 22 (3) against an assessment, he is at liberty to show cause against the issue of writ by pointing out that the assets have been overvalued in the " provisional " and " additional " assessments.

The " provisional " assessment was an assessment made for a limited purpose as indicated by the Commissioner in his endorsement on the valuation, while the " additional " assessment is, undoubtedly, the final assessment which the Commissioner had to make under section 22 after causing " a statement and estimate to be made by the assessor or assessors to be appointed by the Commissioner." In his affidavit of objections filed in November, 1937, after notice was served on him to shew cause against the issue of writ, the appellant himself referred to the " additional " assessment as the final assessment, and the proceedings in the District Court shew that the inquiry was held on the footing that the assessment was the final assessment under section 22. The " additional " assessment, therefore, is binding on the appellant as he failed to appeal against such assessment under section 22 (3).

I do not think that a person cited under section 32 is entitled to re-open the question of the correctness of the assessment in an inquiry held

under that section. (Vide 76 *D. C. Jaffna* 220 *S. C. Minutes* * July 22nd, 1924.)

I dismiss the appeal with costs.

POYSER, S.P.J.

I agree.

Appeal dismissed.

* *Present :* SCHNEIDER & JAYAWARDENE, JJ.

CHELLIAH vs THE COMMISSIONER OF STAMPS

S. C. No. 76—*D. C. Jaffna No.* 220.

Argued & Decided on 22nd July, 1924.

SCHNEIDER, J.

This is an appeal by an administrator, who was cited under the Estate Duty Ordinance No. 8 of 1919, to show cause why execution for the recovery of a sum of Rs. 19/62 should not issue against him. The administrator appeared and showed cause against the assessment of the value of the estate as made by the Commissioner of Stamps. The administrator contends that the estate is worth only Rs. 200/–. The Commissioner has valued it at Rs. 1,961/80. It would appear that the substantial point at difference between the parties is that a deed of transfer executed by the deceased person eight days before his death is, according to the Commissioner, a fraudulent alienation with a view to avoid payment of estate duty. The learned District Judge upheld the contention of the Commissioner that the objection to the assessment of the value of the estate made by the Commissioner came too late. It seems to me that the reason given by the learned District Judge is sound and should be upheld. Section 32 does not enable a person cited to open up the question of the assessment of the estate. Its scope is limited to cause being shown against execution being issued, that is, I think, upon the assumption that the assessment has been correctly made.

I would, accordingly, dismiss the appeal.

JAYAWARDENE, J.

I agree.

Appeal dismissed.

Present : DE KRETSER, J.

SABAPATHY vs THARMALINGAM & OTHERS

S. C. No. 310—*P. C. Jaffna No.* 220.

Argued & Decided on 28th September, 1938.

Criminal Procedure Code, section 289—*Can the Court order that the costs of the accused be paid in postponing a case under section* 289—*Are costs included in the words "on such terms as it thinks fit."*

The complainant, in this case, applied for a postponement when this came up for trial. The accused opposed this application. The Magistrate allowed the application and ordered the complainant to pay ten rupees to the accused to be divided equally between them for the day's expenses.

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Held : (i) That the Magistrate had power to make the order made by him.

(ii) That the expression "terms" in section 289 can be regarded as including costs.

Per DE KRETSER, J.—"I see no reason why section 289 should be limited in the way he suggests. It does not seem to have been so limited in the Indian Courts, and I can conceive of other occasions on which a similar expression would be sufficient to cover an order for costs. In section 82 of the Civil Procedure Code, the language is that the Court may allow a postponement on such terms as to costs and otherwise. One cannot argue from this that the legislature felt the necessity for using the word 'costs,' and the argument is really the other way about. It indicates that the word 'terms' would include costs — costs being probably specified merely as an indication of what might be done."

Dissented from :—Paul vs. Sinniah Kangany, 5 C.W.R. 143.

No appearance for both appellant and respondent.

DE KRETSER, J.

In this case, on the 19th April, the complainant applied for a postponement and this was objected to by the opposite side. The acting Magistrate postponed the case and ordered the complainant to pay Rs. 10/– to the accused to be divided equally between them for the day's expenses. On the 22nd April, he ordered a distress warrant to be issued for the recovery of the money and postponed the trial for the 10th of May. On the 10th of May, the complainant sent a medical certificate and the Magistrate, not being satisfied with the excuse given for his absence, discharged the accused. Meanwhile, according to the journal, a petition of appeal had been filed on the 30th of April and the defendants had been given notice for the 9th of May. The petition of appeal itself is undated, and is signed by the petitioner but was drawn by his proctor. I think it is unsatisfactory that a petition addressed to this Court should bear no date, but the question that arises is whether the Magistrate had any power to make the order he has made. Crown Counsel refers me to section 289 of the Criminal Procedure Code which empowers the Court to order a postponement or an adjournment on such terms as it thinks fit. The terms of this section seems to be wide enough to cover the present order, and Sohoni in his work on the *Criminal Procedure Code of India*, in dealing with the corresponding section, cites a number of cases in which a similar order has been made. In *Paul vs. Sinniah Kangany* (5 Ceylon Weekly Reporter, page 143) is reported a decision by de Sampayo, J. in which he says "that section 289 does not authorise an order for costs and that there is no authority for a Criminal Court ordering costs to be paid by one side or the other, excepting such costs as crown costs and compensation." The authority is directly in point; but, on the other hand, there was no appearance for the respondent and the attention of de Sampayo, J. does not seem to have been directed to any authority. In the present case, the appellant is absent. The order, in my opinion, is justified, and I see no reason to interfere with it.

The appeal is, therefore, dismissed.

Mentioned after judgment on 30th September, 1938.
Decided on 6th October, 1938.

Mr. Tisseverasinghe for complainant-appellant.

DE KRETSER, J.

Mr. Tisseverasinghe argued the matter further on Friday, 30th September, 1938, and the points made by him were:—

(1) That section 289 does not use the word " costs " and that costs should not be considered to be included in the expression " terms."

(2) He quoted *Sangaralingam Mudaliyar vs. Narayana Mudaliyar and Others* (45 Madras, page 913) as supporting the decision in this way, viz. that the Criminal Procedure Code had provided for the Appellate Court ordering costs and the Police Court ordering crown costs, and that, therefore, on the principle of the maxim *expressio unius est exclusio alterius*, section 289 should not be considered to empower the imposition of costs.

(3) That it had not been the practice to award costs in criminal cases, and it would be a dangerous thing to put such power in the hands of the minor judiciary.

(4) He asked whether the Court would deal in the same way with Police Officers and other Government servants.

(5) Whether there was to be no limit on the amount of costs which a Magistrate might impose. He said that, for example, Counsel goes from Colombo to Galle and then, if the case is postponed, Counsel may mention his fee and ask that the fee be included in the award for costs. Further costs may be awarded repeatedly, and the result may be that a man who comes to Court with a grievance may find himself in jail because of his inability to pay costs. He supported the decision in *Paul vs. Sinniah Kangany* as coming from a Judge of great eminence and experience, and suggested that the Indian authorities are not of much value, more especially as most of the reports themselves were not available and we had to depend on notes made by a commentator on the Code.

With regard to the first objection, I see no reason why section 289 should be limited in the way he suggests. It does not seem to have been so limited in the Indian Courts, and I can conceive of other occasions on which a similar expression would be sufficient to cover an order for costs. In section 82 of the Civil Procedure Code, the language is that the Court may allow a postponement on such terms as to costs and otherwise. One cannot argue from this that the legislature felt the necessity for using the word " costs," and the argument is really the other way about. It indicates that the word " terms " would include costs — costs being probably specified merely as an indication of what might be done.

With regard to the second objection, it fails when once his arguments on the first point is not sustained. In the Indian Code there was no provision,

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such as we have in section 352 of our Code, justifying the Appellate Court ordering costs, and all that the case quoted decided was that the Appellate Court had no jurisdiction to award costs.

With regard to the third point made by him, I agree that it has not been usual to award costs in criminal cases and, in fact, when this appeal was taken up, I myself was rather surprised by the order, and no counsel at that time could refer me to any authority justifying the order ; but Crown Counsel was able, in a little while with the assistance of his note-book, to refer me to the sections. The power which the Court has should, undoubtedly, be exercised with moderation, but it is a salutary power, and I think that it might well be used more often than it has been in the past. I cannot accede to the argument that it is a dangerous thing to put such power in the hands of the minor judiciary both for the reason that I have more confidence than Counsel in the minor judiciary and also because the legislature has chosen to impose such confidence in that body of Judges.

The answer to the fourth point raised by him is in the affirmative. The section does not discriminate between Police Officers and Government servants and others, and they will stand on the same footing. Section 352 did not discriminate, and in *P. C. Balapitiya Case No.* 44852, S. C. M. 26th April, 1918,* Bertram C.J. put a Fiscal's officer on " terms, " the terms being that he should pay such reasonable costs with regard to the attendance of witnesses and legal assistance as the Magistrate thought reasonable. As a result of that decision, section 352 was amended, and it was provided that no order for costs should be made against the Attorney-General or the Solicitor-General. In that case, the Solicitor-General was the appellant. Dias in his *Commentary on the Criminal Procedure Code*, page 746, quotes this case as an authority for an order for costs under section 289. There is nothing in the Supreme Court Minutes to indicate that the Magistrate himself had made an order for costs, and the record itself is not available here.

With regard to the next point, the Magistrate must always exercise his discretion in a reasonable way and, in exercising that discretion, he will no doubt bear in mind that it has not been usual to award costs in criminal cases, the condition of the parties, the circumstances in which the postponement is asked for, and will not pay undue attention to the request of Counsel. If the Magistrate does not exercise his discretion reasonably, this Court can always interfere by way of revision. But there should be no occasion for the award of costs repeatedly if litigation is conducted on proper lines. Counsel was here thinking of the state of things which, unfortunately, has obtained, and obtains today in most, if not all, Police Courts. A very large number of cases is fixed for each day, a number much larger than the Magistrate can hope to deal with, and the result is that postponements are granted too readily and there may be the temptation for Magistrates to get rid of a case by means of a threat to impose heavy costs on the party who is not ready. The state of things now prevailing is,

* See page 133

I believe, being given attention to. It is due to anxiety on the part of the Magistrates to keep a short roll. It used to be common to hear Magistrates take a pride in the shortness of their roll. This is legitimate pride if the roll does indicate the true state of work in the Court, but the effort to keep a short roll is often due to other causes. I can only hope that Magistrates will be intelligent enough to realise that their work will be judged, not by the shortness of the roll, but by the quality of work they perform.

As far back as 1896, the Judges of the High Court of Bombay expressed themselves as follows :—

> " The Honourable the Chief Justice and Judges regret to observe that the trial of cases is at times unnecessarily and unduly protracted. Their Lordships, therefore, desire to point out, for the guidance of all Magistrates, that it is their duty to despatch their criminal work with the least possible delay, it being essential for the proper administration of justice that it should be promptly dealt with. As far as possible, criminal work should be given precedence over other work, cases in which the accused are in custody being taken up for disposal in preference to those in which the accused are on bail. Magistrates should so arrange for the despatch of their criminal work that the hearing of one case should, as much as possible, not be allowed to interfere with the hearing of another, each one being fixed for hearing for distinct days, due regard being had to their probable duration. Every effort should be made to minimise delay and hardship to the parties and witnesses. When a case is once commenced, it should be heard *de die in diem* and completed with every possible despatch, the whole, or as much of the working day as could be spared, being devoted to its hearing. Witnesses remaining over from one day should be examined at the first sitting of the Court on the following day. The practice of taking up a case for an hour or so and then dropping it again should be avoided ; and cases should be disposed of, as far as possible, in continuous sittings. Adjournments should, as a rule, be avoided, especially when the accused are likely to be prejudiced thereby ; and if, from any unavoidable cause an adjournment is deemed indispensable, it should be for as short a time as possible. In any case, a trial once commenced should be continued from day to day, except on Sundays and other days when the Public Treasuries are closed, and days when native usage absolutely requires the intermission of all business."

The reference in the case quoted above is to trials, but it applies with almost greater force to inquiries in non-summary cases, and the length of time that often elapses between the beginning and the completion of an inquiry, for example, in a case of murder, is much to be regretted. The fault is really due to the work not being properly arranged. In my opinion, it is much better to have a roll of three months than to have a case taken up and postponed from time to time during the three months. Magistrates will find, however, from experience, that a three-months roll will not be necessary, and spreading out their cases at the start for about six weeks will probably suffice.

With regard to the Indian Reports, I have not been able to get myself most of them, but I have no reason to doubt that they have been accurately summarised by Sohoni at page 775 of his *Commentary*. I have traced one of the cases, *i.e.* the case of *Mathura Prasad vs. Basant Lal* (I.L.R. Allahabad, Vol. 28, page 207, reported at page 136 of Vol. 3 Allahabad, in

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the Reprint of Indian High Court Reports). In that case, the Magistrate ordered the complainant to pay Rs. 100/- being not satisfied with the reason given for the complainant's absence, namely, that he was ill. Richards, J. said :—

> " Section 344 of the Code of Criminal Procedure, dealing with proceedings in prosecutions, expressly empowers the Court to postpone or adjourn an inquiry upon such terms as it thinks fit. It seems to me that this clearly entitled a Court to award costs to a party who has been put to unnecessary expenses by the conduct of the other side. I, furthermore, think that it would be greatly deplored if the Court had no such power. I think the Court has power to award costs, and in proper cases it is a power that the Court should exercise ; and I think a judicious exercise of the power would have the effect of preventing many useless adjournments."

He then goes on to explain the decision in *King Emperor vs. Chhabraj Singh* (Weekly Notes of 1902, page 59). He says that the attention of the Judge in that case does not appear to have been called to the terms of section 344 of the Indian Code ; the case does not seem to have been argued and, further, the award of costs was against the Government. It also appears that the adjournment was not the adjournment of a trial but of an appeal. He goes on to say that, in the case of *Sew Prosad vs. Corporation of Calcutta*, a Bench of the Calcutta High Court, in a considered judgment, held that the Magistrate, in granting an adjournment, was entitled under section 344 to order costs to be paid by a party in whose favour an order to adjourn was made. The Calcutta case is reported in 1904 9 C.W.N. 18, which is not available, but it is described as a considered judgment of a Bench of the Calcutta High Court.

I see no reason to vary my previous order, and the appeal will therefore be dismissed.

Appeal dismissed.

*THE SOLICITOR-GENERAL vs RANASINGHE AND OTHERS

S. C. No. 358—*P. C. Balapitiya No.* 44852.

Argued and Decided on 26th April, 1918.

Dias, Crown Counsel, for the appellant.

J. S. Jayawardene for the respondent.

BERTRAM, A.C.J.

In this case, the learned Magistrate appears to have thought that he would be doing an injustice to the accused if he allowed a postponement for the purpose of formal evidence being procured as to the document on which the arrest was made. It appears to me, however, that it would be more in the interests of justice to allow all the facts in the case to be investigated, and that an opportunity ought to be afforded for that purpose. The charge is a very serious one. Fiscal's officers must be protected in the *bona fide* execution of process. It may ultimately be proved that there was more than one defect in the warrant. But, even if there were defects, it appears that a charge of assault could have been framed in these proceedings, and it is desirable that that charge should be investigated. As the accused persons have been put to expense owing to the fact that the prosecution had not come fully prepared, the appeal is allowed on terms that the appellant pays to the respondents such reasonable costs with regard to the attendance of witnesses and legal assistance as the Magistrate thinks reasonable.

Appeal allowed.

Present: POYSER, S.P.J. & WIJEYEWARDENE, A.J.

BARTLEET & CO. vs EBRAHIM LEBBE MARIKAR

S. C. No. 142—*D. C.* (*Final*) *Colombo No.* 3234.

Argued on 3rd, 4th, 5th October, 1938.

Decided on 5th October, 1938.

Contract—Speculation in buying and selling rubber—Brokers employed to buy and sell—Is the contract with the brokers enforceable.

The plaintiffs are brokers who were employed by the defendant to buy and sell rubber for him in the London Market. The defendant's transactions were in the nature of gambling on the fluctuations in the price of rubber. The plaintiffs had no interest in the defendant's transactions. They acted merely as brokers, and their only interest in the defendant's rubber transactions was their brokerage. To secure certain payments due to the plaintiffs on account of purchases of rubber for him, the defendant gave a bond. This action was in respect of the bond. The defendant pleaded that the plaintiffs were not entitled to succeed as the bond was given in respect of gambling transactions.

Held : That, the plaintiffs' only interest in the transactions being their brokerage, they were no parties to the wagering transactions of the defendant, and were entitled to succeed.

Followed:—Woodward and Another vs Wolfe (1936, 3 A.E.R. 529.)

H. V. Perera, K.C., with *E. F. N. Gratiaen* and *U. A. Jayasundera,* for the 1st defendant-appellant.

F. A. Hayley, K.C., with *F. C. W. Van Geyzel,* for the plaintiffs-respondents.

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In this action, the plaintiffs obtained judgment against the defendant on the mortgage bond P1. The bond in question was, admittedly, executed by the 1st defendant; but the latter, in his defence, alleged that it was executed on account of gambling transactions between himself and the plaintiffs. The District Judge has, in a judgment which deals with every point raised in the lower Court, come to the conclusion that the transactions between the plaintiffs and the defendant were not wagering contracts and, consequently, entered judgment for the plaintiffs as prayed.

The material facts are as follows. The plaintiffs are brokers carrying on business in the Fort. The defendant employed the plaintiffs as his agents for the purchase of rubber on the London market. The contracts, which are material for the purposes of this case, commence with the contract D13 which was entered into on the 16th of May, 1929, and by that and subsequent contracts the plaintiffs bought, on behalf of the defendant and for his account, 700 tons of rubber to be delivered on the London market between the months of June and December, 1929. The plaintiffs duly carried out their terms of the contract; but the rubber that could have been delivered each month was sold at a loss. The defendant paid such losses to the plaintiffs for the months of June to October, but did not, however, pay the amount due to the plaintiffs for the months of November and December; and it is in regard to such non-payment that the bond P1 was executed and that this action was brought.

On appeal, the following points were taken: firstly, that the commission proceedings in London were irregular. It should be stated that a commission was issued to England on the 26th of February, 1936, for the examination of certain witnesses. Such commission was duly carried out and returned on the 7th of July, 1936, and the evidence recorded on such commission was read at the trial. It was argued that it was improperly read, and that the commission was irregularly carried out as the Commissioner had administered to himself the oath he was required to take by the terms of his commission, and, further, that it did not appear that he had subscribed the oath of office as he was required to do. The District Judge, in a separate order dated the 28th of June, 1937, rejected this argument. I think he was perfectly correct in so doing. He points out that there were no special directions in regard to the mode of taking the oath and, in the absence of such directions, the Commissioner was entitled to administer the oath to himself. In regard to the argument that he did not subscribe the oath of office, the District Judge considered that he must presume that the Commissioner duly carried out the instructions he had received. I entirely agree with the reasons for which this argument was rejected.

A further point was taken that the provisions of the Registration of Business Names Ordinance No. 6 of 1918 were not complied with. The

grounds for this argument were that Mr. Boys, one of the partners of the plaintiff firm, died in July, 1936, but the plaintiff firm did not comply with the provisions of section 7 of the Ordinance within the statutory period of 14 days. They actually did not inform the Registrar of Business Names in regard to the decease of Mr. Boys till the 20th of November, 1936, (P67) and, having given such information, they were told (P68) by the Registrar-General that their certificate of registration need not, for the present, be altered. There may or may not be substance in this argument, but the fact remains that when the action was instituted, and that is the material date, there was no infringement by the plaintiffs of any of the provisions of that Ordinance. It has already been held by this Court, in the case of *Mohideen v. Saibo* (22 N.L.R. p. 268) that, for the purposes of this Ordinance, the plaintiffs' rights are to be determined as they existed at the date of the institution of the action. The argument on this point therefore fails.

The principal point to be decided in the case was whether the contracts entered into between the plaintiffs and the defendant were wagering contracts and, as such, unenforceable. If they were wagering contracts, the principles enunciated in the local case of *Tarrant v. Marikar* (36 N.L.R. p. 145) would no doubt be applicable, and the plaintiffs would not be entitled to succeed. On the other hand, if such contracts were not wagering contracts, the plaintiffs, the execution of the bond in question being admitted, must succeed.

The District Judge's findings of fact, and there is abundant evidence both oral and documentary to support such findings, are briefly as follows : that the material contracts commencing with D13 were entered into in consequence of conversations between the defendant and a Mr. Perera who was at the time in the plaintiffs' office. The contracts provided, and for this purpose one must consider the form of the contract, that the plaintiffs bought, on the order of the defendant, rubber to be delivered in London or Liverpool, at any time or times, at sellers' option, during the months of October to December, 1929. The contract was made under and subject to the Constitution, Bye-laws and Rules of the Rubber Trade Association of London. As previously stated, the defendant did not take delivery of any of the rubber he purchased, but such rubber was sold in accordance with the above Bye-laws and Rules and such sales resulted in heavy losses to the defendant.

In regard to whether these contracts between the plaintiffs and the defendant were wagering contracts, the defendant gave evidence to the effect that he dealt with the plaintiffs as principals and that there was no question of taking the rubber he purchased. It was a pure speculation, gambling in differences between him and the plaintiffs. Mr. Parsons, who gave evidence for the plaintiff firm, on the other hand, stated that they were not concerned with whether the defendant intended to speculate or not ; that they acted merely as his brokers for the purchase and sale of 700

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tons of rubber and that their position was purely that of brokers. As regards its being a wagering contract, they had no interest in the price at which the rubber was eventually sold, and their only interest in the contracts was their brokerage. The District Judge has entirely accepted the evidence called on behalf of the plaintiffs and there is no doubt that he is correct, for the documentary evidence, as stated before, amply supports his finding. I need only refer to one of such documents, namely, P4, which is as follows:—

> Dear Sirs,
>
> As arranged, please buy 700 (seven hundred) tons rubber on London June/December, 1929, at the rate of 100 (one hundred) tons each month at the current market rate; and also I allow you to have the selling as well.
>
> (Sgd.) E. L. Ebrahim Lebbe Marikar.

The statement by the defendant in this letter, that he allowed the plaintiffs to have the selling as well as the buying of the rubber, clearly indicates what the relationship between the parties was.

In regard to the argument on behalf of the appellant that the plaintiffs were acting as principals, the form of the contract D13, in my opinion, does not negative the argument that the plaintiffs were only acting as brokers. It does not establish that the plaintiffs acted as principals. What it does establish is that they made themselves liable to the defendant on this contract, and by executing the contract in this form they assumed the obligation of principals and could not escape liability, assuming that differences had been due to the defendant, by parol proof that they were only acting as brokers.

The course of business is clearly indicated by the evidence that was taken on commission. The plaintiffs, on receiving instructions to purchase rubber for the defendant, cabled to their London agents and entered into a contract with them to purchase the rubber they were instructed to. When their agents had carried out these instructions, they completed the contract with the defendant, charging him the same price as they were charged by their London agents and, at the same time, adding on the commission which was all they would make out of the transaction. It appears from the evidence which was taken on commission that if a person buys rubber, as the defendant did, he can have it delivered to him in a certain month or he may re-sell it through the person he purchased it from or through anybody else, and it is no concern of the broker how he disposes of his contract.

Those being the facts, were the contract D13 and the subsequent contracts wagering and unenforceable. I think, for the purposes of this appeal, it may be accepted that the defendant had no intention of taking delivery of this rubber. He intended to speculate in differences and he hoped to sell it at a greater price than he paid for it. Assuming that to be so, that does not necessarily make these contracts unenforceable.

The first, and one of the most important cases in regard to wagering contracts, is the case of *The Universal Stock Exchange Ltd., v. Strachan* (1896, A.C. p. 166). In that case, Cave, J. in the summing-up to the Jury,

stated the law to be as follows : that, if a man goes to a broker and directs him to buy or sell so much stock as the case may be, there may be in the eyes of the purchaser a gaming transaction or there may not. If the purchaser means to sell the stock before settling day, there may be a gaming transaction so far as the broker is concerned ; and, in order to be a gaming transaction such as the law will not enforce, it must be a gaming transaction in the intention of both the parties to it. This summing-up was approved of by the House of Lords and it is still sound law.

As regards the present case, there is one authority, a recent case, which is directly in point, and which, in my opinion, cannot be distinguished from this case. I refer to the case of *Woodward and Another v. Wolfe*, (1936, 3 All-England Law Rep. p. 529). That was a case in which a person gambled on the cotton futures and, to do so, he had to buy or sell cotton futures through members of the Liverpool Cotton Association. It was held that the true relationship between the parties was that of principal and broker and that there was no gaming or wagering contract between them. The following passages in the judgment of Hilbery, J. are peculiarly applicable to this case :—

> " It was urged before me on behalf of the defendant that, as there was a contract made by the plaintiffs directly with the defendant of purchase and sale as principals, and as there was an express understanding that there should be no question of deliveries on either side but only an eventual payment of differences, the claim was one in respect of gaming and wagering contracts and was therefore unenforceable in law. Reliance was placed upon the decision in *Ironmonger & Co. v. Dyne* * and it was contended that that case established that once it was shewn that, notwithstanding the forms of contract between the parties, the intention was that no deliveries were to be made and that nothing was to happen except payment of differences, the contracts were gaming and wagering contracts. But *Ironmonger & Co. v. Dyne* * was a case in which foreign bankers, whose business it was to buy and sell foreign currency, were the contracting parties on the one side. I cannot find from an examination of that case that they acted in any way as brokers in the transactions. In the fullest sense of the word, they were principals in the transactions with the defendant in that case. In such circumstances, the Court of Appeal decided that the test applied by Cave, J. in *Universal Stock Exchange Ltd. v. Strachan* † at page 167, *i.e.* whether the bargains were real ones for purchase and delivery or whether they were simply gambling transactions intended to end in the payment of differences, was the correct test for resolving the question whether the contracts in question were or were not gaming and wagering contracts. But the plaintiffs in the case before me did in fact act in every transaction as brokers. They made a genuine contract in the market, binding them in respect of that and exactly that which the defendant was buying or selling.....
>
> " They (the plaintiffs) acted for the defendant to enable him to gamble, and they acted in the capacity of brokers in the market in which the defendant wished to gamble in the only way in which the defendant could gamble in that market. If all that the plaintiffs had done was to pass a form of contract, made directly between themselves and the defendant, with an existing arrangement that only differences should be paid, the matter might well be concluded on the principle of the decision in *Universal Stock Exchange Ltd. v. Strachan.* † It is not however, what took place here. The plaintiffs made contracts on the market

* (1928) 44 T.L.R. 497 † (1896) A.C, 166

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for the defendant to give effect to his orders. Those contracts, I am satisfied on the evidence, bound him, and they have, I am satisfied, had to meet their obligations under them....."

It is clear, therefore, adopting the judgment in that case, as I think we ought to, that the plaintiffs must succeed; for it is abundantly clear that they only acted as brokers on behalf of the defendant and in no sense did they enter into a gaming contract. The only consideration for their contract was their commission.

In my opinion, the District Judge came to a correct conclusion, and the appeal will be dismissed with costs.

WIJEYEWARDENE, A.J.

The plaintiffs-respondents instituted this action for the recovery of Rs. 101,771/- with interest from the first defendant due on a mortgage bond P1 of 27th March, 1930, executed by him. The 2nd and 3rd defendants were made parties to the action, as they were puisne encumbrancers in respect of the property hypothecated by the bond. The District Judge entered judgment for the plaintiffs, and the 1st defendant appeals from that judgment.

The appellant admitted the execution of the bond, but pleaded in effect that the bond was given for an illegal consideration and was therefore unenforceable. This plea was put forward on the ground that the liability arose out of certain wagering contracts in respect of the purchase and sale of rubber made by the appellant with the respondents as principals. There were other pleas raised in the course of the proceedings, and I shall deal with them later.

The respondents are a leading firm of brokers in Colombo who put through a large number of contracts for their clients for the purchase and sale of rubber. They do their business not only in Colombo but arrange for similar purchases in London and elsewhere. For their business in London, they employ the firm of George White Yuille & Co. as their regular agent.

The appellant is an owner of rubber estates and has been a dealer in rubber.

After an interview with Mr. Perera, the Ceylonese broker then employed in the plaintiffs' firm, the appellant wrote P4 of May 15th, 1929, to the respondents. P4 reads :—

MESSRS. BARTLEET & Co.,
COLOMBO.

Dear Sirs,

As arranged, please buy 700 (seven hundred) tons rubber on London June/December, 1929, at the rate of 100 (one hundred) tons each month at the current market rate. Also, I allow you to have the selling as well.

Yours faithfully,
(*Sgd.*) P. L. Ebrahim Lebbe Marikar.

On receipt of P4, the respondents immediately telegraphed their London Agent, Yuille & Co., " to buy for our account, delivery in equal monthly lots, 700 tons June/December delivery this year." In reply, Yuille & Co. forwarded to the respondents eleven contracts which showed that they had bought on account of the respondents the requisite quantity of rubber " to be ready for delivery in warehouse in London and/or Liverpool any time or times at seller's option " during the months in question. On receiving telegraphic information about these contracts from Yuille & Co., the respondents wrote on May 16th, 1929, several letters (of which D13 is one) to the appellant in the following terms :—

> We have this day bought by your order and for your account from ourselves....London Plantation Rubber at....per lb....to be ready for delivery in Warehouse in London and/or Liverpool.....
>
> Brokerage ½%.
>
> (*Sgd.*) Bartleet & Co.,
> (*Brokers.*)

The sale prices of rubber given in D13 and similar documents addressed to the appellant are exactly the prices mentioned in the corresponding relative documents received by the respondents from Yuille & Co., as may be seen by a comparison of D13 with A. B. Y. 15.

In respect of these dealings with Yuille & Co., the respondents charged the appellant brokerage, though in Colombo contracts brokerage was payable by sellers and not buyers. This is the usual course of business of the respondents in dealing with foreign buyers and sellers, and appears to be due to the peculiar situation created by these contracts. Mr. P. J. Parsons, one of the partners of the respondents' firm, says :—

> " The reason (for charging brokerage from the appellant) is because we had to guarantee him to Yuille & Co. Yuille & Co. had never heard of him. We are responsible to Yuille & Co. They only recognised us. They did not want to know him, and the only firm or person they recognised in connection with this contract is ourselves. So that, in this case, we act as principals so far as they are concerned."

The respondents did not give any specific instructions to Yuille & Co. as to the disposal of the rubber when tendered and, therefore, Yuille & Co. sold the rubber when it was tendered as there was a general arrangement that, in the absence of specific instructions, they should sell any rubber bought by them for the respondents. This arrangement is in consonance with the course of business of Yuille & Co., as stated by Mr. Chapman. Yuille & Co. informed the respondents about these sales from time to time (*vide* A. B. Y. 17 to A. B. Y. 118.) In communicating this information to the appellant, the respondents wrote letters similar to D12 which reads :—

> E. L. Ebrahim, Esqr.
>
> We have this day sold by your order and for your account to ourselves.....tons plantation rubber.....at.....per lb.....to be ready for delivery in Warehouse in London and or Liverpool.
>
> Brokerage 1%.
>
> (*Sgd.*) *Per pro* Bartleet & Co.

The sale prices mentioned in the documents addressed to the appellant are the same as the prices in the relative documents received by the respondents from Yuille & Co.

In consequence of a falling market, these transactions resulted in losses, and Yuille & Co. sent to the respondents accounts, from time to time, showing the amount due on these transactions. The respondents wrote to the appellant showing the amount payable by him and, for this purpose, they adopted the figures given in the advices from London. D25 is one of such documents sent to the appellant. It gives the purchase price of the rubber and its selling price. The amount due is made up by adding to the difference between the purchase price and selling price, the amounts due on account of brokerage, interest and incidental expenses.

It was understood that the appellant would make payment immediately after the account was tendered to him (*vide* P25.) Though the appellant at times delayed in making payment, he met all the bills due except those in respect of losses incurred on sale of Forward Delivery Rubber for November and December, 1929. His attention was drawn to it by P28 to which he replied by P29, stating that he was making arrangements to settle the amount due by the end of December, 1929. It was ultimately agreed that the appellant should give a bond for the payment of the amount due, and P1 was executed by the appellant in March, 1930. He paid for some months the interest provided under the bond and then made default. The evidence does not show whether he stopped the payments because he was unable to meet his commitments or because the thought occurred to him that it would be against public policy to make payments on a bond given for making good all losses incurred by the respondents. On the other hand, there is evidence to show that the respondents have settled all the amounts due to Yuille & Co., and that the appellant was aware of the fact that at the time that such payments were made.

The defence of the appellant, that the consideration for the bond is illegal, is based on the ground that the respondents did not act as brokers in respect of the contracts in question, but as principals. In order to appreciate this contention, it is best to consider the case as presented by the learned Counsel for the appellant. Up to 1926, the appellant's transactions in rubber have been what are referred to as " spot sales." About that time, there was a boom in rubber, and he began to enter into Forward Contracts without any intention of taking delivery of any rubber bought or sold by him. If the market was against him, he paid the difference between the market price and the contract price. Even when the market was favourable, there was no delivery, but he got a cheque for the difference. He negotiated a number of such contracts through the respondents as brokers. About May 1929, he arranged to enter into such Forward Contracts in London in respect of which the sum now claimed on the bond became due from him. With regard to the circumstances which led to the making of these contracts, he says:

> " In May 1929, one Mr. Perera, a broker in plaintiffs' firm, came and spoke to me. He wanted me to buy rubber. He said he could supply any amount of rubber. I consented to buy rubber. It was arranged that Mr. Perera should buy rubber for me at the London Market. I do not know from whom he arranged to obtain the rubber for me. He came and spoke to me on behalf of Bartleet & Co. It was arranged to buy 100 tons of rubber every month, totalling up to 700 tons at the London Market price. There was no delivery (to be made). It was Bartleet & Co. who sold that rubber to me. At the end of each month, they would send to me an account of the profit or loss. There was to be no delivery. The arrangement was that I should pay the difference when the market was against me, and that I should be paid the difference when the market was in my favour."

He says he regarded the respondents as principals on the contracts in question, and he relies on the documents D12 and D13 as establishing this fact, as these documents refer to a sale to him by respondents and a purchase by the respondents. There was no delivery under the contracts and the respondents, he says, should have been well aware that he did not intend to take delivery in London and that he could not make arrangements to receive such delivery. He defines the contracts made by the respondents with Yuille & Co. as independent wagering contracts by the respondents as principals in order to indemnify themselves against any losses that may be incurred by them in respect of the wagering contracts made by them with him. The evidence with regard to his transactions prior to 1929 may have been of some assistance to the appellant in proving the probability of his statement with regard to the contracts in question in the present case, if such evidence indicated a regular system of business for the payment of differences without delivery of the goods. Though the appellant made a general statement in his evidence in chief, that there was not a single contract of his between 1926 and 1929 in which the ordinary obligations of the seller to deliver and of the purchaser to take delivery were enforced, he had to admit in cross-examination that a number of contracts about which he was cross-examined in detail were, in fact, ordinary contracts for the purchase and sale of rubber. Moreover, he made the very significant admission that, even in the case of Forward Contracts put through locally in which there was no delivery but only an eventual payment of differences, the respondents never acted as sellers or purchasers but only as brokers. The evidence of the appellant as to the conversation between him and Mr. Perera, the Ceylonese broker, stands uncorroborated, and is certainly in conflict with P4. He could have called Mr. Perera to support him ; but he did not choose to do so. While it is not necessary to question the veracity of the appellant, I do not think it prudent to accept his testimony on any material particular unless it is supported by some other evidence, in view of the scant regard shown by him for accuracy with regard to various matters on which he was examined.

I do not think that D12 and D13 could be construed as indicating that the respondents acted as principals and not as brokers, as such a

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construction would be in conflict with all the facts of the case. The appellant was charged for the rubber purchased by him at the same rate at which the respondents secured the rubber in London, and when the rubber was sold in London he was given credit at the same rate at which such re-sale took place. Moreover, the documents sent to him by the respondents showed that they were charging him brokerage and incidental expenses. Those facts disprove the contention that they acted as principals with regard to these contracts with him, and it is inconceivable that he could ever have been under the impression that they intended to act as principals notwithstanding the clear instructions given in his order P4. Mr. Parsons has given evidence denying that the plaintiffs acted in any capacity other than as brokers on these contracts. I see no reason for rejecting this evidence. The true position appears to be that, in order to give effect to P4, the respondents were compelled to purchase the rubber through Yuille & Co. in the manner adopted by them in view of the fact that Yuille & Co., and those for whom they acted, were not prepared to enter into contracts with the appellant who was unknown to them. The respondents acted in the only way it was open to them to act for the purpose of carrying out the order of the appellant to them as his brokers.

The present case is clearly distinguishable from *Tarrant v. Marikar* * where the plaintiffs entered into certain contracts with the defendant for the sale of rubber to him. The plaintiffs claimed a sum of money on a bond to them by the defendant on account of moneys that became due to them on these contracts. The Court held, on the evidence before it, that the contracts were not genuine bargains for the sale and purchase of rubber, but were wagering transactions intended to end only in the payment of differences. The plaintiffs, in that case, admitted they were the principals on the contracts. Garvin, J. and Akbar, J. held that, as the contracts were wagering contracts to the knowledge of both the parties, the plaintiff, who was one of the parties to the contract, could not enforce a claim on a bond the consideration for which was a sum due by the other party to the wagering contracts. The case of *Woodward and Another v. Wolfe* † appears to be more in point. The plaintiffs, in that case, were members of the Liverpool Cotton Association. Only the members of the Association were permitted to enter into transactions for the purchase and sale of cotton futures on the Liverpool market, and such transactions were governed by the regulations and usages of the Association. The defendant, who was not a member of the Association, requested the plaintiffs to deal in cotton futures on his behalf. The plaintiffs, thereupon, made purchases from other members of the Association and, according to the regulations, made contracts on specified forms by which they bound themselves as purchasers, and then filled in other specified forms under which they sold the particular lots of cotton to the defendant at the same price at which they were bought, in addition to their brokerage. Duplicates or counterfoils of the sale notes, in the form of bought notes from the defendants to the plaintiffs, were sent

* (1934) 36 New Law Reports 145 † (1936) 3 All-England Reports 529

at the same time for signature and return by the defendant. The plaintiffs sued the defendant for money due on account of differences, interest and brokerage, and were met by the plea that, " as these were contracts made by the plaintiffs directly with the defendant for purchase and sale as principals, and as there was an express understanding that there should be no question of deliveries on either side but only an eventual payment of differences, the claim was one in respect of gaming and wagering contracts and was, therefore, unenforceable in law." Hilbery, J. rejected the plea and held that the plaintiffs acted in fact as brokers, and merely allowed the defendant in form to buy from or sell to them and that, therefore, they could recover the amount claimed.

I hold that the respondents acted as the brokers of the appellant in respect of these contracts, and they are therefore entitled to make the present claim on the bond.

The appellant has also questioned the rights of the plaintiffs to enforce their claim, on the ground that they had not complied with the provisions of section 7 of the Registration of Business Names Ordinance No. 6 of 1918. This contention is based on the following facts. The 3rd plaintiff died some time after the institution of the present action. The plaintiff firm, thereupon, wrote to the Registrar-General inquiring whether " the terms of registration should be altered," and received in reply P68 from the Registrar-General intimating to them that the name of the 3rd plaintiff could be allowed to remain in the Certificate of Registration " till his successor or successors are duly appointed." Though the reference to " successor or successors duly appointed " in P68 is not clear, yet the document may well be regarded as embodying an order by the Registrar-General extending the time for making the necessary application under section 7. As the question arises whether an application under section 7 for an extension of time should not have been made within 14 days after the death of the 3rd plaintiff, I would consider the soundness of the objection on other grounds. Section 9 of the Ordinance is the relevant section which refers to proceedings instituted by persons who have failed to comply with the provisions of the Ordinance. This section reads :

> " Where any firm or person, by this Ordinance required to furnish a statement of particulars or of any change in particulars, shall have made default in so doing, then the rights of the defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to business, in respect of the carrying on of which particulars were required to be furnished, shall not be enforceable at any time while he is in default, by action or other legal proceedings either in the business name or otherwise."

In *Jamal Mohideen & Co. v. Meera Saibu* * Bertram, C.J. considered the scope of this section and, after comparing it with section 8 of the Registration of Business Names Act, 1916, reached the decision that this section should be restricted to transactions entered into by a person or firm while such person or firm was actually in default. He further held that the words

* (1920) 22 New Law Reports 268

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"the rights of that defaulter.....shall not be enforceable by action" meant that "the defaulter shall not be entitled to bring an action to enforce his rights" and that, therefore, this section should be construed in accordance with the general principle that a litigant's rights in an action are his rights at the date of the institution. In the present case, the alleged default occurred after the institution of the action and long after the execution of P1. I hold, therefore, that this objection fails.

Counsel for the appellant further contended that the order of the District Judge, admitting the evidence taken on commission, was erroneous. For the reasons given by the learned District Judge in his order of 26th June, 1937, I hold that this evidence has been properly admitted.

I dismiss the appeal with costs.

Appeal dismissed.

Present: WIJEYEWARDENE, A.J.

SELONONA HAMINE vs PERERA

S. C. No. 109—*C. R. Kalutara No.* 13050.

Argued on 17th October, 1938.

Decided on 18th October, 1938.

Action on Mortgage Bond—Substitution of legal representative of plaintiff—Decree—Irregularities in the appointment of legal representative—Can defendant be compelled to pay the same claim a second time to the proper heirs.

Held : That, although there are irregularities in the appointment of a legal representative to a deceased mortgagee, a party who has paid a claim to such legal representative, on an order of Court, cannot be compelled to pay the same claim again.

A. C. Z. Wijeratne for defendant-appellant.

J. R. Jayawardene for plaintiff-respondent.

WIJEYEWARDENE, A.J.

This is an action on a mortgage bond. The defendant pleaded payment of a part of the principal sum, but the Commissioner of Requests has not accepted the evidence led before the defence. In spite of the able argument of the appellant's Counsel, I am unable to state that the Commissioner has come to a wrong decision.

The appellant's Counsel has invited my attention to certain irregularities in the appointment of a legal representative to represent the estate of the original plaintiff, and he has expressed a fear that his clients may become liable to pay the amount due on the bond a second time.

I do not think that such a situation could arise. A party, who has paid a claim on an order of Court, will not be compelled to pay the same claim again.

I dismiss the appeal with costs.

Appeal dismissed.

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

POUNDS AND ANOTHER vs GANEGAMA

Application for Revision of the Bill of Costs in S. C. No. 33—D. C. (Inty) Matara No. 11735.

Argued and Decided on 31st October, 1938.

Taxation of costs—Civil Procedure Code, Schedule III.

Held : (i) That, where the Registrar had struck off more than one-sixth of the bill of costs, the costs of taxation should be disallowed.

(ii) That there is no provision for the allowance of a further brief fee whore the argument of an appeal in the Supreme Court is continued over the day.

Per POYSER, S.P.J:—"This case, was first argued *ex parte* on the 26th of May, the respondents not appearing. Judgment was reserved, and shortly afterwards the respondents got leave from the Court for the appeal to be relisted in order that their argument might be placed before the Court. The second hearing was on the second of June, and we are informed that Counsel for the appellant did not repeat his argument but the respondent's Counsel replied to what they considered was the substance of such argument. It would have been open to this Court, when the application to re-list the appeal was granted, to have ordered that the costs of the first day should be paid to the appellant and that the costs of the two days should be treated as separate costs. No such order was, however, made; and, in the absence of such an order, there is no provision in the Civil Procedure Code allowing for the payment of a refresher. For these reasons, the sums of Rs. 147/- and Rs. 94/50 will be struck out of the bill of costs; and, further, junior Counsel's fee for the first day will be reduced by Rs. 42/-, that is, the amount allowed will be half of that allowed in respect of senior Counsel, and as stated in the case above referred to, that is the general practice in this Court.".

N. K. Choksy for plaintiffs-petitioners.

Stanley de Zoysa for defendant-respondent.

POYSER, S.P.J.

This is an application for revision of costs in S. C. No. 33—D. C. (Inty) Matara No. 11735. The first two items that are objected to, which have been allowed, are sums of Rs. 2/25 and Rs. 18/- which are, admittedly, costs of taxation. As the Registrar did strike off more than one-sixth of the appellant's bill of costs, these items should have been disallowed. In regard to the fee paid to senior Counsel, the sum of Rs. 210/- was claimed. The Registrar reduced this by Rs. 63/-. It is pointed out that the Code provides for a maximum fee of Rs. 105/- and this is all that can be allowed. The Registrar, apparently, arrived at the sum of Rs. 147/- by allowing fees prescribed for a retainer and a consultation. Such fees, however, were not set out in the bill of costs that was submitted, and it was pointed out to us that it is at least open to doubt whether there was in fact a consultation between Counsel and the proctors for the appellant. Further items which

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the Registrar has allowed are second fees to both senior and junior Counsel. It has been decided in the case of *Adaikappa Chettiar v. Thos. Cook & Son* * (35 N.L.R. p. 20) that there is no provision for the allowance of a further brief fee where an argument is continued over the day. This case was first argued *ex parte* on the 26th of May, the respondents not appearing. Judgment was reserved, and shortly afterwards the respondents got leave from the Court for the appeal to be relisted in order that their argument might be placed before the Court. The second hearing was on the second of June, and we are informed that Counsel for the appellant did not repeat his argument but the respondent's Counsel replied to what they considered was the substance of such argument. It would have been open to this Court, when the application to re-list the appeal was granted, to have ordered that the costs of the first day should be paid to the appellant and that the costs of the two days should be treated as separate costs. No such order was, however, made; and, in the absence of such an order, there is no provision in the Civil Procedure Code allowing for the payment of a refresher. For these reasons, the sums of Rs. 147/- and Rs. 94/50 will be struck out of the bill of costs; and, further, junior Counsel's fee for the first day will be reduced by Rs. 42/-, that is, the amount allowed will be half of that allowed in respect of senior Counsel, and as stated in the case above referred to, that is the general practice in this Court.

There were two further small items in the bill of costs objected to, but the objections were not pressed and it is unnecessary to deal with them.

The effect of this order is that the bill of costs is reduced to the sum of Rs. 181/75. The plaintiffs-petitioners are entitled to the costs of the application.

WIJEYEWARDENE, J.

I agree.

Application allowed.

ABRAHAMS, C.J.

DE SILVA vs SUMATHIPALA

S. C. No. 107—*C. R. Galle No.* 18251.

Argued & Decided on 24th October, 1938.

Prescription—Possession for over ten years by lessee of strip of land adjoining land leased in the belief that it formed part of such land—Agreement to purchase the leased premises by lessee—Purchase of leased premises ten years after agreement—Continued possession of strip of land adjoining thereafter—Action claiming title to the strip of land eight years after purchase and ten years after agreement—When should prescription be regarded as commencing.

A leased a block of land from its owner B in 1916. A continued to possess this land on the lease till 1926 and, during this period, A was in possession of a strip of land adjoining the leased premises under the impression that it formed a part of it. In 1926,

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* 2 C.L.W. p. 88

A agreed to buy the leased land from B, paid an advance of Rs. 100/–, and had a plan prepared on 7th April, 1926; but B died before the conveyance was executed and A continued to remain in possession till November, 1928, when the executor of B conveyed it to him.

In September 1937, the plaintiff filed this action claiming the said strip of land adjoining the leased premises as against A's heir (the defendant) who claimed it on prescriptive title. The learned Commissioner gave judgment in favour of the defendant, holding that the defendant was entitled to count the period as running from the 7th of April, 1926, the day on which the plan was made as a preliminary to the conveyance.

Held : That, in the circumstances, the defendant was not entitled to count any period prior to the conveyance, inasmuch as the possession of A was *qua* lessee and not *ut dominus*.

E. B. Wickremanayake for the plaintiff-appellant.
No appearance for the defendant-respondent.

ABRAHAMS, C.J.

In this case, the appellant contends that the judgment of the Court of Requests in Galle, dismissing his claim to a piece of land and damages for wrongful possession, should be reversed. The learned Commissioner held that the respondent had made out a case for prescription.

The piece of land in question is called "X" in the case. On the left of it is a larger portion known as lot "C" of which, according to the learned Commissioner, it is admittedly a portion. On the right of it is another large piece which is known as lot "E." The respondent proved certain facts to the satisfaction of the learned Commissioner, and no objection has been taken on appeal to the acceptance of those facts; but it is the legal inference which was wrongly drawn from those facts of which the appellant complains.

The deceased husband of the respondent took a lease of lot "E" from the owner, one Mudaliyar B. P. de Silva, in 1916. He continued to possess lot "E" on this lease till 1926, and, during that time, he was in possession of "X" under the impression that it formed a part of lot "E." In 1926, he agreed to buy lot "E" from Mudaliyar de Silva and paid an advance of Rs. 100/–, but de Silva died before the conveyance could be executed and he continued to remain in possession until 1928, when the executor of the estate of Mudaliyar de Silva conveyed lot "E" to him.

The learned Commissioner accepted the evidence of the defendant that her husband possessed "X" as a portion of lot "E" from 1916 to 1926 as lessee, and from 1926, after payment of Rs. 100/– to Mudaliyar de Silva, her husband and herself had been in possession of "X" down to the filing of the plaint on the 3th of September, 1937; and he says that although the title deed is dated the 6th of November, 1928, he is of opinion that she is entitled to count the period as running from the 7th of April,

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1926, the date on which the defendant's husband had a plan prepared, presumably as an adjunct to the conveyance which he expected to get from Mudaliyar de Silva.

Now, it would appear that from 1916 to 1926 defendant purported to be in possession as lessee, and from the 6th of November, 1928, down to the 6th of September, 1937, (the date of filing the plaint), she purported to be in possession as owner. I do not know whether the learned Commissioner, having found that her possession was continuous from 1916 to 1937, considered it immaterial for purposes of prescription. What is the nature of that possession ? Certainly, it is implicit in prescription that the person who claims must prove that he has been in possession *ut dominus*, that is to say, as owner either *per se* or through an agent. This manifestly excludes any person who has been in possession *qua* lessee or, as in this case, presumptively *qua* lessee. Therefore, the period 1916 to 1926 manifestly cannot count in the defendant's favour. From the 6th of November, 1928, down to the 6th of September, 1937, she purported to be in possession as owner in the belief that the deed transferring lot " E " to her incorporated the disputed strip of land. But that period falls short of ten years. The learned Commissioner, however, would permit her to count also the period from the 7th of April, 1926, to the date of the title deed, the 6th of November, 1928 ; and if that were permitted she has possessed the strip for the whole prescriptive period ; but I do not see how that intermediate period can be allowed to count. The defendant's husband, despite the fact that there had been an agreement between him and Mudaliyar de Silva for the purchase of lot " E," and despite the fact that Rs. 100/- had been paid in advance and a plan had been prepared, still held lot " E " as lessee, and therefore still purported to hold the strip of land " X " in the same capacity. The executors of Mudaliyar de Silva, no doubt, could have laid a claim to " X 2 " by prescription through the defendant's husband who purported to hold " X " as the lessee under Mudaliyar de Silva; but that is another story. They did not make such a claim.

I hold, therefore, that this appeal must succeed with costs in both Courts.

Appeal allowed.

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

KANDIAH vs SOLOMON AND TWO OTHERS

S. C. No. 125—*D. C. (F) Jaffna No.* 10886.

Argued and Decided on 19th October, 1938.

Promissory Note—Bills of Exchange Ordinance, section 84 (1).

The plaintiff, as endorsee, sued the defendants on an instrument which, he alleged, was a promissory note. This instrument, in addition to the particulars required to be stated on a promissory note, contained the following words :—

> " Whereas this amount has been taken out on account of *cheetu*, and whereas deposit has been made for 37 months at the rate of Rs. 25/- once in a month, the amount will be paid off. This *cheetu* is in the name of the first named, and the second and third named are the sureties."

Held : That the writing cannot be regarded as a promissory note, and that the plaintiff was not entitled to sue on it.

N. Nadarajah, with *H. W. Thambiah*, for plaintiff-appellant.

L. A. Rajapakse, with *Sabapathipillai* and *M. M. I. Kariapper*, for defendants-respondents.

POYSER, S.P.J.

In this case, the plaintiff sued the defendants on an alleged promissory note (P1). The plaintiff is the endorsee on P1 which was executed by the defendants, in favour of one Sivaguru, under the following circumstances. Sivaguru instituted a *cheetu*. The 1st defendant became a member and subscribed to the funds a sum of Rs. 25/- a month. After three months, he purchased the *cheetu* at an auction, and on such purchase executed P1. This document is in the form of an ordinary promissory note signed by the three defendants, but the following has been added :—

> " Whereas this amount has been taken out on account of *cheetu*, and whereas deposit has been made for 37 months at the rate of Rs. 25/- once in a month, the amount will be paid off. This *cheetu* is in the name of the first named, and the second and third named are the sureties."

After the execution of this document, the first defendant continued to pay his monthly instalments. In July, 1936, however, the *cheetu* ceased. Up to an including that month the first defendant paid all his instalments. On the closing of the *cheetu*, the document P1 was endorsed to the plaintiff who now sues upon it.

The District Judge has dismissed the plaintiff's action. He came to the conclusion that although P1 was a promissory note it was not negotiable and, on that ground, he dismissed the plaintiff's action. I think the District Judge came to a correct conclusion, although I do not agree with the reasons he gave. In my opinion, the document P1 cannot be regarded as a pro-

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missory note. It is more in the nature of an agreement. "A promissory note is an unconditional promise in writing made by one person to another and signed by the maker, engaging to pay, on demand or at a fixed determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer." See section 84 (1) of the Bills of Exchange Ordinance No. 25 of 1927. The document P1 is not an unconditional promise to pay. It is more in the nature of an agreement to pay a certain sum on the happening of a certain event, namely, the default in the monthly payments to the *cheetu*. As the *cheetu* ceased in July, 1936, and as up to that time the 1st defendant had paid all the instalments that were due from him, his liability under this document clearly ceased.

For these reasons, the appeal will be dismissed with costs.

DE KRETSER, J.

I agree.

Appeal dismissed.

Present: HEARNE, J.

JAYASINGHE vs FERNANDO AND OTHERS

S. C. No. 111—*C. R. Gampaha No.* 8079.

Argued on 11th October, 1938.

Decided on 18th October, 1938.

Decisory Oath—Oaths Ordinance, section 8.

This case was decided in the lower Court in accordance with a decisory oath taken by the plaintiff. In appeal, objection was taken to the decision on the ground that there is nothing before the Court to indicate what particular oath had been administered.

Held : That, in the absence of evidence of the terms of the oath and of its binding nature, a decisory oath cannot be regarded as one coming within section 8 of the Oaths Ordinance.

M. M. Kumarakulasingham for defendants-appellants.

R. C. Fonseka, with *S. W. Jayasuriya*, for plaintiff-respondent.

HEARNE, J.

Case No. 8079, of the Court of Requests Gampaha, was decided as the result of an oath which purported to be a decisory oath in accordance with the provisions of Ordinance No. 7 of 1866. The plaintiff, to whom an oath was administered by a Commissioner, gave evidence in support of this case, and judgment was passed in his favour. The defendants have appealed.

The Commissioner appointed by the Court has been directed to administer an oath in the following words, " I did not receive the amount due on the mortgage bond sued upon," and in the return made by him he stated that he had administered an oath to the plaintiff in these words, " I did not receive from the defendants in this case the amount due to me on the mortgage bond sued upon in this case." It is to be noted that what the plaintiff was required to say on oath is to some extent different from what he said. He said he had not received *from the defendants* the amount due on the bond. It may have been the defendants' case, if the case went to trial, that the plaintiff had received the amount due on the bond *from a third party* on account of or on behalf of the defendants. But it is not this aspect of the case that has been stressed on appeal, although my attention was directed to the discrepancy. The objection raised is that there was nothing before the Court to indicate what particular oath had been administered and that, although the defendants protested to the Court that an oath which is not held to be binding by persons of the persuasion to which the appellant belongs, was administered to him (that is the effect of the defendants' affidavit which was drafted by an unskilled draftsman), judgment was passed without any inquiry by the Court.

In *Sinnethamby v. Vallinatchy* (1906) 10 N.L.R. 62, Wood Renton, J. said, " I think that, even if the party or witness to whom an oath is tendered accepts it, it is desirable that the nature of the oath and the circumstances under which it is administered, as well as the evidence which is given under its sanction, should be recorded." In *Tissera v. Annaiya* (1913) 17 N.L.R. 154, it was held that when " the evidence given by the person is incorporated into the oath, the terms of the oath should be taken down and recorded at the time and place the oath is made."

It is not clear, in this case, whether the evidence given by the plaintiff in this case was contemporaneously recorded. There is no record of the form of the oath which preceded the evidence; the Commissioner gave no evidence of its terms or of its binding nature; and it is difficult to see how it can be said that " such oath or affirmation " as is prescribed by section 8 of the Ordinance was in fact administered.

I allow the appeal and remit the case to the Commissioner of Requests to proceed with it on its merits. The appellants will be entitled to their costs in appeal. Costs in the lower Court will abide the result.

Appeal allowed.

Present: HEARNE, J.

ETTAMAN vs NARAYANAN AND ANOTHER

S. C. No. 99—C. R. Colombo No. 34629 with
S. C. No. 175—C. R Colombo No. 34629.
Argued on 10th & 11th October, 1938.
Decided on 14th October, 1938.

Civil Procedure—Joinder of parties and causes of action—Withdrawal of allegations against one defendant in respect of one of the causes of action—Misjoinder—Withdrawal of such cause of action—Right to proceed with other cause of action.

The plaintiff sued the 1st and 2nd defendants on two causes of action *viz.* that the defendants failed and neglected to return a sum of Rs. 85/- which he had deposited with them, and that they failed to pay a sum of Rs. 120/- due to him as wages. Each of the defendants, he alleged, was jointly liable in respect of each cause of action.

The plaintiff, in giving evidence at the trial, stated that the 1st defendant alone was liable on the first cause of action. Counsel for defendants argued that there was a misjoinder of parties and of causes of action, whereupon Counsel for plaintiff moved to withdraw the first cause of action. This was allowed and trial proceeded on the second cause of action. The Commissioner found against the defendants.

In appeal, it was argued on behalf of the defendants that, as soon as it became apparent that the plaintiff's two causes of action had been wrongly joined, the Commissioner should have dismissed both causes of action and should not have allowed the plaintiff to withdraw the first cause of action.

Held : (i) That it was not open to the Court to allow the plaintiff to continue the action after he had withdrawn the first cause of action.

(ii) That, after the plaintiff moved to withdraw the first cause of action, the Court should have dismissed his action.

Per HEARNE, J:—(*a*) "I have some difficulty in adopting the view that a plaintiff who has misjoined two causes of action should not be permitted to abandon one cause of action, submit to that cause of action being dismissed with costs against him, and elect to proceed on the remaining cause of action so long as the latter by itself does not offend against any of the rules which govern the bringing of actions. The rules relating to the joinder of defendants and of causes of action are rules of procedure and not of substantive law. The object of the rules is to prevent embarrassment of a trial ; and, if by sacrificing one cause of action the plaintiff removes all possibility of embarrassment, I think he should be allowed to continue his second cause of action."

(*b*) "But a plaintiff will not be permitted, by a false allegation in the plaint, to make it appear that there is no misjoinder when, in point of fact, on the withdrawal of that allegation, misjoinder at once arises."

Followed: (1) *Abraham Singho v. Jayaneris Singho*, 14 C.L.R. 121.
(2) *Sivakaminathan v. Anthony*, 3 C.L.W. 51.

N. Nadarajah for defendants-appellants.
P. Tiyagarajah for plaintiff-respondent.

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The plaintiff, in C. R. 34629 Colombo, sued the defendants on two causes of action. He alleged that he had deposited Rs. 85/– with the 1st and 2nd defendants " which they had failed and neglected to pay " although demand had been made for the return of the money. On a second cause of action, he claimed that both the defendants had engaged him to look after their goats, and that a sum of Rs. 120/– as wages was due to him by them. Each of the defendants was made jointly liable with the other in respect of each of the two causes of action, and no question of misjoinder arose. When the plaintiff entered the witness box, he stated that the 1st defendant alone was liable on the first cause of action. Counsel for the defendants argued that there was a misjoinder of parties and causes of action, whereupon Counsel for the plaintiff moved to withdraw the first cause of action against both defendants. This was allowed and the trial proceeded on the second cause of action alone. At its conclusion, the Commissioner found in favour of the plaintiff and entered judgment against the defendants in a sum of Rs. 120/– with costs in that class. He did not dismiss the first cause of action which had, with the leave of Court, been withdrawn. The defendants have now appealed.

It was argued on appeal that, as soon as it became apparent that the plaintiff's two causes of action had been wrongly joined, the Commissioner should have dismissed both causes of action and should not have allowed the plaintiff to withdraw the first cause of action.

There appears to be authority for this contention. In *Abraham Singho v. Jayaneris Singho*, 14 Ceylon Law Recorder 121, the plaintiff brought an action against two defendants on different causes of action. The trial Judge allowed the plaintiff to withdraw the cause of action against the 2nd defendant, whom he dismissed from the suit, and to proceed on the first cause of action against the 1st defendant. On appeal, it was held that the Judge was wrong in allowing the plaintiff to proceed against the 1st defendant only, and that he should have dismissed the plaintiff's action with costs against both the defendants. In *Sivakaminathan v. Anthony*, 3 Ceylon Law Weekly 51, the plaintiff pleaded two " separate and distinct causes of action " against two defendants. He asked for judgment against the 1st defendant in a sum of Rs. 7,265/75 and, alternatively, for judgment against the 2nd defendant for the same sum. The plea was taken that this was a case in which there had been misjoinder of parties and of causes of action, and the plaintiff then applied to withdraw his action against the 2nd defendant and to proceed with the action against the 1st defendant only. The application was disallowed, and on appeal the decision of the trial Judge was approved. It was held that two courses were open to the Court. One was to dismiss both causes of action; the other to permit such amendment to be made in the pleadings as to enable both causes of action to be brought within the rules which regulate the bringing of actions.

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It was further held that, as it was impossible by any conceivable amendment to reconstitute the action as against one or other of the defendants at the option of the plaintiff, both causes of action must be dismissed. It would appear that the view taken by the Court was that, as two defendants had been brought into Court, the misjoinder could not be avoided by allowing the plaintiff to withdraw one cause of action, but only by amending the pleadings so as to enable him to proceed against one or the other in the alternative.

The decision of this Court in *Sivakaminathan v. Anthony* (supra) went beyond the decision in *Abraham Singho v. Jayaneris Singho* (supra) in that it was held that, in the case of misjoinder of causes of action and of parties, the only course open to the Court was not to dismiss the whole action ; but it approved the view that the remedy of permitting the plaintiff wholly to withdraw one cause of action was not available to him.

I have some difficulty in adopting the view that a plaintiff who has misjoined two causes of action should not be permitted to abandon one cause of action, submit to that cause of action being dismissed with costs against him, and elect to proceed on the remaining cause of action so long as the latter by itself does not offend against any of the rules which govern the bringing of actions. The rules relating to the joinder of defendants and of causes of action are rules of procedure and not of substantive law. The object of the rules is to prevent embarrassment of a trial; and, if by sacrificing one cause of action the plaintiff removes all possibility of embarrassment, I think he should be allowed to continue his second cause of action.

In view of the opinions expressed by several Judges of this Court, I feel the greatest diffidence in expressing my own opinion. Counsel for the respondent did not advance any argument on the point ; Counsel for the appellants had no opportunity of addressing me on it ; and, for the purposes of this appeal, I therefore follow the authorities I have cited.

The only argument on the law addressed to me by Counsel for the respondent was that misjoinder must appear on the face of the pleadings, and, as this was not the case, no objection on the subject of misjoinder could have been taken. It is true that questions of misjoinder must be decided on the allegations in the plaint, and not on what is found to be correct ultimately. But a plaintiff will not be permitted, by a false allegation in the plaint, to make it appear that there is no misjoinder, when in point of fact, on the withdrawal of that allegation, misjoinder at once arises. In other words, he will not be permitted to proceed with a suit which, at the trial, may be embarrassing by reason of multifariousness merely because by a false allegation in the plaint he has concealed such multifariousness.

In the result, I allow the appeal with costs and dismiss the plaintiff's suit with costs.

Appeal allowed.

Present: WIJEYEWARDENE, J.

ALAGAPPA CHETTIAR vs JAYALATH AND ANOTHER

S. C. No. 77—C. R. Matale 4533.
Argued on 18th October, 1938.
Decided on 19th October, 1938.

Public Servants' (Liabilities) Ordinance—Joint and several promissory note executed by public servant and his mistress—Action against both—Plea that action does not lie against the public servant—Can the action proceed against the public servant's mistress alone.

This action was brought to recover money due on a joint and several promissory note made by a public servant and his mistress. The public servant, who was the first defendant, pleaded the Public Servants' (Liabilities) Ordinance. The Commissioner of Requests thereupon dismissed the action as against both defendants. The plaintiff appealed from this decision.

Held : That the plaintiff was entitled to proceed with his action against the other defendant who is not entitled to the benefit of the Public Servants' (Liabilities) Ordinance.

C. V. Ranawake for plaintiff-appellant.
H. W. Thambiah for second defendant-respondent.

WIJEYEWARDENE, J.

The defendants promised jointly and severally to pay a certain sum of money to the plaintiff-appellant on the promissory note sued upon in this action. At the trial, it was admitted that the 1st defendant was a public servant within the meaning of the Public Servants' (Liabilities) Ordinance, 1899, and that the 2nd defendant was the mistress of the 1st defendant. The Commissioner of Requests dismissed the action against both the defendants.

The plaintiff has preferred this appeal against the order dismissing his action against the 2nd defendant.

The Counsel for the 2nd defendant sought to support the judgment on the ground that, by reason of the institution of the action against the 1st defendant, the promissory note had become void and, therefore, no decree could be entered even against the 2nd defendant. He contended that section 3 of the Public Servants' (Liabilities) Ordinance, 1899, prohibited an action against a public servant and that the note therefore became void under section 4 which enacted :

> " All proceedings and documents, in or incidental to an action, in contravention of this Ordinance shall be void."

In support of his argument, he relied on certain passages in the judgment of this Court in *Narayanan Chetty v. Silva* * and *Samsudeen Bhai v. Gunawardene* †.

* (1933) 35 New Law Reports 210. † (1935) 37 New Law Reports 367

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The Public Servants' (Liabilities) Ordinance has been enacted, as stated in the preamble, to protect public servants from legal proceedings in respect of certain liabilities, and I do not think that, in the absence of any express provision to the contrary, the Ordinance should be so construed as to extend the immunity conferred by it to persons who are not public servants within the meaning of the Ordinance. As this is a disabling Ordinance which interferes with the ordinary contractual rights and liabilities of individuals, it should be given an interpretation which is in favour of the freedom of the individual (vide *David v. de Silva*).* I hold that section 4 of the Ordinance has the effect of making the promissory note void only against the public servant in question, and not void generally. I do not think the judgments cited by the Counsel for the respondent are of much assistance, as in those cases this Court considered the effect of section 4 on a promissory note sued upon in an action to which only the public servant concerned was a party. There are, no doubt, certain passages in these judgments which appear to support the contention of the respondent's Counsel; but such passages, which are expressed in general terms, should not be construed without reference to the facts of those cases. No occasion arose in these cases for this Court to consider the effect of section 4 on the liability of a party to an action other than a public servant.

The promissory note in question is, moreover, a joint and several note, and such a note " though on one piece of paper, comprised, in reality and in legal effect, several notes " (vide Byles on *Bills* 17th Edition, page 9; and Halsbury's *Laws of England*, Volume 7, Art. 693.) The note, therefore, which the Ordinance declares as having become void by operation of section 4 is distinct from the note on which a claim is made against the second defendant.

My attention has been invited to the decision of Maartensz J. in *Allanoor Bai v. Mary Margaret Edwin* † in which case a similar question arose with regard to a joint note made by a public servant and another. I venture respectfully to agree with the opinion expressed by that learned Judge that " the general terms (of section 4) are restricted by the purpose for which the Ordinance was enacted."

I allow the appeal with costs and direct judgment to be entered with costs against the second defendant.

Appeal allowed.

* (1933) 35 New Law Reports 201 † (1938) 12 Ceylon Law Weekly 23

Present : WIJEYEWARDENE, J.

WANIGASEKERA (Sanitary Board Inspector) vs MUSTAPHA

S. C. No. 215—*P. C. Kurunegala No.* 56144.
Argued on 21st October, 1938.
Decided on 3rd November, 1938.

Adulteration of milk—Interpretation of by-law—Meaning of the word "kept" in the context "sold or offered for sale or kept."

The accused was charged with having acted in breach of the following by-law:—

"No adulterated milk shall be sold or offered or exposed for sale or kept on the premises of any eating house or tea or coffee boutique.

"For the purposes of this rule, adulterated milk shall mean milk to which water or any other foreign liquid or substance has been added for the purpose of augmenting its quality or enhancing its apparent quality, and not for the purpose of preparing tea or coffee or any other beverage for the immediate consumption of customers."

The facts are—

that about 8 bottles of unboilt milk were found by the complainant in a pot kept on a table in the accused's tea boutique along with other articles exposed for sale. The accused had bought the milk from a milk vendor. The milk contained 6% of water. The milk was intended for addition to tea or coffee served to the accused's customers, and was not intended for sale as milk.

The Magistrate acquitted the accused, and the complainant appealed.

Held : (i) That the accused was not guilty of an infraction of the by-law.
(ii) That the word "kept" in the by-law means kept for sale.

Van Geyzel for complainant-appellant.
Cyril E. S. Perera for accused-respondent.

WIJEYEWARDENE, J.

This appeal is preferred with the sanction of the Attorney-General against an order of acquittal. The charge against the accused was that "he did expose for sale or keep on the premises of his tea boutique adulterated milk in breach of chapter IV section D (9)..... of the by-laws framed .....under section 9E (2) and 5A of Ordinance No. 18 of 1892 and published in the Government Gazette No. 7142 of November 19, 1920, as amended by deletion No. V119/31 published in the Government Gazette No. 7851 of April 30, 1931."

The by-law as published in the Government Gazette No. 7142 reads :—

"No adulterated milk shall be sold or offered or exposed for sale or kept on the premises of any eating house or tea or coffee boutique.

"For the purposes of this rule, adulterated milk shall mean milk to which water or any other foreign liquid or substance has been added for the purpose of augmenting its quality or enhancing its apparent quality, and not for the purpose of preparing tea or coffee or any other beverage for the immediate consumption of customers."

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Wijeyewardene, J.

Wanigasekera (Sanitary Board Inspector) *vs* Mustapha

The amendment appearing in the Government Gazette No. 7851 deletes the following words at the end of the by-law :—

> " and not for the purpose of preparing tea or coffee or any other beverage for the immediate consumption of customers."

On a survey of the evidence led by the prosecution and the defence, the Magistrate has held the following facts to be proved. About 8 bottles of unboilt milk were found by the complainant in a pot kept on a table in accused's tea boutique along with other articles exposed for sale. The accused had bought the milk from a milk vendor. The milk contained 6% of water. It was used by the accused in the preparation of tea or coffee for customers and was never sold as plain milk.

The Magistrate held that the accused had not committed a breach of the by-law referred to in the charge, and acquitted the accused.

The Counsel for the complainant-appellant contends that the accused should have been convicted in view of the finding by the Magistrate:

(*a*) that water had been added to the milk ; and

(*b*) that such milk to which water had been added was kept on the premises of the accused's tea boutique.

It is desirable that I should examine an earlier decision of this Court before I consider this argument. In *Wijeratne vs. Abdulla* * Lyall-Grant, J. construed the by-law in question as published in the Gazette No. 7142 before it was amended. In that case, the prosecution proved that four bottles of milk to which water had been added were found in the accused's tea boutique. The defence called no evidence, and the Magistrate convicted the accused. On an appeal by the accused, the learned Crown Counsel appearing for the Attorney-General sought to support the conviction on the ground that, when the prosecution proved that water has been added to the milk, the Court was justified in presuming under section 114 of the Evidence Ordinance that such addition had been made for the purpose of augmentation, and the burden was shifted to the accused to prove that the addition was made for the purpose of preparing a beverage for the consumption of customers. In support of that argument, reference was made to section 105 of the Evidence Ordinance which provides that " when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within.....any special exception or proviso contained in..... any law defining the offence is upon him, and the Court shall presume the absence of such circumstances." In rejecting this argument, Lyall-Grant, J. stated :—

> " The by-law forbids the sale of adulterated milk, and the second part of the by-law consists of a definition of adulterated milk when, *inter alia*, water has been added to it for a certain purpose and not for another purpose. This is not a case of a general rule and an exception, but is a case of two alternatives, and the prosecution must prove that the water was added for the purpose of augmenting the quantity of milk."

The amendment of the by-law appearing in the Gazette No. 7851 was apparently intended to meet the difficult situation created by this decision. The amendment enables a complainant to prove merely that water has been

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* (1929) 31 N.L.R. 310

added to the milk, and establish by means of presumption permissible under section 114 of the Evidence Ordinance that water was added for the purpose of augmenting the quantity of milk. It is no longer necessary for a complainant to prove by direct evidence that the accused added water for such a purpose. The amendment does not, however, take away from the accused the right to negative such a presumption by leading evidence to show that the purpose of adding water was not the augmentation of a quantity of milk but the preparation of a beverage for his customers. If the legislature intended to take away such a defence, I have no doubt the draftsman would have enlarged the ambit of his amendment by deleting also the words " for the purpose of augmenting its quantity or enhancing its apparent quality."

I think the only effect of the amendment is to shift the burden of proof from the complainant to the accused, with regard to the purpose for which water or any other liquid or substance is added to the milk, and thus to give legislative sanction to the argument put forward unsuccessfully on behalf of the Crown in *Wijeratne vs. Abdulla.**

Another point that has to be considered in testing the soundness of the argument of the learned Counsel for the complainant-appellant is whether the by-law makes the mere keeping of adulterated milk an offence or whether it requires that the adulterated milk should have been kept for purposes of sale. The passage that has to be construed reads :—

> " No adulterated milk shall be sold or offered or exposed for sale or kept on the premises."

It will be noted that the words " for sale " do not follow the word " kept," and it is on this fact that the learned Counsel bases his argument that the by-law penalises the mere keeping of adulterated milk. I am unable to accept this argument. If the legislature intended to penalise a man for keeping on his premises milk to which water is added, even though such milk was not kept for sale as milk, I cannot understand why the legislature should have inserted in the by-law the words " exposes for sale." The words " No adulterated milk shall be sold or offered or kept on the premises " would have been quite sufficient to penalise all the acts which, according to the learned Counsel, are now made offences by the by-law. I think the word " kept " in the by-law should be read as " kept for sale." The by-law in question is a penal enactment, and where there is a doubt as to its meaning the meaning beneficial to the accused should be favoured.

In view of the Magistrate's finding on the facts, I hold that the accused was entitled to an acquittal and dismiss the appeal.

Appeal dismissed.

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*(1929) 31 N.L.R. 310

Present : ABRAHAMS, C.J.

KIRIBANDA vs KUMARASINGHE

S. C. No. 481—*P. C. Matale No.* 438.
Argued on 28th October, 1938.
Decided on 3rd November, 1938.

Penal Code, section 427—*House Trespass—Action by appellant for rent and ejectment against tenant—Plea by tenant that accused was owner—Accused's evidence and deeds rejected—Judgment for appellant—Writ for delivery of possession—Premises vacated by tenant but in occupation of accused—Has accused committed house trespass.*

A sued B for rent and ejectment. B contended that C was the actual owner of the premises. At the trial, C gave evidence and produced certain deeds in support of his claim, but the learned Commissioner rejected the claim and entered judgment for A. Writ was issued for delivery of possession, and when A proceeded with the Fiscal's Officer for the purpose, they found that B had already left the premises and C had come into occupation. A charged C with house trespass by entering into and remaining in the house with intent to annoy him. C was acquitted, but A appealed with the leave of the Attorney-General.

Held : That the accused had not committed the offence of house trespass inasmuch as the house cannot be said to be in the occupation of the appellant at the time the accused entered it,

Per ABRAHAMS, C.J. " The mere fact that, in giving judgment in favour of the appellant, the Commissioner of Requests had rejected the evidence of the accused is no ground for holding, as the appellant has contended, that the claim of the accused had received adjudication. The fact that he was a witness does not make him a party to the case."

C. E. S. Perera, with *R. C. Fonseka*, for the complainant-appellant.
Shelton de Silva, with *H. A. Chandrasena*, for the accused-respondent.

ABRAHAMS, C.J.

This is an appeal by leave of the Attorney-General against an acquittal. The appellant charged the accused with having committed house trespass by entering into and remaining in the house belonging to the appellant with intent to annoy him. The facts of the case are simple, and the point for decision seems to me to be an obvious one.

The appellant brought an action, in the Court of Requests of Matale, against one Meera Saibo for house rent and ejectment in respect of the house in question. Meera Saibo contended that the accused was the actual owner of the house and cited him as a witness. The accused appeared and duly gave evidence and produced some deeds in support of his evidence. The Commissioner of Requests found the evidence of the accused unconvincing. In fact, he made certain strong remarks about the deeds. Judgment was

given in favour of the appellant and a Fiscal's Officer was entrusted with a writ and proceeded to the house in order to put the appellant into possession. When they reached the house, they found that Meera Saibo had vacated the premises but the accused was there. He produced a deed and said that he claimed the house and land and that the appellant must bring a civil action against him if he wished to have him ejected. The Fiscal's Officer said that the accused did not insult, intimidate or annoy the appellant in any way.

The learned Magistrate acquitted the accused on the ground that the provisions of section 427 of the Penal Code had not been fulfilled in this case, inasmuch as the property was not in the occupation of the appellant. He also held that the accused's entry into and possession of the land were *bona fide* and that his behaviour, according to the Fiscal's officer, indicated that he had no intention to annoy, intimidate or insult the appellant.

There is substance in the first point, and I do not propose to consider the other two. I do not see how the house can be held to be in the occupation of the appellant at the time that the accused entered it. When Meera Saibo vacated the house the appellant was entitled as against him to enter into occupation according to the terms of the judgment; but I do not see how that judgment was binding upon any other person. The mere fact that, in giving judgment in favour of the appellant, the Commissioner of Requests had rejected the evidence of the accused is no ground for holding, as the appellant has contended, that the claim of the accused had received adjudication. The fact that he was a witness does not make him a party to the case. It may very well have been, had he been a party, that any evidence that he could have brought would have been treated with no more respect than it actually was treated by the Commissioner of Requests; but that is not to the purpose. The appellant had other remedies, and it is a pity that he resorted to the Criminal Court.

I dismiss the appeal.

Appeal dismissed.

Present : ABRAHAMS, C.J.

KATONIS APPU vs CHARLES AND ANOTHER

S. C. No. 143—*C. R. Panadura* 3802.
Argued on 24th October, 1938.
Decided on 27th October, 1938.

Appeal—Civil Procedure Code, section 756—Failure to give notice to certain respondents that security for their costs will be tendered—Nor deposit of such security made—When there are several respondents can security for one respondent be accepted as security for all.

Held : (i) That failure to comply with the provisions of section 756 of the Civil Procedure Code cannot be excused.

(ii) That, where there are several respondents to an appeal, security given for the costs of one of them cannot be accepted as security for all.

H. A. Wijemanne for the 11th, 32nd and 34th defendants-appellants.
E. B. Wickremanayake for the plaintiff-respondent.

ABRAHAMS, C.J.

In this appeal, a preliminary objection has been taken which, unfortunately, is most familiar in this Court. The plaintiff-respondent submits that the appeal must be dismissed forthwith as the other respondents cited had not received notice that security for their costs of the appeal will be tendered, nor has such security been deposited, and therefore the provisions of section 756 of the Civil Procedure Code have been infringed without excuse.

There was one plaintiff and 45 defendants. Defendants 11, 32 and 34 are the appellants, and they have cited the plaintiff and the remaining defendants as respondents. It was moved in the lower Court to tender a sum of Rs. 26/– cash security for the plaintiff-respondent's appeal costs. Notice was received on behalf of the plaintiff-respondent, and consent was signified and the money was deposited in Court.

There is ample authority that the provisions of section 756 of the Code must be obeyed in respect of each respondent, and an objection can be taken in respect of non-compliance even by a respondent who has received notice and consented to security. In this connection, I would refer to *Saleem vs. Yoosoof et al.* (17 C.L.R. 117) and, as this has been complete non-compliance with the provisions of the law, I do not see how it can be excused. Counsel for the appellants struggled desperately to rectify his position, and has finally submitted that it is the practice in the Court of Requests, when there are a number of respondents, to accept security for one as security for all. I have never heard of such a practice, and if it does exist it seems to me to be thoroughly unjustifiable. In this case, the plaintiff-respondent accepted

the sum of Rs. 26/– as security for costs. He would certainly be surprised and indignant if he were told that he had to share his costs with a large number of other defendants who, even if they did not file any answer, as these did not, nevertheless, were fully entitled to come into this Court and be represented at the appeal. Moreover, since these respondents received no notice under section 756, how could it be said that they would have to accept a share for their costs when they had received no notification of the amount it was proposed to tender. It is certainly about time that it was fully understood what the provisions of section 756 entail. There have been sufficient decisions over a number of years to make it perfectly clear ; but these cases still go on and the litigants pay.

The appeal is dismissed with costs in both Courts.

Appeal dismissed.

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

MOHAMED ANVAR vs ARUMUGAM CHETTIAR

S. C. No. 132—*D. C. Colombo* 889.

Argued on 17th October, 1938.

Decided on 26th October, 1938.

Minor—Lease of minor's property by curator without sanction of Court—Is such lease null and void—Change of curator—Agreement with lessee for monthly tenancy before expiry of lease—Subsequent notice to quit forthwith by curator—Action by minor for ejectment and damages against lessee—Judgment for plaintiff—Is such tenant entitled to reasonable notice.

I, as curator of a minor's property leased on a notarial bond certain premises to the defendant for a period of two years commencing from the 1st of March, 1936. He did not obtain the sanction of Court for the purpose. In September, 1936, there was a change of curator and M obtained a certificate of curatorship in his favour on 28th of September, 1936. On the 1st of September, 1936, (before the new certificate of curatorship was granted) I and M entered into an agreement with the defendant's Attorney (defendant being away in India at the time) for a monthly tenancy at the same rental as provided in the lease. Later, on defendant's return, a dispute having arisen between the parties, the curator on the 3rd of July, 1937, gave defendant notice to quit forthwith. The defendant did not comply with the notice and action was filed by the minor on the 8th July, 1937, for cancellation of the lease, ejectment and damages alleging that the lease granted by I was null and void as it was executed without the sanction of Court. Decree was entered in plaintiff's favour and defendant appealed.

Held : (i) That the relationship created was one of monthly tenancy.

(ii) That the defendant was entitled to reasonable notice before the te nancy could be terminated

The correctness of the opinion expressed in *Mahawoof vs. Marikar*, 31 N.L.R. 65, and *Perera vs. Perera*, 3 Browne 150, doubted.

Referred to : Uduma Lebbe Udayar vs. Christie, 1 C.W.R. 48.

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de Kretser, J.

Mohamed Anvar *vs* Arumugam Chettiar

H. V. Perera, K.C., with *S. J. V. Chelvanayagam*, for defendant-appellant.

N. E. Weerasooria, K.C., with *J. A. T. Perera*, for plaintiff-respondent.

DE KRETSER, J.

The plaintiff is a minor. His next friend is his father-in-law, who is also curator of his property. The previous curator was one Ismail, and the property now in question consists of grass lands and some tenements, which he had leased to the defendant-appellant on the 20th April, 1935, for 2 years commencing from the first day of March, 1936. The indenture of lease is D8. The certificate of curatorship has not been produced but a summary of it is P2 in the Police Court proceedings. It is in the form prescribed in the schedule to the Civil Procedure Code.

Purporting to act under this certificate, the former curator had leased the appellant, also for 2 years, on D6 of 8th May, 1930, and on D7, also for 2 years, on 1st March, 1934. There is no document on record covering the period 1st June, 1932, to 28th February, 1934.

On the 1st of September, 1936, the appellant was out of the Island and his business was in charge of an attorney.

On that day the present curator, Muktar, went along with the previous curator and entered into an agreement with the attorney for a monthly tenancy at the same rental as had been fixed by D8. The agreement is not well worded but all the parties agree on its meaning. It is in the name of the appellant.

The certificate of curatorship in favour of Muktar is P6 and is dated 28th September, 1936.

The change was made, not because of any mismanagement on the part of Ismail, but because of the relationship created by the plaintiff's marriage.

When, therefore, D1 was executed the certificate had not been issued but the change was already in effect.

On the appellant's return to the Island, some conflict took place and, as a result, Muktar forcibly ejected the appellant on 9th October and was prosecuted. The Police Court case went on till the 1st of July, 1937, on which day Muktar was convicted of criminal trespass and undertook to give, and did give, appellant possession of the premises leased. The appellant was then given notice to quit forthwith. This notice (D5) was given on the 3rd July, and it was given by the curator. It threatened action for the cancellation of the lease.

The plaint in this case was filed on 8th July by the minor, and the one ground alleged was that " the said lease is void and of no effect in law inasmuch as it was granted by the said A. M. M. Ismail without the leave and sanction of Court." Damages in Rs. 450/- a month were claimed from the date of the plaint.

A large number of issues were raised at the trial, and decree was entered in plaintiff's favour on 11th March, 1938, by which date the lease had expired.

Respondent's Counsel argues that a monthly tenancy would come within a curator's power of management but that a tenancy for a longer period would amount to an alienation and would be null and void if it had not been sanctioned by Court. He relies on the cases of *Mahawoof vs. Marikar* * and *Perera vs. Perera* †. These cases decided that a lease for a term exceeding one month was invalid unless sanctioned by Court. I do not understand these cases to decide that such a lease would be illegal or null and of no effect whatsoever, but only that it would not be enforceable in the same way as a non-notarially executed lease for a similar period would not be enforceable. I do not see why such a lease should not operate as a monthly tenancy in the same way that this Court has recognised that non-notarial leases may operate. I do not wish to be understood to agree with the opinions expressed in *Mahawoof vs. Marikar* * and *Perera vs. Perera* † and shall reserve my right to re-consider them should the necessity arise to do so. They are already affected by the opinion expressed by *Uduma Lebbe Udayar vs. Christie* §.

In the present case, it is clearly established that the appellant went into possession as a tenant of the previous curator, Ismail, and that the present curator was willing to accept him as a tenant on the same terms, though not for a fixed period. What was the contract between Ismail and the appellant but one of tenancy on a monthly rental ? Granting, for the sake of argument, that the agreement fixing the period was invalid, or even null and void, the tenancy still remained, and the appellant was recognised by Ismail as his tenant and paid rent as a tenant. It is impossible to get away from that relationship. That relationship could be terminated only by such notice as the law recognised to be reasonable, and no such notice was given by Ismail's successor. Consequently, plaintiff's action was misconceived and must fail.

But, as the appellant was in possession as a monthly tenant and was liable to pay rent, and as his Counsel expressed willingness to pay that rent, I think a decree may be entered for the amount due, but without interest. Presumably, the appellant would be liable for the period beginning on 1st July, 1937, and ending 28th February, 1938, *i.e.* a period of eight months which means a liability to pay Rs. 2,000/–. The whole or greater part of this amount is already in deposit.

The appellant contributed largely to the lengthy and unsatisfactory course the trial took, and the fairest order to make would be to award no costs in the lower Court.

The decree is set aside and the District Judge will enter decree for plaintiff for the rent due without interest or costs.

The appeal succeeds and the appellant is entitled to the costs of this appeal.

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*31 N.L.R. 65 †3 Browne, 150 §1 C.W.R. 48

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Poyser, S.P.J.

Mohamed Anvar *vs* Arumugam Chettiar

POYSER, S.P.J.

I have had the advantage of reading the judgment of my brother de Kretser. I agree that the appellant should only be required to pay rent at the rate of Rs. 250/- a month, as I also have considerable doubts as to the correctness of the opinion expressed in *Mahawoof vs. Marikar* and *Perera vs. Perera* (supra).

Appeal allowed.

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

DON CORNELIS APPUHAMY vs KIRIBANDA AND THREE OTHERS

S. C. No. 162 (Final)—*D. C. Colombo No.* 7569.

Argued on 2nd November, 1938.

Decided on 7th November, 1938.

Stamp Ordinance, section 36—*Written acknowledgment of debt and interest thereon—Document not stamped—When may such a document be admitted in evidence.*

The plaintiff instituted this action for the recovery of the principal and interest due on a mortgage bond. The first defendant pleaded that the claim was barred by prescription. To meet this plea, the plaintiff produced a writing* executed by the first defendant in which he acknowledged the debt and the interest due thereon. This document was unstamped. The defendant objected to the admission of this document in evidence as it was unstamped, and the judge disallowed it.

Held : That the document should have been admitted in evidence subject to the proof of its execution and the payment of a penalty, if any, under section 36 of the Stamp Ordinance.

J. E. M. Obeyesekere, with *S. W. Jayasuriya*, for plaintiff-appellant.

J. R. Jayawardene for defendant-respondent.

WIJEYEWARDENE, J.

The plaintiff instituted this action for the recovery of the principal and interest due on a mortgage bond executed by the first defendant in

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* (*Translation*) —

On this 20th day of October, 1936.

I the undersigned do hereby declare and affirm that on deed No. 7664 I got to pay yet a sum of Rs. 500/- and interest thereon to P. K. D. Cornelis Appuhamy of Hakgala.

(*Sgd.*) KIRIBANDA.

20th October, '36,
Hakgala.

1920. The plaintiff further stated that the first defendant paid him all the interest up to 20th October, 1936. The 2nd, 3rd and 4th defendants were made parties as they were puisne encumbrancers.

The first defendant filed answer stating that he received a loan of Rs. 200/- on the bond, and pleaded that the plaintiff's claim was barred by prescription.

Before the hearing the first defendant served certain interrogatories on the plaintiff, one of which was :—

> "Do you hold any acknowledgment in writing from the 1st defendant to prove any payment or payments of interest made by him ?"

The plaintiff's answer to that interrogatory was to the effect that he held a writing of October 20, 1936, from the first defendant acknowledging the debt due and the interest as from October 20, 1936.

When the plaintiff was giving evidence in Court, he sought to produce the document referred to in his answer to the interrogatory, mainly for the purpose of meeting the plea of prescription. On an objection taken by the defendant's Counsel under section 36 of the Stamp Ordinance 1909, the learned District Judge refused to admit the document in evidence and made the following order :—

> "This is, undoubtedly, an acknowledgment of a debt which is stampable with a stamp of 6 cents and in terms of the provisions of section 36 of the Stamp Ordinance No. 22 of 1909. The document is inadmissible in evidence. I hold that the document is not a receipt falling within the exception contained in section 36 (*b*) of the Stamp Ordinance and, therefore, it cannot be admitted even on the payment of a penalty."

After hearing the oral evidence in the case, the District Judge held that the claim was prescribed, and dismissed the plaintiff's action with costs.

Mr. Obeyesekere, who appeared in support of the appeal, produced the document in question together with a translation. This document is marked Z and initialled by the Registrar of this Court and filed of record. The point that arises for consideration is whether this document is a document stampable under schedule B, part 1 item 1, of the Stamp Ordinance which refers to an :

> "Acknowledgment of a debt amounting to Rs. 20 or upwards in amount or value written or signed by or on behalf of debtor in order to supply evidence of such debt in any book (other than a banker's pass book) or on a separate piece of paper when such book or paper is left in the creditor's possession."

Before rejecting a document of this nature it should be carefully examined, with reference to surrounding circumstances, to ascertain whether it was given to supply evidence of the debt. (*Mulji Lala vs. Lingu Makaji**).

* (1896) I.L.R. 21 Bombay 201

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Wijeyewardene, J.

Don Cornelis Appuhamy *vs* Kiribanda and Three Others

In *Ambica Dat Vyas vs. Nityanud Singh** Banerjee and Henderson, JJ. held that the mere fact of a document being an acknowledgment of a debt within the meaning of section 19 of the Indian Limitation Act would not make it liable to a stamp duty under the corresponding provisions of the Indian Stamp Act, and that other conditions were required to be fulfilled, one of which was that it should be intended to supply evidence of a debt. (See also *Chandick vs. Damoni*†).

On a survey of the evidence led in the case, I am satisfied that the document was not given with the dominant intent of supplying evidence of the debt, and I hold that the document should have been admitted in evidence subject to the proof of its execution and the payment of a penalty, if any, under section 36 of the Stamp Ordinance.

I set aside the judgment of the District Judge and send the case back for hearing *de novo* on the issues already framed and such other issues as may be raised by the parties and accepted by the Judge. At such trial, the document referred to should be admitted in evidence (subject to the payment of any necessary penalty) on the plaintiff proving its execution.

The plaintiff is entitled to the costs of this appeal. The costs of the trial already held in the District Court and the costs of the fresh trial in the District Court will be in the discretion of the District Judge.

POYSER, S.P.J.

I agree.

Set aside and sent back.

* (1903) I.L.R. Calcutta 687

† (1923) I.L.R. 46 Madras 948