The

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

VOLUME XIII

WITH A DIGEST

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between the parties in an action under section 247 of the Civil Procedure Code consequent on a second order upholding claim at a subsequent seizure.

Does section 243 of the Civil Procedure Code place in imperative duty on the claimant to adduce evidence in support of his claim whether the judgment-creditor is present or not—Is a claim inquiry governed by the sections of the Civil Procedure Code relating to summary procedure—Scope of presumption under section 114 illustration (e) of the Evidence Ordinance.

Held : (i) That the terms of section 243 of the Civil Procedure Code places an imperative duty on the claimant to adduce evidence whether the judgment-creditor is present or not at the inquiry.

(ii) That where the requirements of section 243 of the Civil Procedure Code have not been observed, any allowance of a claim cannot be regarded as an order under section 244 or as having conclusive effect within the terms of section 247 of the Civil Procedure Code. Nor does such an order operate as *res judicata* between the parties.

(iii) That the words "in a summary manner" in section 241 of the Civil Procedure Code do not authorise the use of the sections relating to summary procedure in the investigation of claims to property seized.

DHARMATILAKE VS. BRAMPHY SINGHO AND ANOTHER 145

Revisionary Powers

Revisionary powers of Supreme Court—Refusal by one judge to exercise revisionary powers—Application for a rehearing of the same matter by another judge—Circumstances in which an application for a revision refused by one judge, may be reheard by another.

Held : That it would not be right, except under the most exceptional circumstances, to exercise revisionary powers when another judge has refused to do so.

RANASINGHE VS. PUNCHIHAMY 16

Revisionary powers of Supreme Court—Circumstances in which they will not be exercised.

Held : That a mistake of the legal advisers as to the proper procedure or a failure to raise a point of law at the trial are not grounds on which the Supreme Court will exercise its powers of revision in a case in which the aggrieved party had a right of appeal and a full opportunity of presenting that party's case in the trial court.

PETER FERNANDO AND TWO OTHERS VS. AISA UMMA AND ANOTHER .. 25

Right to retention of Land

Right of person planting land to retention—Circumstances in which jus retentionis *is granted and to whom—Compensation for improvements.*

Held : (i) That under our law the right of retention is only granted to persons who have the *possessio civilis* and to certain special classes of persons whose position has been held to be akin to that of a " possessor."

(ii) That this right of retention has been extended by decisions of our Courts to certain classes of persons who may not come under the strict definition of " possessors " *e.g.* persons who are entitled to a planter's share and to persons who make the improvements in the *bona fide* expectation of receiving a formal title.

(iii) That a person entitled to compensation for improvements is not entitled to a *jus retentionis* unless he falls within the class persons to whom the right is granted under our law.

WIJESEKERA VS. MEEGAMA 136

Right to reply by the Crown 83

Servitude

Servitude—Right of footpath through several lands to well—Destruction of the well—Use of new well in one of the intervening lands—Same footpath used with slight diversion—Use of the new well for less than ten years—Is the right of way affected by the discontinuance of the old well.

Held : (i) That with the abandonment of the right of drawing water from the well I, the accessory right of footpath to the said well was destroyed.

(ii) That the original servitude of *aquae haustus* in respect of the well at I is not the same as drawing water from well H.

(iii) That as ten years had not lapsed from the date of commencement of the use of well H by plaintiff, there is no servitude of way over F G, which subserves or is accessory to any existing servitude of drawing water at H.

DON SIMON PETER AND ANOTHER VS. JAMES FERNANDO AND TWO OTHERS .. 109

Setting aside

Sale in execution—Inadequacy of price.

See 5

Small Tenements

Small Tenements Ordinance No. 11 *of* 1882—*Application for rule* nisi *on tenant to show cause why he should not deliver up possession—Affidavit in support by landlord's attorney—Rule made absolute—Power of attorney not filed—Are proceedings regular—Civil Procedure Code section* 25 (*b*).

Held : (i) That section 25 (*b*) of the Civil Procedure Code, which requires a power of attorney authorising proceedings to be filed in Court, his no application to proceedings under the Small Tenements Ordinance.

(ii) That proceedings under the Small Tenements Ordinance can be instituted by an agent of the landlord.

(iii) That it is not necessary that such agent should hold a duly executed power of attorney.

SINAN CHETTIAR VS. SORIMUTTU 40

Stamps

Stamp duty in proceedings under the Trusts Ordinance—Proceedings under section 112 *of the Trusts Ordinance—Properties affected by the trust valued at Rs.* 100,000/–. *How should the petition of appeal to the Supreme Court be stamped.*

Held : That in proceedings under section 112 of the Trusts Ordinance where the value of the trust properties was Rs. 100,000/– *ad valorem* stamp duty should have been paid on the petition of appeal to the Supreme Court as if the value of the action was Rs. 100,000/–.

SAVARIMUTTU AND OTHERS VS. THE SAIVA PARIPALANA SABHA .. 141

Stamping of Appeal

Stamping of appeal— Objection taken to 285 voters' names on the register of Municipal voters—Dismissal of objection —Appeal against order of dismissal — One appeal petition in respect of all the voters— Appeal petition stamped with a stamp to the value of Rs. 5/- —Section 24 (2) of the Colombo Municipal Council (Constitution) Ordinance—What should be the proper duty on the petition.

Held : (i) That the petition of appeal had not been correctly stamped.
(ii) That there should have been paid a stamp duty of Rs. 5/- in respect of each respondent to whom objection had been taken.

SIRIWARDENE VS. MEERA SAIBO PANA NAGOOR AND OTHERS 116

Summary Procedure

Is a claim inquiry governed by the sections of the Civil Procedure Code relating to summary procedure 145

Action under Chapter LIII of the Civil Procedure Code — Date on which security to be tendered not specified 118

Supreme Court

Can the Supreme Court entertain a petition for divorce by a wife permanently resident in Ceylon against her husband an Englishman domiciled in England 27

See Revisionary Powers .. .. .. 16 & 25

Trial

Trial—Procedure at—Onus of proof on defendant—Close of defendant's case—Facts elicited in cross-examination from plaintiff — Should a judge allow fresh issues on facts so elicited after close of plaintiff's case.

Held : That the Commissioner should not have allowed the defendant to raise such an issue of mixed law and fact at the close of the case.

PERIYA CARPEN VS. JAYASUNDERA 43

Trusts

Stamp duty in proceedings under the Trusts Ordinance.

See Stamps 141

Will

Will—Construction of—Intention of testator to be given effect to.

Held : That the Archbishop of Colombo was entitled to the income from the land referred to in Clara Pinto's bequest, as her intention was that the income should be handed over to the person exercising authority over and managing the Church of St. Peter.

VERY REVD. FATHER MASSON VS. MATHES 61

Words and Phrases

Meaning of the word 'move' in rule No. 38 of rules made under section 4 (1) of Ordinance No. 2 of 1926 (Crime Prevention Ordinance).

See 114

Meaning of "if they are living separately by mutual consent" in section 5 of the Maintenance Ordinance

See 133

Meaning of the words "by a title adverse to.....or plaintiffs" in section 3 of Prescription Ordinance No. 22 of 1871

See 44

Workmen's Compensation

Workmen's Compensation Ordinance No. 19 of 1934—Claim by dependent—Test of dependency.

Held : That this evidence was insufficient to establish that the claimant was a dependent of the deceased.

ROSA MARIA vs. JAYAWARDENA 19

Workmen's Compensation Ordinance—Section 9—Commutation of half-monthly payments—Effect of such commutation.

Held : (i) That a workman in arranging for commutation under section 9 of the Ordinance does not accept a lump sum in exchange for all claims.

(ii) That a workman by commutating the half-monthly payments under section 9 merely redeems his right to receive half-monthly payments and he does not thereby surrender or prejudice any rights which may later accrue to him.

FERNANDO vs. THE COMMISSIONER FOR WORKMEN'S COMPENSATION .. 165

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

FERNANDO vs FERNANDO AND ANOTHER

Application for leave to appeal in forma pauperis *in D. C. Negombo No. 3—S. C. No. 109.*

Argued on 7th November, 1938.

Decided on 14th November, 1938.

Civil Procedure Code sections 441 *and* 447—*Action in* forma pauperis *—Proctor's certificate that the application has a good cause of action—How far binding—Conditional permission to file fresh action—Can it be brought without complying with condition.*

The appellants sued the defendants for the recovery of a land that had been sold in pursuance of a mortgage decree in favour of the latter, or in the alternative for a sum of Rs. 1,500/–. The appellants' action was dismissed for failure to furnish the security ordered by the Judge on the motion of the defendant. The appellants attempted to get the order of dismissal set aside without success. They then asked for leave to file a fresh action. This application was granted subject to the condition that the appellants should pay to the defendant all the taxed costs of the action, before instituting a fresh action. Without paying the costs, the appellants launched the present action and asked for permission to sue as paupers. The application was referred to a proctor, who certified that the appellants had a good cause of action. The District Judge looked into the previous order and found that the appellants were not entitled to succeed, and refused leave to sue in *forma pauperis*. The appellants appealed from this order. It was contended in appeal —(*a*) That the District Judge was wrong in having gone beyond the proctor's certificate under section 447 of the Civil Procedure Code. (*b*) that the only question left to the Judge under section 447 was the question of pauperism.

Held : (i) That the proctor's certificate under section 447 of the Civil Procedure Code is not absolutely binding on the trial Judge.

(ii) That the Judge entertaining an application to sue in *forma pauperis* is entitled to look into the surrounding circumstances and the relative merits of an action before granting the application, even though it is supported by the certificate of a proctor under section 447.

(iii) That the appellants were not entitled to sue, on the footing of the leave to bring a fresh action granted by the Judge, without first paying the costs to the defendant as laid down in the order granting leave to sue.

(iv) That the appellants were not entitled to sue in *forma pauperis* as they did not fall within section 441 of the Civil Procedure Code.

Per WIJEYEWARDENE, J.—" In *Kapil Deo Singh v. Ram Rikha Singha et al* * the High Court of Allahabad held that a plaintiff seeking to sue for redemption in *forma pauperis* cannot claim to sue as a pauper so long as he could raise money on his equity of redemption, and that in doing so he would not in effect be mortgaging his claim. If the principle underlying that judgment is applied to the present case it cannot be said that the appellant is a pauper within the meaning of section 441 of the Civil Procedure Code.

A. Sambandam, with *Navaratnarajah*, for the petitioner.

* (1910) 33 Allahabad 238

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Wijeyewardene, J.

Fernando *vs* Fernando and Another

WIJEYEWARDENE, J.

This is an appeal from an order of the District Judge, made under section 447 of the Civil Procedure Code refusing to allow the appellants to sue as paupers. It was contended in support of the appeal that the judge had misdirected himself in going behind the certificate of the proctor who had certified that the appellants had a good cause of action and holding that the appellants' cause of action was bad, as the only matter which the judge had to consider under section 447 was the question of pauperism. Though the Counsel who appeared for the appellants argued the appeal as if it involved a pure question of law, I think it desirable to set out briefly the facts disclosed in the present proceedings, as well as the proceedings in the connected action No. 9451 of the District Court of Negombo.

The appellants—Mary Angeline Pieris and her husband—instituted action No. 9451 in the District Court of Negombo, on 7th May, 1936. In the plaint they stated that :—

(*a*) They mortgaged the land called Murungahawatte with the defendant by a bond of September 6th 1930, for the sum of Rs. 2,000/- but received only a sum of Rs. 1,000/-.

(*b*) The mortgage was executed to place the mortgaged land beyond the reach of their creditors who had obtained decrees against them.

(*c*) The defendant put the bond in suit in action No. 6708 of the District Court of Negombo in 1932 and sold the mortgaged premises and purchased the same on 7th February, 1933.

(*d*) They had paid Rs. 750/- to the defendant prior to the institution of the mortgage action.

The appellants asked for judgment against the defendant directing him to reconvey Murungahawatte on their paying him Rs. 250/- and the costs of the conveyance, or in the alternative, for a sum of Rs. 1,500/-.

The defendant filed answer asking for the dismissal of the action.

On the application of the defendant, the District Judge ordered the appellants under section 417 of the Civil Procedure Code, to give security in cash Rs. 100/-, or in property worth Rs. 200/- within a certain stated time. On the appellants failing to give security as ordered, the District Judge entered decree on November 16th 1936, dismissing the action with costs. The appellants thereupon filed a motion in Court dated December 22nd, 1936, asking the court to set aside the order of dismissal. This motion reads :—

No. 9451 D. C. Negombo.

We, Kurukulasuriya Moderage Emalianu Fernando and Kurukulasuriya Mary Angelina Pieris of Negombo, the plaintiffs in the above case, move that the Court may be pleased to permit us to deposit the amount ordered as cash security by the Court which we are prepared to do so and we beg of the Court to vacate the order made, and to refix the same for trial in due course.

1 Emalianu Fernando
2. —— (illegible)
Plaintiffs

Witness to the signature and identity of the plaintiff abovenamed.

D. E. Justin Peiris,
Proctor S.C. & N.P.

Negombo, 22nd December, 1938.

The District Judge refused to set aside his order dismissing the action as the application was not made within thirty days as required by section 418 of the Civil Procedure Code. The appellants, thereupon, applied to the judge for leave to file a fresh action and the judge granted this application, subject to the condition that the appellants should pay to the defendant, all the taxed costs of the action before instituting a fresh action. The proceedings do not show under what provision of the law the learned judge purported to act when he made that order. But assuming that the judge had the power to give the appellants leave to institute a fresh action long after their action had been dismissed the appellants would not be entitled to file such fresh action without paying the defendant first the costs as ordered by the judge (*vide Scriven & Co., v. Perera* *).

Without making any payment on account of costs in terms of the order of the District Judge the appellants instituted the present proceedings against the defendant on 22nd March, 1937 and filed papers applying for permission to sue as paupers. The plaint in the present action, it may be added is identically the same as the plaint in the previous action.

On August 24th, 1937 the District Judge referred the application to Mr. D. E. J. Peiris, Proctor, requesting him to certify to the Court whether the appellants had a good cause of action against the defendant. Mr. Peiris forwarded to Court on September 14th, 1937 a report in very general terms certifying that the appellants had a good cause of action. He stated in his report that " he made due inquiry of the plaintiffs (appellants) as to the grounds of their proceedings and the evidence by which they propose to support it and have duly examined such documents and other evidence as they have produced." It will be noted that Mr. Peiris who gave the certificate is the proctor who identified the signature of the appellants on the motion of 22nd August, 1936 filed in the earlier case. It is not likely that Mr. Peiris was unaware of the earlier action when he gave his certificate. It was undoubtedly the duty of Mr. Peiris to have made some investigation regarding the earlier case before he gave his certificate. He has either been misled by the appellants or has dealt with the matter without a proper appreciation of his responsibilities. When the matter came up for inquiry before the court under section 447 the District Judge referred to the previous action and held that the appellants could not succeed in the present action as they had failed to pay the costs and therefore refused to grant them leave to appeal as paupers. It is against this order that the present appeal is preferred.

The only reported decision in which the court has considered the scope of section 447 appears to be the case of *Hinniappu v. Hendris.*†

* (1904) 7 N.L.R. 326.

† (1917) 19 N.L.R. 105.

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Wijeyewardene, J.

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That case is of some assistance in showing that a Proctor's certificate does not have the conclusive effect claimed for it by the appellants. There does not appear to be any good reason for so limiting the jurisdiction of a judge as to deny him the power in circumstances such as those arising in the present case to take cognisance of an order made by him in a previous action between the parties in order to ascertain whether the plaintiff has a good cause of action. The judge would otherwise be helpless to prevent a flagrant abuse of the process of Court. In *Mc Cabe v. The Governor and Company of the Bank of Ireland* * a somewhat similar question came up for decision in the House of Lords. A certain amount of stock standing in the name of a third party was alleged by the appellant James Mc Cabe to have been settled upon his wife. After the death of his wife the appellant brought an action in the Exchequer Division in Ireland to recover from the Bank of Ireland the stock that stood in the name of the third party. Judgment was entered against him with costs. The appellant then brought an action in the Chancery Division of the same Court alleging that the previous action was dismissed because it was instituted in the wrong division of the Court. He made an application to sue as a pauper. The Court ordered that the petition for leave to sue in *forma pauperis* should be dismissed and that action should be stayed until the appellant paid the costs of the previous action. The House of Lords affirmed the order of the lower Court and Lord Herschell stated—" I think that judgment is really not open to objection of any sort. It was a matter within the discretion of the learned Judge of the Court below, the Court of first instance, whether he would refuse or grant the permission to sue in *forma pauperis*. He, in the exercise of that discretion, considered that it was not a case in which he ought to grant it. The Court of Appeal have concurred in that view and I can see no reason to doubt that they acted with perfect propriety." The position of the appellant in the present case is much weaker. If the District Judge's order giving the appellants leave to file a fresh action is bad, then the previous action operates as *res judicata* against the appellants. The appellants could sustain the present action only on the authority of the order made by the District Judge giving them leave and that leave was granted subject to the condition that the appellants should prepay the costs of the previous action. The attempt of the appellant to file the present action relying on the order of the District Judge and yet to circumvent the condition regarding the prepayment of costs by moving for leave to sue as a pauper cannot possibly be countenanced in a court of law.

A further question also arises for consideration with regard to the alleged pauperism of the appellants. Section 441 of the Civil Procedure Code defines a pauper as a person who " is not entitled to property worth Rs. 50/- other than his necessary wearing apparel and the subject matter of the action." The corresponding provision of the Indian Code of Civil Procedure 1908, (order 33 Rule 1) gives the following definition of a pauper.

* (1889) 14 Appeal Cases 413.

" A person is a pauper when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit or where no such fee is prescribed when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject matter of the suit."

In *Kapil Deo Singh v. Ram Rikha Singha et al* * the Hight Court of Allahabad held that a plaintiff seeking to sue for redemption in *forma pauperis* cannot claim to sue as a pauper so long as he could raise money on his equity of redemption, and that in doing so he would not in effect be mortgaging his claim. If the principle underlying that judgment is applied to the present case it cannot be said that the appellant is a pauper within the meaning of section 441 of the Civil Procedure Code.

I do not think that the learned District Judge has erred in refusing to grant leave to the appellants to sue as paupers and I dismiss the appeal.

POYSER, S.P.J.

I agree.

Appeal dismissed.

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

KUNJIKUTTY vs MATHURUVALLIACHY

S. C. No. 90 *(I)—D. C. Negombo* 9834.

Argued on 1st November, 1938.

Decided on 4th November, 1938.

Sale in execution—Setting aside of—Irregularity in publishing sale—When may a court presume that inadequacy of price is due to such irregularity —Civil Procedure Code section 276.

Judgment was entered against M as executrix *de son tort* of the estate of her deceased husband. The judgment-creditor purported to seize and sell the right of the judgment-debtor in a mortgage Bond No. 2459 which was in favour of her deceased husband.

In the sale notice what was to be sold was described as the right, title and interest of M in the said Bond No. 2459, whereas what was actually sold was the interest of M as executrix *de son tort* of the deceased mortgagee. There was no indication in the sale notice as to how M had an interest in the bond. The sale realised only Rs. 55/- when there was nearly Rs. 10,000/- due on the bond.

Held : That there was an irregularity in the publishing of the sale within the meaning of section 276 of the Civil Procedure Code.

Per WIJEYEWARDENE, J. " Where a property worth Rs. 10,000/- has fetched only Rs. 55/- and there has been an irregularity in publishing the sale, as indicated by me, I think a court is justified in presuming under section 114 of the Evidence Ordinance that the inadequacy of the price is due to the irregularity."

H. V. Perera, K.C., with *C. E. S. Perera*, for purchaser-appellant.

N. E. Weerasooriya, K.C., with *S. Nadesan*, for the defendant-respondent.

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* (1910) 33 Allahabad, 238.

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Wijeyewardene, J.

Kunjikutty *vs* Mathuruvalliachy

WIJEYEWARDENE, J.

This is an appeal from an order of the District Judge setting aside a sale on the ground that substantial damage has been caused to the judgment-debtor by reason of an irregularity in publishing and conducting the sale.

In this action, judgment was entered against Mathuruvalliachy as the executrix *de son tort* of the estate of her deceased husband Murugappa Chettiar. In order to obtain satisfaction of the decree, the judgment creditor purported to seize and sell the rights of the judgment debtor in Mortgage Bond No. 2459 which was a bond in favour of the deceased Murugappa Chettiar. The property seized was sold for Rs. 55/- and it is this sale which the learned District Judge has set aside.

The advertisement of the sale in the Gazette is as follows —

"In the District Court of Negombo.

No. 9834 K. Pitche Muppen of Negombo Plaintiff vs Mathuruvalliatchy by her attorney S. P. Palaniappa Chettiar of 52, Sea Street, Colombo. Defendant.

Notice is hereby given that on Monday, September 6th, 1937, at 10-30 in the forenoon, will be sold by Public Auction at my office the right, title, and interest of the said defendant in the following property, viz —

The principal and interest due on mortgage bond No. 2459 dated October 16, 1930, and attested by H. Paul Silva, Notary Public, for Rs. 6,750/-.

Amount to be levied Rs. 1,149/37, with interest on Rs. 900/- at 9 per cent. per annum from March 22, 1937 till payment."

Sgd. A. W. ROSA,
Deputy Fiscal.

Deputy Fiscal's Office,
Negombo, August 10, 1937.

It will be seen that the sale notice referred to the interest of Mathuruvalliachy in the bond No. 2459 though what is said to have been sold is the interest of Mathuruvalliachy as the executrix *de son tort* of the deceased mortgagee. The sale notice does not indicate how Mathuruvalliachy has an interest in a bond in favour of another. Any person desirous of bidding at the sale would have taken the precaution to examine the bond and on finding that the bond was in favour of Murugappa Chettiar would have desisted from making any bid at the sale. I hold that there has been an irregularity within the meaning of section 276 of the Civil Procedure Code, 1889.

It was not contested in the lower court that the amount due on the bond was nearly Rs. 10,000/-. Where a property worth Rs. 10,000/- has fetched only Rs. 55/- and there has been an irregularity in publishing the sale, as indicated by me, I think a court is justified in presuming under section 114 of the evidence Ordinance that the inadequacy of the price is due to the irregularity. No attempt has been made by the judgment creditor or the purchaser to lead any evidence to rebut such a presumption.

I dismiss the appeal with costs.

POYSER, J.

I agree.

Appeal dismissed.

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

MOHAMED MUSTAPHA vs IBRAHIM ALIM

Application of M. M. I. Ibrahim Alim for leave to appeal in Kathi Court No. 130—Board of Kathis Court No. 67 (206).

Argued and Decided on 12th October, 1938.

Application for leave to appeal under section 13 (1) of Part 2 of the Third Schedule to the Muslim Marriage and Divorce Registration Ordinance—Has respondent right to be heard at such application.

Held : That the opposite party, to whom notice of an intended application for leave to appeal to the Supreme Court has been given under section 13 (1) * of Part 2 of the Third Schedule to the Muslim Marriage and Divorce Registration Ordinance, is entitled to be heard in opposition to the application.

L. A. Rajapakse, with *M. M. I. Kariapper* for petitioner.

N. E. Weerasooriya, K.C., with *S. A. Marikar* for the respondent.

POYSER, S.P.J.

This was an application under section 13 (1)* of Part 2 of the Third Schedule to Ordinance No. 27 of 1929 for leave to appeal from an order made by the Board of Kathis. It came before Koch, J. on the 21st of June last and he referred it to a Bench of Two Judges. The question he referred was whether the respondent could claim to be heard in opposition to the application, the petitioner contending that the application should be disposed of *ex parte*. Koch, J. pointed out that the phraseology of section 13 (1) was confusing. There is no doubt that it is. The section provides that a husband or wife who is aggrieved by the decision of the Board of Kathis may within one month of the communication of such decision apply to the Supreme Court for leave to appeal and shall give the opposite party notice of such application. The latter part of the section provides that the Supreme Court may grant leave to appeal and also gives the Supreme Court power to fix the payment of costs payable in the event of the appellant not obtaining leave to appeal or not succeeding in his appeal. It is not quite clear from this section whether the application for leave to appeal should be heard *ex parte* or not. The matter, however, is I think put beyond all

* Section 13 (1)—If the husband or wife is aggrieved by the decision of the Board of Kathis, he or she may within one month of the communication of such decision apply by petition to the Supreme Court for leave to appeal, and the applicant shall give the opposite party notice of the intended application. It shall be lawful for the Supreme Court to grant leave to appeal, and if such leave is given, to hear the appeal upon such conditions as the Supreme Court may fix as to the payment of all costs that may become payable to the respondent in the event of the appellant not obtaining an order granting him leave to appeal, or in the event of the appellant not succeeding in his appeal.

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Poyser, S.P.J.

Mohamed Mustapha *vs* Ibrahim Alim

doubt by the words of section 18 of the Ordinance which is as follows :— " It shall be lawful for the Judges of the Supreme Court or any three of them, of whom the Chief Justice shall be one, from time to time to make, subject to the approval of the Governor in Executive Council, such general rules as to them shall seem meet for regulating the mode of applying for leave to appeal and of prosecuting appeals from decisions and orders of the Board of Kathis and for regulating any matters relating to the costs of such applications for leave to appeal and of appeals." The power given by this section to the Supreme Court to frame rules in regard *inter alia* to the costs of applications for leave to appeal and of appeals seems to indicate beyond all doubt that a respondent may, if he so desire, appear for an application for leave to appeal and if such application is refused the Supreme Court have the power to award costs. Apart from these provisions of the Ordinance, I think the general principle of law *audi alteram partem* must be applied. The application for leave to appeal to which the respondent was made a party is a matter which may be prejudicial to him. He has obtained a decision in his favour and the suspension of the operation of such decision which the granting of this application would effect would prejudice him.

We have been referred to various sections of the Civil Procedure Code and rules regulating appeals to the Privy Council and also to the Ordinance which regulates appeals from the Courts of Requests. It will be noticed that under this latter Ordinance a statutory provision is made for an *ex parte* application for leave to appeal. In the absence of such clear statutory direction, any party on an application affecting him is entitled to be heard.

We accordingly order that the respondent may be heard at the hearing of this application which will be listed for hearing in due course. Costs will abide the final result of the appeal.

I would add that, as stated before, section 13 (1) of Part 2 of the Third Schedule to the Ordinance is not altogether clear and it would appear desirable that the Supreme Court should at an early date frame rules in regard to applications for leave to appeal and for appeals.

WIJEYEWARDENE, J.

I agree.

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

PEMARATANA THERO vs INDASARA THERO

Application for Special Leave to Appeal to Privy Council in S. C. No. 338 D. C. Tangalle 3768.

Argued and Decided on 24th October, 1938.

Privy Council—Leave to appeal to—Action valued at Rs. 500—Can leave be granted—Privy Council Appeals Ordinance rule 1 (b).

The plaintiff-applicant claimed the right to succeed to an incumbency which he valued at Rs. 500/–. He succeeded in the trial court but failed in appeal. He sought to obtain leave to appeal to the Privy Council.

It was urged that the question was one of great general or public importance within the meaning of rule 1 (*b*) of the rules in Schedule 1 of the Privy Council Appeals Ordinance.

It was stated in support of this argument that the vihare was repaired at a cost of Rs. 60,000/– and that the offerings made by pilgrims during the festivals exceeded Rs. 5,000/–.

Held : (i) That the applicant was not entitled to leave, as his claim was less than Rs. 5000/— in value;

(ii) That the claim to the incumbency of the vihare, is not a question of " great general or public importance " within the meaning of rule 11 (*b*) of the rules in schedule 1 to the Privy Council Appeals Ordinance.

J. E. M. Obeyesekera, with *C. J. Ranatunga* for plaintiff--petitioner.

H. V. Perera, K.C., with *N. E. Weerasooriya, K.C.*, and *Baar-Kumarakulasingham* for defendant-respondent.

POYSER, S.P.J.

This is an application for special leave to appeal to the Privy Council in case No. 3768 of the District Court of Tangalle. The action was in respect of the incumbency of the Tissamaharama Temple. In the District Court the plaintiff succeeded in his claim but on appeal, this decision was reversed.

The plaintiff in his claim puts the value of the incumbency at Rs. 500/–, *prima facie* therefore, he has no right to appeal to the Privy Council. He has however filed an affidavit in which he sets out " that the matter involves a claim to or respecting property exceeding the value of Rs. 5,000/–" *i.e.* he claims that under Rule 1 (*a*) of the Rules made under Ordinance No. 31 of 1909, that this is a case where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or to the value of Rs. 5,000/– or upwards and that, therefore, he has the right of appeal.

Mr. Obeyesekera has cited a number of cases to us on the point. It was decided in *de Alwis v. Appuhamy* * that where parties had valued their claim at a low figure for their own purposes, one of which was to avoid

* 30 N.L.R. p. 421

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the payment of heavy stamp duty, the Court would not allow the re-valuation of the subject matter of the claim for the purposes of an appeal to the Privy Council. Further in the case of *Sathasiva Kurukal v. Subramaniam Kurukal* *, there was a similar decision. In that the plaintiff valued the subject-matter of the claim at Rs. 20,000/–. The defendant who desired to appeal to the Privy Council had alleged that the value of the claim was only Rs. 2,500/–. The Court held that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it and who seeks to relieve himself from it by appeal. The Court further held that, as the applicant had expressly pleaded that the value of the matter in dispute was only Rs. 2,500/–, it did not seem possible to say that such matter was of the value of Rs. 5,000/–.

In this case the applicant specifically valued his claim at the sum of Rs. 500/–, and I do not see how we can now accede to his request to treat it of the value of over Rs. 5,000/–.

The material which he sets out in his affidavit is that the temple was repaired at a cost of Rs. 60,000/– after centuries of neglect and further that the offerings made by pilgrims at festival periods would exceed Rs. 5,000/–. On the other hand, whoever is the incumbent of this temple, is subject to control by the Public Trustee. The income of the Temple whatever it is, has to be accounted for and it cannot be treated as the private income of the incumbent. I, therefore, think the application cannot be granted.

It was however further argued having regard to the provisions of Rule 1 (*b*) of the rules previously referred to that this was a matter of great public importance, and as such should be submitted to His Majesty in Council, I do not agree. It was stated that the appointment of an incumbent to this historic temple is of great importance to all Buddhists, but this aspect of the case however need not be considered, the points to be decided are the respective claims of the plaintiff and the defendant, and that is not a matter of great importance to the public.

The application is refused with costs.

WIJEYEWARDENE, J.

I agree.

Application refused.

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* 31 N.L.R. p. 165

Present: HEARNE, J.

ROSLIN NONA vs ABEYWEERA

S. C. No. 385—P. C. Tangalla No. 5619.

Argued on 6th October, 1938.

Decided on 11th October, 1938.

Maintenance—Application by wife living in separation in respect of her minor children—Children given to mother by agreement at separation—Liability of husband to pay maintenance to the children while wife lives apart.

The appellant appealed from an order to pay maintenance for his three children who were in the custody of their mother who was living apart from her husband, the father of the children. It was not disputed that the applicant was living apart from her husband by common consent and that the children were in her custody lawfully. The appellant offered to provide a home for his wife and children and resisted the claim for maintenance.

Held : That a husband who agrees to his wife living apart from him with their children is liable to pay maintenance for the children while she lives apart from him.

L. A. Rajapakse, with *Kumarakulasingham* for defendant-appellant.

E. B. Wickremanaike for applicant-respondent.

HEARNE, J.

The defendant and the applicant in the Magistrate's court are husband and wife. The latter acting, as he says, " on the advice of a doctor to abstain from marital relations " with her husband left him. She went to her mother's house with her children of whom the eldest is ten years of age. After a lapse of eight months she applied to the Court for maintenance of herself and the children. The defendant offered in Court to provide a home for his wife and family and the applicant then alleged that he was living in adultery. The defendant denied the charge and a date was fixed for enquiry. On this date the applicant withdrew her application for maintenance of herself and limited it to the maintenance of her children.

The Magistrate found that the defendant was in a position to pay Rs. 20/– per month for the eldest child and Rs. 10/– per month for each of the younger children and made an order accordingly. It is from this order that the defendant appeals. It was not argued in this Court that the Magistrate was wrong in holding that the defendant could afford to pay Rs. 40/– per month.

In view of the fact that the applicant had withdrawn her application for maintenance of herself, the Magistrate did not record a finding on the question of whether the defendant was living in adultery or whether the applicant's refusal to live with her husband was with sufficient cause.

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He considered the question of the defendant's means and addressed himself to the one argument concerning the defendant's liability to maintain his children that appears to have been advanced. It was to the effect that the applicant was liable to maintain the children under the Married Women's Property Ordinance. As this contention, although contained in the defendant's petition, was not pursued on appeal it is unnecessary to deal with it.

The crucial question which the Magistrate had to decide was whether the children were in the lawful custody of their mother (*Dingiri Menika v. U. Mudianse*, 3 Bal. Rep. 253.) But everybody appears to have agreed that they were and the inquiry proceeded on this footing. Even the defendant's evidence that when his wife left with the children the parting was " on almost friendly terms " suggests a mutual understanding and an agreement that his wife should have the custody of the children, two of whom at least are of very tender years.

In the circumstances Mr. Poulier who appeared for the defendant assumed that the children were in the lawful custody of their mother—he certainly did not ask the court to take a contrary view—but on appeal it has been urged that the defendant is not liable to support his children while they are in their mother's custody on the authority of *Fernando v. Fernando*, 9 Ceylon Law Weekly 97.

That case decided that the grandfather of a child who is maintaining the child cannot compel the father to pay maintenance when the father is willing to maintain the child in his own home. These facts are not comparable with the facts of the present case where a man, whatever the merits of the dispute between himself and his wife, agrees to separate from her and to give her the custody of their children.

Another point was raised on appeal which was not raised in the court below or even in the petition of appeal. It was said that there was no proof of neglect or refusal. The applicant gave evidence that " the defendant had not maintained " her or her children " for several months." This was not challenged by the defendant's proctor, it was not contradicted by the defendant when he gave evidence, and it was properly accepted by the Magistrate as the truth.

There remains the question of the offer of the defendant to provide a home for his wife and family. His wife cannot be compelled to return to him. While she lives apart from him and the children are in her lawful custody, she is entitled to an allowance for their maintenance. Should a Court give the defendant the custody of the minor children, no allowance would of course be payable, but in the present state of affairs his liability in law is in my opinion beyond doubt.

I dismiss the appeal with costs.

Appeal dismissed.

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

SILVA vs CAROLIS APPUHAMY AND ANOTHER

S. C. No. 120—*D. C. Kalutara No.* 20262.
Argued on 9th and 10th November, 1938.
Decided on 16th November, 1938.

Action under section 247 of the Civil Procedure Code—Plaintiff's interests in the subject-matter of action transferred before seizure subject to an agreement to a reconveyance—Can plaintiff maintain the action.

A and B obtained a mortgage decree against C in November, 1935. Order to sell was issued in May, 1936, and part of the claim was realised. A and B obtained writ for recovery of the balance and seized certain properties on 6th of November, 1936—D, C's son, claimed the properties on a deed P1 dated 2nd June, 1936, executed by C in D's favour. The claim was dismissed and the present action was brought by D under section 247 of the Civil Procedure Code.

In the course of the trial, the plaintiff admitted that his interests on P1 had been transferred by deed D2 of 28th of October, 1936, to G, subject to an agreement to reconvey the said interests on repayment of the consideration within two years. An issue was then framed as to whether plaintiff could maintain this action as he had divested himself of his title and, at the conclusion of the trial, the learned District Judge held in favour of the plaintiff on the ground that there was no proof that the execution of deed P1 had rendered C insolvent. A and B appealed.

Held : (i) That the plaintiff (D) cannot maintain this action, inasmuch as he had divested himself of his interests under P1 before the date of seizure.

(ii) That, in view of the admission by the plaintiff, it became unnecessary for the learned District Judge to consider whether deed P1 was executed in fraud of creditors.

Cases referred to:
(1) *Wijeyawardena v. Maitland* (1893) 3 Ceylon Law Reports 7.
(2) *Abdul Cader v. Annamalay* (1896) 2 N.L.R. 166.
(3) *Silva v. Nona Hamine* (1906) 10 N.L.R. 44.
(4) *Vaitya Nathar Aiyar v. Sooritamby Suppiah* (1924) 6 C.L.Rec. 21.
(5) *Juanis v. Podisingho* (1937) 39 N.L.R. 184.

N. E. Weerasooria, K.C., with *A. C. Z. Wijeratne* and *H. A. Wijemanne*, for 2nd and 3rd defendants-appellants.

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

WIJEYEWARDENE, J.

This is an action under section 247 of the Civil Procedure Code, 1889. The 2nd and 3rd defendants obtained a mortgage decree against the 1st defendant in November, 1935, and on an order to sell issued in May, 1936, sold the mortgaged property and realised a part of the claim due to them. The 2nd and 3rd defendants thereafter obtained a writ for the recovery of the balance amount which was nearly Rs. 1,500/- and caused

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certain undivided shares in five lands to be seized on November 6th, 1936. The 1st defendant's son, the plaintiff in the present action, claimed the shares seized under the writ, his claim being based on deed P1 of June 2nd, 1936, executed by the 1st defendant in his favour. The consideration for the transfer is shewn in the deed to be Rs. 2,000/–, while the attestation clause states that Rs. 500/– was paid in cash and Rs. 500/– was paid by cheque, in the presence of the Notary, and the balance Rs. 1,000/– was acknowledged by the vendor to have been received earlier. The claim was dismissed and, thereupon, the claimant filed the present action.

In the course of the trial, the plaintiff admitted that by document D2 of October 28th, 1936, he transferred his interests under P1 to one Goonewardene, subject to an agreement by Goonewardene to reconvey the land on repayment within two years of the consideration together with interest at a specified rate. An issue was then framed raising the question whether the plaintiff could maintain this action in view of the execution of D2.

It was elicited in cross-examination from the plaintiff that, in spite of P1, the defendant was in occupation of one of the properties transferred, and was getting the rubber trees on two of the remaining lands tapped. The plaintiff, however, led evidence with the intention of showing that the 1st defendant was possessed of other properties and that, therefore, the transfer P1 did not render the 1st defendant insolvent. It is rather significant that the plaintiff did not call the 1st defendant to prove the possession by him of other properties available for seizure, but contented himself with seeking to establish this fact through the evidence of others. The learned District Judge, however, has accepted this evidence, and basing his judgment on the fact that the 2nd and 3rd defendants have not examined the 1st defendant under section 219 of the Civil Procedure Code, held in favour of the plaintiff on the ground that there was no proof that the execution of the deed P1 has rendered the 1st defendant insolvent.

It was urged in appeal, for the 2nd and 3rd defendants, that the plaintiff was not entitled to an order in his favour in view of D2. It was contended that an unsuccessful claimant filing an action under section 247 should establish the right which he claimed to the property in dispute, and the plaintiff in this action, having formulated his claim in paragraph 2 of the plaint as the right of ownership under P1, must necessarily fail as he had parted with his rights under P1 even before the seizure. The appellant's Counsel relied in support of his argument on a number of decisions including *Wijeyawardena v. Maitland*, * *Abdul Cader v. Annamalay*, † *Silva v. Nona Hamine* ‡ and *Vaitaiya Nathar Aiyar v. Sooritamby Suppiah* § as establishing the principle that, while the material issue at a claim inquiry was one of possession, the question that arose for adjudication in an action under section 247 of the Civil Procedure Code by an unsuccessful claimant was one of title.

* (1893) 3 Ceylon Law Reports 7
† (1896) 2 New Law Reports 166
‡ (1906) 10 New Law Reports 44
§ (1924) 6 Ceylon Law Recorder 21

The respondents' Counsel argued that all that section 247 required an unsuccessful claimant to do was "to establish the right which he claimed to the property in dispute" and that the right mentioned in this section was identically the right referred to in section 241 by virtue of which the claimant claims to have "some interest in" or "to be possessed of" the property seized. He relied strongly on a recent decision of this Court, *Juenis v. Podisingho.* * That case does not appear to me to support to any appreciable extent the various propositions of law enunciated by the respondent's Counsel. In the course of his judgment in that case, Koch, J. stated "I am therefore of opinion that, if it came to a question of title, all the plaintiff would have to establish is title superior to that of the judgment-debtor. The fact that a third party had a title *prima facie* superior to that of the plaintiffs is immaterial." In the present case, the plaintiff on his own showing had no title to the land after he conveyed his rights by D2. The plaintiff, who has not even a shadow of a title as he has divested himself of whatever title he had, cannot possibly establish a title superior to that of the judgment-debtor. Moreover, the only right which the claimant put forward at the claim inquiry was a right to possession under P1. The order made at the claim inquiry was to the effect that he had no such right to possession. That order would be conclusive against him unless he gets it reversed in an action under section 247. He cannot, in the present action, expect to establish such a claim in view of his admission that, before the date of seizure, he had divested himself of all rights under P1. I am of opinion that when the plaintiff made that admission it became unnecessary for the learned District Judge to consider whether P1 was executed in fraud of creditors. It appears to me that if any other view is taken with regard to the effect of D2, it will result in encouraging parties who have no interest whatever in a land seized under a decree of Court to come forward and initiate claim proceedings and thus delay the due execution of writs.

The plaintiff made a certain specified claim at the claim inquiry, and has put forward the same claim in the present action. He cannot be allowed in the appellate court to put forward his claim to possession on some other ground as it would be distinctly prejudicial to the 2nd and 3rd defendants who are seeking the assistance of the Court to execute a decree they have obtained legally.

I set aside the judgment of the District Judge and dismiss the plaintiff's action with costs. The 2nd and 3rd defendants are entitled to the costs of the appeal.

POYSER, S.P.J.

I agree.

Judgment set aside.

* (1937) 39 New Law Reports 184

Present: POYSER, S.P.J.

RANASINGHE vs PUNCHIHAMY

Application in revision in P. C. Matara No. 25392.

Argued on 11th November, 1938.

Decided on 16th November, 1938.

Revisionary powers of Supreme Court—Refusal by one judge to exercise revisionary powers—Application for a rehearing of the same matter by another judge—Circumstances in which an application for revision, refused by one judge, may be reheard by another.

Held : That it would not be right, except under the most exceptional circumstances, to exercise revisionary powers when another judge has refused to do so.

H. W. Thambiah, with *M. M. Kumarakulasingham*, in support.
J. R. Jayawardene, with *Colvin R. de Silva*, for respondent.

POYSER, S.P.J.

This application first came before Koch, J. on the 30th of June, 1938. There was no appearance in support and it was refused. Subsequently, on the same day, Counsel did appear and moved that he be heard in support and was heard. Koch, J., however, again refused to exercise revisionary powers, and the order of the Supreme Court embodying such refusal was sent to the Police Court on the 2nd of July. On the 3rd of August, Maartensz, J. ordered that the application should be relisted, and de Kretser, J. on the 26th of September, ordered notice to issue on the respondent.

Mr. Thambiah, who appeared for the applicant, argued that the Magistrate's order was wrong in law and, in support of his argument, cited a judgment of Garvin, S.P.J. (S. C. No. 345 S. C. Minutes of 11th June, 1926).* He also argued that the revisionary powers of this Court are very wide and that I could exercise revisionary powers in spite of the previous order of Koch, J.

I do not think I should accede to this request. In the first place, it was conceded in the lower Court that the extension of maintenance granted was justified on the merits; and, secondly, I do not think it would be right, except under the most exceptional circumstances, to exercise revisionary powers when another Judge has refused to do so.

If Koch, J. had refused this application for want of appearance, there might be no objection to granting it; but I must assume that Koch, J., when Counsel did appear, considered the application on its merits, and I must also assume that Maartensz, J. when he ordered the application to be relisted,

* Vide p. 17

did so on the grounds that the application had been dismissed for want of appearance, and I would add that the notes made by the Registrar on the record support this latter assumption.

In view of the above, it would, I consider, be establishing a very undesirable precedent to exercise revisionary powers when another Judge has refused to do so and when no new material is adduced in support of the application.

The application is refused with costs.

Application refused.

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*DONA ROSALINE vs GUNASEKERA

S. C. No. 345—*P. C.* (*Addl.*) *Colombo No.* 9197.
Argued and Decided 11th June, 1926.

Marshall Pulle for appellant.

Garvin, A.C.J.

The facts material to this appeal are these. In March, 1911, an order was made against the appellant directing him to pay a certain sum, by way of maintenance, for his illegitimate child. This child attained the age of 14 years on the 27th of December, 1924. In the original order, no special direction had been given that the payments were to continue after the age of 14; in the result, the order for maintenance ceased to be of any force or validity after the 27th of December, 1924. The appellant, however, continued to make payments but in January, 1926, he moved the Court to cancel the order for the payment of maintenance. His application was allowed and on the 16th of February the Court made order accordingly. This was a wholly unnecessary application. Section 8 of the Ordinance specifically states that "no order for maintenance of any illegitimate child....shall, except for the purpose of recovering money previously due under such order, be of any force or validity after the child, in respect of whom it was made, has attained the age of 14 years....." In March, 1926, the mother of the illegitimate child made an application for a direction that the payments to be made under the original order should be extended until the child attains the age of 18. This application was made under the proviso to section 8 as amended by the Ordinance No. 13 of 1925. Prior to the passing of this Ordinance, which came into operation on the 27th day of October, 1925, a Police Magistrate had no power to give a direction continuing the payment to be made under an order for maintenance where such directions had not been made in the original order directing the payments to be made. By the Amending Ordinance, it was provided that such direction may be given in the order or subsequently. The short point in the case is whether a Police Magistrate may give such directions in the case of an order which had expired and was no longer of any force or validity. In my opinion, the amendment does not give a Police Magistrate jurisdiction to give directions in respect of an order which had ceased to be of any force or validity. The direction that he is permitted to give is a direction that the payments to be made under an order, which would originally cease to be of any force or validity after the child in respect of whom it was made attains the age of 14 years, shall continue until the child reaches the age of 18 years. It presupposes the existence of an order and authorizes the extension of the period for which the order shall continue to be of force. Where an order, as in this case, expired and ceased to be of any force or validity, there are no payments to be made thereunder in

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respect of which the Court may direct that they shall continue until the child attains the age of 18. A Magistrate may extend the period of an existing and enforceable order. The legislature has not given him power to make a fresh order imposing a fresh liability upon a person whose original liability to pay maintenance had expired. The word "subsequently," introduced into the proviso by the Amending Ordinance, means subsequent to the making of the order but before the order expires and ceases to be of any force or validity.

The order in appeal will be set aside.

Order set aside.

Present: DE KRETSER, J.

DEVASAGAYAM (Police Sergeant) vs MOHAMED BUHARY

S. C. No. 549—M. C. Colombo No. 63605.

Argued and Decided on 13th October, 1938.

Police Ordinance No. 16 of 1865 section 53 (4)—Is a master liable for an act committed in breach of section 53 (4) by his servant.

The accused, the manager of a jewellery shop, was charged with having allowed "a camp cot to be placed in the pavement in a manner likely to cause obstruction to pedestrians," in breach of section 53 (4) of the Police Ordinance. The evidence was that the accused's servant took the cot out to the pavement, for airing it and cleaning it, without the authority or knowledge of the accused. No sooner than the accused's attention to the presence of the cot on the pavement was drawn by the Police, he ordered its removal from there.

Held : (i) That the accused had not committed a breach of section 53 (4) of the Police Ordinance.

(ii) That, in the circumstances, the accused cannot be convicted of abetting the offence of his servant.

H. W. Thambiah for accused-appellant.

E. H. T. Gunasekera, Crown Counsel, for complainant-respondent.

DE KRETSER, J.

The appellant in this case was charged with committing an offence under section 53 (4) of Ordinance No. 16 of 1865, in that he did "allow a camp cot to be placed in the pavement in a manner likely to cause obstruction to pedestrians."

When a person is charged with an offence under a particular section, it is as well to quote the words of that particular section. Section 53 (4) does not speak of "allowing a thing to be an obstruction" but of exposing a thing in such a way as to cause obstruction. The Police filed a faulty plaint and the Magistrate seems to have been misled by it, for he says,

" the point is that he allowed to be placed on the pavement and has caused obstruction." That is not the point described under this section. Crown Counsel argues that the accused might be convicted of abetment, even if he were not guilty of the principal offence, and he relies on the case of *Weerasooriya v. Marianu* (10 N.L.R. page 127) but the facts of the case are entirely different. There, the workmen employed under a person, in the course of their ordinary employment, committed a nuisance which went on from day to day and which they committed only because it was part of their employment. The natural inference was that the matter caused them to commit that nuisance. He might then be said to abet the commission of the offence, but in this case, the placing of a servant's cot on a street or pavement is not one of the natural consequences of that person's employment by his master, and I cannot see how the master could be held to be guilty of abetment if he were aware that his servant had placed his cot on the pavement and had not caused it to be removed. His conduct would be an act of omission, and it is only when an omission is an illegal omission that it may amount to abetment.

The conviction, therefore, is set aside and the accused is acquitted.

Conviction set aside.

Present: POYSER, S.P.J.

ROSA MARIA vs JAYAWARDENE

S. C. No. 362—*Workmen's Compensation Ordinance No.* 19 *of* 1934.
Argued and Decided on 11th November, 1938.

Workmen's Compensation—Ordinance No. 19 *of* 1934—*Claim by dependent—Test of dependency.*

The deceased contributed to the maintenance of his sister, the applicant, till two years before his death, when he obtained employment in Anuradhapura. After this he ceased to support her. The deceased had shortly before his death written to his sister and aunt saying that he was coming for the New Year with money.

Held : That this evidence was insufficient to establish that the claimant was a dependent of the deceased.

J. R. Jayawardene, with *R. G. C. Pereira*, for appellant.
No appearance for respondent.

POYSER, S.P.J.

This is an appeal under the Workmen's Compensation Ordinance No. 19 of 1934. The Commissioner found that the applicant was a dependent of the deceased workman, and the only question that arises on this appeal is whether there was sufficient evidence before him to justify such finding.

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Rosa Maria
vs
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The relevant facts, as found by the Commissioner, are as follows. The deceased workman contributed to the maintenance of the applicant, his sister, till two years before his death. The deceased then obtained employment in the mines at Anuradhapura and, after obtaining such employment, ceased to contribute to his sister's support. That evidence of itself is certainly not sufficient to establish that the applicant was in fact a dependent of the deceased. Dependency, however, may exist in certain cases without any actual payment being made at the time dependency is claimed. In deciding whether or not there is dependency, the facts to be considered are past events and future probabilities—see *Lee v. George Munro* (21 B.W.C.C. p. 401). There were, in this case, payments to the applicant in the past, but what were the future probabilities that the deceased would resume such payments ? The only evidence on this point is that the deceased had written a letter to his sister and aunt saying he was coming in the new year with money. There was no evidence that he was going to give such money to his sister or to resume payments to her. I do not think this evidence is sufficient to bring the case within the principles laid down by Lord Justice Sankey in the case above referred to. It should be noted that in *Lee v. George Munro* (supra) the facts were very different. It was a claim by a widow, and the deceased workman had supported his wife regularly and continuously, but at the time when he met with his accident he was only earning a very small amount which did not permit of his supporting his wife. In the other case referred to by the Commissioner, namely, *Robertson v. Hall Brothers Steamship Co.* (3 B.W.C.C. p. 368) the facts also are very different to those in this case. In that case, a father claimed to be a dependent of his son. The son had for some four years contributed towards his father's upkeep, but did not during the last two or three months before his death make any contributions, but during such time he was mostly out of England. It was held that there was sufficient evidence to find that the father was in fact a dependent.

In this case, as stated before, I do not think there was sufficient evidence before the Commissioner to justify his finding. The appeal is accordingly allowed and the award in favour of the applicant set aside.

Appeal allowed.

Present: POYSER, S.P.J.

TENNAKOON vs PONNIAH

S. C. No. 393—*P. C. Mullattivu No.* 14416.
Argued and Decided on 4th November, 1938.

Evidence—Credit sale of arrack—Only evidence against accused an entry in a book kept for recording the transactions relating to arrack in the tavern —Expert evidence to prove that entry in accused's handwriting not called.

The accused, the tavern-keeper of a tavern in Vavuniya, was convicted of selling arrack on credit. An entry in a book kept for recording transactions relating to arrack was produced in evidence. This entry read "Credit sale 5/75." An Excise Inspector said that this entry was in the handwriting of the accused. He based his opinion on his knowledge of the accused's handwriting. This evidence was supported by the evidence of the Superintendent of Excise who said that the handwriting in the book produced was similar to that in the official account book kept by the accused.

A handwriting expert was not called in support of this evidence.

Held : That the conviction was not justified in the absence of some independent corroborative evidence, especially as the witnesses were not qualified to express the opinion they gave as to the writer of the entry in question.

E. F. N. Gratiaen, with *S. Nadasen*, for accused-appellant.
G. E. Chitty, Crown Counsel, for complainant-respondent.

POYSER, S.P.J.

In this case, the three accused were charged under the provisions of the Excise Ordinance for (1) on the 3rd of October, 1936, selling arrack on credit, (2) selling arrack below the standard price. The 1st and 2nd accused are the renters of the arrack tavern, No. 3 Vavuniya, in the District of Mullattivu where the offences were alleged to have been committed, and the 3rd accused is the tavern-keeper. The 1st and 2nd accused were acquitted but the 3rd accused was convicted on the charge of selling arrack on credit.

The evidence against the appellant was as follows. During the month in which this offence is alleged to have taken place, Mr. Jayawardene, an Excise Inspector, visited this tavern and found there certain books. In one of such books, namely, No. 3, there appears an entry dated the 3rd of October, 1936, "Credit sale 5/75." This witness stated that such entry was in the handwriting of the appellant. His grounds for this statement were that the handwriting in this and other books found in the tavern is similar, and he knows the appellant's handwriting. It will, however, be seen that one of the other books referred to contains practically only figures. The only other evidence implicating the appellant was a submission by Mr. Tennakoon, Superintendent of Excise, that the handwriting in book No. 3 is similar to the handwriting on the official account book. There was no other evidence against this accused for a credit sale.

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Poyser, S.P.J.

Tennakoon vs Ponniah

The Magistrate considers that there was no doubt that book No. 3 was kept by the 3rd accused in the ordinary course of business and referred to arrack transactions in this tavern, and clearly established that there had been a credit sale for which the 3rd accused was responsible. He therefore convicted the 3rd accused and sentenced him to pay a fine of Rs. 750/– or, in default, four months' rigorous imprisonment.

I do not think that the evidence before the Magistrate justified the conviction of the appellant. Before such conviction would be justified, there should be some evidence in addition to the evidence of the entries in book No. 3. The witness, Mr. Jayawardene, did not hold himself out as a handwriting expert. Even if he had, there should have been some corroboration of his evidence that the entry in question was in the handwriting of the appellant. This book may well have been kept by one of the renters of this tavern or some other person. I do not consider that there was satisfactory proof that the appellant sold arrack on credit on the 3rd of October, 1936, or any other date.

The appeal will, accordingly, be allowed and the conviction set aside.

Appeal allowed.

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

SIYADORIS APPU vs ABEYENAYAKE

Application under section 756 of the Civil Procedure Code or for leave to appeal in the alternative, notwithstanding lapse of time, in D. C. Kalutara No. 18162.

Argued on 9th November, 1938.

Decided 22nd November, 1938.

Civil Procedure Code, section 756—Leave to appeal notwithstanding lapse of time.

This is an application, by the seventh defendant to a partition action, for relief under section 756 of the Civil Procedure Code or, in the alternative, for leave to appeal notwithstanding lapse of time. The contest in the action was between the applicant and the plaintiff, the latter being successful. The second defendant did not file answer but she gave evidence in support of the plaintiff's case. The applicant appealed from the decision making the plaintiff and the second and other defendants respondents. He gave notice of security to the plaintiff only. The security was accepted. The second defendant thereafter moved that the action do abate on the ground that the applicant had failed to give notice of security in terms of section 756. The second defendant's motion was allowed.

Held : That there was substantial non-compliance with the terms of section 756 of the Civil Procedure Code by the applicant, and that he was not entitled to relief under the section in the absence of sufficient reason for such non-compliance.

N. E. Weerasooria, K.C., with *H. A. Wijemanne*, for petitioner.
E. B. Wickremenayake for respondent.

POYSER, S.P.J.

This is an application by the seventh defendant for relief under section 756 of the Civil Procedure Code or, in the alternative, for leave to appeal notwithstanding lapse of time.

The action was for the partition of a land in the Kalutara District and decree was entered on the 1st of February, 1938. The contest was between the seventh defendant and the plaintiff, the latter being successful. The second defendant did not file answer as she agreed to the share allotted her in the plaint, but she did give evidence at the trial in support of the plaintiff's case.

On the 2nd of February, the applicant filed a petition of appeal making the plaintiff, the second and other defendants respondents. He only gave notice of security to the plaintiff and such security was accepted. On the 9th of April, 1938, proxy on behalf of the second defendant was filed and the Court was moved that the appeal do abate on the ground that the seventh defendant had failed to give notice of security in terms of section 756 of the Civil Procedure Code.

The District Judge on the 20th of May ordered that the appeal do abate, and this application is made in consequence of such order.

It was conceded both in the lower Court and on appeal that the second defendant will be prejudicially affected if the seventh defendant's appeal succeeds, and the question therefore is whether this is a case where relief should be granted in accordance with the provisions of the amendment to section 756 of the Civil Procedure Code introduced by Ordinance No. 42 of 1921. A number of cases were cited to us, and the general principles upon which this Court has acted are that no relief will be given when there has been a substantial non-compliance with the provisions of the section. See *Silva v. Goonesekere* * and *Saleem v. Yoosoof* †.

Relief, however, was given in a case where the appellant deposited cash as security but omitted to give notice of such deposit as required, *Singho v. Singho* ‡.

The case, however, by which we must be guided is *Zahira Umma v. Abeysinghe* §, recently decided by a Divisional Bench. In that case it was held that " where an appeal has abated under section 756 of the Civil Procedure Code and relief is sought against the order of abatement, the proper procedure is by way of an application for relief to the Supreme Court. Application for relief under the section should not be granted in the following cases—(*a*) where there has been a non-compliance with the terms of the section without an excuse, irrespective of the question whether material prejudice has been caused or not; (*b*) where the non-compliance with an essential term is trivial but material prejudice has been caused."

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* 31 N.L.R. p. 184
† 17 Ceylon Law Recorder p. 117
‡ 13 Ceylon Law Recorder p. 238
§ 39 N.L.R. p. 84

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In this case, there was a substantial non-compliance with the terms of the section and no excuse was made or even suggested for such non-compliance; further, it is impossible to say that no material prejudice has been caused, for the second defendant may have desired to object, not only to the amount, but also to the nature of the security tendered.

In view of this Divisional Bench decision, the application must be rejected with costs.

WIJEYEWARDENE, J.

I agree.

Application disallowed.

Present: ABRAHAMS, C.J.

LOURENSZ, (Head Quarter Inspector of Police) vs SIMON

S. C. No. 446—*P. C. Badulla No.* 27115.

Argued and Decided on 27th October, 1938.

Wrongful confinement—Charge of—Conviction—Conviction changed in appeal to one of wrongful restraint.

The appellant was charged with wrongfully confining a Police constable by locking him up in a room. It was admitted by the prosecution that there was another exit out of the room through which he could have escaped. The Magistrate convicted the appellant.

Held : (i) That the appellant was not guilty of the offence of wrongful confinement.

(ii) That the conviction could be altered to one of wrongful restraint.

N. Kumarasingham, with *A. C. Nadarajah*, for accused-appellant.

E. H. T. Gunasekera, Crown Counsel, for complainant-respondent.

ABRAHAMS, C.J.

The appellant is charged with wrongfully confining a Police constable who had come to his house for the purpose of serving upon him a summons in a criminal case. He was fined Rs. 30/–. The constable appears to have acted somewhat rudely in marching into the appellant's living room while he was taking his lunch, but that did not justify the subsequent behaviour of the appellant who locked the door of the room, in which they happened to be, and shouted for a gun. It was alleged by the Inspector of Police that there was another exit out of the room, even if the constable did not know it was there and made no attempt to look for it, so that he could not be said to be wrongfully confined if he was merely restrained from going in one direction and his movement was not blocked in another way. Nevertheless, the appellant cannot escape a conviction for a lesser offence, namely, that of wrongful restraint, because he had no right to prevent the constable from going out of the main door. The conviction is altered to one of wrongful restraint. I do not propose to interfere with the fine of Rs. 30/– as I think that the appellant requires a lesson in good behaviour.

Conviction altered.

Present : POYSER, S.P.J.

PETER FERNANDO & TWO OTHERS vs AISA UMMA & ANOTHER

Application in Revision in C. R. Kalutara No. 13523.

Argued on 21st November, 1938.

Decided on 25th November, 1938.

Revisionary powers of Supreme Court—Circumstances in which they will not be exercised.

The plaintiffs, among whom were two minors, sued the defendants on a mortgage bond in the Court of Requests. At the trial, the only issue raised was in regard to whether the bond was prescribed. The question of the minority of the 1st and 2nd plaintiffs was not raised. The plaintiffs' action was dismissed on the ground that the action was prescribed. The Commissioner refused leave to appeal. Application was made to the Supreme Court for leave to appeal, but was refused on the ground that there was a right of appeal without obtaining leave. Thereafter, this application for revision was made on the ground that the Commissioner's finding was wrong *ex facie* as prescription could not run against the minor plaintiffs.

Held : That a mistake of the legal advisers as to the proper procedure or a failure to raise a point of law at the trial are not grounds on which the Supreme Court will exercise its power of revision in a case in which the aggrieved party had a right of appeal and a full opportunity of presenting that party's case in the trial court.

S. W. Jayasuriya for petitioner.

A. C. Z. Wijeratne for defendants-respondents.

POYSER, S.P.J.

In this case, the plaintiffs sued the defendants on a mortgage bond and the plaint set out that the 1st and 2nd plaintiffs were minors.

The defendants admitted the execution of the bond but denied the other averments set out in the plaint.

At the trial, the only issues framed were in regard to whether the bond in question was prescribed or not. These issues were decided in the defendants' favour and the plaintiffs' action was dismissed.

Application was then made to the Commissioner for leave to appeal on the facts, but such application was refused. The plaintiffs then made a similar application to the Supreme Court but such application was refused on the grounds that there was a right of appeal and no leave was necessary.

The plaintiffs now ask the Court to exercise revisionary powers on the ground that the judgment of the Commissioner was *ex facie* wrong, as prescription could not run against the minor plaintiffs.

This is the first time this point has been raised. Before the Commissioner, the only question argued was whether a payment of Rs. 15/– had been made on the mortgage bond so as to take the case out of prescription. Further, in both applications for leave to appeal, no mention was made of the first and second plaintiffs' minority.

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Poyser, S.P.J.

Peter Fernando & Two Others *vs* Aisa Umma & Another

The present petition sets out that no appeal was filed in consequence of " a mistaken view of the procedure;" it is silent as to why the question of the plaintiffs' minority was not brought to the notice of the Commissioner or even to the Supreme Court when leave to appeal was applied for, although on both occasions an advocate represented the plaintiffs.

I am consequently asked to exercise revisionary powers on the grounds that the petitioner's legal advisers were mistaken as to the procedure and failed to raise a point of law at the trial. I do not consider that these are grounds for granting this application ; it would, in my opinion, be establishing a very undesirable precedent if I were to hold otherwise.

The application is dismissed with costs.

Application dismissed.

Present : WIJEYEWARDENE, A.J.

KAPPALARPITCHAI vs ANTHONY

S. C. No. 132—*C. R. Mannar No.* 3244.

Argued & Decided on 18th October, 1938.

Preliminary objection—Action under section 247 *of the Civil Procedure Code by judgment-creditor—Judgment for plaintiff—Appeal by claimant* (1*st defendant*)*—Judgment-debtor* (2*nd defendant*) *not made a party—Is such omission fatal to the appeal.*

An action under section 247 of the Civil Procedure Code was brought by a judgment-creditor against the claimant (1st defendant) and the judgment-debtor (2nd defendant). Judgment was entered in favour of the plaintiff. The 1st defendant appealed, but failed to make the 2nd defendant a party to the appeal.

Held : That the appeal should be rejected inasmuch as the 2nd defendant was not made a party to the appeal.

E. B. Wickremanayake, with *G. E. Chitty*, for 1st defendant-appellant.

J. R. Jayawardene for plaintiff-respondent.

WIJEYEWARDENE, A.J.

The plaintiff brought this action under section 247 of the Civil Procedure Code to have a land belonging to the 2nd defendant declared liable to be seized under a decree obtained by him in another case. The 1st defendant claimed the property as his own on a transfer obtained by him. The learned Commissioner entered judgment in favour of the plaintiff holding that the land was liable to be seized. The 1st defendant has failed to make the 2nd defendant a respondent to this appeal. If the judgment is set aside, the other properties of the 2nd defendant will become liable for seizure. I hold, therefore, that the 2nd defendant should have been made a respondent. I uphold the preliminary objection raised by Counsel for the plaintiff-respondent and dismiss the appeal with costs.

Appeal dismissed.

Present : KOCH, J.

HELEN MORRIS vs WALLACE MORRIS

S. C. No. 1(*Divorce*)
Argued on 8th July, 1938.
Decided on 11th July, 1938.

Divorce—The Ceylon Divorce Jurisdiction Order-in-Council of 1936 *—First section of the Indian and Colonial Divorce Jurisdiction Act* 1926*—Jurisdiction of the Supreme Court to decree dissolution of marriage between parties who are British subjects domiciled in England or Scotland—Husband an Englishman domiciled in England—Wife a permanent resident of Ceylon —Can the Supreme Court entertain a petition by the wife—Does the wife acquire the domicile of her husband.*

Under and by virtue of the terms of the Ceylon Divorce Jurisdiction Order-in-Council, 1936, and section 1 of the Indian and Colonial Divorce Jurisdiction Act, 1926, the Supreme Court of Ceylon is vested with jurisdiction to decree the dissolution of marriage between parties who are British subjects domiciled in England or Scotland provided that certain other conditions are fulfilled.

The petitioner (the wife) prayed the Supreme Court for a divorce, in the exercise of the said jurisdiction, on the ground that her husband had maliciously deserted her. In the petition, she alleged that her husband was an Englishman who had his domicile in England and was resident in England. She was described as 'a native of Ceylon' and 'a permanent resident of Ceylon.'

Held : That the wife acquired the domicile of her husband and therefore the Supreme Court had jurisdiction to entertain the petition.

Cases referred to :— (1) *Warrender vs. Warrender* (1835) 3 Cl. & F. 488; 6 E.R. 1239.
(2) *Dalhousie vs. M'Donnell* (1840) 7 Cl. & Fin. 817.
(3) *Williams vs. Dormer* (1852) 2 Rob. Eccl. 505.
(4) *In re Daly* (1858) 25 Beav. 456.
(5) *Dolphin vs. Robins* (1859) 7 H.L. Cases 290.

N. Nadarajah, with *O. L. de Kretser* (*Jr.*), for petitioner.

KOCH, J.

Under and by virtue of the terms of an Order-in-Council named the Ceylon Divorce Jurisdiction Order-in-Council, 1936, a petition for divorce *a vinculo matrimonii* on the ground of malicious desertion has been presented to this Court by Mary Ethel Helen Morris nee Spaar of Lady Mac Carthy Road, Kandy, against her husband Robert Wallace Morris of Lunn House, 46A, Park Road, East Moseley, Surrey, England.

It has been ordered by this Order-in-Council that on or after the 1st of July, 1936, the provisions of the first section of the Indian and Colonial Divorce Jurisdiction Act, 1926, shall apply to the Island of Ceylon in like manner as they apply to India, and, in the Preamble, that it shall be subject

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to the necessary modifications which are set out. It is further ordered that the Court, which has to exercise jurisdiction in respect of a petition so presented under this Order-in-Council, shall be the Supreme Court of Ceylon.

In pursuance of the powers conferred by the Indian and Colonial Divorce Jurisdiction Act, 1926, and by the Ceylon Divorce Jurisdiction Order-in-Council, 1936, the Secretary of State for the Colonies, with the concurrence of the Lord Chancellor, made certain rules which have to be complied with. These rules are described as the Ceylon (Non-Domiciled Parties) Divorce Rules, 1936, and are dated the 1st of July, 1936. The petition as originally presented was defective in certain particulars as required by these rules. I, therefore, made order returning the petition for amendment and compliance in respect of those particulars. This has now been done and the petition as amended is before me.

Now, section 1 of the Indian and Colonial Divorce Jurisdiction Act, 1926, read side by side with the terms of the Order-in-Council referred to would give the Supreme Court of Ceylon jurisdiction to make a decree for the dissolution of a marriage where the parties to the marriage are British subjects domiciled in England or Scotland, provided that the petitioner resides in Ceylon at the time of presenting the petition, that the place where the parties last resided together was in Ceylon, and that either the marriage was solemnized in Ceylon or the adultery or crime complained of was committed in Ceylon.

The petition discloses that the petitioner is residing in Ceylon and that the parties last resided together in Ceylon till the year 1932. It also sets out that the marriage took place in Ceylon and that the matrimonial offence complained of was committed in Ceylon. To this extent the petition complies with the requirements of the law. But there remains the fundamental essential as to whether the parties to the marriage are British subjects domiciled in England or in Scotland. So far as the respondent is concerned, the petition sets out that fact that he is an Englishman who has his domicile in England, that that was his domicile at the time of the marriage and that he is at present residing there. The difficulty arises with regard to the domicile of the petitioner.

The petitioner alleges that she is " a native of Ceylon " and " a permanent resident of Ceylon; " in other words, that her domicile of origin is Ceylon. If that domicile still continues, there can be no question that her petition will have to be rejected on the ground that this Court, in that event, will have no jurisdiction to entertain it. But, has she, by reason of her marriage, acquired a new domicile, that domicile being that of her husband ? If this is the case, then this requirement too will have been complied with.

Before dealing with the authorities on this point, I wish to refer to one or two of the Statutory Rules already mentioned.

Rule 6 (1) requires that in the body of the petition shall be stated the date and place of marriage, and the name, status and domicile of the wife

before the marriage ; which Rule 6 (2) requires that the status of the husband and his *domicile at the time of marriage* should be stated. It is significant that while it is necessary to state the domicile of the husband at the time of the marriage, there is no requirement that the domicile of the wife at the time of the marriage should be stated, but only her domicile before the marriage. This, presumably, is due to the fact that by her marriage it is possibly contemplated that her domicile might be changed.

In *Warrender vs. Warrender* (1835–3 Cl. & F. 488–English Reports Vol. 6 page 1239), the facts were that a Scotsman domiciled in Scotland was married to an Englishwoman in England. After the marriage, the parties resided first in Scotland and thereafter in England, where a mutual separation took place and the wife went out to reside abroad. The husband continued to be domiciled in Scotland and there raised an action for divorce against her on the ground of adultery alleged to have been committed abroad. It was held by the House of Lords that the wife's legal domicile was in Scotland where the husband was, and that she was amenable to the jurisdiction of the Scotch Court. The importance of this decision is that, in spite of the mutual separation and the living abroad, her marriage domicile continued.

In *Dalhouse vs. M'Donnell* (1840–7 Cl. & F. 817), Lord Brougham at page 884 expressed himself thus, " If the domicile was not the same for both parents.....we should hold that that *of the father at the time of the marriage* should give the rule." Again, at page 886 he said, " My Lords, with respect to the case of *Warrender vs. Warrender*, undoubtedly as far as the case goes it is in favour of the legitimacy here because the domicile of the parties was clearly held to be Scotch. An attempt was made to shew that Lady Warrender's domicile was not Scotch with a view to another branch of the argument, but we all agreed here that *her domicile was the domicile of the husband* and that both parties had a Scotch domicile."

In *Williams vs. Dormer* (1852–2 Rob. Ecc. 505), it was held that a wife is legally domiciled where the husband was, but that this may not apply after a decree of divorce was pronounced.

In *In re Daly* (1858, 25 Beav. 456), the facts were that the wife, Mrs. Balagrave, was married to an Englishman who had his domicile in England. A few years later, she separated from her husband and went to reside in Paris. There was no judicial separation. In considering the validity of a testamentary disposition made in France, according to the mode there prevailing, the Master of the Rolls, Sir John Romillery, was of opinion that the disposition was good according to the French Law, but that that raised the question whether Mrs. Balagrave could obtain a domicile in France different from that of her husband. *He was of opinion that she could not.*

In *Dolphin vs. Robins* (1859, 7 H. L. Cases 390) a wife, who was married to her husband in England and whose domicile was England, later sued out in the Scotch Courts a process for the dissolution of her marriage on account of adultery committed by her husband in Scotland, and obtained

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a decree for divorce *a vinculo matrimonii*. She, thereafter, married a Frenchman and went with him to his domicile in France. Nearly two years later, she executed in France a holograph will (valid according to the laws of that country) revoking all previous wills. The question arose whether the holograph will made in France had the effect of revoking a will which she had previously executed in England. This depended on whether her domicile was in England or in France. Had she acquired a new domicile in France by reason of her second marriage and her stay in France, the holograph will would have prevailed; but it was held that the Scotch decree of divorce had no effect and, therefore, she continued to be married to her first husband; that, as his domicile continued to be in England and as his domicile was her domicile, she was a domiciled Englishwoman; that the will executed in France, not having been executed in the mode which was required by the English law, had no effect on the will which she had previously executed in England; and that the English will was rightly admitted to probate.

The point in the case is that all the three learned Judges were firmly of opinion that the husband's domicile was the wife's domicile; but the question whether the wife had the power to change her domicile after obtaining a divorce or a judicial separation from her husband was left an open matter.

Dicey, in his work on the *Conflict of Laws* (5th Ed. at page 107) in dealing with rules on the Domicile of Natural Persons, sets out Rule 8, Sub-Rule 2 thus :—

> "The domicile of a married woman is, during coverture, the same as, and changes with, the domicile of her husband."

He refers to several cases, some of which I have already dealt with.

Pothier, in his *Introduction Contra de Mar. No.* 552, says that from the instant of the marriage the domicile of the husband becomes that of the wife.

Burge, in his work on *Colonial Law* (Vol. 1) at page 35, says that the wife by her marriage, even before she leaves her residence, acquires the domicile of her husband, and no longer retains that of her origin. The wife retains the domicile of her husband even after the relationship is disturbed by the death of her husband, until she makes choice of and establishes another domicile or remarries.

Voet (V–1–95 & 96) says that the wife by her marriage acquires the domicile of her husband and retains it even after her husband's death until she makes choice of and establishes another domicile or remarries.

In view of the authorities I have referred to, there would be justification at present for my entertaining the petition, but in doing so, as the present proceedings are *ex parte*, I leave it open to the respondent to show cause, if so advised, as to whether the petition has been rightly entertained and whether the Court has jurisdiction to do so.

I, accordingly, direct that summons to issue. The summons will be served on the respondent personally. The proctor for the petitioner will within a month from today, after correspondence with his solicitor in England, inform this Court as to the mode of service he proposes, and this Court will then decide as to whether such mode meets with its approval. When summons has been served on the respondent, he is directed to enter appearance within two months of the date of such service.

Petition entertained.

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

AGOSTINA SILVA & THREE OTHERS vs JOHN CHRISIS SILVA

S. C. No. 34—D. C. Colombo No. 666.
Argued on 15th September, 1938.
Decided on 21st September, 1938.

Construction of deed—Deed of gift—Mortgage of subject-matter of gift by donees—Donees parties to the mortgage—Interests of donees mortgaged—Does ignorance of their rights on the part of the donees affect their act in so far as it is valid.

By a deed P1* an allotment of land was gifted to Francina Soosa and her husband Arnolis Silva. Francina Soosa died leaving her husband and their children. By a bond P2† Arnolis Silva and his three children mortgaged certain interests in the property gifted by P1. The bond was put in suit and the land sold. The plaintiffs, the descendants of Arnolis Silva and Francina Soosa, claimed that P1 created a valid *fideicommissum* and that the deed P2 did not create an effective mortgage of their rights over the half share dealt with in P1.

Held : That P2 created a valid mortgage of the share of land dealt with in P 1.

N. E. Weerasooriya, K.C., with *A. E. R. Corea*, for defendant-appellant.
L. A. Rajapakse, with *J. R. Jayawardena*, for plaintiffs-respondents.

HEARNE, J.

I have had the advantage of reading the order proposed by my brother. I agree with it, though not for all the reasons he sets out. I regret I am unable to agree with him that P1 creates a valid *fideicommissum*. I do not think the case of *Wijetunga vs. Wijetunga* (1912) 15 N.L.R. 493, a case the correctness of which has been doubted though it has not been expressly dissented from, helps the respondents. In that case, the deed did not mention "assigns." Nor do I think the cases in which the deeds expressly refer to a "*fideicommissum*" help them. In my opinion, the deed P1 gifted the land in question absolutely to the donees.

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* (*Deed of Gift.*)

No. 3761 Value Rs. 150/–

The purport of the Deed of Gift caused to be written and granted on this 23rd day of June in the year of Our Lord one thousand eight hundred and seventy four is as follows :—

I, Eliyadura Carlis Soosa of Nagoda in the Ragam Pattu of Alut Kuru Korale in consideration of the proposed marriage of my daughter Francina Soosa with Anthoniduru Arnolis Silva of Nagoda aforesaid with my free will and consent do hereby grant and assign by way of gift unto the said two persons the following premises of the value of Rupees one hundred and fifty (Rs. 150/–) to wit :— All that just half (½) share of the divided one-fifth part

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I think it is clear that when the children of Francina joined with their father in P2, they purported to mortgage all their interests in the land possessed by them under P1 as they interpreted P1. The fact that they misconceived their rights makes no difference to the result. Having regard to the legal effect of P1 and the operative clause of P2, they did, in my opinion, mortgage what they intended to mortgage viz. all their right, title and interest in and to the land in question.

I agree that the appeal should be allowed with costs and the plaintiffs' action dismissed with costs.

WIJEYEWARDENE, A.J.

The plaintiffs-respondents instituted this action for declaration of title to an undivided half share of a defined block of land called Etambagahawatte. The plaintiffs based their title on a deed of gift P1 executed in 1874. By this deed of gift, the original owner of a larger allotment of land called Etambagahawatte, of which the subject-matter of this action is a defined portion, gifted an undivided half share on the east to his daughter Francina Soosa and her husband Arnolis Silva, subject to certain conditions and restrictions set out in the deed. By an amicable arrangement between the donees and the co-owners of the remaining half share, the donees possessed for nearly 50 years the defined block which is the subject-matter of this action. About 40 years ago, Francina Soosa died leaving her husband and three children, Agostinu the 1st plaintiff, Gonsal the 2nd plaintiff and Loginia. Arnolis Silva died in 1933 and Loginia about a year ago. The 3rd and 4th plaintiffs are the children of Loginia.

By bond P2 of 1924, Arnolis Silva, the 1st and 2nd plaintiffs and Loginia mortgaged certain interests in the property. The bond was put in suit and, under an order to sell issued in pursuance of the hypothecary decree, the mortgaged property was sold by the Fiscal under section 12 of Ordinance No. 21 of 1927 and purchased by the defendant who obtained a conveyance D4 of 1929 in respect of his purchase.

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alloted to me out of the half part of Etambagahawatte situated at Nagoda aforesaid, which said one-fifth part is bounded on the north by the boundary of the one-fifth part of this land belonging to Endahandige Daniel Fernando, east by the high road, south by the boundary of the garden belonging to Colamba Acharige Manual Naide and Dewata Koad, and west by the boundary of Kahatagahawatte belonging to me the said Carolis Soosa and others, containing in extent about two roods and of all the trees and plantations standing thereon, which said premises have been held and possessed by me under and by virtue of Dowery Deed No. 2591 dated 30th August 1865 attested by Don Abraham, Notary, and executed in my favour on behalf of my wife and in favour of four others.

Therefore, I the said donor or any of my heirs, executors and administrators shall not claim any right or title hereafter regarding the said premises

The plaintiffs allege that P1 created a *fideicommissum* in favour of the descending heirs of the donees and that by P2 the interests mortgaged were only the half share that devolved on the 1st and 2nd plaintiffs and Loginia on the death of their mother and the fiduciary interest of Arnolis Silva. They contend that, as Arnolis Silva is now dead, the defendant is entitled to claim under D4 only this undivided half share. They claim that the remaining undivided half share which was given to Arnolis Silva by P1 has now devolved on them after the death of Arnolis.

The defendant denies that P1 created a *fideicommissum*, and states that P2 mortgaged the entire property which he claims by virtue of D4.

The learned District Judge held that P1 did not create a *fideicommissum*, and that therefore on the death of Francina, Arnolis Silva became entitled to undivided 3/4ths and the children of Arnolis Silva to an undivided 1/4th. He construed P2 as mortgaging only the undivided 1/4th that devolved on the first two plaintiffs and Loginia on the death of their mother and a life-interest of Arnolis Silva. On these findings, he reached the decision that the plaintiffs were entitled to 3/4th shares and defendant to an undivided 1/4th share but, as the plaintiffs claimed only a half share, he declared them entitled to that share.

The mortgage bond P2 is written in Sinhalese. While there may be some room for argument on the translation of P2 as to the interests that were in fact hypothecated, the document P2 itself states very clearly that the mortgagors mortgage the entirety of the subject-matter of this action. The mortgagors could not have expressed in clearer terms than they have done in P2 their intention to mortgage the land in question. According to the bond, the property mortgaged is "the eastern half share of the land of about 2 roods" within the given boundaries, the house and the plantations standing thereon together with the right, title and interest of the mortgagors.

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hereby donated, and do hereby assign and deliver unto the said two donees all the right title and interest which I have in and to the same to be held by them from this date for ever.

The said two donees shall become entitled to the said premises after their marriage and they shall possess the same during their lifetime, but they shall not sell, mortgage or in any other way alienate the said premises, and after the lives of the said two donees their descending heirs, executors and authorised persons such as administrators etc. shall possess the same uninterruptedly subject to the rules and regulations of the Government or do anything they please with the same.

In proof whereof this deed of gift was caused to be written and I said donor set my usual signature to three copies of the same tenor as these presents and delivered the same unto the said two donees and the said two donees accepted the same with thanks by signing these presents in the presence of the witnesses Weliserege Bastian Fernando of Mattumagala and Edirisoori Mohottige Hendrick Saram Appuhamy of Peliyagoda.

Signed, witnessed and attested.

Sgd. D. M. Amarasekera.

(*Notary Public.*)

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It is conceded by both parties that what is described in the deeds as eastern half share of the lands is the defined block which was possessed by the donees under P1 and which forms the subject-matter of this action. I have no hesitation in holding that by P2 the mortgagors mortgaged the entire property mortgaged by the donees under P1.

The question whether P1 creates a *fideicommissum* is not free from difficulty. Several translations of this document, which is in Sinhalese, have been produced. The translation adopted by the learned District Judge appears to me to be the most satisfactory.

The relevant portion of P1, according to this translation, is rendered as follows :—

> " It is hereby declared that I, the donor, or my heirs or any person authorised, such as executors, administrators and assigns shall hereafter have no right to any interests whatever in the allotment of land gifted, and that all rights and interests I and my heirs etc. had are hereby given and delivered to the aforesaid donees for ever ; and that the two donees after their marriage shall only possess (the said property) but shall not sell, mortgage or alienate (the same) in any other manner and that after their death the heirs descending from them and their authorised persons such as executors, administrators and assigns are hereby given the right to possess the same undisputably and also to do anything they desire (with the same) subject to the Government Regulations."

A large number of cases was cited by Counsel for the appellant to shew that the use of the words " heirs, executors, administrators and assigns " prevents an instrument from being construed as creating a *fideicommissum*. I would in this connection respectfully adopt the observations of de Sampayo J. in *Craib vs. Loku Appu* :* " I think it is not wrong to bear in mind that the draftsman of the deed is a Sinhalese notary who was manifestly endeavouring to imitate conveyancing phraseology, without duly considering its relevancy to the matter in hand and I am inclined to attribute any apparent incoherency to the notary's want of care rather than to any uncertainty of intention on the part of the donor."

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† (*Mortgage Bond Rs.* 400/–)

Know all men by these Presents that We, Anthonidura Agostinu Silva Gunatilaka of Dematagoda, within the gravets of Colombo, Do Logina Silva Gunatilake, Do Gonsal Silva Gunatilaka and Do Arnolis Silva Gunatilaka all of Nagoda in the Ragam Pattu of Alut Kuru Korale the four persons borrowed, counted and received this day in full from Mallikage Caroline Alwis Jayatilaka of Nagoda aforesaid a sum of Rupees four hundred (Rs. 400/–) of lawful money of Ceylon.

Therefore hereby renouncing the benefit of denying to have counted and received the said amount we the said debtors do hereby jointly and severally promise and bind ourselves to repay the said principal with interest thereon at the rate of 16 per cent per annum on demand unto the said creditor Mallikage Caroline Alwis Jayatilaka or her heirs, executors, administrators and assigns.

And for further securing the payment of the said sum of Rupees four hundred (Rs. 400/–) and interest accruing thereon as aforesaid we the said debtors do hereby mortgage and hypothecate to and with the said creditor and her aforewritten as a

* (1918) 20 N.L.R. 449

In the present deed, the gift is made to the donees. It is not made to the two donees, their heirs, executors, administrators and assigns. The donees are prevented from mortgaging selling or alienating the property. It is then stated that after the death of the donees, the property is to go to the " heirs descending from them and their authorised persons such as executors, administrators and assigns." There is no doubt that if this badly drafted deed of a Sinhalese Notary, who did not most probably understand the full significance of the terms of conveyancing used by him, is carefully examined, one could find words which by themselves appear to militate against a construction that the donor intended to create a *fideicommissum*. I think, however, that too great an emphasis should not be placed on such words so as to defeat the clear intention of the testator, which could be gathered from the whole document. In this deed, there is an express prohibition against alienation. The persons prohibited are the donees to whom the gift is made. It then proceeds to say to whom the property should go on the death of the donees. It appears to me that unless an undue importance is attached to the phrase which is undoubtedly a mere notarial flourish it cannot be said that the beneficiaries are not designated with certainty. I think that effect could be given to the intention of a party executing a Sinhalese deed by following the series of cases (*Wijetunga vs. Wijetunga*,* *Coudert vs. Don Elias*,† *Mirando vs. Coudert*,‡ *Dassanayake vs. Tillakaratne*,§ *Craib vs. Loku Appu* (supra), *Gylaux vs. Jayawardena* ||) which favour a liberal interpretation rather than those cases which place an undue emphasis on technical words introduced into a deed by the notary.

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first or primary.....mortgage free from all encumbrances All the right title and interest which we the said debtors have in and to the eastern undivided half share and the tiled house and all other trees and plantations and everything therein from and out of the land called one-fifth part of half part of Etambagahawatte situated at Nagoda in the Ragam Pattu of Alut Kuru Korale in the District of Colombo of the Western Province, which said one-fifth part is bounded on the north by the boundary of the one-fifth part of this land belonging to Endahandige Daniel Fernando, east by the high road, south by the boundary of the garden belonging to Colamba Acharige Naide and Dewata Road and west by the boundary of Kahatagahawatte belonging to Carolis Soosa, containing in extent about two roods which said premises have been held and possessed by the said Agostinu Silva Gunatilaka, the first named debtor, Logina Silva Gunatilaka, the second named debtor, and Gonsal Silva Gunatilaka, the third named debtor, by right of maternal inheritance as appearing in the Deed No. 3761 dated 23rd June 1874 attested by D. M. Seneviratne, Notary Public, of the District of Colombo and by me the said fourth named debtor under and by virtue of the life-interest reserved to me under and by virtue of the said Deed and also appearing in the certified copy of the said Deed which certified copy is herewith delivered.

* (1912) 15 N.L.R. 493

† (1914) 17 N.L.R. 129

‡ (1916) 19 N.L.R. 90

§ (1917) 20 N.L.R. 89

|| (1930) 32 N.L.R. 105

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Wijeyewardene, A. J.

Agostina Silva and Three Others *vs* John Chrisis Silva

I hold that the deed P1 created a valid *fideicommissum* binding on the two donees and that, on their death, the property vested absolutely in their descending heirs. I may add, however, that the question whether the deed P1 creates a *fideicommissum* is not of much importance in this case. If the deed P1 gifted the land absolutely to the two donees, then as by P2 the whole land was mortgaged the defendant gets title to the whole land under D4. Even if the deed created a *fideicommissum*, yet since the fiduciary and *fideicommissaries* joined in mortgaging the entire property the defendant who was the purchaser under the mortgage decree gets a title to the whole property both as against the mortgagors and the heirs of the *fideicommissum*. The case of *Silva vs. Silva* * is a direct authority on the point.

I find, therefore, that the plaintiffs are not entitled to any share of the property.

In view of these findings the questions with regard to compensation and damages do not arise for consideration.

I allow the appeal and dismiss the plaintiff's action with costs.

Appeal allowed.

And we the said debtors do hereby declare that we have lawful power and authority to mortgage the said premises hereby mortgaged as aforesaid and that we shall not do or commit any act against this mortgage whereby the same shall become void or whereby the value of the mortgaged property shall be decreased during the existence of this mortgage or till the same is lawfully discharged.

And for the true performance of the foregoing conditions we the said debtors do hereby bind ourselves our heirs, executors and administrators to and with the said creditor and her heirs, executors, administrators and assigns firmly.

In witness whereof we the said debtors Anthonidura Agustinu Silva Gunatilaka, Do Logina Silva Gunatilaka, Do Gonsal Silva Gunatilaka and Do Arnolis Silva Gunatilaka set our signatures to this and to two others of the same tenor as these presents at Nagoda on this 4th Day of March 1924.

Signed, witnessed and attested.

Sgd. D. P. S. Jayasuriya.

(*Notary Public.*)

* (1927) 29 N.L.R. 373

Present : POYSER, S.P.J.

HAMY & ANOTHER vs HAMY & ANOTHER

Application for Revision in P. C. Balapitiya No. 32739.
Argued & Decided on 1st December, 1938.

Criminal Procedure—Case compounded on terms—Disagreement regarding terms of settlement—Terms of settlement vacated—Case refixed for hearing—Order for ejectment—Has the Magistrate power to refix hearing—Section 290 of the Criminal Procedure Code.

Held : (i) That once a case is compounded, the accused is deemed to be acquitted and it should be so recorded.

(ii) That the Magistrate has no power to refix a case for hearing after it has been compounded under section 290 of the Criminal Procedure Code.

L. A. Rajapakse, with *V. F. Gunaratne*, for the petitioners.
R. L. Pereira, K.C., with *A. P. de Soysa*, for the respondent.

POYSER, S.P.J.

In this case, the petitioners were charged in the Police Court with offences under sections 434 and 486 of the Penal Code. Evidence was led in support of the charges and summons was directed to be served on the accused for them to appear on the 19th of March, 1938. In fact, they appeared before the Magistrate on the 26th of March and, when charged, pleaded not guilty. The trial was fixed for the 31st of March. On that day, the Magistrate records as follows :—

> " This case is compounded. The complainants will transfer their interests to this house and land as per deed 28785 by C. A. Jayatillake, Notary Public, for Rs. 250/– to D. Darwis Soysa. The money to be paid on or before 5-5-38. If not paid, accused will vacate the house. Call case on 5-5-38."

On the 19th of May, however, the matter again is brought before the Magistrate and he records that " there seems to have been some *bona fide* mistake regarding the terms on which this case was compounded." The Magistrate goes on to state that, in view of such disagreement, he vacates the terms of settlement in this case and refixes it for hearing. On the 7th of June, the proctor for the petitioners takes the point that the Court has no power to vacate the order made on the 31st of March and, after some discussion, the Magistrate makes order that the petitioners shall be ejected from the premises in regard to which the dispute between the parties arose. Further orders are made on the 28th of June and on the 6th of September.

On behalf of the petitioners it is contended that, when the case had been compounded, the accused should have been acquitted in accordance with the provisions of section 290 (5) of the Criminal Procedure Code. There is no doubt in my mind that this contention is sound. The Magistrate

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appears to have misdirected himself by treating the case after the 31st of March as a civil case. This he had no power to do. Once the case was compounded, the accused are deemed to be acquitted and it should have been so recorded.

This Court has previously come to similar decisions, viz. in a case which is briefly reported at page LXXX of Volume 13 of the Ceylon Law Recorder and in case *P. C. Gampaha No.* 37488 (S. C. Revision Minutes of 7th April 1936).*

Acting in revision therefore, I direct that the accused be formally acquitted, such acquittal to take effect as from the 31st of March, 1938. I also set aside all orders made by the Magistrate subsequent to that date.

Orders set aside and accused acquitted.

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* *Present :* POYSER, J.

FERNANDO vs ENSOHAMY & OTHERS

Application in Revision in P. C. Gampaha No. 37488.
Argued & Decided on 7th April, 1936.

L. A. Rajapakse for applicant.
S. W. Jayasooriya for respondent.

POYSER, J.

In this case, the seven accused were charged with mischief under section 410 of the Penal Code. Before evidence (except in support of the summons) was recorded, the parties decided to settle the matter, and the complainant applied to the Court that he be allowed to withdraw the case. He also moved that the Court do direct that the timber which was alleged to have been cut by the accused be delivered over to one Podi Singho. The Magistrate agreed to this settlement which was in effect a compounding of the case. He should, therefore, after allowing the case to be withdrawn, have formally acquitted all the accused. He omitted to make this order and, subsequently, on the 21st of January, made a further order with regard to the disposal of the timber. He had no power to do this. The case was finally concluded on the 15th January. Acting in revision therefore, I direct that the accused be formally acquitted, such acquittal to take effect as from the 15th of January; and I also set aside all orders made by the Magistrate subsequent to that date.

Accused acquitted.

Present : DE KRETSER, J.

PETER (Police Sergeant) vs RAZAK

S. C. No. 590—*P. C. Kandy No.* 59581.
Argued on 1st December, 1938.
Decided on 6th December, 1938.

Penal Code, section 183—*Obstruction to public servant in the discharge of his functions—Instigating a person not to make a statement or to sign any document—Does this amount to obstruction.*

On the approach of the complainant, a Police Sergeant, a crowd that had gathered in front of one Abdeen's boutique ran away and the complainant found a box with implements for gaming. While the Sergeant was questioning Abdeen as to what had taken place, the appellant came up and " ordered Abdeen not to make a statement nor to sign any statement " and added " let him do anything he wants."

The appellant gave no explanation of his conduct and the Magistrate convicted him, under section 183 of the Penal Code, with having voluntarily obstructed the Sergeant.

Held : That the appellant was rightly convicted.

Per DE KRETSER, J.—"Each case must be decided on its own facts. Mere words may, in certain circumstances, not amount to obstruction, and in other cases words may be as potent as physical acts and may amount to very real obstruction."

E. F. N. Gratiaen, with *M. M. I. Kariapper*, for accused-appellant.
Douglas Jansze, Acting Crown Counsel, for complainant-respondent.

DE KRETSER, J.

On receipt of certain information from an Aratchi, a Police Sergeant and a Constable went for inquiry, and on seeing them a crowd which had settled in front of one Abdeen's boutique ran away. The Sergeant found a box with implements for gaming at the spot and, naturally, inferred that Abdeen could throw light on what had taken place. He therefore questioned Abdeen and, as he was going on questioning Abdeen, the appellant came up and " ordered Abdeen not to make a statement nor to sign any statement " and added " let him do anything he wants." The Sergeant says, " I was unable to proceed further in my inquiry after this obstruction." In cross-examination he added, " I questioned a boy who was there. He *also* did not answer my questions." The learned Police Magistrate convicted the appellant, under section 183 of the Penal Code, with having voluntarily obstructed the Sergeant.

The appeal has been argued purely on the footing that the appellant's act did not amount to obstruction, and it was contended that mere words do not constitute an obstruction and that appellant did nothing more than advise Abdeen. The case of *Fernando vs. Alia Marikkar* (1 C.A.C. 173) was cited in support of this contention.

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de Kretser, J.

Peter (Police Sergeant) *vs* Razak

At the close of the argument, I indicated that I was inclined to think that the Magistrate was correct in his finding, and further consideration has not led me to change my opinion.

Each case must be decided on its own facts. Mere words may, in certain circumstances, not amount to obstruction, and in other cases words may be as potent as physical acts and may amount to very real obstruction.

The Magistrate held that, " in the absence of any explanation from the accused, the accused did intend to impede the inquiry which the Sergeant was holding," and that he did succeed in doing so.

On this finding, there can be only one conclusion and that is the appellant did obstruct the Sergeant. He came well within the purview of the reasoning in the cases cited by the Magistrate and other cases both of earlier and later dates. I affirm the conviction and sentence and dismiss the appeal.

Appeal dismissed.

Present : POYSER, S.P.J.

SINAN CHETTIAR vs SORIMUTTU

S. C. No. 169—*C. R. Colombo No.* 43120.

Argued on 17th November, 1938.

Decided on 21st November, 1938.

Small Tenements Ordinance No. 11 *of* 1882—*Application for* rule nisi *on tenant to show cause why he should not deliver up possession—Affidavit in support by landlord's attorney—Rule made absolute—Power of attorney not filed—Are proceedings regular—Civil Procedure Code section* 25 (*b*).

Held : (i) That section 25 (*b*) of the Civil Procedure Code, which requires a power of attorney authorising proceedings to be filed in Court, has no application to proceedings under the Small Tenements Ordinance.

(ii) That proceedings under the Small Tenements Ordinance can be instituted by an agent of the landlord.

(iii) That it is not necessary that such agent should hold a duly executed power of attorney.

N. Nadarajah, with *S. J. V. Chelvanayagam* and *H. W. Thambiah*, for (tenant) appellant.

Paramasothy for (landlord) respondent.

POYSER, S.P.J.

This is an appeal from an order of the Commissioner of Requests, Colombo, made under the provisions of the Small Tenements Ordinance No. 11 of 1882, directing the appellant to deliver up possession of two rooms in premises situated in Sea Street.

The application for a *rule nisi* was supported by an affidavit of the landlord's attorney, Shanmugam Chettiar. When the tenant showed cause against the order being made absolute, the following issues were framed:

(1) Is the defendant a tenant of the plaintiff ?
(2) Was due notice to quit given ?

Shanmugam Chettiar was the only material witness for the landlord, and the Commissioner of Requests accepted his evidence in its entirety and made the rule absolute. There are no grounds for dissenting from the Commissioner's findings of fact, but Mr. Nadarajah argues that the proceedings were irregular as only a landlord, not his attorney, can institute proceedings under this Ordinance and, further, that it was not proved that Shanmugam Chettiar was not in fact the attorney of the landlord.

In regard to the first point, section 3 of the Ordinance specifically provides that an application for a *rule nisi* shall be supported by an affidavit of the landlord or his agent.

The institution of these proceedings was therefore quite regular. In regard to the second point, Shanmugam Chettiar's evidence that he was the attorney of the landlord was not questioned—he did not produce his power of attorney when the *rule nisi* was made absolute ; he did, however, file a copy after notice of appeal had been given.

Mr. Nadarajah has referred to section 25 (*b*) of the Civil Procedure Code which requires a power of attorney authorising proceedings to be filed in Court. This section, in my opinion, has no application to proceedings under the Small Tenements Ordinance. That Ordinance, in accordance with its preamble, provides a speedy and effectual method for the recovery of tenements unlawfully held over after the determination of the tenancy. It permits of a landlord's agent supporting an application for a *rule nisi* and also provides that an agent may be given possession of the tenements claimed. No doubt, such agent must prove his agency, but there is nothing in this Ordinance to indicate that only a power of attorney can constitute an agent or that such power must be filed when proceedings are instituted.

In this case, Shanmugam Chettiar proved that he was the landlord's agent, and his agency was never questioned before the Commissioner of Requests.

The appeal fails and must be dismissed with costs.

Appeal dismissed.

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

RAJASINGHAM & ANOTHER vs SUPPIAHPILLAI

S. C. No. 80—*D. C.* (*Inty.*) *Kandy No.* 48972.
Argued & Decided on 31st October, 1938.

Court—Power of—Can a court dismiss an action because plaintiff fails to supply the necessary exhibits.

Held : That if a party fails to produce evidence which he is required to produce, the Court has no power to dismiss the action, but must adjudicate on the material that is before it.

N. E. Weerasuriya, K.C., with *A. A. Rajasingham*, for plaintiffs-appellants.

E. B. Wickremanayake for defendant-respondent.

POYSER, S.P.J.

The judgment of the learned District Judge cannot be supported. He has dismissed the plaintiff's action with costs, stating that in this simple case he cannot write his judgment because the plaintiff, on whom the onus lies, has not supplied him with the necessary exhibits. Actually, there was only one exhibit which the plaintiff did not supply in time, namely, the decree in D. C. Kandy 45690. Mr. Wickremanayake, on behalf of the respondent, admitted that he could not support the judgment, but did point out that the production of this decree was immaterial. However that may be, this Court has already held that if a party fails to produce evidence which he was required to produce, the Court has no power to dismiss the action but must adjudicate on the material that is before it.

The appeal will be allowed and that there must be a fresh trial. In view of the fact that Mr. Wickremanayake did not support the judgment, and in view of para 8 (*g*) of the petition of appeal, there will be no order as to costs of the appeal. The costs of the trial in the lower Court will abide the final decision.

WIJEYEWARDENE, J.

I agree.

Appeal allowed.

Present : WIJEYEWARDENE, A.J.

PERIYA CARPEN vs JAYASUNDERA

S. C. No. 100—*C. R. Matale No.* 4726.

Argued & Decided on 19th October, 1938.

Trial—Procedure at—Onus of proof on defendant—Close of defendant's case—Facts elicited in cross-examination from plaintiff—Should a judge allow fresh issues on facts so elicited after close of plaintiff's case.

The 1st defendant gave a promissory note as security for the payment of the purchase price of certain articles bought from the 2nd defendant. The 1st defendant gave evidence and the case for the defence was closed. Thereafter, the plaintiff was called, and in cross-examination he admitted certain loans given by him. At the close of plaintiff's case, defendant's proctor raised a fresh issue as to whether the plaintiff could maintain the action without keeping proper books of account. The Commissioner decided this issue against the plaintiff and dismissed plaintiff's action with costs.

Held : That the Commissioner should not have allowed the defendant to raise such an issue of mixed law and fact at the close of the case.

C. E. S. Perera, with *V. F. Gunaratne*, for plaintiff-appellant.

R. C. Fonseka for defendant-respondent.

WIJEYEWARDENE, A.J.

In this case, the plaintiff sued on the promissory note made by the 1st defendant in favour of the 2nd defendant and endorsed by the latter to the plaintiff. The 1st defendant had given the note as security for the payment of a sum of money due by him in respect of the purchase of certain articles from the 2nd defendant.

The 1st defendant gave evidence, and the case for the defence was closed. At this stage, the learned Commissioner should have rejected the defence of the 1st defendant on the issues raised, and entered judgment for the plaintiff. However, the plaintiff was called and, in reply to questions put to him in cross-examination, he made certain statements with regard to a few loans given by him.

At the close of the plaintiff's case, the Commissioner permitted the 1st defendant's proctor to raise a further issue :—

" Can the plaintiff maintain this action without keeping proper books of account ? "

The Commissioner decided this issue against the plaintiff and dismissed his action with costs. This is a very unsatisfactory way of dealing with the rights of parties. Such a plea should have been raised at the commencement of the trial. The Commissioner should not have allowed the defendant to raise such an issue of mixed law and fact at the close of the case, and then based his decision on that issue.

I allow the appeal with costs, and direct that judgment be entered for plaintiff for the sum of Rs. 156/– and costs.

Appeal allowed.

Present : LORD ATKIN, LORD MACMILLAN, LORD PORTER, SIR LANCELOT SANDERSON & SIR GEORGE RANKIN.

CADIJA UMMA AND ANOTHER vs MANIS APPU AND OTHERS

Privy Council Appeal No. 9 of 1937.

Judgment of the Lords of the Judicial Committee of the Privy Council.

Decided on 17th November, 1938.

Prescription Ordinance No. 22 of 1871—Section 3.

Held : (i) That section 3 of the Prescription Ordinance cannot be regarded as introducing the Roman Law requirement known as *justus titulus* or *justa causa*.

(ii) That a person can acquire title by prescription by virtue of section 3 of the Prescription Ordinance even though his possession be wholly without right.

(iii) That the purpose of the parenthetical clause in section 3 of the Prescription Ordinance is to explain the character of the possession which, if held without disturbance or interruption for ten years, will result in prescription.

(iv) That a man's possession by his agent or co-owner cannot be regarded as dispossession by his agent or co-owner for the purposes of section 3 of the Prescription Ordinance.

L. M. D. de Silva, K.C., with *Stephen Chapman*, for appellant.
No appearance for respondent.

SIR GEORGE RANKIN:

The appellants, on 16th and 25th April, 1930, brought in the District Court of Colombo two actions to recover possession of two contiguous plots of land measuring in the aggregate 2 acres and 38 perches and forming a triangular area to the north of land which is admittedly theirs. The disputed land is known as Maha Ettambagaha Kumbura. In the first suit they impleaded four defendants as being in wrongful possession, S. Don Manis Appu being the first defendant. In the second suit he was the sole defendant. The District Judge dismissed both actions on 23rd March, 1933, finding against the appellants on the issue as to title and also on the question whether the first defendant had acquired a prescriptive title under Ordinance XXII of 1871. The Supreme Court, on 22nd January, 1936, affirmed the decrees of the District Judge. Without pronouncing upon the issue as to the appellants' title, the learned judges of the Supreme Court proceeded solely upon the ground of prescription under the Ordinance. The defendants have not appeared at the hearing of this appeal by the Board.

The two acres (or thereabouts) now in dispute are said by the District Judge to be to a great extent swamp on which lotus grows : he states that on the portion which is not swampy there is a little wild grass and buildings which have been put up from time to time. Akbar J. (with whose judgment

Poyser, J. agreed) says that the fact appears to be that the portion in dispute was at one time liable to be flooded and water-logged, but that now, owing to a bund built by the Government, the floods do not seem to affect the portion in dispute.

Section 3 of Ordinance No. XXII of 1871, so far as applicable to this case, is in the following terms :

> " Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as hereinbefore explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs. Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute."

Both Courts are in agreement on certain important facts affecting the applicability of this section. In particular, both accept the evidence of a witness called Podi Singho who deposed that from 1911 he had grass from the disputed land cut by his own servants and paid the first defendant's mother (Getho Hamy) for it at the rate of ten cents for a bag of grass. This, according to his statements, continued for five or six years from 1911 until Getho Hamy was taken to the leper asylum; and, thereafter, he paid the money to the first defendant until 1930 or thereabouts when the land began to be more occupied and there was no grass to be cut. Both Courts have likewise accepted as true the evidence of the second defendant, Abraham, that for the last ten or eleven years (that is from 1922–33) he had been living on the disputed land with the permission of Getho Hamy and put up a house for himself thereon at a ground rent paid to her and afterwards to the first defendant. This witness further stated that, besides his own, there are eight horses on the land in suit of which three were put up by himself at Getho Hamy's request about 1925 and three by the first defendant about 1929–30. The District Judge has expressly accepted these statements as true.

On these facts the Supreme Court considered that it was impossible to say that the District Judge had come to a wrong conclusion in holding that the first defendant and his mother had been in adverse possession for the period required by law. It has been argued before their Lordships that, as the buildings are not shown to have come into existence before 1922

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or 1923, the ten years before action are not covered by this part of the evidence which, to satisfy the Ordinance, would require to extend so far back as 1920. Also, that the mere taking of wild grass being conduct which an owner of swampy land would not necessarily be minded to resist is an insufficient foundation for a finding of possession in the earlier years, especially as grass cannot be cut all the year round but only (as the second defendant stated) for six or eight months according to the weather. Mr. de Silva for the appellants has sought very reasonably to lay stress upon the facts that his clients appear to have paid municipal rates upon the disputed land as part of their total holding until 1929, and that in 1912 they exercised their right of occupation in the disputed land by obtaining a consent decree against a third party in ejectment.

While recognising that the sufficiency of the defendants' evidence of possession for the first two or three years after 1920 is debatable, their Lordships are not of opinion that in this case the concurrent findings of the Courts below should be departed from. The evidence as to the cutting of grass is not merely that the first defendant and his mother were allowed to take some grass, but that they were allowed to sell it to the overseer in charge of the cattle segregation camp ; and that this was continued over a number of years and at a time when the grass was the only, or at least the main, advantage accruing from the land. The evidence as to buildings put upon the land after 1923 is, if believed, very strong to show possession and is not without a bearing upon the earlier years as interpreting the acts of the first defendant and his mother with respect to the grass, even if these might otherwise be thought to be ambiguous.

Taking the evidence fairly and as a whole, their Lordships see no reason to think that the Courts in Ceylon have misinterpreted it : indeed, the question of the value of the taking of the grass as evidence of possession is one on which the opinion of the local Courts is entitled to some special weight owing to their familiarity with the conditions of life and the habits and ideas of the people. It cannot be held that the Courts in Ceylon were obliged to regard the evidence as establishing no more, in respect of the earlier years, than a permissive taking of grass by or on behalf of the first defendant and his mother. The finding of possession for ten years before suit must therefore be upheld. It follows, in their Lordships' opinion, that the appellants' suit must fail, since the character of the possession held by the first defendant and his mother was clearly adverse to the appellants and satisfies section 3 of the Ordinance.

Mr. de Silva contended, however, that the section should be construed as introducing the requirement known to the Roman Law as *justus titulus* or *justa causa* — the words " by a title adverse to or independent of that of the claimant or plaintiff " being construed as requiring the defendant to prove that his possession was on the footing of some title, however imperfect,

and not wholly without right. Learned Counsel had, however, to admit that the law of Ceylon recognised no such doctrine at the date of the passing of the Ordinance, and their Lordships find it impossible to interpret the section as introducing it.

This opinion does not rest solely upon the words enclosed in brackets by way of explanation or definition — " (that is to say, a possession..... inferred) " but is supported also by the absence of any words calculated to define or assert the special doctrine of *justa causa*. There is a passage in the judgment of the Board delivered by Lord Macnaghten in *Corea vs. Appuhamy* (L. R. (1912) A. C. 230) which supports (without discussion of the matter) the opinion that the parenthetical clause above mentioned is intended as an explanation of the words " undisturbed and uninterrupted possession " and not as a statement of what is meant by the full phrase previously employed " possession.....by a title adverse to or independent of that of the claimant or plaintiff." It appears that the late Mr. Justice Walter Pereira, in his work on *The Laws of Ceylon*, suggested as a possible view that the words in parenthesis were " intended to be explanatory of the expression ' possession ' only ; " but that his own opinion was that they " do not contain an illustration but are by themselves a full and self-contained definition of the expression ' possession by a title adverse to and independent of that of others ' " (2 Ed., pp. 388, 390). Departing widely from this learned author's opinion, Bertram C.J. (in *Tillekeratne vs. Bastian*, 1918, 21 Ceylon New Law Reports 12, 17) relying on Lord Macnaghten's language in *Corea's* case, held that " the parenthesis has no bearing on the meaning of the words ' adverse title ; ' it may henceforth be left out of account in the discussion of the question." Their Lordships cannot accept this dictum of the learned Chief Justice. The section in its second half discloses the standpoint of the draughtsman by a phrase to which Lord Macnaghten's words may perhaps be attributed — " proof of such undisturbed and uninterrupted possession as hereinbefore explained by such plaintiff.....shall entitle such plaintiff.....to a decree in his favour with costs." The explanation thus pointed to includes not merely the requirement of adverse or independent title but also the period of ten years. The words " undisturbed and uninterrupted " are, however, repeated ; indeed, the parenthetical clause does not seem to contain any direct reference to acts other than acts of the possessor having a bearing upon the question of an acknowledgment by him. Their Lordships are unable to doubt that the purpose — perhaps the somewhat ambitious purpose — of the parenthetical clause is to explain the character of the possession which, if held without disturbance or interruption for ten years, will result in prescription. While, however, the clause is no mere illustration, it is not so completely successful an attempt to achieve the " full and self-contained definition " as might be wished. A phrase having been introduced and then defined, the definition *prima facie* must entirely determine the application of the phrase ; but the definition must itself be interpreted before it is applied, and interpreted, in case of doubt, in a sense

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appropriate to the phrase defined and to the general purpose of the enactment. Thus in a case where A's possession has been on behalf of B or has been the possession of B (whether by reason of agency or co-ownership) it seems impossible to apply this definition clause as between B and A so as to defeat the rights of B. It cannot be applied to defeat the rights of a person in possession. Under what conditions an agent or co-owner can be heard to say that his possession has been an ouster of his principal or co-sharer is a matter which need not here be examined. Ouster apart, a man's possession by his agent is not dispossession by his agent. The like is true between co-owners in Ceylon, and is the ground of decision in *Corea's* case.

Their Lordships will humbly advise His Majesty that this consolidated appeal fails and should be dismissed. The respondents not having appeared there will be no order as to costs.

Appeal dismissed.

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

MUTTUCARUPPEN CHETTIAR vs MOHAMED SALIM AND OTHERS

Application for Conditional Leave to Appeal to Privy Council.
S. C. No. 293—*D. C. Colombo* 50221.
Argued on 5th December, 1938.
Decided on 14th December, 1938.

Privy Council Appeal—Rules 5 and 6 of Privy Council Appeal rules—Application under Rule 5 for a notice to be served on the respondents of intended application for leave to appeal—Applicant's proxy signed by attorney—Is the proxy bad.

The applicant made application under Rule 5 of the Privy Council Appeal Rules for a notice to be served on the respondents of his intended application for leave to appeal to the Privy Council. The application was filed by a proctor whose proxy had been signed by the applicant's duly appointed attorney.

Objection was taken to the application on the ground that the proxy should have been signed by the applicant himself and not by his attorney.

Held : That the proxy granted by applicant's duly appointed attorney satisfied the requirements of Rule 6 of the Privy Council Appeal Rules.

H. V. Perera, K.C., with *Chelvanayagam*, for petitioner.

N. Nadarajah, with *E. F. N. Gratiaen* and *Kariapper*, for 1st respondent.

S. A. Marikar for 2nd to 7th respondents.

KEUNEMAN, J.

This matter came before us as a Divisional Court upon a reference by Poyser, S.P.J. and Wijeyewardene, J. The facts are as follows.

The judgment of the Supreme Court was delivered on the 28th June, 1938. Under Rule 5 of the Appellate Procedure (Privy Council) Order 1921, application was made for a notice to be served on the respondents of the petitioner's intended application to appeal to the Privy Council. This was accompanied by a proxy dated 29th June, 1938, in favour of proctor Somasunderam, by the person holding the petitioner's power of attorney for the purpose. This was filed under Rule 6.

Both the application and the proxy were received in the Supreme Court Registry on the 1st July, 1938.

On the 4th July, 1938, the application was allowed but, on notice issuing, the Fiscal reported that the respondents were evading service. A further application was then made to the Supreme Court for substituted service on the respondents under Rule 5 (*a*). This was allowed and substituted service was effected on the 9th July, 1938.

In addition, notices were posted to the respondents on the 2nd July, 1938. These notices were signed by proctor Somasunderam.

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It is not contended that these steps are out of time, but Counsel for the respondents argued that the proxy filed was bad under the rules, as it was signed by the plaintiff's attorney and not by the plaintiff himself.

In the case of *Annamalay Chetty vs. Thornhill* (36 N.L.R. 413), a bench of two judges held that, where an application for conditional leave to appeal to the Privy Council was made by a duly authorised attorney of the applicant through a proctor to whom the attorney had granted a proxy for the purpose, that the application was not regularly made.

Poyser, S.P.J. and Wijeyewardena, J. had doubts as to the correctness of this decision and have referred the matter to us for determination.

Counsel on both sides agreed before us that the matter is not governed by the sections of the Civil Procedure Code, notably sections 24, 25, 26 and 27. There is also a finding to this effect in the case of *Fradd vs. Fernando* (36 N.L.R. 132), where the effect of these sections was restricted to actions in the District Court and appeals to the Supreme Court. Our decision on this matter must depend upon our interpretation of the rules contained in the Appellate Procedure (Privy Council) Order 1921 only.

The rule that is relevant in this case is Rule 6, the material portion of which is as follows:—

> "A party to an application under the Ordinance, whether applicant or respondent, shall unless he appears in person, file in the Registry a document in writing appointing a proctor of the Supreme Court to act for him in connection therewith."

Under Rules 5 and 5(*a*) it has been held that notice of an application for conditional leave to appeal to the Privy Council must be served on the party personally or on his proctor empowered to accept service, and that service on a person holding a power of attorney from a party is insufficient; see *Fradd vs. Fernando* (supra). The correctness of this decision has not been disputed before us. It was argued that the present case is the converse of that decision and that was the view taken by the judges in *Annamalay Chetty vs. Thornhill* (supra). I think, however, that the language of these rules is not similar to that of Rule 6. Rule 5 states that the notice may be served on the party or his proctor, and Rule 5(*a*) states that, where service of the notice cannot be duly effected upon a party personally or upon his proctor empowered to accept service thereof, it shall be competent to the Court to prescribe any other mode of service. In *Fradd vs. Fernando* (supra) emphasis was laid on the word "personally" and it was held that the most natural meaning to be given to that word was that "it refers to the party himself and not to any representative of his, however fully equipped with a power of attorney."

If we examine the language of Rule 6 it certainly does appear that, in the absence of the "document in writing appointing a proctor" filed in the Registry, the party must appear "in person." If we apply the decision in *Fradd vs. Fernando* (supra), the appearance in Court will be recognised

only of the party himself or of his proctor authorised thereto, and not of a person holding the party's power of attorney. Does Rule 6 go further and require that the proxy to the proctor should be given by the party himself and not by his attorney ? I am of opinion that the language of Rule 6 does not warrant such an interpretation. The party to the application, unless he appears in person, must file " a document in writing appointing a proctor." Counsel for the respondent argued that this means " a document in writing in which he appoints a proctor " and that, on this construction, the party alone and not his attorney can give the proxy. I do not think that these words can be read into the rule. I think the words in the rule imply nothing more than " a document which appoints a proctor "— a loose but sufficiently precise phrase. It is of significance that the rule nowhere states that the document must be signed by the party himself ; and, in the absence of such words to that effect, I do not feel compelled to place any restriction on the right which a party would have under the common law to do any act through his lawfully appointed attorney.

It has been argued that it is anomalous that the party's attorney should not be allowed to enter appearance in these proceedings, but should be permitted to appoint a proctor to enter appearance. I do not, however, think such a position is unreasonable, and in any event I am of opinion that the interpretation of Rule 6 leads to that result.

In the case of *Annamalay Chetty vs. Thornhill* (supra), stress was laid on the wording of Rules 5 and 5(*a*). With deference, I do not agree that the language of those rules is of assistance in the interpretation of Rule 6 which deals with a different situation. I may add in passing that the words in Rule 6 " unless he appears in person, " as far as I can discover, were not inserted as an amendment, but appeared in the Original Order.

Counsel for the respondent referred us to the case of *Re Prince Blucher, Ex parte The Debtor vs. Official Receiver* (144 L.T. 152). Here the interpretation of the words " signed by him " appearing in section 16 of the Bankruptcy Act 1914 was in question. In this connection, Lord Hanworth M.R. said " We have to consider the explicit and very simple terms of the Statute. The words in the statute are ' signed by him. ' Where a statute intends that the authorisation may be by a person on behalf of a debtor, the legislature knows how to provide it." It was held that only a proposal in writing signed by the party was in contemplation, and not a writing signed by a lawfully authorised agent. Reference was also made to *Hyde vs. Johnson* (2 Bing N.C. 776). I do not think that these decisions are of assistance in this case. I may, however, refer to the comment made in this connection by Bowstead (*Agency* 8th Ed. page 12): " As a general rule, where the signature of a person is required by statute, it is sufficient if the name of that person is signed by a duly authorised agent, unless a contrary intention plainly appears."

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In this case, I have already pointed out that no such words as " signed by him " are to be found in Rule 6 in connection with " the document in writing " appointing the proctor, and I do not think we are entitled to read in such words.

I am of opinion that conditional leave to appeal should be allowed subject to the usual terms and conditions. The petitioner is entitled to the costs of the argument of this matter.

MOSELEY, J.

I agree.

DE KRETSER, J.

I agree.

Application allowed.

Present : KEUNEMAN, J. & NIHILL, J.

SOKKALAL RAM SAIT vs KUMARAVEL NADAR & FOUR OTHERS

S. C. No. 94 (*Inty*)—*D. C. Colombo No.* 6138.

Argued on 14th December, 1938.

Decided on 19th December, 1938.

Civil Procedure Code section 761—*Stay of execution pending appeal—In what circumstances may stay of execution be made.*

Held : That stay of execution pending appeal is ordinarily granted only when the proceedings would cause irreparable injury to the appellant, and when the damages suffered by the appellant by the execution pending appeal would be substantial.

H. V. Perera, K.C., with *Choksy*, for defendants-appellants.

R. L. Pereira, K.C., with *Iyer*, for plaintiff-respondent.

KEUNEMAN, J.

In this case, the plaintiff sued the defendants for infringement of certain trade marks, and claimed an injunction, and also for damages for passing off. The learned District Judge entered judgment for plaintiff allowing injunction to issue in terms of the prayer, but awarded no damages. On the 23rd June, 1938, before the expiry of the time allowed for appealing, the defendants moved for stay of execution, and they also filed an appeal against the judgment which is now pending. The learned District Judge refused to stay execution, and dismissed the application made in this connection. The present appeal is taken from that order.

Under section 761 of the Civil Procedure Code, the District Judge had a discretion to allow stay of execution for sufficient cause, but he could not make such order, *inter alia*, unless he was satisfied that substantial loss might result to the party applying for stay of execution, unless the order was made.

One point taken for the appellant was that the learned District Judge had misdirected himself by stating in this order that the defendants' user of the trade mark had not been honest, as found by himself in the judgment in this case. In the first place, it is not quite clear from the context whether this statement was merely incidental, or whether the District Judge rested some part of his finding on this. But even if we take the latter view, I do not think the District Judge is debarred from taking such a matter into consideration. In dealing with a similar application, Sir W. Page-Wood V.C. said, " I do not think I ought to hold my hand simply on account of the decision being under appeal, unless I have some doubt of the justice of the decision;" *Attorney-General vs. Proprietors of the Bradford Canal* (2 Eq. 71 at 79). I do not think there has been any misdirection here.

It is also argued for the appellant that the failure to stay execution would result in substantial, and even irreparable, damage to the defendants. The evidence in support of this contention is not strong. In the affidavit filed in support of the application there is a statement that " if they (the appellants) are ultimately successful, they will sustain considerable loss and damage and also considerable prejudice to their trade marks." It is to be noted that nothing has been said as to the amount of business done in this particular class of goods, or whether this is the only class of business done by the defendants and, if not, what proportion of the business is done in these goods. It has, however, been argued before us that the loss of currency of the defendants' trade mark until the determination of the appeal may have serious consequences, and that in any event the defendants will not be able to recoup themselves for any losses suffered during this period. The learned District Judge thought that the defendants would suffer inconvenience or damage by the continuance of the injunction, they would not suffer irreparable damage which could not be adequately compensated by damages. I must confess that I do not myself see that the defendants would be able to recover damages for the period during which the injunction continues, but, on the other hand, I do not think that it has been shown that the damage would be substantial. It has been stated in England that " the usual course is to stay proceedings pending an appeal only when the proceedings would cause irreparable injury to the appellant ; mere inconvenience and annoyance is not enough to induce the Court to take away from the successful party the benefit of his decree ; *Walford vs. Walford* (L.R. 1867, 83, Ch. App. Cases 812). Even if we are to regard the damages as being irreparable, in the sense that the defendants could not recover the damages (I wish to add that I do not hold that they could not recover the damages),

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yet I think that under our law it must be shown that the damage would also be substantial, and I do not think that has been established in this case.

Further, in this case the District Judge has taken into account the balance of convenience and inconvenience in granting or refusing stay of execution. He has pointed out that to permit the defendants to use the mark during the pendency of the appeal might cause irreparable prejudice to the plaintiff. Certainly, if the defendants continued to use these marks in competition with the plaintiff, damage would result to the plaintiff, and it might be difficult or impossible for the plaintiff to recover these damages.

I think this was a matter which the District Judge was entitled to take into account in exercising his discretion in this case.

The appeal is dismissed with costs.

NIHILL, J.

I have read my brother's judgment in the case and I agree with it. I can see no grounds for interfering with the discretion of the learned District Judge which seems to me to have been properly based upon a just appreciation of the relative position of the two parties. It should not be overlooked, I think, that whilst there may have been concurrent user of the two marks in Ceylon over a period of years, the plaintiffs in this action took the trouble to apply for and obtained registration of their mark in 1934. The defendants' mark is unregistered.

Appeal dismissed.

Present : POYSER, S.P.J.

DE SILVA vs THE GOVERNMENT AGENT (UVA) AND ANOTHER

S. C. No. 428—*P. C. Badulla No.* 26895.

Argued on 5th December, 1938.

Decided on 19th December, 1938.

Forest Ordinance—Sections 39 *and* 42—*Application for refund of security deposited in respect of timber released from seizure—Has a Police Magistrate jurisdiction to entertain such application.*

Held : That a Police Magistrate has no jurisdiction to entertain an application for the refund of security deposited in respect of timber released from seizure under section 42 of the Forest Ordinance, unless a report is forwarded to him by the Government Agent or the Assistant Government Agent as required by section 39 of the same Ordinance.

J. E. M. Obeysekera, with *C. S. Barr Kumarakulasingham*, for the petitioner-appellant.

D. Jansze, Crown Counsel, for complainant-respondent.

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The petitioner instituted proceedings under the Forests Ordinance (No. 16 of 1907) for the refund of a deposit of Rs. 3,212/50 deposited by him with the Govt. Agent, Uva Province, as security in respect of timber felled by him.

The affidavit in support of the petition, and it was the only material before the Magistrate, set out that the petitioner obtained in 1926 a lease of some land in the Badulla district; that in February, 1927, he felled some timber on the said land; that such timber was seized by the Forest Officer but released, under the provisions of section 42 of the Ordinance, on the petitioner depositing a sum of Rs. 3,212/50. The affidavit also set out that the land from which the timber had been cut was always regarded as private property and he had not been tried for any alleged offence against the provisions of the Forest Ordinance.

The Magistrate refused the application on the grounds that he had no power to accede to it; he held that he only had power under section 39 to make orders for the disposal of property as contemplated in sections 37 and 38, and that he could not extend the meaning of the words "the property" in section 39 to stand for the proceeds of sale of the property or the security taken for the release of the property.

I agree with the Magistrate's decision, but I cannot agree with his reasons for arriving at such decision.

In my opinion, the Magistrate got jurisdiction only when a report was forwarded to him by the Govt. Agent or the Assistant Govt. Agent (section 39). In this case, there is nothing on the record to indicate that any such report had been forwarded. The Magistrate considers that, under section 114 of the Evidence Ordinance, he must presume that this report was made. I do not think he was entitled to presume that fact for it is not necessarily "likely to have happened." There is power under the Forest Ordinance (section 51) for a Forest Officer to compound an offence, and as the petitioner paid a sum of money as security for the timber he cut and as no proceedings were instituted, I think there must have been a compounding of the petitioner's alleged offence.

As previously stated, I think the Magistrate had no jurisdiction to entertain this application as no report had been made to him under section 39 and, consequently, the appeal will be dismissed.

Such dismissal, however, will not be a bar to the petitioner putting forward a claim for the security he deposited in appropriate proceedings.

Appeal dismissed.

Present : POYSER, S.P.J.

WEERASEKERA vs THE COLOMBO MUNICIPALITY

S. C. No. 95—C. R. Colombo No. 34924.

Argued and Decided on 1st December, 1938.

Municipal Councils Ordinance—Objection to assessment—Action under section 124—Onus of proof that assessment is excessive on whom—How onus may be discharged.

The appellant brought this action under section 124 of the Municipal Councils Ordinance.

Certain premises owned by the appellant in Dean's Road, Colombo, were assessed for the year 1937 at Rs. 850/–. The appellant claimed that the assessment should be Rs. 650/–.

The appellant proved that premises were valued in 1932 and 1933 at Rs. 650/–. That in 1934 it was valued at a higher figure but was reduced to Rs. 650/– on objection. In 1936 it was assessed at Rs. 1,000/– but reduced on objection to Rs. 850/–. Although the appellant was dissatisfied with the assessment, he could not take the matter further as he was out of time.

The appellant called the tenant of the premises to prove that he paid Rs. 65/– per mensem. The tenant stated that he would not stay in the premises if the rent was increased, and that he had told the appellant this when he intimated his intention of increasing the rent to him.

As against this, the Municipal Assessor stated that upon inspection of the premises and its ground space he thought that Rs. 850/– was the fair annual value.

It was not proved that the locality has improved in the last few years either from a residential or business point of view or that the value of premises in the locality has gone up. There was no evidence of any other conditions such as good trade, increased population or increased prosperity which would lead to a greater demand for premises of this description and a consequential increase in their annual value.

Held : (i) That, in the circumstances, the appellant was entitled to succeed in his objection.

(ii) That the appellant had discharged the onus that lay on him of proving that the assessment was excessive.

N. Nadarajah, with *H. W. Thambiah*, for plaintiff-appellant.

L. A. Rajapakse for defendant-respondent.

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In this case, the appellant claimed that the annual value of his premises No. 88, Dean's Road, be reduced for the year 1937 from Rs. 850/– to Rs. 650/–. The Commissioner has dismissed his claim and the appeal is against that decision.

The material facts are not in dispute and are as follows. The building in question, together with other adjacent buildings belonging to the plaintiff, were constructed in 1929 out of money paid to him by the

Municipality in respect of the acquisition of some land. The premises in regard to which this claim is made were assessed in 1932 at Rs. 650/- a year. There was a similar assessment for 1933, and although in 1934 it was assessed at a higher figure, on objection it was reduced again to Rs. 650/-. In 1936 it was assessed at Rs. 1,000/- and on objection it was reduced to Rs. 850/-. The appellant states that he was not satisfied with the assessment but was out of time for his appeal. For the year 1937, these premises were again assessed at Rs. 850/-, and it is against this assessment that the claim is made.

The appellant's evidence, in addition to establishing the above facts, was also to the effect that he had never been able to obtain a larger rent than Rs. 65/- a month for these premises. He stated that he had asked his tenant to pay an increased rent but the latter refused to do so; he also stated that he had made no alteration to the buildings since 1934. The tenant was called as a witness. He confirmed the appellant's evidence that Rs. 65/- a month rent was paid for more than the last three years and stated that the appellant had threatened to raise his rent but he (the tenant) stated that if that was done he would leave, and even now thought that he was paying too much. In that connection, he mentioned other premises belonging to the plaintiff which are assessed at a lower figure which he stated were preferable to the premises he occupied for the purposes of an eating house. Later, he qualified this by saying there was nothing to choose between them. This evidence of the appellant and his tenant in regard to the rent was not contradicted or questioned.

On behalf of the Municipality, Mr. Orr, the Municipal Assessor, gave evidence to the effect that he had inspected premises of a similar character in the locality and, in consequence of such inspection, he came to the conclusion, after taking into account the area in square feet of the basement, ground floor and first floor of each of the premises he inspected, that a fair annual value for the premises in question would be Rs. 850/- a year.

The Commissioner has held that the burden was on the plaintiff to prove that this assessment was unreasonable and that this has not been proved. He, consequently, holds that the sum of Rs. 850/- is a fair and reasonable annual value of the premises in question.

It is never easy to decide what is the annual value of any premises as defined in section 3 of Ordinance No. 6 of 1910. It is necessary to decide what a hypothetical tenant would pay. What the actual tenant pays is not necessarily decisive of the annual value, although in deciding the question it may be of the utmost importance.

The most difficult cases arise in regard to premises which are occupied by the owner and such premises as schools. Certain principles, however, have been laid down in order to decide how the annual value is to be arrived at. Firstly, it has been decided, and such decision is binding on me, that when a person institutes an action, under section 124 of the Municipal

Councils Ordinance, that the onus is on him to show that the assessment is unreasonable. *Marikar Bawa v. Colombo Municipal Council* (30 N.L.R. page 73). Now, has the plaintiff satisfied this onus ? There is the uncontradicted evidence that he can only obtain Rs. 65/– a month as rent and that he has tried to obtain more. The tenant who pays this rent considers he is paying too much and states he would leave the premises if the rent was raised. As I stated before, the rent actually paid is by no means conclusive as to what a hypothetical tenant would pay, but it is *prima facie* evidence which, if uncontradicted, may become conclusive. It is, of course, open to either party to show that the rent agreed to be paid was a misconception. See Ryde on *Rating*, 5th Edition page 207.

Local decisions are to the same effect. In *Silva v. Colombo Municipal Council* (3 Bal. Rep. page 163) Pereira, J. held that the actual rent received by the landlord, in the absence of evidence of bad faith on the part of the landlord or tenant, is, generally speaking, a fair test to go by in estimating the annual value, provided it has not been fixed in view of special circumstances applicable to any particular case. Similar opinions were expressed in *Sidoris Appuhamy v. Municipal Council of Colombo* (6 C.W.R. page 335).

I do not think the case of *Poplar Assessment Committee v. Roberts* (1922, 2 Appeal Cases, page 93) in any way modifies the principles above enunciated. There is a passage in the judgment of Lord Buckmaster in which it is stated that " the tenant referred to is, by common consent, an imaginary person ; the actual rent paid is no criterion, unless indeed, it happens to be the rent that the imaginary tenant might be expected to pay in the circumstances mentioned in the section. But although the tenant is imaginary, the conditions in which the rent is to be determined cannot be imaginary. They are the actual conditions affecting the hereditament at the time when the value is made. "

Apart from the evidence to which I have already referred, the Municipal Assessor, who, no doubt, has examined all the premises in the immediate locality with the utmost care, has not stated that this locality in the last few years has improved, either from a residential or business point of view, or that the value of the premises in such locality has gone up. Nor has he given evidence of any other conditions such as good trade, increased population or increased prosperity which would lead to a greater demand for premises of this description and a consequential increase in their annual value. He has added to the assessment an amount of Rs. 100/– per annum on account of the fact that these premises have electric light. That appears to me an excessive amount when electric light is available to all persons living in this locality and has been so for some time past. The fact that electricity has been brought to these premises could, however, be taken into account in fixing the assessment. See the principles enunciated in *Kirby v. Hunslet Assessment Committee* (1906, Appeal Cases, page 43).

Taking all the facts into consideration, the uncontradicted nature of the appellant's evidence, the absence of any suggestion as to *mala fides*, collusion or special circumstances such as the tenancy of a relation, I think the appellant has satisfied the onus that was on him and has proved that Rs. 650/- is a fair annual value for these premises.

The appeal will, accordingly, be allowed with costs, and the annual value of these premises reduced to its former figure of Rs. 650/-.

Appeal allowed.

Present : WIJEYEWARDENE, A.J.

PITCHE & ANOTHER vs MOHAMADU

S. C. No. 131—*C. R. Puttalam No.* 13568.
Argued on 18th October, 1938.
Decided on 19th October, 1938.

Arbitration—Award filed in presence of proctors—Parties to the case not noticed—Is it sufficient compliance with the requirements of section 685 *of the Civil Procedure Code.*

Arbitrators, to whom a dispute had been referred, filed their award in Court on May 11, 1938. Proctors for both parties were present, but nothing on record shows that the parties were present or that the proctors took notice on their behalf. On a subsequent date, the defendant's proctor stated he had objections, but the Commissioner refused to hear his objections on the ground that he should have filed them earlier, and ordered decree to be entered.

Held : (i) That the decree was bad inasmuch as due notice of the filing of the award had not been given to the parties as required by section 685 of the Civil Procedure Code.

(ii) That it is essential that there should be a due observance of all the formalities before a Court proceeds to give judgment according to an award.

Tisseverasinghe, with *C. T. Olagesegeram*, for defendant-appellant.
M. I. M. Haniffa for plaintiffs-respondents.

WIJEYEWARDENE, A.J.

The matters in dispute between the parties to this action were referred to the arbitration of two persons under Chapter 51 of the Civil Procedure Code 1889. The arbitrators filed their award in Court on May 11, 1938. The journal entries, with regard to the filing of the award relevant to the present appeal, are as follows :—

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11-5-38 Mr. Ismail for plaintiff. } Present.
Mr. David for defendant. }
Order of reference to arbitration returned with award.
Call on 27-5-38.

27-5-38 Mr. Ismail for plaintiff.
Mr. David for defendant.
Defendant now says he has objections. He should have filed them earlier.
Award is made on decree of Court.
Decree entered.

Section 685 of the Civil Procedure Code requires notice of the filing of the award to be given to the parties, and I think it essential that there should be a due observance of all the formalities before a Court proceeds to give judgment according to the award. I am not prepared, in the circumstances of this case, to hold that due notice of the filing of the award has been given to the parties. Though the proctors were present on May 11, 1938, when the award was filed, the journal does not show that the parties were present on that day or that the proctors took notice on behalf of their clients. In *Pitche Thamby et al. vs. Fernando et al.* * Wood Renton, J. & Grenier, J. held that the notice contemplated by section 685 should be given to the parties, and that the presence of the proctors in Court on the date of the filing of the award did not excuse the failure to give such notice. This case was cited with approval in *Thigisa vs. Sandarisa* † by Schneider, J. and the same principle was followed in *Punchi Singho vs. Tikiri Banda* ‡ .

I set aside the order appealed from, and all proceedings subsequent to May 11, 1938, in order to enable the Court to give due notice of the filing of the award to the parties and to continue the proceedings in compliance with the provisions of Chapter 51 of the Code.

The costs of this appeal will be costs in the cause.

Order set aside.

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* (1910) 14 N.L.R. 73 † (1924) 6 C.L.Rec. 25 ‡ (1918) 5 Cey. Weekly Rep. 90

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

VERY REVD. FATHER MASSON vs MATHES

S. C. No. 139—*D. C. Negombo No.* 9998.

Argued on 27th and 28th October, 1938.

Decided on 28th October, 1938.

Will—Construction of—Intention of testator to be given effect to.

By her last will, one Clara Pinto, *inter alia*, made the following bequest:

"*Secondly*, The one-sixth share, belonging to me by right of marital inheritance, of the land called Madampellawatta, situated at the village Madampella, shall devolve on the Church of St. Peter the Apostle, at First Division Hunupitiya, in the following manner to wit :—

"This portion of land shall be in charge of the two executors hereunder named and the said Mihindukulasuriya Juan Pinto Mooppo, and they shall spend out of the income derivable therefrom for the improvement of the said portion of land and for other necessary works in connection therewith and shall give over all the remaining income to the said church ; and if one or more of the said three persons die, the survivor or survivors shall give over to the said church the income of the said portion of land in the said manner and after the death of the said three persons the heirs of the said three persons or two of them or one of them shall take charge of the said portion of land and shall give over the income as aforesaid to the church and improve the said portion of land, and if they have no heirs or descendants then the said portion of land shall devolve on the said church and shall be held and possessed for ever by the said church but the same shall not be alienated in any manner."

The said church was, at the time of the bequest, in the charge of the Archbishop of Colombo who was given the income from the land till about 1930. Thereafter, the land was handed over to the present defendant for the purpose of being managed in accordance with the terms of the bequest. The defendant did not, however, pay the income to the said Archbishop, and disputed his right to receive it. The Archbishop instituted the present action to establish his right to the income from the said property. The District Judge held in favour of the Archbishop. From this decision the defendant appealed.

Held : That the Archbishop of Colombo was entitled to the income from the land referred to in Clara Pinto's bequest as her intention was that the income should be handed over to the person exercising authority over and managing the Church of St. Peter.

Cases referred to :—

Godinho vs. Mrs. Koning (Ram. '43–'55 p. 132).

Sillani vs. Corea (Ram.' 68 p. 201).

Fernando & Others vs. The Rt. Rev. Father Bonjean, Bishop of Medea and Vicar Apostolic of Jaffna (Ram. '72–'76 p. 168).

Brown vs. The Curate and Church Wardens of Montreal, 44 L.J.P.C. Cases p. 1.

Melezan vs. Savery, 1 S.C.R. 107.

Van Reeth vs. de Silva 8 N.L.R. 97.

Changarapillai vs. Chelliah, 5 N.L.R. 70.

H. V. Perera, K.C., with *E. B. Wickramanayaka*, for defendant-appellant.

Croos Da Brera, with *Kingsley Herat* and *Wijeyekoon*, for substituted plaintiff-respondent.

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POYSER, S.P.J.

This appeal raised very important questions affecting the property of the Roman Catholic Church in Ceylon. We think it should be referred to a fuller Bench, and we have come to this decision before the conclusion of the arguments.

The appeal is therefore referred to a Bench of three Judges.

WIJEYEWARDENE, J.

I agree.

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

Argued on 6th and 7th December, 1938.
Decided on 20th December, 1938.

DE KRETSER, J.

In the early part of the last century there seems to have existed in Ceylon a branch of the Roman Catholic Church known as the Portuguese Mission, which was under the patronage of the King of Portugal and the administrative head of which in Ceylon was the Archbishop of Goa. During this period, the Church of St. Peter at Negombo was built on private land, and the owners of the land transferred " the said portion of garden and the chapel and all the buildings standing thereon " on D12 of 22nd April, 1864, to the Archbishop of Goa, " the Primate of the East and his successors in office, and the Vicars Capitular, Metropolitan and Primatial Diocesan," upon trust and subject to the condition that certain burials should be allowed and that he should " permit and suffer the said chapel to be used, occupied and enjoyed as for the public religious worship of God by Roman Catholics in this Island under the right of the Royal patronage."

The present branch of the Church had meanwhile begun its work in Ceylon and, at a later date, by arrangement between the Pope, the King of Portugal and the different ecclesiastical personages concerned, the Portuguese Mission withdrew from Ceylon in favour of the present mission and the priest in charge of St. Peter's having received instructions, handed over the keys and all the temporalities in the presence of the principal members of the church to " the chief lay officer of the church, Mihindukulasuriya Domingo Tissera Mooppo " on the 26th of January, 1887, (D4).

In February, 1888, a number of the members of the congregation " who were (had been) under the spiritual administration of the Archbishop of Goa," addressed a letter (D8) inviting the Archbishop of Colombo to admit them to His Lordship's spiritual administration. The letter contained this passage :

> " As we the parishoners were transferred to the Archdiocese of Colombo in accordance with the decree granted by His Holiness the Pope Leo XIII of Rome, the Supreme Shepherd of the Holy Church, we, while esteeming the said decree,

do respectfully declare that we remain, as long as we live, as obedient Catholics to His Holiness the Pope of Rome, the Vicar of Christ, and, in the name of His Holiness, to Your Grace the Archbishop of Colombo and to all heads appointed by His Holiness to the Archdiocese of Colombo hereafter."

The Archbishop of Colombo accepted the invitation by his letter dated 6th June, 1888, in which he recited that by a concordat concluded between the Holy See and the Crown of Portugal on the 23rd of June, 1886, the right of patronage heretofore exercised by the King of Portugal was by mutual consent declared extinct in Ceylon leaving to His Holiness the Pope to take such measures as in His wisdom he might consider just for the good of the faithful. He went on to say that the Pope had elevated Colombo to the Archiepiscopal dignity and that the Titular Archbishop of Cesarea had by a decree issued on 2nd January, 1887, " declared the provisional extraordinary jurisdiction of the Archbishop of Goa to be extinct in Ceylon and ordered the Goa clergy, in virtue of obedience due to the Holy See, to submit to the jurisdiction of the Archbishop of Colombo and the Bishop of Jaffna respectively, an order to which they submitted with the sanction of the Archbishop of Goa." The Archbishop of Goa had on 21st March, 1887, declared that " he had no more any jurisdiction in Ceylon." The Archbishop of Colombo, after reciting all these facts, appointed the Very Rev. Fr. Dominic Publicani, O.M.I., second Vicar-General and Fiscal Procurator, to visit St. Peter's and administer the Sacraments. Rev. Fr. Griaux as parish priest, and the Very Rev. Fr. Publicani seem to have taken possession of the Church and, thereupon, Domingo Tissera, to whom it will be remembered the keys had been handed over, brought an action against them and two others named Manuel Costa and Juan Fernando.

The case went up in appeal and the Supreme Court, consisting of Burnside C.J. and Clarence J., decreed that the plaintiff's action should be dismissed. A copy of their judgment has been filed and it shows that the action had been a possessory action and that it had been dismissed because Domingo Tissera was only a caretaker. This decree was in 1889.

The evidence makes it quite clear that from 1888 the Archbishop of Colombo has been in effective control of St. Peter's and has received its income and generally administered its affairs through the priest of an adjoining church and for a period with the assistance of a Committee of Church Members.

In 1900, by last will, Clara Pinto devised a share of the land called Madampellawatte to the " Church of St. Peter " and provided that Juan Fernando, Anthony Mathes, executors, and Juan Pinto should be in charge of the land, spend for its improvement and upkeep, and give all the remaining income " to the said church."

The will provided for their successors and, rather inconsistently, ordained that, if no heir or descendant remained, the said portion of the land was to " devolve " on the church.

The inconsistency is, in my opinion, more apparent than real, but it is unnecessary to consider that question.

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It will be noted that this will was drawn in 1900, i.e. eleven years after the judgment of the Supreme Court and thirteen years after the Archbishop of Goa had relinquished jurisdiction and the priest had given over the church and the Archbishop of Colombo had been invited to take charge and had taken charge.

It can hardly be that Clara Pinto was unaware of these facts and that she could have intended her bequest to go to any other than those who were managing the existing church.

It is contended, however, that all she intended, and must be taken to have intended, was to make a bequest to the church, to religion so to speak, irrespective of who managed the particular church and, therefore, the person entitled to receive the bequest must be ascertained independently of her intention. In the construction of a last will, the intention of the testator is of paramount importance and must be given effect to, if it can be ascertained with reasonable certainty ; and one is not thrown back on artificial modes of construction unless the testator's intention is obscure.

The evidence establishes that the persons named in the last will and referred to as managers in its last clause regularly gave the income to the Archbishop of Colombo. One of them, Juan Fernando, was probably one of the defendants in the case against the representatives of the existing mission. Another of the defendants is said to have been the present defendant's grandfather. Juan Fernando died in 1910. He gave the income to the Archbishop during his life and, at his death, a sum of Rs. 7,000/- having accumulated in his hands, his widow paid the money to the Archbishop through the witness John Fernando, who took charge of the land and paid the income to the Archbishop for nearly 20 years and handed it over to his brother-in-law, the defendant. John Fernando was sued in 1930 for an accounting, and the action was brought by the Archbishop. He denied the Archbishop's right, but judgment went against him and he then handed over the land to his brother-in-law, the defendant. He says he requested the defendant to pay the income to the Archbishop but, in fact, the defendant did not, and the present action was the result.

In this action, the plaintiff was the Archbishop of Colombo, and in paragraph 6 of the plaint he claimed that, as such, he was " vested with the care and charge and control of the said church." He prayed for an accounting. The defendant stated that he was in possession since 3rd September, 1931 ; denied that the plaintiff was vested with the care, charge and control of St. Peter's and also made other general denials. He denied that plaintiff could sue him for an accounting even if the plaintiff had the charge and control of the Church, and gave certain figures to prove that no balance was left in his hands from the income.

The learned District Judge held in favour of the plaintiff, and the defendant appeals. The one point urged on his behalf in different ways was that the bequest to the church was a bequest to the trustee of the church and, according to D12, the trustee was the Archbishop of Goa. There was

the risk, it was alleged, of the Archbishop re-establishing his Mission in Ceylon and bringing the defendant to account, and, even if that was unlikely, still no one but he could sue the defendant until a competent Court had appointed a trustee and, by a vesting order, had vested the property in that trustee. Meanwhile, presumably, the defendant would take the produce and would not mind doing so since that income would cover his expenses, and, presumably, the church would suffer no loss since the expenditure amount at least to the income.

In my opinion, this case can be decided quite irrespective of the question as to whether the trust created by D12 extended to the length to which Counsel contended it did ; but it is due to Counsel to examine his skilful argument on this point.

To begin with, before 1864, title to the land on which the church stood was in private persons. Had that state of things continued, it would hardly be contended that Clara Pinto intended that the income from her land should go to those private persons. The fabric of the church would accede to the soil in the absence of agreement, but a right of *superficies* might be acquired by prescriptive user, and by 1900 the fabric of the church, as well as the institution known as the Church, would not belong to the owners of the land, and clearly Clara Pinto's bequest could not be claimed by them but the person in authority or managing the Church. The existence of D12 does not make a difference. The trust was with regard to the land and the fabric — even though the fabric may have been mentioned in order to avoid any question arising as to the legal title.

The trust, therefore, affected the fabric and did not extend to the institution known as the church. It is said that, among Roman Catholics, it is impossible to separate secular from religious authority, and that may be so ; but they may be separated from a legal point of view. The more convincing answer, however, to the claim in favour of the Archbishop of Goa is the well established fact that he renounced his trust with the consent and acquiescence of all persons concerned in the trust. It cannot be said any longer that he is the trustee even of the property dealt with in D12. It is unnecessary to consider the argument that the trust was in respect of his Archbishopric of Ceylon and his successor in office was the Archbishop of Colombo, or the argument that the trust has ended because its object as stated in D12 can no longer be fulfilled. Who then can bring an action ? Commonsense, principles adopted by this Court and found in the Roman-Dutch Law, the express provision found in section 107 of the Trusts Ordinance and the intention of the testatrix all, point to the person in actual control of the temporalities of the church.

In my opinion, this case ought to be decided on Clara Pinto's intention and, in my opinion, her intention was that the income should be handed over to the person exercising authority over and managing the Church of St. Peter, and that was the Archbishop of Colombo; and for over a third of a century that was how all persons interested in the church regarded the

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matter. I do not think this eminently sensible and practical view of the matter taken by practical persons should be rejected unless we are obliged to do so by some rule of law.

In *Godinho vs. Mrs. Koning* (Ram. '43–'55, p. 132) this Court held that a deed *ad pios usus* was valid and that the plaintiff, as the Roman Catholic Missionary at Batticaloa and manager of the church and property thereof, could maintain an action on the deed. The judgment, citing Viner's Abridgment, says " it seems that in ancient times a grant ' *deo et ecclesiae* ' was good, or if a man gives ' lands per *dedi et concessi ecclesiae de D*' this goes to the person and his successors, and this construction now prevails in wills where the intention only of the devisor is regarded..... Thus a devise ' *Ecclesiae sancti Andreae de H*' would be a good donation by will to the corporation of the person of the said church and his successors, for such description was sufficient in a will to express the person of the church and his successors."

The judgment goes on to say that in Dutch Law the distinction, in construing deeds, between deeds and wills was not recognised; but the intention was preferred.

It is rather difficult to understand this decision in every part of it, but clearly it held that a bequest to a church was not invalid (it is not argued in this case that it is) and it emphasised that intention was the main thing to be considered and that the manager of a church could maintain an action on such a deed. The decision may seem to regard the church as a corporation, but all it does say is that that was the law in ancient times and it uses this statement to justify the holding that such a deed is not invalid. The chief point of interest to us at present is that the manager of the church was allowed to maintain an action on such a deed.

The case is more fully reported in Morgan's *Digest*, page 472. From this report it appears that certain property was seized under writ as the property of the defendant, and that plaintiff claimed it as ' the presiding Roman Catholic Missionary at Batticaloa and Manager of the Church and property thereof." It also appears that the conveyance was " unto the Church of Saint de Croos."

In *Sillani vs. Corea* (Ram. '68, p. 201) this Court held that the plaintiff, who was the Roman Catholic pro-administrator of the southern Vicariate of Ceylon, had the right to make appointments, as the evidence established that such appointments, had been made by the chief local dignitary of the Roman Catholic Church for the time being, and it said that this right was supported, not only by the law of prescription, but by the principle that when the Court has to direct what shall be the arrangement of a religious institution, it will, in the absence of express proof of the founder's intentions, look to see what has been the usage of the congregation and ministers and others officially interested on the subject ; and the Court will presume that such usage has been in conformity with the original design. They held,

also on the oral evidence, that proprietary right in the temporalities was in the officiating priest and not in the congregation's trustee as contended by the defendants.

This was a case from the District Court of Negombo and was decided in 1866, i.e. before the present mission took over the work in that district.

Fernando & Others vs. The Right Revd. Father Bonjean, Bishop of Medea and Vicar Apostolic of Jaffna (Ram. '72–'76, p. 168) was an action brought, regarding the well known Madhu Church in the Mannar District, by certain persons against the Bishop and Vicar Apostolic, the Missionary Apostolic of the District and another person reported to be dead. The plaintiffs alleged that the church had been built by their ancestors and that they had had prescriptive possession of the land and income, offerings and furniture of the church, and prayed for ejectment of the defendants. The defendants pleaded that by law and usage, the title to the church and the sole right to administer its affairs were vested in the Bishop and that the charge of the church and its income belonged to the officiating priest, the 2nd defendant, appointed by the 1st defendant. The trial Court held for the defendants but ordered that trustees should be appointed to hold the church subject to the right of the officiating priest to use it.

Both parties appealed and this Court delivered its judgment through Morgan, C.J., the other Judges being Stewart and Cayley, JJ. It held that the plaintiffs had failed to prove their claim ; that the evidence as to the building of the existing church was conflicting, but it appeared to have been built by a gentleman called Muyce with the assistance of neighbouring villagers and was occasionally visited by the Goanese priests under the authority of the Archbishop of Goa ; it refers to a concordat between the Pope and the King of Portugal followed by a pastoral letter from the Archbishop of Goa, filed in the case previously cited by me, viz. one in the District Court of Negombo, and states " we do not think it very material to ascertain by whom and out of what funds the church was rebuilt in 1854, because, in the absence of any evidence to the contrary, we think it must be presumed that it was the intention of all parties concerned that the new church should be held and managed upon the same footing as the old one and should be subject to the same ecclesiastical rules and discipline.....Upon the issue as to whose the legal title as to the fabric and ground on which it stands and which forms the actual precincts of the Church is, we do not think that either side has made out a case entitling it to judgment..... After all, this question as to the bare fabric of the church and the ground attached to it does not appear to us of much practical importance. For, in whomsoever they are vested, the premises can only be held and possessed for religious purposes, to be carried on in accordance with the doctrine, discipline and usage of the Roman Catholic Church in this Island..... We must be guided by the principle laid down by this Court in the case (No. 1421 D. C. Negombo above referred to) that, when the Court has to direct what shall be the management of a religious institution, it will, in the

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absence of express proof of the founder's intentions, look to what has been the usage of the congregation and the ministers and others officially interested in the subject.....It is true the Roman Catholic Church is not established here ; but, treating it as a religious society resting upon a consensual basis, the Court is bound (as pointed out by the Judicial Committee of the Privy Council in the case of *Brown vs. The Curate and Church-Wardens of Montreal*, 44 L.J.P.C. Cases p. 1) " to regard its laws and rules in determining the right of any aggrieved person if these rights relate to a matter of a mixed spiritual and temporal character." The Court held that the usage has always been for the chief spiritual dignitary of the diocese or vicarate to appoint the priests to the mission and to churches belonging to it, and the concordat was considered to have settled the question who are the chief local dignitaries of the Roman Catholic Church here now. The right of appointment was therefore held to be in the 1st defendant.

The 1st defendant had himself pleaded that, whilst he had the legal right to the income etc., the income was actually received by the priests and had desired a declaration accordingly. This Court decreed that the priest for the time being in charge was entitled to receive the offerings and personally to manage and administer the affairs of the church, subject to the control of the Vicar Apostolic of the Vicariate and to the observance of the usages and discipline of the Roman Catholic Church in the Island.

I have dealt with this case at some length not only because it deals with many points which are of interest in the present case but also because it seems to be the latest decision on closely analogous points, and has regard to Roman Catholic Churches in particular.

The question which arose in *Melezan vs. Savery* (1 S.C.R. 107) and *Van Reeth vs. de Silva* (8 N.L.R. 97) was quite different. Those cases decided that title vested in a Roman Catholic Bishop did not pass to his successor in office, and as a result Ordinance No. 19 of 1906 was passed.

Mr. Croos Da'Brera, himself a Roman Catholic, stated without contradiction and, as far as I know, quite rightly, that a Roman Catholic desiring to transfer property for religious uses would transfer it to the Bishop (or Archbishop in the case of the diocese of Colombo). This seems to accord with the evidence in this case, and the Ordinance above referred to seems to confirm this view for it makes no provision for any other case.

We next pass to another aspect of the matter. In *Changarapillai vs. Chelliah* (5 N.L.R. 70) Bonser, C.J. drew attention to the Roman-Dutch Law which provided that " in the case of property belonging to churches and religious bodies.....persons called *economi* and other like officers could recover property by actions *rei vindicatio*," and he thought that *a fortiori* they could recover it by the lesser remedy of a possessory action. It seems to me that *a fortiori* they could recover something less than the property viz. the income from it. He thought that certain cases had been decided upon too narrow grounds and explained another as having been brought by too subordinate an officer. He thought that each case must depend upon its

own facts and concluded by saying " In the present case, it seems to me that if the plaintiff, who is called the manager of the temple, has control of the fabric of the temple and of the property belonging to it, he has such possession as would enable him or even entitle him to maintain an action, even though he makes no pretence of claiming the beneficial interest of the temple or its property, but is only the trustee for the congregation who worship there." The similarity of reasoning between this case and the cases reported in Ramanathan's Reports will at once strike one, and also that the Archbishop is in a stronger position than the manager in that case.

Mr. Perera sought to meet the case by arguing that in Roman-Dutch Law a church was *res sacra* and, as such, public property, and therefore some provision had to be made for the protection of its property, whereas in Ceylon all property of a religious body belongs to someone. He argued that as in modern law it is possible to appoint trustees, therefore the previous law on the subject should not prevail. The fact that trustees may be appointed does not mean that trustees and trustees only may exercise rights in matters concerning the temporal affairs of an ecclesiastical body. He further argued that the passage from Voet referred to actions *rei vindicatio* and to recovery of corporeal property, movable or immovable, and not choses-in-action. It seems to me that this argument is more ingenious than sound. The Roman-Dutch Law did not unduly favour technicality. It aimed at doing substantial justice and, no doubt, had the present problem been presented, it would have dealt with it on the same lines as earlier decisions of this Court have done. It had a habit, like its basis the Roman Law, of accommodating itself to the facts of each case.

The accident that the observation occurs in a title dealing with actions *rei vindicatio* does not obscure the principle on which it went and which Bonser, C.J. had no difficulty in extending to possessory actions. Besides, the Roman-Dutch Law regarded personal actions as movables (Voet 1–8–30 & Nathan 436).

It seems to be too narrow a view to take to interpret the legacy as a bequest of a chose-in-action. The Roman-Dutch Law would consider the church's right to be based on a quasi-contract. It would be extraordinary if the manager of the property belonging to a religious body could maintain an action for the recovery of property but, once he leased it, he could not sue for rent as his right was based on contract. In the present case, it is fairly arguable that the property vested in the church with the management in the persons designated, upon failure of whom even this right would pass to the church. But, even assuming the position taken up by Mr. Perera that the property vested in the persons designated upon trust for the church, what was the right of the church ? The position would be that once the fruits had been sold and the expenses deducted the beneficial interest in the money that was left belonged to the Church. That money was corporeal property, and the fact that in order to ascertain the exact amount an accounting was necessary does not affect the right. Had the parties been

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agreed that it was, say Rs. 5,000/–, the action would be to recover Rs. 5,000/–. I do not see why the right of the manager of property of a religious body to recover its property or income should be restricted in the manner suggested.

There is still another way of looking at the matter and that is that the Archbishop had exercised control over the property of the church and was in receipt of this income for many years, and it is really for the defendant to prove a superior title to the porperty of the Church, and it is at least doubtful that the Archbishop of Goa had any rights or will ever exercise any.

Lastly, I shall deal with a position which seems to be peculiar to our law. I refer to the recognition of the Trusts Ordinance in sections 106 and 107 of the *de facto* trustee. The enactment of these sections was probably due to an extraordinary situation which existed, particularly with regard to Hindu Temples, and which gave rise to many difficulties. If one applies the provisions of section 107, as one is entitled to do, there can be no doubt that, though there may be no formal constitution of a trust in the Archbishop of Colombo, all the circumstances of the case prove that such a trust does in fact exist and, on Mr. Perera's one and only contention, the Archbishop is entitled to maintain this action.

From whatever angle, therefore, the case is approached, the right of the plaintiff seems to be clear, and there is no impediment to the intention of the testatrix being given effect to, however convenient it may be to the defendant that a contrary conclusion should be reached.

The appeal is dismissed with costs. The decree entered will stand. Of course the costs of any further inquiry into the account will be dealt with by the District Judge.

MOSELEY, J.

I agree.

KEUNEMAN, J.

I agree.

Appeal dismissed.

Present : MOSELEY, J. & KEUNEMAN, J.

E. B. CREASY vs GOONERATNE NEE FERNANDO & OTHERS

Application for conditional leave to appeal to the Privy Council.
S. C. Nos. 112-113—*D. C. Colombo No.* 6783.
Argued on 2nd & 8th December, 1938.
Decided on 14th December, 1938.

Conditional leave to appeal to Privy Council—Same defendant appearing in personal and representative capacity—Notice of intention to appeal signed without addition of representative capacity—Is the notice in order.

The 1st and 2nd defendants are the same person viz. W. B. Nellie Magdalene Gooneratne nee Fernando. As the 1st defendant, she is the legal representative of the estate of one W. B. J. Fernando and, as the 2nd defendant, she appears in her personal capacity. The necessary notice of intention to appeal to the Privy Council was sent to the respondents signed by this person as " N. Gooneratne." The respondents argued that the notice as signed can only apply to the 2nd defendant and that therefore it was not in order.

Held : That the notice contained sufficient indication of her intention to appeal in all the characters which she had in the action.

Ranawaka, with *Jayasuriya*, for petitioners.
Choksy for respondent.

KEUNEMAN, J.

In this case the judgment of the Supreme Court was delivered on the 31st October, 1938. The 3rd defendant-petitioner posted to the plaintiff-respondent on the 5th November, 1938, notice of his intention to appeal to the Privy Council, and as far as the notice is concerned, it is conceded that this is in order. As regards the other defendants-petitioners, it is to be observed that the 1st and 2nd defendants are the same person, namely, W. B. Nellie Magdalene Gooneratne nee Fernando, but she is, as the 1st defendant, the legal representative of the estate of W. B. J. Fernando deceased, and she appears as the 2nd defendant in her personal capacity. On the 7th November, 1938, a notice of intention to appeal to the Privy Council, signed by this person as " N. Gooneratne " and by the 4th defendant, was posted to the plaintiff, and it is now admitted that this was received by the plaintiff within the period mentioned in the rules. It is not denied that the notice by the 4th defendant is in order, but it is argued that the notice signed " N. Gooneratne " can only apply to the 2nd defendant, who is a party in her personal capacity, and not the 1st defendant who is a party in a representative capacity.

I think this is too narrow an interpretation to be given to the notice. It is clear that notice has been signed by the party who is both the 1st and the 2nd defendant, although that party occupied a different legal character

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in each case. In signing the notice as "N. Gooneratne," this person did not restrict the signature to her character of the 1st or 2nd defendant. Had this person appeared only in one character, viz. in a representative capacity, I think a notice signed by her, without any addition of her representative capacity, would have been sufficient. I do not think it makes a difference that in this case she occupied two distinct characters, unless it can be shown that she restricted her notice to one character alone. The two different characters are united in the same person, and when she signed the notice as "N. Gooneratne," I think that was sufficient notice of her intention to appeal in all the characters which she had in the action.

I may add that I cannot see prejudice has been caused to the plaintiff by a notice in this form. I accordingly hold that the notices are good as regards all the four defendants.

In view of my decision on this point, it is unnecessary to decide the other question argued by respondent's counsel at the time when he was under the impression that a notice signed by the 3rd defendant was the only notice given to the plaintiff. Counsel's argument was that the 3rd defendant, who was joined in this action as the transferee of one of the lands mortgaged, could not appeal to the Privy Council without proof that the value of his interest in the land transferred to him was over Rs. 5,000/-.

I allow this application for leave to appeal to the Privy Council, subject to the usual conditions. The petitioners are entitled to the costs of this argument.

There is another application by the petitioners that this Court do direct that security in house and landed property be accepted for the purpose of this appeal. No particular house or landed property has yet been tendered for the approval of this Court, and it is not possible to deal with a general application of this sort. If and when such security is tendered for the approval of this Court, it will be open to this Court, after hearing both parties, to make an appropriate order.

MOSELEY, J.

I agree.

Application allowed.

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

ATAPATTU (Superintendent of Excise) vs PUNCHI BANDA *alias* NILAME

S. C. No. 45—*P. C. Ratnapura No.* 17623.
Argued on 5th and 6th December, 1938.
Decided on 19th December, 1938.

Criminal Procedure Code sections 147 (1) (*a*) *and* 425—*Prosecution not sanctioned by Attorney-General—Can case proceed after objection has been taken that it has not been sanctioned as required by section* 147 (1) (*a*)—*Objection taken at close of case for prosecution.*

The accused was charged under section 180 of the Penal Code. At the close of the case for the prosecution, objection was taken to the further progress of the case on the ground that the requirements of section 147 (1) (*a*) of the Criminal Procedure Code had not been fulfilled. The Magistrate overruled this objection and proceeded with the case. The accused was found guilty and convicted. The accused appealed.

Held : That, in the circumstances of the case, the conviction was not bad as the want of sanction did not occasion a failure of justice.

Editorial Note : In the case of *Wijesekera vs. Charles Appu* (P.C. Panadure 13357, S. C. Minutes of 27th August 1895) non-compliance with the section of the Code of 1883, corresponding to the present section 147(1) (*a*), was held to be fatal to a conviction, while the case of *Corea vs. Wijesinghe* (5 Bal. Notes of Cases, 19) decided that the want of sanction did not vitiate a conviction unless it occasioned a failure of justice. There, the fact that the accused took no objection at any stage of the proceedings was regarded as indicating that there was no failure of justice.

Colvin R. de Silva for accused-appellant.

J. W. R. Illangakoon, K.C., Attorney-General, with *E. H. T. Gunasekere, Crown Counsel,* for complainant-respondent.

MOSELEY, J.

This appeal originally came before Abrahams, C.J. who referred it to a Bench of Three Judges. The facts of the case appear in the order of reference, which is as follows. (See Abrahams, C.J.'s judgment of 4-3-38).*

What, in effect, we are asked to decide is whether the learned Magistrate was right in proceeding to determine the case after it had been brought to his notice that the requirements of section 147 (1) (*a*) had not been complied with.

Counsel for the appellant relied upon the opening words of section 147 (1): "No Court shall take cognizance.....," and invested the term "cognizance" with the meaning of "hearing and determining." Once the fact of non-compliance with the requirements of the section was discovered, said he, the Court had no jurisdiction to overlook the omission and proceed to determination of the case. It is beyond argument that the powers conferred by section 425 of the Criminal Procedure Code may only

* See page 75

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be invoked by a Court of appeal or in revision, and Mr. de Silva contended that it was not for the Magistrate to consider the possibility of the exercise of those powers by this Court. He submitted that the omission was not properly curable in the trial Court, and that if in practice it was curable, that could only be done before the case for the prosecution was closed.

The Attorney-General argued that it was immaterial whether the objection was taken in the lower Court; that therefore, presumably, if objection was taken, it was immaterial at what stage of the proceedings it was done. He cited the case of *Halliday vs. Kandasamy* (14 N.L.R. 492), in which the applicability of section 423 (the purport of which is similar to that of section 425) was considered.

In that case Lascelles, C.J. said :

> " It was said that the section should only apply when no objection was taken to the jurisdiction in the Court of first instance. But there is nothing in the section or in the context which lends the slightest support to this suggestion. To engraft such a proviso or exception on the section would, in my opinion, be an unjustifiable encroachment on the province of the Legislature."

It seems to me that these observations, with which I respectfully agree, are equally applicable to section 425. If this proposition is accepted, it seems unreasonable to differentiate between the various stages of a proceeding at which objection might be taken.

Counsel for the respondent proceeded to argue that the provisions of section 425 are imperative, and that this Court is prohibited from interfering with the judgment of the lower Court unless the irregularity complained of has occasioned a failure of justice. In this connection, it may be borne in mind that although the complaint of which the Court took cognizance was not that of the officer concerned, it had in fact received his written sanction. In *The Inspector of Police vs. Meera Saibo* (3 C.W.R. 149) the prosecution was based upon a report made by the police, on the face of which was an endorsement signed on behalf of the Government Agent by the Office Assistant to the effect that the prosecution was authorised. It is true that in that case the Government Agent, in addition to authorising the prosecution, actually appeared in Court and gave evidence. De Sampayo, J. had " no doubt that the purposes of section 147 were practically satisfied." He went on to say, " The objection was taken only at the close of the case, and the irregularity in no way occasioned any failure of justice." Our attention was also drawn to the case of *Manuel vs. Kanapanickan* (14 N.L.R. 186) and *Murphy vs. Punchappu* (23 N.L.R. 274), in each of which the application of section 425 was approved in the absence of a failure of justice. A similar view was taken by Wood Renton, J. in *Rodrigo vs. Fernando and Others* (1 Current Law Reports, 129) and by Bertram, C.J. in *Batuwantudawa vs. Karunaratne* (4 Ceylon Law Recorder 64).

The obvious intention of section 147 is to protect private persons from frivolous and vexatious prosecutions. If, in the present case, there had existed grounds for believing that the prosecution was frivolous or

vexatious, the validity of the complaint would have been queried by the defence at the outset and the irregularity discovered. We are, however, informed by counsel for the appellant that the irregularity was not discovered until after the close of the case for the prosecution. At no time has it been suggested that the prosecution was frivolous or vexatious.

Two Indian decisions were also brought to our notice. In *Mozumdar vs. Mozumdar* (22 Cal. 176) it was held that section 537 of the Indian Criminal Procedure Code (the counterpart of our section 425) could not refer to a case in which the want of sanction was directly brought to the notice of the Magistrate " at the commencement of the proceedings before him." The compelling inference is that it does apply when the irregularity becomes apparent at a later stage.

In *Nilratan Sen vs. Jogesh Chundra Bhuttacharijee* (23 Cal. 983) Banerjee, J. said " When an objection is taken on the ground of there being a material error, omission or irregularity before a case is finally disposed of, and while there is time to correct the same, it would be unreasonable to hold that section 537 intends the error, omission or irregularity to be allowed to remain uncorrected." In the case before us, the case for the prosecution had closed at the time for correcting; the irregularity had therefore passed. The only way in which it can be corrected is before this Court. The learned Magistrate, in my view, adopted the proper course in proceeding to determine the case.

I can see no reason for interfering with the conviction on the ground advanced or on any other ground.

The appeal is dismissed and the conviction and sentence affirmed.

KEUNEMAN, J.

I agree.

DE KRETSER, J.

I agree.

Appeal dismissed.

**Present :* ABRAHAMS, C.J.

ATAPATTU (Superintendent of Excise) vs PUNCHI BANDA *alias* NILAME

S. C. No. 45—*P. C. Ratnapura* 17623.

Argued on 4th March, 1938.

Colvin R. de Silva for accused-appellant.

E. H. T. Gunasekera, Crown Counsel, for complainant-respondent.

ABRAHAMS, C.J.

The appellant, in this case, was charged under section 180 with having given to a public servant, to wit the Excise Commissioner, Mr. Wadia, information which he knew or believed to be false, intending thereby to cause the Excise Commissioner, or knowing it to be likely that he would cause the Excise Commissioner, as a public servant, to use his lawful power to the injury or annoyance of an Excise Inspector. Proceedings apparently

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were instituted on a report made by D. V. Atapattu, Superintendent of Excise, in terms of section 148 (1) (*b*) of the Criminal Procedure Code, and Mr. Atapattu signs himself as complainant. This report bears the superscription "I sanction this prosecution. (Signed) S. H. Wadia, Excise Commissioner." This was done presumably in an attempt at compliance with section 147 (1) (*a*) which states that no Court shall take cognizance of certain offences, this offence among others, except with the previous sanction of the Attorney-General or on the complaint of the public servant concerned or of some public servant to whom he is subordinate. Now, it is obvious that this indication of sanction on Mr. Wadia's part does not constitute this the complaint of Mr. Wadia as the public servant concerned; and further, as the sanction of the Attorney-General had not been obtained, there was therefore a statutory bar to the Court proceeding with this trial. However, section 425 of the Criminal Procedure Code enables this Court on appeal or revision to permit such an irregularity, provided that no failure of justice has been occasioned. But it has been pointed out by learned counsel for the appellant, who in fact conducted the defence in the lower Court, that before proceeding to call his defence he argued that the prosecution was wrongly constituted and must therefore fall inasmuch as there was no complaint of the public servant to whom the complaint was made. It was also pointed out to the Magistrate that the sanction of the Attorney-General, which otherwise would have been an efficient substitute for the complaint of Mr. Wadia, had not been obtained either. Counsel for the defence went on to argue that it was too late now to go on, inasmuch as section 425 gave authority to the Appeal Court and not to the Court of trial to cure this irregularity if no miscarriage of justice was in fact occasioned. The Magistrate, in a somewhat elaborate order, treated this objection as raising merely a trifling irregularity and he stated that the accused cannot claim that he has in the least bit been prejudiced by the failure of the complaint to be signed by the actual complainant or to obtain the previous sanction of the Attorney-General. It seems to me that the learned Magistrate was either endeavouring to anticipate the decision of the Court of Appeal or was usurping the functions of the Court of Appeal; it does not matter which. But the question really is whether, the objection having been taken at as late a stage as after the close of the case for the prosecution, it can now be said that the Magistrate was wrong in not adjourning the proceedings for the sanction of the Attorney-General to be obtained. Can this Court, where an accused person demands that the provisions of the law should be complied with, investigate the matter and decide whether this failure to obtain the sanction of the Attorney-General did in fact occasion a miscarriage of justice? I am inclined to think that the objection was taken at so late a stage as to preclude the accused now from contending that the provisions of the law ought to have been complied with as soon as he made the objection, no matter at what stage he took it. If this were not so, an accused person might deliberately permit the case for the prosecution to develop and then, when he discovered that he had no genuine answer to it, endeavour to postpone his conviction by demanding the right to a strict compliance of the law. But so far as I can see, the matter is *res integra*. The only case that was cited to me, and it was also cited in the lower Court, *Inspector of Police vs. Meera Saibo* (3 C.W.R. p. 149), although of some use in elucidating the exact situation, nevertheless does not cover the point.

I think this matter is of sufficient importance to go before a larger Bench for decision and I, accordingly, direct that the case be listed for argument before a Bench of Three Judges.

Present : POYSER & KEUNEMAN, JJ.

SADDANANDA THERUNNANSE vs SUMANATISSA THERUNNANSE

S. C. No. 242—*D. C. Tangalle* 3375.

Argued on 12th December, 1938.

Decided on 15th December, 1938.

Costs—Action for declaration of title to temple premises against two defendants personally—Averment in answer that they were incumbent and trustee—Failure to alter caption in the plaint to show representative capacity—Representative capacity established by evidence led—Order for costs against defendants—Objection by trustee that he is not personally liable—Ordinance No. 8 *of* 1905—*Section* 30.

The plaintiff brought this action, for declaration of title to certain premises belonging to a Buddhist temple, against the 1st and 2nd defendants personally. The defendants averred in their answer that the 1st and 2nd defendants were incumbent and trustee respectively. No step was taken by either party to alter the caption of the plaint. The evidence established the fact that the 2nd defendant was the trustee of the temple and that he asserted his rights as such. In the District Court, counsel for 2nd defendant argued that his client was trustee of the temple and that the action should be dismissed, while counsel for plaintiff replied that the trustee and the incumbent were rightly sued and the action was maintainable. At no stage was the caption altered to show that the 2nd defendant was sued as trustee.

The case was ultimately decided against the defendants who were ordered to pay costs. On the failure of the defendants to pay the costs so ordered, a notice under section 219 of the Civil Procedure Code was served on the 2nd defendant who took up the position that he was not personally liable to pay the costs by virtue of section 30 of Ordinance No. 8 of 1905. The learned District Judge overruled the objection and the 2nd defendant appealed.

Held : (i) That, in the circumstances, the 2nd defendant was personally liable for the payment of costs.

(ii) That the mere fact that the evidence disclosed that the 2nd defendant was a trustee and that he asserted claims to the premises as such was not sufficient to convert the action into one against the 2nd defendant as trustee.

L. A. Rajapakse, with *O. L. de Kretser* (*Jnr.*), for 2nd defendant-appellant.

E. B. Wickremanayake for plaintiff-respondent.

KEUNEMAN, J.

On the 1st March, 1937, the learned District Judge made an order that the defendants should pay certain costs to the plaintiff. These costs were not paid and on the 6th October, 1937, plaintiff obtained leave of Court to issue notice under section 219 of the Civil Procedure Code on the 2nd defendant-appellant. Notice was thereafter served on the 2nd defendant, and

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objections were filed by him. At the enquiry on the 28th February, 1938, 2nd defendant took up the position that he was only sued as trustee of the Buddhist temple, and that he was not personally liable to pay costs, in virtue of section 30 of Ordinance No. 8 of 1905, which is the Ordinance applicable in this case. The learned District Judge overruled his objection and the 2nd defendant appeals.

The plaintiff brought this action, for declaration of title to the premises in question, against the 1st and 2nd defendants, alleging that he was the true owner and that the defendants, falsely claiming title, were in wrongful and unlawful possession of the premises. The 2nd defendant was sued personally and not as trustee. The defendants did aver in their answer that the 1st defendant was the incumbent and the 2nd defendant the trustee of the temple, and set up certain defences. No step was, however, taken either by plaintiff or the 2nd defendant to secure an alteration of the caption in the plaint, or to establish the fact that the 2nd defendant was being sued not personally but as trustee of the temple. Undoubtedly, the evidence established the fact that the 2nd defendant was the trustee of the temple and that he asserted rights in the premises in question in virtue of his office of trustee. Indeed, on the 20th February, counsel for 2nd defendant argued that his client was the trustee of the temple and the action against him should be dismissed. No reasons were adduced for this argument. Counsel for plaintiff argued that the trustee and incumbent were rightly sued, and the District Judge held that the action was maintainable. Even at this stage, no attempt was made to alter the caption of the plaint by adding the fact that the 2nd defendant was being sued as trustee. After trial, the District Judge dismissed the plaintiff's action with costs, but in appeal the Supreme Court set aside this judgment and declared the plaintiff entitled to the premises in question and that the defendants be ejected therefrom.

The case was also sent back to the District Judge for a question of compensation to be determined. The defendants were ordered to pay the costs of appeal, and the costs of the lower Court were to be dealt with by the trial judge on the conclusion of the further trial.

At this further trial, the learned District Judge held against the defendants. As regards costs he said, "The defendants will pay the costs of this continued trial. The Supreme Court has left it to this Court to make an order with regard to the costs of the previous trial too. The plaintiff has succeeded in the trial on both occasions and on every issue. I hold he is entitled to the costs of the previous trial also." There was no appeal from this order.

On the failure of defendant to pay the costs so ordered, notice under section 219 of the Civil Procedure Code issued.

Now, it is clear from these proceedings that the plaintiff sued the defendants personally and not in their representative character. Even after

the fact that the 2nd defendant was trustee was disclosed, the action at no time was converted into an action against the 2nd defendant as trustee of the temple, and the order of the District Judge in question did not purport to make the 2nd defendant responsible for the costs in his capacity as trustee.

I do not think it is possible in this case to apply section 30 of the Buddhist Temporalities Ordinance No. 8 of 1905. That section says:

> " It shall be lawful for the trustees to sue under the name and style of ' trustees of (name temple) ' for the recovery of any property vested in them under this Ordinance.....They shall also be liable to be sued under the same name and style, but shall not be personally liable in costs for any act *bona fide* done by them under any of the powers or authorities vested in them under this Ordinance."

In this case, the 2nd defendant was not sued under the name and style of trustee of the temple. Not only was there no formal change made in the caption, but further nothing was done which could be said to have converted this action into one against the 2nd defendant as trustee. The mere fact that the evidence disclosed that 2nd defendant was a trustee and that he asserted claims to the premises in question in virtue of that office were not sufficient for that purpose. Accordingly, the first requisite necessary for the application of section 30 is absent.

It may be a matter for consideration whether the assertion of title to this land would fall within the words " any act *bona fide* done by them under any of the powers or authorities vested in them under this Ordinance." But I think it is unnecessary to decide this point.

It was further contended that a decision in C. R. Tangalle 13935 was *res judicata* in this connection. The learned District Judge decided that it was not. The judgment and decree in that case have, however, not been read into these proceedings and, in their absence, it is not possible for us to decide this matter.

The appeal is dismissed with costs.

POYSER, J.

I agree.

Appeal dismissed.

Present : HEARNE, J., KEUNEMAN, J. & NIHILL, J.

THE SOLICITOR-GENERAL vs CHELVATHAMBY

In the matter of an application under section 19 of the Courts Ordinance No. 1 of 1889.

Argued on 19th December, 1938.

Decided on 21st December, 1938.

Courts Ordinance section 19—Proctor convicted of breach of trust of property—Trust not qua *proctor—Application to strike proctor's name off roll.*

The respondent, a proctor, was convicted of criminal breach of trust of an *attiyal* entrusted to him in his private capacity and not *qua* proctor. An application was thereafter made for his disenrolment. The respondent showed cause.

Held : (i) That there is no absolute rule that a proctor convicted of felony should be struck off the rolls.

(ii) That, in the circumstances of this case, suspension of the respondent from practice for twelve months was sufficient.

M. T. de S. Amarasekera, Acting Solicitor-General, with *Jansze, Crown Counsel,* in support.

Gratiaen, with *N. Nadarajah* & *Navaratnarajah,* for the respondent.

HEARNE, J.

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

On 27th May, 1938, the respondent was convicted in S. C. Case No. 31, P. C. Kandy No. 57320, of an offence punishable under section 389 of the Ceylon Penal Code, in that in or about July, 1930, he did commit criminal breach of trust of an *attiyal* of the value of Rs. 1,250/– entrusted to him at Kandy for sale by Mrs. E. R. Rasiah.

The facts of the case, which the Jury by their verdict accepted, were that the *attiyal* which had been entrusted to the respondent for sale had been deposited by him as security for a loan which he obtained from one S. J. Fernando.

Mrs. Rasiah in D. C. Kandy No. 41900 sued the respondent for the recovery of Rs. 7,500/– (with this we are not here concerned) and on a second cause of action for the recovery of the *attiyal* or its value. Judgment was entered of consent and was followed by execution proceedings in which, by the sale of respondent's property, a sum of Rs. 3,728/90 was recovered by the plaintiff.

Prior to the Police Court proceedings, the respondent offered to Mrs. Rasiah an *attiyal* which he stated was the one entrusted to him, but she declined to accept it on the ground that it was not the original *attiyal* she had handed to the respondent. This *attiyal* was a production at the Supreme Court trial and, at its conclusion, as Mr. Gratiaen who appeared for the respondent at the trial states, the Chief Justice who presided advised her to accept it which she did. It would, we think, in these proceedings be fair to assume that though belated and not, as it would appear, in consequence of contrition, restitution has in fact been made.

In the case of *Re Hill* reported in 18 L. T. 564 in which an admitted attorney, being engaged in the employ of a firm of attorneys as a managing clerk, embezzled two sums of money amounting to £93 which he had received from a client of the firm, the fact that he had repaid the sums was referred to as a relevant circumstance although repayment took place only upon the discovery of the fraud.

But the most important consideration to which, in our opinion, weight should be given is that the *attiyal* was not entrusted to the respondent in his capacity as proctor. This aspect of the matter was pressed on our notice by Mr. Gratiaen and was not disputed by the learned Solicitor-General.

In *Re A Solicitor : Ex Parte The Incorporated Law Society*, 61 L.T. 842, a Solicitor, while acting as a clerk to a firm of Solicitors, misappropriated various sums of money amounting to £175 belonging to his employers. For this offence he was sentenced to eighteen months' suspension. Later he was prosecuted in a criminal Court and sentenced to six months' imprisonment. The Incorporated Law Society then applied to strike the Solicitor off the rolls on the ground of such conviction for felony, although the facts were the same as on the former occasion when he was suspended. It was held that there was no absolute rule that a Solicitor convicted of felony should be struck off the rolls.

In his judgment, Pollock, B. said "the mere conviction is not binding upon the Court in a case of this kind, and the Court can, and may and ought, to enter upon and weigh all the facts of the case, including any extenuating circumstances....."

Manisty, J. said "It is very important to bear in mind that the facts of this case are exactly the same as in the case of *Re Hill* (supra). It was not *qua* Solicitor that he committed the offence of which he had been convicted, and that was pointed out as a very strong fact to be considered. So far as the offence was concerned, he was like an ordinary individual..... It is not the case of a Solicitor, but it is the case of a man committing a felony, he being a Solicitor at the time, and that is pointed out strongly in the judgment of Cockburn, C.J. and Blackburn, J....."

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Hearne, J.

The Solicitor-General *vs* Chelvathamby

The respondent is a man of 49 years of age and has been in practice for 17 years. He appears to have acted under the influence of considerable pressure. I think that, in all the circumstances, we are not called upon to go to the extent of striking him off the rolls. It will be sufficient, in my opinion, if we mark our sense of his misconduct by ordering that he be suspended from practising as a proctor for twelve months from this date. He will bear the costs of this application which we fix at Rs. 52/50.

KEUNEMAN, J.

I agree.

NIHILL, J.

I agree.

Suspended for twelve months.

Present : POYSER, S.P.J.

MEDAWALA (Inspector of Police) vs ERNST

S. C. No. 626—*P. C. Matara* 20910.

Argued & Decided on 21st November, 1938.

Firearms Ordinance—Dog shooter employed by Urban District Council—Use of gun without licence in his own name—Can he lawfully use a gun which the Chairman of the Urban District Council is authorised to use.

Held : That a dog shooter employed by an Urban District Council cannot lawfully use, for the purpose of shooting dogs, a gun for which he has no licence but which the Chairman of the Urban District Council is licensed to use.

Colvin R. de Silva for accused-appellant.

Crossette Thambiah, Crown Counsel, for complainant-respondent.

POYSER, S.P.J.

An interesting point arose in this case. The accused was charged under the Firearms Ordinance for using a gun without a licence. He used it under these circumstances. The Chairman of the U. D. C., Matara, has a licence to use a gun. Licences are made out to him, not in his personal capacity, but as Chairman of the U. D. C. The accused, who was employed under the Council, was directed by the Chairman to shoot stray dogs and for that purpose used the gun which is the property of the U. D. C. The Magistrate has held that he should have had a licence to use this weapon and I do not think there is the slightest doubt that the Magistrate came to a correct conclusion. He has, in a careful judgment, considered all the points that arose, and I agree with him that the accused does not come under any of the exceptions set out in the Firearms Ordinance which authorize certain persons to have a gun without a licence. I also agree with the Magistrate

that although under the Rabies Ordinance (No. 7 of 1893) the Chairman of the U. D. C. may, under certain circumstances, cause dogs to be destroyed, yet that Ordinance does not in any way vary the Firearms Ordinance or provide a further exception.

A further argument on behalf of the accused was that, under section 233 of the Local Government Ordinance, the Chairman is authorised to delegate his powers. The Magistrate quite correctly, in my opinion, points out that he may delegate his power to destroy dogs, but it does not follow that the persons to whom such powers are delegated can infringe the provisions of the Firearms Ordinance.

The appeal is dismissed.

Appeal dismissed.

Present : HEARNE, J.

KING vs ROMANIS PERERA & THREE OTHERS

S. C. No. 2—P. C. Kalutara 32233.

Decided on 30th November, 1938.

Criminal Procedure Code sections 237 (2) *and* 296 (2)—*Witness called by one of several accused tried together—Evidence touching other accused given by the witnesses—Has the prosecuting counsel a right of reply against all the accused.*

At a trial of four persons indicted for murder before the Supreme Court, one of the accused (the first) called evidence on his behalf. The witness called by the accused touched also the other three who called no evidence. The Solicitor-General for the Crown claimed a right of reply against the second accused who called no evidence on the ground that the witnesses called by the first accused gave evidence touching him. In support of his contention he cited : 15 Cox's Criminal Reports, 289; 9 Carrington & Payne p. 118 and 27 Times Law Reports p. 164

Counsel for the second accused resisted the contention of the Solicitor-General on the ground that the first accused's defence necessitated reference, by the witnesses called by him, to the second accused. The evidence led by the first accused was for disproving the prosecution and it cannot be regarded as evidence for the second accused merely because it touched him. He cited 22 N.L.R. 468 and submitted that 15 Cox Criminal Reports 289 was not applicable.

Held : That the Solicitor-General had no right of reply to counsel for the second accused.

M. T. de S. Amarasekera, Acting Solicitor-General, with *Nihal Gunasekera, Crown Counsel,* for the Crown.

U. A. Jayasundera, with *H. A. Chandrasena,* for 1st accused.

R. L. Pereira, K. C., with *V. F. Gunaratne,* for 2nd accused.

Sri Nissanka, with *O. L. de Kretser (Jnr.),* for 3rd and 4th accused.

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HEARNE, J.

The question which arises for decision is whether, the 1st accused having adduced evidence which is applicable to the case of the 2nd accused, the Solicitor-General has a right of reply to counsel for 2nd accused. In the Law of England relating to Criminal Procedure this would be so. Should that principle be applied here? Is it not inconsistent with our Code and can it be made auxiliary thereto? The provisions of our Code are most incomplete. In accordance with its provisions, if counsel for the accused announces his intention not to adduce evidence, counsel for the Crown cannot speak. After his opening speech his mouth is closed. No provision is made in the Code to enable him to address the Jury at all where he loses the right of reply by reason of section 296 (2) of the Code. He is in practice accorded the right to speak only by virtue of section 6 of the Criminal Procedure Code. The present application for directions by the Solicitor-General involves a consideration of section 237 (2) of the Code which reads, "The prosecuting counsel shall, subject to the provision of section 296 (2), be entitled to reply on any evidence given by or on behalf of the accused." The section seems to me to lay down quite categorically the circumstances in which a right of reply exists. Evidence on behalf of an accused is, in my opinion, the evidence of witnesses called at the instance of such accused. There may very well be circumstances, where the 1st accused in a case calls evidence which relates exclusively to the case of the 2nd accused, in which the Court would rule that the evidence called was in reality on behalf of the 2nd accused. But where the evidence touches the 1st accused's case as well, as it does in the present case, (for he is charged with conspiracy in consequence of which the 2nd accused is alleged to have committed murder for which he equally with the 2nd accused is punishable) I refuse to take upon myself the responsibility in the present state of the Code of saying that the evidence called by the 1st accused is evidence which, within the meaning of section 237 (2), is given on behalf of the 2nd accused.

In all the circumstances, and having regard to the wording of section 237 (2), I am not prepared to say that the application to this case of the principle of English law which I have quoted is not inconsistent with our Code.

I, therefore, rule the Solicitor-General has no right of reply to counsel for the 2nd accused.

Present: POYSER, J. & HEARNE, J.

THE COMMISSIONER OF INCOME TAX vs ROWAN

Case stated under the provisions of section 74 of the Income Tax Ordinance 1932, for the opinion of the Hon'ble the Supreme Court upon the application of The Commissioner of Income Tax. (Appellant).

S. C. No. 114 (I) 1938.

Argued on 17th & 18th January, 1939.

Decided on 24th January. 1939.

Income Tax—Solicitor in the employment of a firm of Solicitors becoming a partner of the firm—Does the solicitor commence to exercise a profession—Section 11 of the Income Tax Ordinance.

A Solicitor, employed by a firm of Solicitors on a monthly salary, was made a partner of the firm. During his period of service as paid assistant, he received in addition to his salary a share of the profits. On his becoming partner he ceased to receive any salary but became entitled to a share of the profits. During his period as paid assistant he discharged the functions of a Solicitor and was engaged in the legal units of the firm.

When the Assessee became a partner of the firm, The Commissioner of Income Tax claimed to exact tax from him on the basis that he had ceased an employment and commenced to exercise a profession.

Held : (i) That the assessee did not commence to exercise a profession on the day he became a partner.

(ii) That the Assessee commenced to exercise his profession on the day he became a paid assistant of the firm, and that there was no cessation of employment on his becoming a partner.

CASE STATED

S. C. No. 114 1938

1. The assessment of Mr. F. C. Rowan, (who is an English Solicitor and a Proctor of the Supreme Court of Ceylon) for the Income Tax Year of Assessment commencing on 1st April, 1934, and ending on 31st March, 1935, was revised under the provisions of Section 11 (6) (*b*) of the Income Tax Ordinance under the following circumstances. Mr. Rowan was employed until the 31st March, 1936, as an assistant, by Messrs. Julius & Creasy, a firm of Proctors and Notaries practising in Ceylon, and was paid by way of remuneration a monthly salary and a certain percentage of the nett profits as commission. He was made a partner of the firm as from 1st April, 1936, under a duly executed deed of Partnership according to which he was to get as his remuneration a share of the profits of the firm as from 1st April, 1936.

2. The Assessor treated him as having ceased an employment on 31st March, 1936, and as having commenced to carry on or exercise a profession as from 1st April, 1936, within the meaning of section 11 of the Income Tax Ordinance. He, accordingly, revised the assessment of Mr. Rowan for the Income Tax Year 1934/1935. If this contention is correct, the assessment for the Income Tax Years 1935/36, 1936/37 and 1937/38 would also be affected ; and it was agreed that these assessments should abide the decision of the question arising on this appeal,

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3. Being dissatisfied with the revision on the ground that, in law, his assessments were not liable to alteration on the ground upon which the alteration was made, the Assessee appealed to The Commissioner of Income Tax.

4. The Commissioner of Income Tax heard the appeal on the 20th April, 1938, and made order confirming the revision of the assessment of the Income Tax Year 1934/35. A copy of the Appeal Minute together with the reasons for the decision of the Commissioner is annexed to this Case Stated marked "A."*

5. The Assessee appealed against the decision of the Commissioner to the Board of Review, constituted under the Income Tax Ordinance, on the following ground :

> "That I, appellant, did not cease to carry on or exercise a trade, business, employment or vocation in Ceylon on the 31st March, 1936, nor did I, the appellant, on the 1st April commence to carry on a trade, business, profession or vocation or employment within the meaning of section 11 of the Income Tax Ordinance."

6. At the hearing before the Board of Review on the 29th June, 1938, it was contended on behalf of the Assessee, that he did the same class and type of work after 1st April 1936, as he did before ; that his change of status from Assistant to Partner was only an incident of the exercise of his profession ; that the word "employment," as used in the Income Tax Ordinance, was a word of general description to be interpreted in a very wide sense ; and that once a man commenced earning his living by exercising his "profession" he could not be said to be exercising an "employment" because he happened to be a professional Assistant in a firm ; and that he was always "exercising his profession" whether he was working as an Assistant or as a partner. It was contended by the Assessor that, once the Assessee became a partner, he assumed liabilities which could not have been imposed upon him while he was an Assistant ; that the character of the remuneration he received when he became a partner was different from that which he received when he was only a professional assistant and that this factor necessarily affected the nature of his employment ; that the exercise of a profession as an Assistant or employee is an "employment" and that when the Assessee ceased his "employment," by becoming a partner, he then commenced the "exercise of a profession."

7. After hearing argument, the Board of Review decided that there had been no "cessation of employment" and the commencement of the "exercise of a profession," within the meaning of section 11, and allowed the appeal of the Assessee. A copy of the decision of the Board is annexed hereto marked "B."†

8. On the 23rd July, 1938, the Commissioner of Income Tax requested the Board of Review to state a case on a question of law for the opinion of the Supreme Court. The question of law is whether, under section 11, there was a "cessation of an employment" on the 31st March, 1936, when Mr. Rowan ceased to be an Assistant and the "commencement of the exercise of a profession" on the 1st April, 1936, when he became a partner of the firm of Messrs. Julius & Creasy. We have accordingly stated this case.

1. (Sgd.) J. A. Tarbat
2. ,, Francis De Zoysa
3. ,, E. J. V. I. Ekanayake

Members of the Board of Review.

Colombo, 10th September, 1938.

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* See page 87 † See page 88

(A) Appeal Minute—20th April, 1938. 1939

MR. F. C. ROWAN

Poyser, J.

The Commissioner of Income Tax *vs* Rowan

Present: Mr. T. D. Perera, Commissioner.
Mr. V. Suppiah, Clerk.

For the Appellant—Appellant present in person.

Supporting the Assessment—Mr. K. Sivagurunathan, Assistant Assessor.

Year of Assessment—1934/35.

Income Assessed —Rs. 14,239/–.

Tax —Rs. 147/20.

Facts: 1. The appellant is a Solicitor and a Proctor & Notary Public who was employed till the 31st March, 1936, as an Assistant by Messrs. Julius & Creasy, a firm of Proctors & Notaries, and was paid a monthly salary and a certain percentage of the nett profits as commission. On 1st April, 1936, he was taken into partnership in the firm, under a duly executed agreement of partnership according to which he would get a share of profits as from that date.

2. The Assessor treated him as having ceased an employment on 31st March, 1936, and revised the 1934/35 assessment under section 11 (6) (*b*) of the Income Tax Ordinance. If the view taken by the Assessor is correct, viz. that the appellant ceased an employment within the meaning of section 11 (6) and commenced to carry on or exercise a profession on that date within the meaning of section 11 (3) and (4), the assessments for 1935/36, 1936/37 and 1937/38 would also be affected, and it is agreed that the decision of this appeal would settle the assessments of those years.

Arguments for the appellant: In accordance with the decision of the Supreme Court in *Commissioner of Income Tax v. Rodger* (35 N.L.R. 169)* there is no cessation of an employment or commencement of a profession. In that case, the Supreme Court decided that the word "employment" has a wide meaning equivalent to vocation, and the appellant, whose employment prior to 31st March, 1936, was that of a Solicitor, continued to exercise the same employment notwithstanding the change in his status in the firm.

The following English cases were quoted by him :

May v. Falk—17 T.C., 218.

Osler v. Hall & Co.—17 T.C., 68.

Fry v. Burma Corporation Ltd.—15 T.C., 113.

Bartleet v. Commissioner of Inland Revenue—7 T.C., 229.

The appellant also referred to section 29 which states that an employment may be carried on in partnership.

Arguments in support of the assessment: Although the work done by the appellant before and after he became a partner in the firm of Messrs. Julius & Creasy was the same, viz. the professional work of a Proctor & Notary Public, he was prior to 31st March, 1936, carrying on an employment in the sense that his services were given to an employer who paid him remuneration by way of salary, while after that date he carries on a profession and, consequently, there has been a cessation of an employment and the commencement of a profession ; it cannot be said that he continues the same employment as there is no employer.

Commissioner's decision: The assessment is confirmed.

Reasons for the decision: In the case of *Commissioner of Income Tax v. Rodger** it was decided that an Accountant who resigned from his employment under one Company and on the same date took up an appointment under another Company as an Accountant, had not ceased one employment and commenced another. This decision cannot, in my opinion, have any bearing on the present case which is one of a person ceasing to be an employee and becoming a partner. We have first to consider whether the appellant who, it is admitted, was carrying on an employment within the meaning of the Income

* 2 C. L. W. 275 (Edd)

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Tax Ordinance as an Assistant in the firm of Messrs. Julius & Creasy, ceased that employment on the 31st March 1936. In regard to this matter, it is useful to note that section 6 (2) (*a*) indicates what are "profits from any employment" and it is clear that this section contemplates profits in the nature of wages, salary, commission, free residence and other allowances granted by an employer. When the appellant became a partner, he ceased to receive such profits from an employment and, in my opinion he ceased to carry on that employment. By becoming a partner, he ceased to have an employer and commenced the exercise of a profession just as he would have done had he left the firm and started practice on his own. I consider that this is the correct interpretation to be given to section 11 (6). The decisions in the English cases quoted by the appellant are not helpful as not one of them deals with a similar set of facts, and also the law in England is somewhat different from our law.

A case which is not on all fours with the present case, but indicates the English practice in somewhat similar circumstances, is that of *Humphries v. Cooks*—19 T.C., 121. In that case, Humphries, who had carried on the business of contracting with Film Companies for the processing of films, had arranged with Mr. T. to carry out certain technical work for which he paid Mr. T. Mr. T's business was confined to orders given by Humphries. Subsequently, Humphries took Mr. T. into partnership and they continued to carry on the same business. In fact for some time until larger premises were engaged, Mr. T. after becoming a partner continued his work in the same premises as before. It was held that there was cessation of a business carried on by each of them and a commencement of a new business on the date when they became partners. This case is useful in showing that there may be a commencement or cessation by reason of a change of status although the person in question continues to do the same work.

Mr. Rowan expressed dissatisfaction with this decision.

(*Sgd.*) T. D. Perera,
Commissioner of Income Tax.

21st April, 1938.

(*B*) DECISION OF THE BOARD

The question for consideration is whether a change of status of the appellant from professional assistant or employee to partner or employer, while following the same profession, is a "cessation of employment" entitling the Assessor to recast the appellant's assessment.

It is a fact that the appellant has lost certain privileges which he had while he was a professional assistant as for example, the payment of his tax by instalments guaranteed by the firm ; and he has also gained other privileges by becoming a partner, as for example, in the matter of his remuneration. But in view of the observations of the Supreme Court on the word "employment" in the case of *The Commissioner of Income Tax v. Rodger* (35 N.L.R. 169) we are unable to accept the position as formulated by the Assessor at the argument, viz. that the exercise of a profession as an assistant constitutes an "employment" (under the section) but that to become a partner in the same firm brings about the cessation of "employment" and marks the commencement of the "exercise of a profession."

We think that there has been no cessation of employment and commencement of the exercise of a profession.

We, therefore, allow the appeal and order that the assessment be determined accordingly.

(*Sgd.*) J. A. Tarbat,
Chairman.

E. G. P. Jayatilleke, K.C., Solicitor-General, with *S. J. C. Schokman, Crown Counsel*, for appellant.

H. V. Perera, K.C., with *Van Geyzel* for respondent.

POYSER, J.

This is a case stated by the Board of Review under the provisions of section 74 of the Income Tax Ordinance, 1932.

The material facts are as follows. The assessee, Mr. Rowan, is an English Solicitor and a Proctor of the Supreme Court of Ceylon. He was employed as an assistant by Messrs. Julius & Creasy, a firm of Proctors & Notaries, carrying on business in Colombo, until the 31st March, 1936, and received as remuneration a salary and a percentage of the nett profits.

On the 1st April, 1936, he was made a partner in the firm under a duly executed deed of partnership, and from that date ceased to receive any salary but only a share of the profits.

The assessor considered that Mr. Rowan had ceased an employment on the 31st March, 1936, and commenced to exercise a profession; he, accordingly, revised Mr. Rowan's assessment, for the Income Tax year 1934/35.

Mr. Rowan appealed first to the Commissioner, who confirmed the revision, and then to the Board of Review. The latter decided that there had been no cessation of employment and commencement of the exercise of a profession and, accordingly, allowed the appeal.

The short question for this Court to decide, therefore, is whether there was "a cessation of employment" on the 31st March, 1936, when Mr. Rowan ceased to be an assistant, and "the commencement of the exercise of a profession" on the 1st April, 1936, when he became a partner in the firm of Messrs. Julius & Creasy.

In my opinion, the Board of Review came to a correct conclusion. The case they relied on was *The Commissioner of Income Tax v. Rodger* (35 N.L.R. 169).*

In that case, Drieberg, J. held that an accountant, who terminated his contract with one employer and entered into another contract with another employer for the same kind of employment, did not "commence to carry on an employment."

The material part of the judgment which strongly supports the case for the assessee is as follows:

> (Page 173) "I do not think the word 'employment' is here used in that sense to indicate a particular contract of service but that it refers to occupation other than trades, businesses, professions or vocations. The assessee must be regarded as having commenced an employment as an accountant.....when he first began to do the work of an accountant taking remuneration for his services."

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Another case which supports the decision of the Board of Review is *Davies v. Braithwaite* (1931, 2 K.B. 628) in which it was held that an actress, who accepted engagements for which her professional qualifications fitted her, was assessable in respect of the profits she derived from her profession or vocation as an actress and not in respect of the profits of her employment. Rowlatt, J. in the course of his judgment stating, " I think that whatever she does or whatever contracts she makes are nothing but incidents in the conduct of her professional career."

In my opinion, Mr. Rowan commenced to exercise his profession when he first began to do the work of a Proctor and receive remuneration for his services. The fact that his remuneration has been increased and his status altered does not, in my opinion, affect the matter; nor do I think, having regard to the cases above referred to, that he would cease to carry on his profession if he severed his connections with Messrs. Julius & Creasy and entered into a contract on a salary basis with another firm of Proctors.

His position is similar to that of the actress. His professional qualifications fit him for a certain class of work, and whatever contracts he makes may be regarded as incidents in his professional career.

The Solicitor-General urged that Mr. Rowan had the benefit of the provisions of section 76 of the Ordinance and other benefits, and having elected to receive such benefits cannot now say that his statu has not altered.

On the other hand, as Mr. Perera pointed out, the question of estoppel does not arise. The only question before this Court is set out in paragraph 8 of the Case Stated, viz. whether there was a cessation of employment on the 31st March, 1936, and the commencement of the exercise of a profession on the 1st April 1936; and for the reasons above stated, I consider Mr. Rowan has, at all material times, exercised his profession.

The decision of the Board of Review is, accordingly, confirmed, and I order that the Commissioner of Income Tax do pay to Mr. Rowan his costs of the proceedings in the Supreme Court.

HEARNE, J.

I agree.

Decision of the Board of Review affirmed.

Present: KEUNEMAN, J. & NIHILL, J.

EBERT vs EBERT

S. C. No. 121—*D. C.* (*Inty.*) *Colombo* (*I*) 204.

Argued on 18th and 19th January, 1939.

Decided on 27th January, 1939.

Alimony—Decree for divorce obtained by husband against the wife—Can the District Court order permanent alimony in favour of such wife—Civil Procedure Code—Section 615.

Held : That the District Court has no power, under section 615 of the Civil Procedure Code, to order alimony to a wife against whom her husband has obtained a decree for divorce.

PER KEUNEMAN, J. "It is with reluctance that I have arrived at this conclusion and I should have preferred to follow the more humane principle of the English Law. That, however, is a matter which the Legislature alone can put right."

Cases referred to:

Ashcroft vs Ashcroft and Roberts (L. R. 1902 p 270; 87 L. T. 229.)
Robertson vs Robertson and Favagrossa (48 L. T. 590.)
Gooden vs Gooden (L. R. 1892 p 1; 65 L. T. 542.)

Colvin R. de Silva, for defendant-appellant.

R. L. Pereira, K.C., with *Ahlip* and *Mackenzie Pereira*, for plaintiff-respondent.

KEUNEMAN, J.

In this action, the plaintiff prayed for a decree of divorce against her husband, the defendant, on the ground of malicious desertion, and claimed alimony at Rs. 200/– a month. The defendant denied the allegations in the plaint and claimed in reconvention, a decree of divorce against the plaintiff, on the ground that the plaintiff had maliciously deserted him. After trial, the learned District Judge dismissed the plaintiff's action and granted to the defendant a decree *nisi* for divorce. At the stage when the defendant's decree was made absolute, the plaintiff moved for an order in that decree that, in the event of the defendant refusing to pay the plaintiff monthly Rs. 55/–, being the maintenance ordered in case No. 15791 of the Additional Police Court, the plaintiff should be entitled to recover the said sum of Rs. 55/– monthly from the defendant as alimony. She also moved for an order in the decree absolute for payment of the sum of Rs. 5/– a month for visiting her children at Ratnapura.

After enquiry, the learned District Judge allowed the application of the plaintiff, and the defendant appeals.

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As regards the order for the payment of Rs. 5/- a month, counsel for the appellant did not contest this matter and the order of the learned District Judge on this point must be affirmed.

Counsel for the appellant contended that the Court had no power to order alimony in this case in view of the terms of section 615 of the Civil Procedure Code. That section runs as follows :

> " The Court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of separation obtained by the wife, order that that husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money, for any term not exceeding her own life, as having regard to her fortune (if any), to the ability of her husband, and to the conduct of the parties it thinks reasonable."

Counsel for the appellant argued that the words " obtained by the wife " qualified not only the words " any decree of separation," but also the words " any decree absolute declaring a marriage to be dissolved."

This, apparently, is the first application made in Ceylon by a wife for alimony where the decree for divorce has been obtained by the husband ; at any rate we have been informed that no authority on the point is available. The learned District Judge has laid great stress on the punctuation of the section. He points out that the ' comma ' after the word ' dissolved ' seems clearly to indicate that the words ' obtained by the wife ' must be taken to refer only to the ' decree of separation ' and not to the ' decree of dissolution ' in the earlier phrase. Now, if the punctuation must be regarded as of essential importance, I think it is necessary for us to try and understand the manner in which the draftsman of the Ordinance employed his punctuation. Counsel for the appellant had directed our attention to section 613 of the Code which runs as follows :

> " Whenever any application is made under section 606, the Court, if it thinks that the applicant had no grounds or no sufficient grounds for intervening, may order him to pay the whole or any part of the costs occasioned by the application."

This is an apt illustration. It is clear that the words ' for intervening ' qualify not only the words ' no sufficient grounds ' but also the words ' no grounds,' and the employment of the ' comma ' after the words ' no grounds ' does not prevent that interpretation.

I do not think that the use of the ' comma ' in the position which it occupies in section 615 can be conclusive in the interpretation of the section

Counsel for the appellant also emphasised section 614 of the Code, which deals with alimony *pendente lite*. The section commences as follows :

> " In any action under this chapter, *whether it be instituted by a husband or a wife*....."

Counsel argued that when the draftsman intended to refer to any action whether by the husband or the wife, he employed language which made his meaning manifest, and that we should not presume that he would have left his meaning in doubt in section 615. I think this argument is of importance. The learned District Judge has not dealt with this argument

The District Judge has purported to follow a decision in England viz. *Ashcroft v. Ashcroft and Roberts* (L.R. 1902 p 270 ; 87 L.T. 229) where it was held that, under the *Matrimonial Causes Act of* 1857 20 & 21 Vict. c. 85 section 32, the Court had an absolute discretion to grant alimony to a guilty wife. In this case, the wife had no means of sustenance and could not support herself or earn her own living owing to ill-health. In an earlier case, in 1883, *Robertson v. Robertson and Favagrossa* (48 L.T. 590) Jessel, M.R. in the course of the argument, without giving a final opinion, suggested that it was intended that a guilty wife should be turned out into the streets to starve ; and in *Gooden v. Gooden* (L.R. 1892 P1 ; 65 L.T. 542) it was held that the Court had jurisdiction to grant permanent alimony to a wife against whom a decree for judicial separation has been pronounced on the ground of her cruelty.

Section 32 of the Act of 1857 stated that " the Court may, if it shall think fit, on any such decree secure to the wife " permanent alimony. The words " any such decree " referred back to section 31 which related to a decree of divorce without any qualification as to whether the decree was obtained by the husband or the wife. The learned District Judge said that section 615 of our Code is " almost identical with section 32 of the English Act of 1857. But I think there is a material difference caused by the insertion in our section 615 of the words " or on any decree of separation obtained by the wife." These words have to be given an interpretation.

Counsel for the appellant argued that it would be unreasonable to restrict the words " obtained by the wife " merely to the " decree of separation." The result of doing so would be that, in the case where the marriage still subsisted and a decree of separation only was entered against the wife, she was prevented from claiming permanent alimony. It was pointed out that it was open to a husband on the same set of facts, *e.g.* malicious desertion, to claim either divorce or separation, and that it was unreasonable to hold that, in the first case, permanent alimony was in certain circumstances available to the wife, but that it was absolutely denied to her in the second case.

I have to take into consideration the fact that in section 614 the draftsman used the words " whether it be instituted by a husband or a wife " to make clear his meaning that, in every action, the wife was entitled to claim alimony *pendente lite*. It is important that these words are not reproduced in section 615. Further, I think it would be an unreasonable interpretation to restrict the words " obtained by the wife " only to a decree of separation, and not to a decree for the dissolution of the marriage.

It is with reluctance that I have arrived at this conclusion and I should have preferred to follow the more humane principle of the English Law. That, however, is a matter which the Legislature alone can put right.

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I set aside the order of the learned District Judge directing the payment of Rs. 55/– a month to the wife as permanent alimony, but I affirm his order directing the payment to the wife of Rs. 5/– a month to enable her to visit her children at Ratnapura.

I make no order as to the costs of appeal.

NIHILL, J.

I agree.

Order for alimony set aside.

Present : MOSELEY, J. & KEUNEMAN, J.

KARUNARATNE vs THE PUBLIC TRUSTEE

S. C. No. 118—*D. C. Kalutara No.* 19324.
Argued on 8th & 9th December, 1938.
Decided on 15th December, 1938.

Administration—Heir in exclusive possession of certain premises—Action for rent by administrator—Can such action be maintained in the absence of a contract of tenancy.

Held : That an administrator can, for the purposes of administration, maintain an action against an heir for reasonable rent in respect of premises in the possession of such heir although such action is not based on a contract of tenancy.

L. A. Rajapakse, with *Kurukulasuriya*, for defendant-appellant.
N. E. Weerasooria, K.C., with *C. Seneviratne*, for plaintiff-respondent.

KEUNEMAN, J.

The plaintiff as administrator of the estate of Dr. D. T. A. Karunaratne, sued in his plaint for declaration of title to a certain house and premises, and for ejectment of the defendant, and for the sum of Rs. 1,840/– as damages. The defendant in his answer averred that as an intestate heir of Dr. Karunaratne he had lawful right and title to one-half of the premises, and denied that an action lay against him for declaration of title and ejectment. In the alternative he pleaded that he was liable only to the extent of one-half of the amount of rent due. At the trial plaintiff's counsel restricted his claim and prayer to a half share of the premises, and the following issues were framed.

Issues by Plaintiff.

1. Is the Defendant in exclusive possession of premises No. 318, Panadura.
2. Has the defendant at any time paid rent for the half share of these premises due to his sister.

3. Is the income from these premises necessary for the proper distribution of the Intestate Estate of Dr. Karunaratne.
4. What sum is now due by defendant to the estate in respect of these premises.

Issues by Defendant.

5. Does the plaint disclose any cause of action.
6. Is the plaintiff entitled to:
   (*a*) Declaration of title in respect of these premises.
   (*b*) Ejectment.
   (*c*) Damages.
7. Has the plaintiff suffered any damage by the defendant occupying half of the premises for his share.
8. What is a reasonable rent for these premises.
9. If any sum is found to be due, is the defendant entitled to a set-off against his share of the estate of his deceased brother?

The evidence established that the defendant and Mrs. C. Wijeratne were the heirs of their brother Dr. Karunaratne, that the defendant exclusively occupied the premises in question from December 1931, and deliberately refused to account for the income of these premises and of almost all other properties belonging to the estate of the deceased, that a letter of demand P3 dated the 16th April, 1935 was sent to the defendant on behalf of the administrator demanding rent for the premises in question from the 16th August, 1931, but that this demand was ignored by the defendant. In the circumstances the learned District Judge entered judgment against defendant for the sum of Rs. 1,460/- due from the 1st January, 1932 till the 31st January, 1938, with further rent or damage of Rs. 20/- per month thereafter. This is calculated on half the rental value of the premises.

From this judgment the defendant appeals. I do not think it is possible to disturb the findings of fact of the learned District Judge, but counsel for the appellant contends that the original basis of the action has been abandoned, and that there is no cause of action disclosed in the issues. In particular he contends that no action can be brought by an administrator against an heir to recover rent in respect of premises of which the heir has been in possession. Certainly no authority has been cited to us to show that such an action can or cannot be maintained. But when we examine the matter we find that the power of the personal representative extends over immovable property (Vand. 273), and that for the purposes of due administration he is entitled to sell a property even though it has already been transferred by the heir. (vide *Silva vs. Silva* 10 N.L.R. 234). There seems little doubt that an administrator can bring an action to recover money or other movable property forming part of the estate, in the hands of any person, and in fact under section 712 of the Civil Procedure Code, he may proceed by way of citation. In *Fernando vs. Rosa Maria* (28 N.L.R. 234 at 238) it was held that " where heirs take possession of the estate of a deceased, as they are entitled to do under our law, they would hold the property in trust for the legal representative, as representing the creditors,

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to the extent necessary to satisfy the debts of the estate." This last authority should however be applied with caution, for the decision is based upon the terms of section 96 of the Trust Ordinance.

Quite apart from the Trust Ordinance however, I find it difficult to deny to the legal representative the right for the purposes of administration of requiring the heir or heirs in possession to bring into the testamentary suit a reasonable rent for premises in the possession of such heirs, and of bringing an action to enforce this. This would more particularly be the case where one heir is in possession of the whole or the greater part of the deceased's estate to the prejudice of the other heirs. In the absence of authority I find it difficult to hold that while an administrator can for purposes of administration sell the immovable property of the estate over the heads of the heirs, he cannot call upon the heirs to account for the income of premises of which they are in possession. This latter right would certainly conduce to the preservation of the property of the estate.

As regards the further point raised, it is no doubt true that there is no evidence in this case, that this income is needed for the payment of the debts of the estate. The learned District Judge has however held that the income from the premises is necessary for the proper distribution of the deceased's estate. I think this finding is correct, for the evidence shows that the testamentary case is at a stand-still owing to the failure of the defendant to account for the income.

The appeal is dismissed with costs.

MOSELEY, J.

I agree.

Appeal dismissed.

Present: ABRAHAMS, C.J., POYSER, HEARNE, KEUNEMAN & NIHILL, J.J.

WIJEYEWARDENE vs PODISINGHO ET AL

S. C. No. 84—*D. C.* (*F*) *Kalutara* 19088.

Argued on 16th January, 1939.

Decided on 31st January, 1939.

Civil Procedure Code section 226—*Effect of failure on the part of Fiscal to require the debtor to pay the amount of the writ in accordance with section* 226.

The facts shortly are as follows :

This is an action for declaration of title to a land called Maharawilakumbura. This land belonged to one Jayawardene who died in 1932. In execution of a writ against the administrator of Jayawardene's estate (the second defendant in this action) the Fiscal seized the land in question on December, 16th 1932, and the seizure was registered three days later. The land was sold in execution on January, 7th 1933, and purchased by the plaintiff in this action. The Fiscal's transfer was issued over a year after the sale on January, 12th 1934, and was registered on February 30th, 1934.

On January 14th, 1933, seven days after the Fiscal's sale, the administrator of Jayawardene's estate (the second defendant) had the same property sold by public auction with the sanction of the Court, under conditions of sale approved in the administration proceedings. The purchaser at this auction was the first defendant to the present action.

The District Judge upheld the plaintiff's title and the first defendant appealed. The main contention of the appellant was that the Fiscal's sale was null and void as the Fiscal's officer did not require the judgment-debtor to pay the amount of the writ under section 226 of the Civil Procedure Code before proceeding to seize and sell the land.

The Judges before whom this appeal was first heard had doubts as to the correctness of an earlier decision in the case of *Hadjiar et al v. Kuddoos et al* (37 N.L.R. 376) and expressed the wish that this appeal be considered by a Full Bench.*

Held : That the fact that no demand was made by the Fiscal under section 226 of the Civil Procedure Code does not deprive the Court of jurisdiction and render the seizure and sale thereafter a nullity, and that it is not open to any person to seek to attack the seizure and sale on that ground in a separate action.

Cases referred to :

1. *Hadjiar et al v. Kuddoos et al* 1935 (37 N.L.R. 376) †
2. *The King v. Migel Kangany and Others* (4 C.W.R. 127)
3. *Saibo v. Mohamadu* 1937 (39 N.L.R. 522.)
4. *Keel and Others v. Asirwatham et al* (4 C.L.W. 128)
5. *Omer v. Fernando et al* (16 N.L.R. 135)
6. *Malkarjun v. Narhari and Another* (1 L.R. 25 Bom. 337)
7. *Raghunath Das v. Sundara Das* (1 L.R. 42 Cal. 72)
8. *Rajogopala Aiyar v. Ramunugachariya* (1 L.R. 47 Mad. 288)
9. *Bastianpillai v. Anapillai* (5 N.L.R. 31.)
10. *Mahadeo Dubey v. Bhola Nath Dichit* (1 L.R. 5 All. 86)
11. *Juan Appu v. Weerasena* (20 N.L.R. 30)
12. *Aserappa v. Weeratunga et al* (14 N.L.R. 417)

H. V. Perera, K.C., with *J. R. Jayawardene*, for 1st defendant-appellant.

N. E. Weerasooriya, K.C., with *Corea* and *Chandrasena*, for plaintiff-respondent.

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* See page 103 † 4 C.L.W. 105 (Edd)

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KEUNEMAN, J.

This is an action for declaration of title to a property called Maharawilakumbura. The property belonged to Mr. R. Jayawardene who died in 1932. The 2nd defendant was appointed administrator of his estate.

In execution of writ in case No. 15805 D.C. Kalutara against the 2nd defendant administrator, the Fiscal seized the property in question on the 16th December, 1932, and the seizure was registered on the 19th December, 1932. The land was sold in execution on the 7th January, 1933, and purchased by the plaintiff, but the Fiscal's transfer was not issued till the 12th January, 1934, and was registered on the 30th January, 1934.

On the 14th January, 1933, seven days after the Fiscal's sale the 2nd administrator had the same property sold by public auction, and it was purchased by the 1st defendant, who obtained a notarial conveyance of the property. This sale was with the sanction of the Court, and under conditions of sale approved by the Court, in Testamentary Case No. 2332 D. C. Kalutara, and no fraud has been proved in respect of this sale.

The learned District Judge entered judgment for the plaintiff, and the 1st defendant appealed. At the appeal before Maartensz and Hearne, JJ. as at the trial in the District Court, the appellant contended that the sale by the Fiscal was null and void, as the officer entrusted with the execution of the writ did not require the judgment-debtor to pay the amount of the writ under section 226 of the Civil Procedure Code before proceeding to seize and sell the property. The learned Judges in appeal had doubts as to the correctness of an earlier decision in the case of *Hadjiar et al v. Kuddoos et al* * and have referred the determination of the question to the Full Bench.

Subject to an argument that I shall deal with at the end of this judgment, the Fiscal's transfer related back to the 7th January, 1933, the date of the Fiscal's sale, and therefore took precedence over the later deed by the administrator. Counsel for the 1st defendant argued however, that the Fiscal's seizure, sale and transfer were null and void owing to the failure of the Fiscal's officer to make demand under section 226 of the Civil Procedure Code which runs as follows—"Upon receiving the writ, the Fiscal or his deputy or other officer shall within forty eight hours after delivery to him of the same.....repair to his (the debtor's) dwelling house or place of residence and there require him, if present, to pay the amount of the writ."

In *Hadjiar et al v. Kuddoos et al* (supra) which was decided by two judges, Koch, J. emphasised the use of the word 'shall' in the Section, and thought that the intention of the legislature was to regard a demand by the Fiscal as essential. He continued "if therefore the Fiscal has failed in this duty and this has been established to the satisfaction of the Court,

* (1935) 37 N.L.R. 376

I am of opinion that the sale held under the writ is null and void." He further stated that "the default of the Fiscal amounted to more than a mere irregularity for it rendered the sale null and void."

It is necessary to point out that this case is not exactly parallel to the present case. In the case decided by Koch, J. an application to set aside the sale was made in the same action in which execution issued and Koch, J. expressly held that such an application could be made under section 344 of the Civil Procedure Code. It is clear therefore, that these were proceedings between parties to the action, including the purchaser at the Fiscal's sale in that category. The decision therefore does not deal with the question whether the sale was "null and void" for all purposes.

Moreover the authority of this case is weakened in view of two other cases which have been cited to us. In *The King v. Migel Kangany and Others* * which was a criminal proceeding for unlawful assembly and rioting, it was argued that the accused was engaged in a lawful enterprise, viz. resisting the Fiscal's officer in enforcing execution, in that the Fiscal's officer had not complied with the provisions of section 226 of the Civil Procedure Code. Shaw, J. said "section 226 in my opinion does not render an execution invalid, if it is executed beyond the time specified after delivery of the writ to the Fiscal. That section in my opinion is merely an instruction to the Fiscal as to the manner in which he should proceed when levying execution. It is intended compulsory to the effect that the writ would become invalid if not executed within forty eight hours of delivery to the Fiscal."

Koch, J. in *Hadjiar et al v. Kuddoos et al* (supra) accepted this dictum of Shaw, J. but held that although the time limit was not compulsory, the necessity for the demand itself goes to the root of the interests of the judgment-debtor. I find some difficulty in following this distinction.

Again, in a later case *Saibo v. Mohamadu* † Abrahams, C.J. held that the case decided by Koch, J. was "no authority for saying that the seizure was invalid when no demand was made, if the defendant was aware of the seizure.....The defendant cannot claim the benefit of section 226, when he is not injured by mere non-compliance with it."

Under section 226, there can be no doubt that a duty is placed on the Fiscal to repair to the dwelling house or place of residence of the debtor. If the debtor is present the Fiscal has to make demand, but if the debtor is absent no further duty is imposed on the Fiscal in this connection.

If the Fiscal fails in the performance of the duty imposed, I think it is equally clear, that is, open to the defendant to make an application to set aside the sale under section 344 of the Civil Procedure Code. I may add that I am of opinion, that mere proof of non-compliance with section 226 without more is not sufficient to enable the defendant to succeed.

In my opinion, however, it is not correct to say that where there has been a failure on the part of the Fiscal to comply with the duty imposed on him under section 226 of the Civil Procedure Code, the subsequent proceed-

* 4 C.W.R. 127 † (1937) 39 N.L.R. 522

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ings in execution are null and void for all purposes. No doubt under the section a peremptory direction is given to the Fiscal but no section of the Code invalidates all subsequent proceedings, where the Fiscal fails in his duty. In this connection there is an interesting judgment by Drieberg, A.J. in a criminal case where the accused was charged with resisting a Fiscal's officer in executing a writ of possession issued under a partition decree. In that case section 347 of the Civil Procedure Code was in question. That section provides, that where more than one year has elapsed between the date of the decree and the application for its execution, the Court shall cause the petition to be served on the judgment-debtor and it was argued that writ issued without such notice was void for want of jurisdiction, an illegal process, which the appellant was justified in resisting. But Drieberg, A.J. rejected this argument saying " notice is required in the interests of the parties against whom execution is sought, and the absence of notice makes the execution proceedings void as against them and not merely voidable, but I do not think they can be regarded as void against persons not parties to the action and who are not entitled to notice."

With deference I think myself that the use of the words ' void ' and ' voidable ' in this connection is misleading. It is possible that in a proceeding under section 344 of the Code, the Court may regard a failure to comply with the requirements of any section relating to execution as of such fundamental importance, that mere proof of that fact is sufficient to entitle a party to have all the proceedings set aside, and I think that where the word ' void ' is used it is used in this sense, and that the word ' voidable ' implies that it is incumbent on the party seeking to set aside the sale, to establish other matters in addition to the fact of non-compliance with any section relating to execution.

As regards parties to the action in which a decree is passed, it is the policy of the law, that all questions relating to the execution of the decree shall be determined by order of the Court executing the decree and not by separate action *vide* section 344 of the Code. Has the legislature reserved to persons not parties to the action the right to raise such questions in separate actions ? In my opinion it is not possible to come to such a conclusion. It is certainly the policy of the Code to provide a number of safeguards to the judgment-debtor, and he is the person who may be damnified by non-compliance with the terms of the various sections, and where the judgment-debtor does not or cannot claim a right to raise such questions, I do not think we should extend this right to third parties who are not parties to the action.

Several authorities on other sections relating to execution were cited before us and it is necessary to consider them in this connection. In *Keel and Others v. Asirwatham et al* * Soertsz, A.J. considered the effect of failure to comply with the terms of section 763, which provided that in the case of an application for execution of a decree which is appealed against the judgment-debtor shall be made respondent. It is to be noted that the question arose in an appeal from an order setting aside a sale in the action

*4 C.L.W. 128

in which execution issued. Soertsz, A.J. quoted Stroud's Judicial Dictionary in connection with the word 'shall' as follows—"Whenever a Statute declares that a thing shall be done, the natural and proper meaning is that a peremptory mandate is enjoined," and held that the failure to give notice vitiated the sale. The decision in this case was based partly on the case of *Omer v. Fernando et al* * which in its turn purports to follow the Privy Council decision in *Malkarjun v. Narhari and Another* † in which the meaning of the word 'nullity' was discussed.

Lord Hobhouse there said :

"Other decisions are cited in which proper notices have not been served after decree, but on examining them they all appear to be cases in which proceedings have been taken either under section 311 of the Code or by independent suit, within the year allowed for setting aside a sale. In such cases the necessity for distinguishing between irregularity and nullity does not arise, and general assertions of the invalidity of such sales, quite appropriate to the case in which and the purpose for which they are used, are only misleading when separated from their context and applied to a case in which the distinction between irregularity and nullity is the cardinal point.

"It is then necessary for the plaintiffs to set aside the sale in order to clear the ground for redemption of the mortgage. There can be no question that omission to serve notice on the legal representative is a serious irregularity, sufficient by itself to entitle the plaintiff to vacate the sale. But there may be defences to such a proceeding, and justice cannot be done unless those defences are examined by legal methods. It may be that the plaintiff could unite a suit to set aside with one to redeem, and that the defendant's anticipatory plea of misjoinder would if tried have been overruled. But that need not be dicussed, because their Lordships think it is beyond reasonable doubt that this is not a suit to set aside the sale."

I may add, however, that the question whether property sold after a vesting order had been made under the Insolvent Debtor's Act of 1848 without notice to the Official Assignee was good, has subsequently been decided by the Privy Council in *Raghunath Das v. Sundara Das.* § For reasons given, their Lordships decided that notice under Order 21 rule 22 was necessary, in order that the Court should obtain jurisdiction to sell the property. "In the first place the property having passed to the Official Assignee, it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which was done. In the third place the judgment-debtors had at the time of the sale no right, title or interest which could be sold or vested in the purchaser and consequently the respondents acquired no title to the property." The case in 1 L.R. 25 Bom.

* 16 N.L.R. 135 † 1 L.R. 25 Bom. 337 § 1 L.R. 42 Cal. 72

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was distinguished, as there a notice had been served on the wrong party, but the Court had held that in the same proceedings that it was the correct party.

A similar principle has been applied in India to the case where property attached is sold after the death of the judgment-debtor, *vide Rajogopala Aiyar v. Ramunugachariya.* * But it is clear that special considerations apply to that case. in particular the necessity of joining new parties on whom the title of the judgment-debtor has devolved by operation of law. It may be pointed out that the decision of the Privy Council does not rest on the ground merely of the failure to comply with the terms of the section but is based on the other considerations I have mentioned.

We have also been referred to the case of *Bastianpillai v. Anapillai* † where the right of a plaintiff whose title arose under a Fiscal's conveyance was successfully disputed, on the ground that what was sold by the Fiscal was not what had been seized by him. Bonser, C.J. followed the judgment in *Mahadeo Dubey v. Bhola Nath Dichit* § where it was held that a regularly perfected attachment is an essential preliminary to sales in execution of simple decrees for money and where there has been no such attachment any sale which may have taken place is not simply voidable but *de facto* void. It may be noted that the Indian decision was given in a proceeding for setting aside the sale and not in a separate action. But Bonser, C.J. rests his judgment on the fact that " the Fiscal is empowered to seize and sell the debtor's property, the Code prescribes what seizure means, and that he has no power to sell property that he has not seized, and that property as to which the provisions of the Code as to seizure have not been followed cannot be said to have been seized." In this case what was seized was the property itself and not the mortgage debt upon it which was subsequently sold.

I think, however, it is possible to distinguish this case from the present one. Bonser, C.J. appears to lay emphasis on section 255 of the Code, which may be regarded as limiting the power of the Fiscal to selling only property which he has seized, and it is possible to argue that the sale of property which has not been seized, is no sale under the Code, and that an act done by the Fiscal which the Code did not empower him to do, is a nullity. I do not think that the same argument is applicable to an omission on the part of the Fiscal to do something which the Code enjoins.

On a consideration of all these authorities, I am of opinion that the fact that no demand was made by the Fiscal under section 226 of the Code does not deprive the Court of jurisdiction and render the seizure and sale thereafter a nullity, and that it is not open to any person to seek to attack the seizure and sale on that ground in a separate action.

One other matter was argued before us, which was not referred to us viz. that the doctrine of relation back under section 289 of the Civil Procedure Code cannot have effect, where the judgment-debtor has between the date of the Fiscal's sale and the Fiscal's transfer been deprived of his title by a

* 1 L.R. 47 Mad. 288 † 5 N.L.R. 31 § 1 L.R. 5 All. 86

sale which is not a private alienation. In my opinion such an interpretation would render section 289 entirely nugatory and I agree with two decisions to the contrary viz. *Juan Appu v. Weerasena* * and *Aserappa v. Weeratunga et al* † decided by a Bench of three judges. I hold against the appellant on this point.

The appeal is dismissed with costs.

ABRAHAMS, C.J. I agree.
POYSER, J. I agree.
HEARNE, J. I agree.
NIHILL, J. I agree.

Appeal dismissed.

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* *Present:* MAARTENSZ, S.P.J. & HEARNE, J.

S. C. No. 84. 1938—*D. C. Kalutara No.* 19088

Decided on 4th August, 1938.

MAARTENSZ, ACTING S.P.J.

The land called Maharawilakumbura which is the subject of this action belonged to Mr. R. Jayawardene. He died in 1932 and the 2nd defendant was appointed administrator of his estate.

In execution of a writ issued in case No. 15805 of the District Court of Kalutara against the 2nd defendant the Fiscal seized the land on the 16th of December, 1932, and registered the seizure on the 19th.

The land was sold in execution on the 7th January, 1933, and purchased by the plaintiff who obtained Fiscal's Conveyance No. 10927 of the 12th January, 1934. In the meantime the administrator with the leave of Court had the land sold by public auction and it was bought by the 1st defendant. The 2nd defendant as administrator conveyed the property to the 1st defendant by deed No. 820 dated 7th April, 1933.

The defendant contended both in appeal and in the District Court that the sale by the Fiscal was null and void as the officer entrusted with the execution of the writ did not as provided by section 226 of the Civil Procedure Code require the judgment-debtor to pay the amount of the writ before proceeding to seize and sell the property.

The case of *Hadjiar et al v. Kuddoos et al* (1935) 37 N.L.R. 376, was cited in support of this contention. The learned District Judge was of opinion that the cases were distinguishable, as in the case cited, the application to set aside the sale was made, in the case in which writ issued, by the judgment-debtor and as the property was sold for far less than its real value. The District Judge also relied on the fact that the 2nd defendant admitted in the present case that he could not have paid the amount of the writ if a demand had been made.

I do not think the reasons given by the District Judge for not following the case cited are sound, as the failure of the Fiscal to demand payment of the writ was the sole ground upon which it was held that a sale thereafter is null and void.

I am, however, with due respect, unable to agree with that ruling. I think it goes too far. The failure to demand payment of the writ as required by section 226, in my judgment, would at least render the sale voidable at the instance of the judgment-debtor. As at present advised, I think he would also have to prove that he was in a position to pay the amount of the writ and that he was not aware that a sale of the property was about to take place.

The case of *Hadjiar et al v. Kuddoos et al* being a decision of a bench of two judges, this appeal should be referred to a fuller bench for decision.

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* 20 N.L.R. 30 † 14 N.L.R. 417

Present: POYSER, J. & HEARNE, J.

NATIONAL BANK vs THE COMMISSIONER OF INCOME TAX

Case stated by the Board of Review, Income Tax, under the provisions of section 74 of the Income Tax Ordinance, 1932, for the opinion of the Hon'ble the Supreme Court upon the application of the Commissioner of Income Tax (Appellant.)

S. C. No. 59 (I) 1938

Argued on 17th January, 1939.

Decided on 24th January, 1939.

Income Tax—Interest payable by a resident in Ceylon to a bank in England in respect of a debt contracted in England—Is the bank liable to be assessed in respect of this income on the ground that it is income arising in or derived from Ceylon—Section 5 of the Income Tax Ordinance.

The Assessee is The National Bank of India, Limited, London, for which its Ceylon branch acts as agent. The bank was assessed for Income Tax in respect of interest payable by a Mr. A who had obtained an overdraft from the bank in England when resident there. Thereafter, Mr. A came to reside in Ceylon. It was a term of the contract that both interest and principal was payable to the bank in England. The rate of interest had been fixed with reference to the Bank of England rate of discount.

The Commissioner of Income Tax claimed that the interest payable by Mr. A during his residence in Ceylon was income arising in or derived from Ceylon.

Held : That the interest payable by Mr. A while resident in Ceylon, was not income arising in or derived from Ceylon.

CASE STATED

S. C. 59 (I)/1938

1. The National Bank of India, Limited, London, was assessed in the name of its agent The National Bank of India, Limited, Colombo, for the year of assessment 1937/38, in respect of a sum of Rs. 13,102/– as being income arising in or derived from Ceylon by The National Bank of India, Limited, London. The tax payable has been assessed at Rs. 1,310/20.

2. The income consists of interest payable in respect of the year of assessment, by a client who has been " resident " in Ceylon, within the meaning of section 33 of the Income Tax Ordinance, as from 18th April, 1936, but who was non-resident for several years prior to that. The interest accrued upon two sterling overdrafts granted to the client in London while he was staying in England and was " non-resident " in Ceylon. One of these liabilities was a loan on the security of shares in companies registered in Ceylon, and owned by borrower himself. On this loan, the interest taxable for the year of assessment amounts to Rs. 1,147/–. The other liability was also a sterling overdraft against sterling securities of the particular constituent's brother. The taxable interest on that amounted to Rs. 11,955/–. The interest has not been paid, but in the appellant Company's books it has been treated as received and has been added to capital in accordance with usual banking practice.

3. Upon these facts, the Assessor assessed The National Bank of India, Limited, London, as having a taxable income arising in or derived from Ceylon equal to the aggregate of the two sums of Rs. 1,147/– and Rs. 11,955/– namely Rs. 13,102/–.

4. The Bank appealed against the Assessment to the Commissioner under the provisions of section 69 of the Ordinance. The Commissioner confirmed the Assessment. A copy of the Appeal Minute and of the Commissioner's reasons for his decision is annexed to this Case Stated and is marked "A."

5. Being dissatisfied with the Commissioner's decision, the Bank appealed to the Board of Review under the provisions of section 71 of the Ordinance upon the grounds set forth in the copy of the Grounds of Appeal annexed hereto marked "B."

6. The case was argued before the Board on the 1st February and the 1st March, 1938, and, on the adjourned date, the following documents were produced on behalf of the Bank :

(*a*) Letter to National Bank of India, Ltd., London, dated 9th November, 1928, from the constituent's brother marked "X1."

(*b*) Letter to the National Bank of India, Ltd., London, dated 15th April, 1929, from the constituent himself marked "X2."

(*c*) Letter to the National Bank of India, Ltd., London, dated 31st December, 1929, from the constituent's brother marked "X3."

(*d*) Letter to the National Bank of India, Ltd., London, dated 16th February, 1938, from Messrs. Callingham Brown & Co., marked "X4."

(*e*) Letter from the General Manager, National Bank of India, Ltd., London, to the Manager of the Colombo Branch, dated 18th February, 1938, marked "X5."

No earlier correspondence in connection with the actual arrangements for the two overdrafts in question was produced as the Bank's files of general correspondence prior to 1932 had been destroyed. But the facts are that the loans or overdrafts in question were granted to the constituent when he was in England, in pursuance of an arrangement made there, at a rate of interest which was fixed with reference to the Bank of England rate of discount. Although the Bank was unable to place definite evidence of any specific agreement by the constituent to that effect, the Board was asked to hold that it must have been one of the implied, if not expressed, terms of the contract that both principal and interest should be payable to the Bank in sterling in England. The Board was of the opinion that such an inference was a reasonable one in the circumstances and it, therefore, held that such a term must have been necessarily contemplated by the parties and implied in the contracts when the contracts for the loans were made.

7. It was contended on behalf of the Bank that the source of the income, upon the facts, was London and that the residence of the debtor in Ceylon could not affect the Bank. The Assessor contended that this was a simple contract debt and that according to law such a debt is locally situated wherever the debtor may be resident for the time being and that, as the constituent was resident in Ceylon within the meaning of the Income Tax Ordinance, the debt must be deemed to be situated in Ceylon and, therefore, the obligation to pay interest on that debt attached or arose in Ceylon, and that therefore, the income arose in Ceylon and was taxable in Ceylon.

8. After hearing, the Board decided to allow the appeal, being of the view that the interest payable on the two loans was not income of The National Bank of India, Limited, London, "arising in or derived from Ceylon." A copy of the decision of the Board is annexed hereto marked "C."

9. The Commissioner, however, has applied to the Board of Review to state a case for the opinion of The Hon'ble the Supreme Court on a question of law. The question upon which the opinion of the Court is sought is whether the two sums of Rs. 1,147/- and Rs. 11,955/- are taxable in Ceylon as income or profits "arising in or derived from Ceylon" of the National Bank of India, Ltd., London, which is admittedly a 'non-resident.' We have accordingly stated this case for the opinion of the Supreme Court.

(*Sgd.*) Members of the Board of Review.

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(C) DECISION OF THE BOARD

This appeal was partly heard on the first day of February, 1938, and was adjourned for the 1st March, 1938, to enable the appellant bank to place before the Board the documents connected with the loan and the overdraft, the interest on which, it is claimed by the Assessor, is liable to Income Tax in Ceylon. Certain correspondence has been produced at the hearing and further arguments have been submitted on both sides.

The main contention has been whether the interest which was payable by the constituent of the Bank, who was resident in Ceylon during the material period, was income of the Bank " arising in or derived from Ceylon " within section 5 of the Ordinance.

The debts were incurred in England by the constituent when he was in England, upon security given in England, at a rate of interest which was fixed with reference to the Bank of England rate of discount, both principal and interest being payable (in the necessary contemplation of the parties at the time the arrangements for the loan and the overdraft respectively were made) to the Bank in sterling in England.

In these circumstances, the two debts are properly recoverable and payment can be enforced in England, where also the securities would be realised, even though the debtor may have been resident here for the purposes of and within the contemplation of the Income Tax Ordinance, during the material period.

The Board is therefore of the view that the interest payable on these two debts by the constituent to the Bank is not income of the Bank " arising in or derived from Ceylon " so as to be taxable against the bank in Ceylon.

(*Sgd.*) Rosslyn Koch,
Chairman.

Colombo, 8th March, 1938.

J. W. R. Illangakoon, K.C., Attorney-General, with *S. J. C. Schokman Crown Counsel*, for Commissioner of Income Tax (Appellant.)

H. V. Perera, K.C., with *E. F. N. Gratiaen* and *C. C. Rasaratnam*, for respondent.

POYSER, J.

The material facts in this case are as follows. A person, referred to throughout the proceedings as Mr. A, became a resident in Ceylon, within the meaning of section 33 of the Income Tax Ordinance, in April, 1936. Prior to that date, Mr. A resided in England and had, about the year 1928, obtained overdrafts from The National Bank of India, Ltd.. London. Such overdrafts were secured by the deposit of shares in companies registered in Ceylon and by sterling securities, the property of Mr. A's brother.

The Board of Review found that the overdrafts in question were granted to Mr. A, when he was resident in England, in pursuance of a contract made there, at a rate of interest fixed with reference to the Bank of England rate of discount, and that it was one of the terms of the contract, it implied if not expressed, that both principal and interest should be payable to the bank in England.

The Board of Review held, reversing the Assessor and The Commissioner of Income Tax, that the interest payable on these overdrafts is not income of The National Bank of India, Ltd., London, " arising in or derived from Ceylon."

The Commissioner of Income Tax appeals from that finding.

The Attorney-General argued that Mr. A's overdraft was a simple contract debt; that in law a debt was situated wherever the debtor was resident for the time being; and that, as Mr. A resided in Ceylon from April, 1936, the obligation to pay interest on the debt arose in Ceylon from that date and that such interest was liable to Ceylon Income Tax.

The case he principally relied on was *English, Scottish and Australian Bank, Ltd. v. Commissioners of Inland Revenue* (1932, A.C. 238.)

In that case, it was held that an agreement for the sale of (amongst other things) simple contract debts, owed by debtors resident out of the United Kingdom, is exempt from *ad valorem* stamp duty in respect of such debts upon the ground that they are " property locally situate out of the United Kingdom " within the meaning of the exception in section 59 subsection 1 of the Stamp Act 1891.

In Lord Buckmaster's judgment, the following passages occur:

(Page 245) " But debts do, in one form or another, represent property of very considerable value in the modern world, and it appears to me it is desirable that they should possess a locality, even if they are invested with it by means of a legal fiction. Nor can I see why, when that locality has been attributed for several centuries for purposes of jurisdiction in the administration of estates, it should be regarded as impossible when dealing with the Stamp Act.

" It is, in my opinion, a fair assumption that the Statute was passed with knowledge of the well established law relating to probate, and the phrases then used would be perfectly proper to cover debts where the debtors were out of the United Kingdom."

(Page 246) " If, however, once it be assumed that a debt must have a local situation, as I think it must, it can only be where the debtor or creditor resides, and the fact that it has for other and similar purposes been assumed to be determined by the residence of the debtor and not the creditor is a sufficient reason for holding that that is its situation for the purpose of the Statute."

If the argument of the Attorney-General succeeds, the consequences will be far-reaching.

No doubt, many Ceylon residents incur debts in the United Kingdom, not only overdrafts but debts for goods supplied; and if the payment of such debts or the interest on them renders the payees liable to Ceylon Income Tax, it is difficult to foresee what the consequences would be. In the great majority of cases it would, no doubt, be impracticable to collect such tax. The present case is exceptional in that The National Bank of India have a branch in Colombo who are agents for the Bank's office in London.

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There is a further difficulty in regard to upholding the argument of the Attorney-General. The Commissioner of Income Tax has assessed the Bank on the interest due on the overdrafts without any deductions. He has treated such overdrafts as an investment on a property situated in Ceylon when it is common ground that the interest payable to a Bank on overdrafts is not necessarily nett income; all the expenses incurred by the Bank in their business, bad debts, etc. have to be taken into account in assessing their income.

When the attention of the Attorney-General was drawn to this aspect of the case, he argued that it was no hardship on the Bank as they would get credit for the amount of Ceylon Income Tax they paid from the Inland Revenue.

I have very considerable doubts on that point, but I think the fallacy of the Attorney-General's argument lies in treating an overdraft incurred in England by a person at the time resident in England, as something in the nature of an investment in Ceylon when the debtor became resident in Ceylon.

I do not think legal fictions can be applied to the Ceylon Income Tax Ordinance and, in that latter, I can find no provisions under which this assessment can be upheld. In fact, the reverse appears to be indicated, for in section 44 which deals with interest, etc. payable to persons out of Ceylon, the following occurs :

> Section 44 (1) (iii) " this section shall not apply to any interest paid out of income arising in Ceylon, or to interest on any loan or advance made by a banker."

In this case, it was not suggested that the interest on the overdrafts was remitted from Ceylon ; in fact, interest was not paid at all but added to the overdrafts, and I agree with the Board that such interest cannot be said " to arise in or be derived from Ceylon."

The decision of the Board is confirmed and the Bank is entitled to the costs of the proceedings in the Supreme Court.

HEARNE, J.

I agree.

Decision of the Board confirmed.

Present : HEARNE, J.

DON SIMON PETER & ANOTHER vs JAMES FERNANDO & TWO OTHERS

S. C. No. 201—*C. R. Negombo No.* 43338.

Argued on 6th February, 1939.

Decided on 9th February, 1939.

Servitude—Right of footpath through several lands to well—Destruction of the well—Use of new well in one of the intervening lands—Same footpath used with slight diversion—Use of the new well for less than ten years—Is the right of way affected by the discontinuance of the old well.

The plaintiff established that he had acquired a prescriptive right to a footpath F G I leading through several intervening lands to a well (I). Seven years prior to the institution of this action this well crashed and the plaintiff commenced to use a well H in one of the intervening lands, the access to which lay along the same path up to the point G, and from there along a slight diversion G H. The owners of the lands through which the portion F G runs objected to the use of the path by the plaintiff. At the trial the learned Commissioner held that, as the plaintiff had not prescribed to the right of way F H G, his access to the new well along F G was barred.

The plaintiff appealed.

Held : (i) That with the abandonment of the right of drawing water from the well I, the accessory right of footpath to the said well was destroyed.

(ii) That the original servitude of *aquae haustus* in respect of the well at I is not the same as drawing water from well H.

(iii) That as ten years had not lapsed from the date of commencement of the use of well H by plaintiff, there is no servitude of way over F G, which subserves or is accessory to any existing servitude of drawing water at H.

N. E. Weerasooriya, K.C., with *H. A. Wijemanne* and *Pieris* for plaintiffs-appellants.

N. Nadarajah with *S. Mahadewa*, for 1st defendant-respondent.

C. E. S. Perera for 3rd defendant-respondent.

HEARNE, J.

The plaintiff established that for over a period of 10 years he had used a footpath which led from his land, (1) in the plan, through the land of the 3rd defendant, (4) in the plan, again through the land of the 1st defendant, (2) in the plan, and finally through the land of the 2nd defendant, (3) in the plan, to the land of Anthony Silva in which there was a well, I in the plan, from which he drew water. He used the footpath FGI.

Seven years ago the well I crashed, and after an interval of about a month, the plaintiff started to use and continued to use up to the time the

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action was filed, a well H on the land of the 2nd defendant. He used the path from F to G and from the latter point, by a slight diversion, the path GH.

The 2nd defendant raised no objection to the use of so much of the path as is represented by GH, or to the drawing of water at H, but as it was held by the Commissioner that the plaintiff "had not prescribed to the right of way FGH" his access to the well along the route FG is barred. He has now appealed.

It was argued on behalf of the plaintiff that the servitude of drawing water *aquae haustus* at I, gave him the right to use the path FG, as part of the path FGI, and that although the use of the well at I had been discontinued the right of way over FG was unaffected by such discontinuance.

If this argument were sound it would follow that even if there had been no well in (3) from which the plaintiff could have drawn water either by agreement or by claim of right, he would still be entitled to use FG without let or hindrance.

This offends against first principles. Servitudes are indivisible in their nature. If two distinct principal servitudes are due from the same tenement, the abandonment of one does not destroy the other: but where there are two servitudes, the one principal and the other accessory which are due at the same time and the principal is abandoned, the accessory is also regarded as abandoned. *Voet* 8: 6: 5.

It was, however, alternatively argued that the servitude had not been abandoned and that it had been merely diverted. I am unable to agree with this. The original servitude of *aquae haustus* in respect of the well at I is not the same as drawing water from H which, even if based on a claim of right, has not hardened into a servitude. There is no servitude of way over FG which subserves or is accessory to any existing servitude of drawing water at H. I am sorry for the plaintiff but I think the law is against him.

I dismiss the appeal with costs.

Appeal dismissed.

Present : ABRAHAMS, C.J.

DOLE, (Inspector of Police) vs ROMANIS APPU

S. C. No. 821—*P. C. Kegalle No.* 36875.

Argued & Decided on 7th February, 1939.

Corroboration—Charge of incest—Is corroboration of the testimony of a partner in incest necessary for conviction.

Held : (i) That a partner in incest is an accomplice and it is dangerous to act upon the uncorroborated evidence of such person.

(ii) That corroboration must be evidence from an independent source, and not a self-serving source.

Per ABRAHAMS, C.J.— (*a*) "It is a principle that it is dangerous to act upon the uncorroborated evidence of an accomplice, which clearly means that although a conviction is not necessarily bad because it is founded on the uncorroborated evidence of an accomplice, there must be the most potent reasons for dispensing with corroboration."

(*b*) "In my view, even if intercourse was had with this girl without her consent, corroboration is none the less desirable because in rape cases it is a principle that it is dangerous to convict on the uncorroborated testimony of the alleged victim."

Cyril E. S. Perera, with *Mackenzie Pereira* for the accused-appellant.
D. Jansze, Crown Counsel for respondent.

ABRAHAMS, C.J.

The appellant was convicted of incest with his own daughter who was at the time 15 years of age. As a result of this intimacy the girl gave birth to a child. The learned Magistrate sentenced the appellant to one year's rigorous imprisonment.

The learned Magistrate said that " the girl is still quite a child and obviously was speaking the truth and I accept her evidence that the accused committed incest on her. It is most improbable that a girl of this age would falsely charge a father, and I have no doubt that this is not a false charge." Now, there is no objection to a Magistrate being impressed with the truthfulness of a partner in incest. Such a person is an accomplice and before proceeding even to consider the question of corroboration, when the evidence of the girl is necessary to a conviction, it is obvious that the preliminary question is whether she appears to be a witness of truth. But that does not dispose of the question of corroboration. The learned Magistrate said that he did not think any corroboration is necessary but it is always helpful. That is not a correct statement of the practice in these courts. It is a principle that it is dangerous to act upon the uncorroborated evidence of an accomplice, which clearly means that although a conviction is not necessarily bad because it is founded on the uncorroborated evidence of an an accomplice, there must be the most potent reasons for dispensing with

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corroboration. Those reasons are not given in this case, nor is there any reason to suppose that they existed. In my view, even if intercourse was had with this girl without her consent, corroboration is none the less desirable, because in rape cases, it is a principle, that it is dangerous to convict on the uncorroborated testimony of the alleged victim.

The Magistrate, however, says that there was some corroboration of the girl's evidence, for when she was taken to hospital for her confinement, she told the doctor that her father was responsible for her condition. That, of course, is not corroboration. It is merely telling the doctor what she told the court, otherwise if she told twenty people on twenty different occasions, that would amount to twenty corroborations. Corroboration must be evidence from an independent source, not a self-serving source.

Crown counsel says very fairly that he is unable to support the conviction. I therefore allow the appeal and acquit the appellant.

Appeal allowed.

Present : ABRAHAMS, C.J.

PONNAMBALAM & ANOTHER vs MURUGESU & ANOTHER

S. C. No. 200—*C. R. Kayts No.* 2901.

Argued & Decided on 26th January, 1939.

Preliminary objection—Court of Requests—Appeal—Action for an order to erect masonary blocks in lieu of the stones buried so as to constitute boundary-marks and to repair dam at joint expense—Alternative claim for damages—Is the action one concerning an interest in land—Section 13 *of Court of Requests Amendment Ordinance No.* 12 *of* 1895*—Leave to appeal not obtained.*

The plaintiffs instituted this action in the Court of Requests for an order that the defendants be ordered to erect masonary blocks in lieu of the stones buried so as to constitute boundary-marks between two contiguous lands belonging to the parties, and to repair the dam at the joint expense of the plaintiffs and defendants and in default that plaintiffs be permitted to do so at their own expense and to recover a half share of the expenses from the defendants, and further that the defendants be ordered to pay damage Rs. 49/- to the plaintiffs.

The Commissioner dismissed the action and the plaintiff appealed. A preliminary objection was taken by counsel for respondents on the ground that leave to appeal had not been obtained.

Held : That as no interest in land is directly involved and no title to land is challenged, the action was one of pure demand and damage under section 13 of the Court of Requests Amendment Ordinance No. 12 of 1895, and therefore, leave to appeal should have been obtained.

S. Nadesan with *T. K. Curtis* for plaintiffs-appellants.

N. Nadarajah with *H. W. Thambiah* for defendants-respondents.

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In this appeal a preliminary objection is taken that the appeal is purely on questions of fact, which is not denied by the appellants' Counsel, and as it concerns an action for damage and demand under section 13 of the Court of Requests Amendment Ordinance No. 12 of 1895 an appeal only lay by leave and that leave has not been granted, in fact was not requested either in the lower court or here. The plaintiffs and the defendants own contiguous portions of land. To be brief, the prayer of the plaintiffs in the lower court was that the defendants be ordered to erect masonary blocks in lieu of the stones buried so as to constitute boundary-marks between the said two lands and to repair the dam at the joint expense of both the plaintiffs and the defendants and in default that the plaintiffs be ordered, or to use a better term, be permitted to do so at their own expense and to recover a half share of the expenses from the defendants, and further, that the defendants be ordered to pay damage Rs. 49/– to the plaintiffs. It was contended that the first part of the prayer concerns itself with a demand within the meaning of section 13 of the above mentioned Ordinance and that the second part of the prayer concerns damages.

It has been argued that this is an action concerning an interest in land and therefore escapes the disabling provisions of section 13 above-mentioned. In a sense, of course, it is an action concerning an interest in land, because but for the fact that the plaintiffs and defendants are land-owners, that is to say, have an interest in the lands they own, the action would not have been brought. But as no interest in land is directly involved and no title to land is challenged, it seems to me that the action was one of pure demand and of damage, demand in that the defendants were required to do something, which of course, they could not be compelled to do, or in lieu of that to pay a sum of money which, of course, they could be compelled to pay.

A certain number of authorities were cited to me by respondents' counsel when he took this preliminary objection, but I do not think it is necessary to mention these because I think the case is perfectly clear.

The appeal then is dismissed with costs on the preliminary objection.

Appeal dismissed.

Present : ABRAHAMS, C.J.

SIVASAMPU vs CAROLIS APPU

S. C. No. 608—*P. C. Dandagamuwa No.* 3652.

Argued on 24th January, 1939.

Decided on 27th January, 1939.

Interpretation—Prevention of Crimes Ordinance No. 2 of 1926—*Rules made under section* 4 (1)—*Meaning of the word* ' *move* ' *in Rule No.* 38.

Held : That the word ' move ' in rule No. 38 of the rules made on January 8th, 1929 under section 4 (i) of the Prevention of Crimes Ordinance of 1926, means change of one's position whether for a permanent or an indefinite period and does not mean change of one's residence.

D. Jansze, Crown Counsel, for complainant-appellant.

No appearance for accused-respondent.

ABRAHAMS, C.J.

This is an appeal under section 337 of the Criminal Procedure Code against the refusal of the Police Magistrate of Dandagamuwa to issue process against Ranasinghe Mudiyanselage Carolis Appu to answer the charge that he, being a person subject to police supervision, and as such bound to report himself to the Inspector of Police, Kuliyapitiya, within whose division, he resided, whenever he left his division, failed to report his departure to Unaliya in Narammala Division, in breach of rule 38 of the rules made under section 4 (1) of the Prevention of Crimes Ordinance No. 2 of 1926. The accused is a convict and has not appeared, nor is he represented, but as this question is entirely one of law there is no reason why he should be brought before this Court.

Section 8 (1) of the above quoted Ordinance provides for police supervision and section 4 (1) (*a*) enables rules to be made regulating the supervision of persons subject to police supervision under the above quoted section. The relevant rule under which these proceedings were sought to be taken, is rule 38 of the rules made on January 8th 1929. The relevant portion runs as follows :—

> " Whenever he (the person sentenced to police supervision) shall change his residence from one division to another or move for any period whatsoever beyond the jurisdiction of the officer to whom he is liable to report himself within such first mentioned division, he shall at least 48 hours before changing his residence or so moving, personally notify such change or such moving to the officer in charge of the Police Station, or in his absence to the officer acting for him or where there is no Police Station, to the Chief Headman of the division which he is leaving, and shall within 48 hours of his arrival at his new residence or the place to which he has so moved report himself to the officer in charge of the Police

Station or in his absence to the officer acting for him or where there is no Police Station to the Chief Headman of the division to which he has changed his residence or so moved."

There is a further provision requiring him whenever he changes his residence or moves for any period whatsoever from one district to another, at least 48 hours before changing his residence or so moving, to personally notify such change or such moving to the Superintendent or Assistant Superintendent of Police of the district which he is leaving, and shall report himself within 48 hours of his arrival, and in the case of a change of residence thereafter once a month to the Police.

The accused in this case had to report himself at Kuliyapitiya Police Station on the 2nd of every month. He reported himself on the 2nd July, 1938, and again on the 2nd of August 1938. On the 6th of July, 1938, he was caught at Unaliya which is outside that police area.

The learned Magistrate does not agree that the accused was required by rule 38 to notify the Kuliyapitiya Police Station before leaving the area. He contends that the word ' move ' does not have the connotation of the word ' leave. ' He says the fact that it is employed in the rule after the expression ' change of residence ', gives it the same meaning as the words ' change of residence ' because as it is a general expression following after a specific expression it should on the *ejusdem generis* rule have a limiting meaning. He also quotes his dictionary which informs him that one of the meanings of the word ' move ' in its intransitive sense is ' change one's residence.'

Now, before considering the application of the *ejusdem generis* rule in the construction of statutes, one has to consider whether there is anything to interpret, in other words, is there any reason why the plain, ordinary meaning of the word ' move, ' that is to say, change one's position, whether for a permanent or an indefinite period, should not be accepted. If in the construction of any particular word the employment of it in its plain ordinary meaning violates one of the rules of construction, and when it cannot be given its plain ordinary meaning because that would create an ambiguity, then no doubt it is necessary to give it a suitable meaning, and in that event, of course, the *ejusdem generis* principle of construction can be followed. But I can see no reason why the plain ordinary meaning which contrasts actual change of position, no matter for what period, with change of residence, which is movement in fact for a definite purpose, should not be accepted. I do not know what the Magistrate's notion of the genus which includes both change of residence and movement can be, but it would appear to me that ' to move ' is the genus of which ' change of residence ' is the species. To change one's residence would be to move from one place to another for the purpose of residing, that is to say, taking up one's habitation. If ' to move ' were to be used in the sense of changing one's residence it would seem hardly necessary that the rule should be drafted in the way that it is. But manifestly, on a reading of the rule itself they are intended to be

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contrasted, because it appears, that on a change of residence notification is to be made once a month, whereas in the case of moving for any period, the person concerned must merely report himself within 48 hours of his arrival.

The Magistrate seeks to interpret the word 'move' as equivalent to a 'change of residence,' temporarily or permanently by a *reductio ad absurdum*. For instance if a man under police supervision were walking along the boundary and were driven over the limits of that area by *force majeure* he would have committed that offence. The simple answer to that is that it is very difficult to see a police officer placing such an absurd charge before a Magistrate or a Magistrate taking such a charge seriously. The obvious intention of the rule is that persons of criminal tendencies who are placed under police supervision should not deliberately move outside the area where that supervision is exercised, without notifying the police of both areas, otherwise crime is facilitated. It does not require residence to enable the commission of crime.

The appeal is allowed and the proceedings must continue.

Appeal allowed.

Present: ABRAHAMS, C.J.

SIRIWARDENE vs MEERA SAIBO, PANA NAGOOR AND OTHERS

S. C. No. 767—Objection Inquiry, M.C. Kandy No. 9.

Argued & Decided on 20th January, 1939.

Stamping of appeal—Objection taken to 285 voters' names on the register of Municipal voters—Dismissal of objection—Appeal against order of dismissal—One appeal petition in respect of all the voters—Appeal petition stamped with a stamp to the value of Rs. 5/—Section 24 (2) of the Colombo Municipal Council (Constitution) Ordinance—What should be the proper duty on the petition?

Held : (i) That the petition of appeal had not been correctly stamped.

(ii) That there should have been paid a stamp duty of Rs. 5/– in respect of each respondent to whom objection had been taken.

N. Nadarajah, with *Pandita Gunawardene* for appellant.

H. V. Perera, K.C., with *Cyril E. S. Perera*, for respondent.

ABRAHAMS, C.J.

In this case I am afraid that owing to the optimism of a Proctor and the mis-interpretation of a Municipal Commissioner the petition of appeal involving the status of certain persons in Kandy who claim to have a vote for the Municipal elections must be dismissed. There was an objection taken to their presence on the voters' list and the objector has now appealed

against the order of the learned Municipal Magistrate of Kandy who dismissed his application on a preliminary objection made by the respondents, or rather the respondents' proctor, as to the objector's status. Unfortunately the objector has appealed in one petition of appeal against 285 persons and in doing so he has affixed only one Rs. 5/- stamp. Section 24 (2) of the Colombo Municipal Council (Constitution) Ordinance No. 60 of 1935, which has been made applicable to Kandy, says that every such appeal shall be made by means of a petition, which shall bear uncancelled stamps to the value of five rupees, and shall be filed with the Commissioner, who shall on receipt thereof forward the same forthwith to the Registrar of the Supreme Court, together with the record relating thereto.

It has been argued that because the point taken by the objector referred to the 285 respondents and because it was dealt with in one order by the learned Municipal Magistrate, that therefore there need be no more than one petition of appeal and the appellant is entitled to have that appeal heard by virtue of the Rs. 5/- stamp which he had placed upon the petition. But I am afraid I cannot accede to that argument. As there are 285 respondents there are in fact 285 petitions of appeal. The fact of placing all the names on the document makes no difference any more than would the fact of hearing the case in respect of one person, and therefore giving a decision which shall be binding on the others make it nevertheless 285 decisions, from a common sense point of view. Although the respondents are all affected by one point and one point only, each person is in fact independent of the others. This is a matter which affects the revenue, and if the appellant desires a decision against 285 persons he must pay in respect of each person.

It has been argued that because sub-section 5 of section 24 of the above named ordinance states that every such appeal shall be heard and determined by a single judge of the Supreme Court, and I am therefore bound to hear the appeal despite the error in stamping. I do not think that I am so bound. The appeal, of course, ought not to have been forwarded by the Commissioner, but that does not correct the error of the appellant, and because the Commissioner was wrong in letting the appeal go forward, that does not confer a right upon the appellant to have it heard.

Nor can the appellant ask me to decide the appeal in respect of one of the 285 respondents, withdrawing it in respect of the remaining 284. He has to all intents and purposes brought his appeal against all these people and he cannot choose one man either at random or out of fear or affection and let the others go free.

It is, of course, very unfortunate that this appeal must be dismissed on this preliminary objection because the time has long since expired within which an appeal could be preferred and there is no power in me to extend the time.

The appeal must be dismissed with costs.

Appeal dismissed.

Present : POYSER, S.P.J. & HEARNE, J.

DON SALMON APPUHAMY vs ALLIS APPUHAMY & FOUR OTHERS

S. C. No. 125—*D. C.* (*Inty.*) *Kalutara No.* 8310.

Argued & Decided on 20th January, 1939.

Action under summary procedure—Chapter LIII of the Civil Procedure Code—Leave allowed to file answer on giving security—Date on which security to be tendered not specified—Tender of security after 21 *days—Is the tender too late*

On the 9th of May, 1938, the defendants were allowed to file answer on giving security in a sum of Rs. 700/–, but no date was specified within which the security was to be tendered. On the 26th May, plaintiff moved *ex parte* that judgment be entered on the ground that two weeks had elapsed since the date of the order. The learned judge allowed the motion and entered judgment for plaintiff. On the 30th May, security was tendered, but the learned judge refused to set aside the decree on the ground that the tender was too late. The defendants appealed.

Held : That as no time was specified in the order of the 9th May, 1938, within which the security was to be tendered, the appellants were entitled to tender it within a reasonable time and that a period of 21 days was not an unreasonable one under the circumstances.

Per POYSER, J.—"I would only add that in all orders such as that of the 9th May, it is highly desirable that a time should be specified in the order."

U. S. Jayasundera for defendants-appellants.

J. R. Jayawardene for plaintiff-respondent.

POYSER, S.P.J.

This was an action on a promissory note brought by the plaintiff against the heirs of one Johannes Perera. The 1st defendant did not contest the plaintiff's claim. The 2nd defendant for himself, and as guardian *ad litem* of the other defendants, contested the claim and moved that leave be granted to file answer without giving security. The motion was allowed on the 9th May, 1938, to the extent that answer could be filed on the giving of security in a sum of Rs. 700/–. It is to be noted, that no date was specified in the judge's order within which such security was to be tendered, and there is no provision in Chapter LIII of the Civil Procedure Code, laying down, that such security should be tendered within a particular period.

The plaintiff, on the 26th May, moved *ex parte*, that judgment be entered, as two weeks had elapsed since the order allowing answer to be filed was made. The learned Judge allowed the motion and entered judgment for the plaintiff as prayed for.

On the 30th May, the 2nd defendant tendered security, but the learned Judge held that such tender was too late and did not, under the provisions of section 707 of the Civil Procedure Code, set aside the decree that he had entered.

I consider, as no time was specified in the order of the 9th May, within which the security was to be tendered, that this appeal must be allowed. In the absence of any direction as to time, the security should have been accepted if it was tendered within a reasonable time, and having regard to the nature of the security tendered, I do not consider that a period of 21 days was an unreasonable time. I would only add that in all orders such as that of the 9th May, it is highly desirable that a time should be specified in the order.

This appeal is therefore allowed, and the order of the 26th May, is set aside. The case will go back to the District Court in order that the 2nd defendant may file answer and contest the case, provided that the District Judge considers that the security tendered is adequate.

The costs of this appeal will abide the final result of this case.

HEARNE, J.

I agree.

Appeal allowed.

Present : SOERTSZ, J. & NIHILL, J.

VELUPILLAI vs PARAMASIVAMPILLAI

S. C. No. 131—*D. C.* (*Inty.*) *Colombo No.* 5052.

Argued on 2nd February, 1939.

Decided on 7th February, 1939.

Insolvency—Is a woman exempt from arrest under the provisions of the Insolvency Ordinance—Section 298 *of the Civil Procedure. Code.*

Held : (i) That a woman is not exempt from arrest under the provisions of the Insolvency Ordinance.

(ii) That the exemption created by section 298 of the Civil Procedure Code applies only to cases arising under that Code.

N. Nadarajah for appellant.

No appearance for respondent.

SOERTSZ, J.

This is an appeal from an order of the District Judge, dated the 6th of September, 1938, dismissing an application made by a creditor for a certificate in Form R and for a warrant of arrest to be executed against a woman

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who, in the course of Insolvency proceedings taken against her, was given a certificate of conformity in the 3rd class, subject to the condition that it should be in abeyance for six months.

The order granting this qualified certificate was made on the 30th of June, 1938. The period of suspension has now elapsed, and the point involved in this appeal, namely whether a woman is exempt from arrest under the provisions of the Insolvency Ordinance, is really academic so far as this case is concerned, for although in the petition of appeal there is a prayer that an "order be made that the period of suspension do begin to run for six months from the date the record is received back in the District Court," I understood counsel for the appellant not to press that matter. He desired, however, that we should give our ruling on the point, and I think he is entitled to that.

In my opinion, the answer to the point raised is free from doubt. It is quite clear that the exemption created by section 298 of the Civil Procedure Code applies only to cases arising under that Code. Indeed, section 298 says so in precise terms. I am unable to follow the learned Judge when he says "I do not think that so much importance should be attached to the words under this Code." I should have thought that legislators choose their words deliberately and with care. But, whether that is so or not, it is an elementary rule of legal interpretation that every word in an enactment must be given effect whenever possible.

I do not think the learned Judge has taken a correct view of the position of a woman in the matter of liability for arrest under the Roman Dutch Law, but it is not necessary to go into that question for, whatever her position under the Law, she is liable to arrest under the Insolvency Ordinance because that Ordinance applies with exactly the same force to all persons, be they men or women, coming or brought within its provisions.

I would, therefore, hold that the order of the District Judge was wrong. He should have allowed the application. But, for the reasons already given by me, I do not at this stage allow the application. The appellant must, however, be relieved from the order for costs made against him. He is, I think, entitled to the costs of the inquiry and of this appeal. I make order accordingly.

NIHILL, J.

I agree.

Appeal allowed.

Present : MOSELEY, J. & WIJEYEWARDENE, J.

FONSEKA vs FONSEKA ET AL

S. C. No. 148—*D. C. Colombo* 5440.

Argued on 18th November, 1938.

Decided on 14th December, 1938.

Legacy—Liability of executors to pay interest on legacy money When does interest become payable on a legacy.

The plaintiff sued the executors *inter alia* for interest on a legacy which the executors failed to pay at the time prescribed by the testator. The facts shortly are:—

The plaintiff is one of the heirs of one S. R. de Fonseka who died in 1926 leaving a last will in which he directed *inter alia* as follows:—

Clause 28. I do hereby further charge and direct my said trustees, to fund and deposit in any Bank in Colombo, all the nett income, rents and profits of the said several estates and properties and *out of such fund to pay* (1) my Testamentary expenses and Estate duty and (2) the legacies aforesaid.

Clause 29. I do hereby also will and direct, that out of the fund so accumulated my said trustees shall pay to each of my unmarried daughters on her marriage with such consent and approval as aforesaid, a sum of ten thousand rupees in cash and a further sum of five thousand rupees for the purchase or making of jewellery for each of them and my said trustees shall also expend a sum not exceeding two thousand rupees for expenses in connection with each such marriage. The said sums shall be retained by them and so far as they are not applied to the purposes aforesaid, shall fall into my residuary estate referred to in clause 34.

The plaintiff married in October, 1926. On her marriage the defendants paid her Rs. 10,000/– and met the expenses in connection with her marriage. In November, 1927 and in January, 1932 respectively, the defendants paid the plaintiff two instalments of Rs. 1,000/– each, out of the sum of Rs. 5,000/– due to her " for the purchase or making of jewellery." The plaintiff claimed interest on the footing that the sum of Rs. 5,000/– became due to her on the date of her marriage. In the course of the present action the defendants paid the balance due to the plaintiff after deducting a certain sum which they had spent in excess of the sum of Rs. 2,000/– provided in the will for marriage expenses and which sum they said were due to them. The plaintiff accepted payment without prejudice to her rights in the action ; she also denied the right of the defendants to make the deduction they claimed.

It was proved that it was not possible for the defendants to have made to the plaintiff the payments required to be made at the time of her marriage in terms of the will. It was also proved that the defendants had to borrow the sum of Rs. 10,000/– which they paid to the plaintiff at the time of her marriage, and that it was by careful management of the estate that they were able to pay the sum of Rs. 5,000/– in the way they did.

Held : (i) That the plaintiff was not entitled to interest on the legacy of Rs. 5,000/–.

(ii) That the defendants were not entitled to deduct the sum they claimed from the legacy of Rs. 5,000/–.

Per WIJEYEWARDENE, J. —"The principles that appear to be deducible from the various authorities on Roman-Dutch Law examined by me and relevant to the present case are:—

a. "Where the obligation to pay a legacy is suspended until an uncertain date or an uncertain condition (*e.g.* marriage of the legatee), the executors cannot be put in *mora* except by demand.

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b. "that such demand, if extra judicial, should be more or less of a formal nature.

c. "that interest runs only from date of *mora*.

d. "that in certain circumstances, lack of funds may be pleaded as an excuse by the executors for their *mora*, in which case the estate will not be liable to pay interest."

H. V. Perera, K.C., Kumarasingham and *H. A. Chandrasena*, for plaintiff-appellant.

L. A. Rajapakse with *M. M. I. Kariapper*, for defendants-respondents.

WIJEYEWARDENE, J.

This is an action filed by a legatee against the executors of the last will D4 of S. R. de Fonseka, Mudaliyar.

The testator made his last will on February 8th, 1923, and died on April 12th, 1926. The defendants who were the executors and trustees named in the will, proved the will and obtained probate on December, 3, 1929.

The plaintiff, who is a legatee under the last will, and the first and second defendants are children of the testator. The 3rd defendant is married to a sister of the plaintiff.

By his last will the testator directed the trustees to manage, cultivate and improve certain specified estates for five years from the date of his death. He then gave further directions under the following clauses of the will:—

Clause 28. I do hereby further charge and direct my said trustees to fund and deposit in any Bank in Colombo all the nett income, rents and profits of the said several estates and properties and *out of such fund to pay* (1) my Testamentary expenses and Estate duty and (2) the legacies aforesaid.

Clause 29. I do hereby also will and direct, that out of the fund so accumulated my said trustees shall pay to each of my unmarried daughters on her marriage with such consent and approval as aforesaid, a sum of ten thousand rupees in cash and a further sum of five thousand rupees for the purchase or making of jewellery for each of them and my said trustees shall also expend a sum not exceeding two thousand rupees for expenses in connection with each such marriage. The said sums shall be retained by them and so far as they are not applied to the purposes aforesaid, shall fall into my residuary estate referred to in clause 34.

The plaintiff got married on October 25, 1926 " with the consent and approval " of the 1st and 2nd defendants as required by D4. On the occasion of her marriage the defendants admittedly paid her Rs. 10,000/- and met " the expenses in connection with her marriage." On November 18, 1927 and on January, 26th, 1932, the defendants paid the plaintiff two instalments of Rs. 1,000/- each out of the sum of Rs. 5,000/- due to her " for the purchase or making of jewellery."

The plaintiff claimed in the plaint a sum of Rs. 6,947/08 on the footing that the sum of Rs. 5,000/- became payable to her on the date of her marriage and the defendants were therefore liable to pay not only the balance sum of Rs. 3,000/- but also interest at 9% from October 26th, 1926. This amount is shown in detail as follows :—

Principal sum	Rs.	5,000.00
Interest on Rs. 5,000/– @ 9% from 25/10/26 to 18/11/27 ..	,,	479.50
	,,	5,479.50
Paid Rs. 1,000/– on 18/11/27	,,	1,000.00
	,,	4,479.50
Interest on 4,479/50 @ 9% from 18/11/27 to 26/1/32	,,	1,668.10
	,,	6,167.60
Paid Rs. 1,000/– on 26/1/32	,,	1,000.00
	,,	5,167.60
Interest on Rs. 4,479/50 @ 9% from 26/1/32 to 24/6/36	,,	1,779.48
	Rs.	6,947.08

The defendants filed answer admitting liability in a sum of Rs. 2,029/20. They claimed the right to set off Rs. 970/80 alleged to have been spent by them in excess of the sum of Rs. 2,000/– set apart under D4 for "expenses in connection with the marriage," and denied the right of the plaintiff to claim any interest. During the pendency of the case the defendants paid the plaintiff the balance sum of Rs. 2,029/20 which the plaintiff accepted without prejudice to her rights in the action.

The learned District Judge held that the defendants were entitled to set off a sum of Rs. 643/55 against the plaintiff's claim, and were not liable to pay any interest to the plaintiff.

He entered judgment for the plaintiff for Rs. 327/25 with legal interest from date of action and ordered the plaintiff to pay half the taxed costs to the defendants. The present appeal has been preferred by the plaintiff. There is no appeal by the defendants against the findings of the District Judge.

There is a conflict of evidence with regard to the purposes for which the sum of Rs. 970/80 claimed as a set off in the answer was spent. The defendants state that this sum was spent in connection with the plaintiff's marriage, while the plaintiff contests that position. Though the balance of evidence appears to be in favour of the defendants, it is not necessary, however, to express an opinion on this aspect of the matter, in view of the decision I have reached that, in any event, the defendants are not entitled to set off this sum or any part of it—as allowed by the District Judge against the claim of the plaintiff.

In the answer filed by the defendants there was no averment that this excess expenditure was incurred at the request of the plaintiff, or that the plaintiff at any time, agreed to such amount being deducted from the legacy of Rs. 5,000/– due to her. At the trial, the defendants sought to establish the liability of the plaintiff for this sum on the basis of such a request coupled with an agreement. The evidence led by the defendants on this point was very meagre. The first defendant, in the course of his evidence referred in very general terms to the instructions given by the plaintiff, that moneys due on orders placed by her in connection with her marriage should

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be deducted against her share of the estate. The first defendant himself has very frankly admitted that he had no personal knowledge of " the dealings between the executors and the various heirs, as that part of the work was done " by the 2nd defendant who is now away in England. On a careful consideration of his evidence on the point, I think it will be unfair to the first defendant to conclude, that he intended, by his evidence, to establish knowledge on his part of a specific request made by the plaintiff to incur such expenditure or of an agreement by her to the deduction of such excess amount from her legacy. The plaintiff, on the other hand, has denied on oath that she made such a request or gave such an undertaking. It is not improbable, in view of the close relationship between the parties, that the excess expenditure, if any, was incurred by the plaintiff's brothers without any intention of recovering it from the plaintiff. The pleadings in the case as well as the documents D5, D6, D7 and P12 corroborate the plaintiff's testimony. The following passage occurs in letter D5 of September 10th, 1935, written by the defendant's proctor to the plaintiff giving details of the various payments made to her under clause 29 of the last will :—

> " You will see that the expenses incurred in connection with your marriage exceed the amount provided therefor by the will by Rs. 970/80, and this amount in now being deducted from the sum due to you under clause 29."

By D6 of October 1st, 1935 the plaintiff replied :—

> " With regard to the marriage expenses the executors had no right to spend over Rs. 2,000/-. They had no authority either from me or my husband to spend anything over Rs. 2,000/-. In fact both of us were quite against any sort of reception. I decline to allow the executors to claim a sum of Rs. 970/80 from me."

Instead of joining issue with the plaintiff and reminding her of her alleged request and agreement, the defendant's proctors chose to state in D7 of November 1935.

> " You will find on reference to the intermediate account and our letter of September, 10 last, that out of the sum of Rs. 2,000/- which the executors were authorised and directed to expend they have expended Rs. 636/56 on your wedding reception. In respect of the balance sum of Rs. 1,363/44 therefore, which has not been applied to the purpose indicated by the testator the executors have decided that this sum " shall be retained by them, and shall fall into the residuary estate referred to in clause 34."

The defendant's proctor prepared a statement of facts P12 for submission to counsel whose opinion was sought with regard to the mode of payment of the legacies, and the administration of the estate in general. In that statement a sum of Rs. 3,000/- was given as due to the plaintiff under clause 29. It is difficult to understand why a sum of Rs. 3,000/- and not a sum of Rs. 2,029/20 was mentioned, if the plaintiff had agreed to her legacy being reduced by the excess expenditure of Rs. 970/80.

I hold that the defendants have failed to discharge the burden of proof in respect of issue 3 which raises the question of the plaintiff's indebtedness to the defendants in the sum of Rs. 970/80.

I shall set out briefly the facts connected with the plaintiff's claim for interest, before I discuss the question of law arising in respect of that claim.

At the time of the testator's death his debts, secured and unsecured, amounted to about Rs. 110,000/- while the only cash that was available was a sum of about Rs. 1,500/- in a bank. The fund that was established by the executors under clause 28 of the will amounted to only Rs. 40,904/37 at the end of the period of 5 years. Some of the purposes for which this fund had first to be utilised were :—

Estate duty and other testamentary expenses	.. ..	Rs. 42,378.53
Funeral expenses etc.	.. ..	,, 2,379.28
Executorship expenses	.. ..	,, 7,058.91

It will thus be seen, that it was not possible for the defendants to have made to the plaintiff the payments required by clause 29 out of this fund, when the plaintiff got married about 6 months after the death of the father. In fact, the evidence shows that the defendants had to negotiate certain loans in order to pay plaintiff the cash dowry of Rs. 10,000/- and meet the expenses in connection with her marriage. The defendants, however, were able by judicial administration of the estate, to realise from the sale of a property which formed part of the residuary estate, funds which after the discharge of the debts of the estate, left sufficient money in their hands in 1935 for the payment of the sum due to the plaintiff on account of the jewellery. The evidence establishes clearly that it was not possible for the defendants to make the payment out of the funds of the estate prior to 1935.

The plaintiff's claim for interest is based on the contention that she became entitled to recover Rs. 5,000/- on account of jewellery on October 25th 1926, and that she is, therefore, entitled to claim interest from the estate as from that date whether or not the estate had sufficient funds to make a payment on that date. This raises a difficult question of law.

I agree with the learned District Judge, that the liabilities of the defendants to pay interest should be decided according to the principles of the Roman-Dutch Law. Unfortunately it is not only somewhat difficult to reconcile the various opinions of the Roman-Dutch Law writers on the question, but it is at times even difficult to harmonise the views expressed by the same writers on the different aspects of the question.

Under the Roman Law interest could be claimed in *stricti juris* actions only if there had been a stipulation. A mere pact sufficed only in a few exceptional cases *e.g. nauticum fenus*, loans by cities, loans of fungibles other than money and loans by bankers. Apart from any agreement, interest became due by law in certain transactions *e.g.* in debts to minors, in debts to the Fiscus and in some cases of *dos*. There was a further class of transactions in which, without any agreement interest became due by law, *a tempore morae*. They were *bonae fidei* transactions and claims for certain forms of legacy.

In discussing the doctrine of *mora*, Buckland states in his text-book of Roman Law (1921 Edition at p. 546) :—

Mora is failure to discharge a legal duty on demand made at the proper time and place. This is sometimes called *mora ex persona*, as distinct from *mora ex re*, where *dies interpellat pro homine*. But this latter expression is unwarranted. There was no *mora ex re*—in some cases some of the effects in *mora* were produced where there was in strictness, no *mora*, *e.g.* liability to interest on price from delivery of goods sold. The expression is suggested by a text which says that where there is no one from whom the demand can be made, there is no *mora in re*. But this case and that of a defendant who holds a thing by theft or similar delict, who is said to be always in *mora*, seems to have been the only cases in which demand was not necessary.

The delay must be wilful and wrongful: there was no *mora* if the debtor was unable, through no fault of his own, to be at the place, or if he had reasonable grounds for doubting that the debt was due provided in this case, he was ready to litigate at once. *Mora* or no *mora* was a question of fact, rather than law; the *judex* must decide it on all the facts."

The Roman-Dutch Law effected certain changes in the Roman Law with regard to the liability to pay interest According to Voet (Voet's Commentaries Book 22 Title 1 Horwood's Translation paragraphs 11 and 12) the differences which existed between *bonae fidei* and *stricti juris* matters were for the most part disregarded and the rule was that interest was not to be decreed solely because of extra judicial *mora* either in *bonae fidei* or in *stricti juris* matters, but in both matters it should be granted after *litis contestatio*. Voet proceeds to say that there are however, "by the present practice of the Courts" some cases in which a defendant is decreed to pay interest solely because of extra judicial *mora*, and after giving a few instances, adds:—

"Interest may be claimed after extra judicial *mora* in an action for a legacy.....because of favour shown to the last wishes of testators the fulfilment of which is a matter of public concern."

Voet defines *mora* as culpable delay in making or accepting performance and says it is in the discretion of the Court to decide whether *mora* has occurred in any transaction since "it is a difficult thing to define." He divides *Mora* into *Mora ex persona* and *Mora ex re* and says:—

"*Mora ex persona* is brought about when the creditor demands from the debtor performance at a suitable time and place and the latter does not perform his part.....It can be produced by a single demand legally made, whether judicial or extrajudicial, provided that the creditor keeps pressing the debtor.

Mora ex re occurs without any demand, being brought about by law without any human act.....It is not only men who make demands, but the law or even a date demand instead of a man, provided only that a fixed date was made a term in the obligation. For if the obligation is suspended until an uncertain date or an uncertain condition the better opinion is that the debtor cannot be put in *mora* except by a demand made through human agency.....The coming into existence of the condition has only this result that he who so far was not a debtor begins to be one, and as in an unconditional debt, so too in this, which has now become unconditional and sprung into existence, it is equitable that a demand be made.....Even in those cases in which *Mora ex re* does occur, texts do not state that there is sometimes no *mora* so long as there is *mora ex persona* arising out of a demand made.

(Voet's Commentaries Book 22 Title 1 Horwood's translation paragraphs 24, 25, 26 & 27.)

The Roman-Dutch Law Jurists recognised the fact that even a party who would otherwise be in *mora* could plead that he is not guilty of *mora* in the legal sense, in view of certain extenuating circumstances. Voet says:—

> " Still it sometimes happens that *mora* (delay) deserves to be excused to this extent that it is not everything causing delay that can be called *mora* (in the technical sense)."
>
> " What if some supervening accident or some act of the creditor himself makes very difficult what was easy for the debtor when he bound himself by the contract *e.g.* if a slave sold or promised falls into the hands of the enemy ? It would scarcely be just to the debtor to be liable on the ground of *mora* brought about by some obstacle of this sort. The reverse would hold if the difficulty had been caused by his negligence or if at the time when the liability was undertaken, the difficulty of fulfilment was already in existence and known to the debtor. For then the debtor has only himself to thank in that of his own free will he laid the burden upon himself since difficulty of performance does not avoid a stipulation."
>
> (Voet's Commentaries Book 22 Title 1 Horwood's Translation para 29).

Nathan sets out the limitation to the maximum *dies interpellat pro homine* as follows :—

> *Mora ex re* takes place without the making of an interpellation or demand upon the debtor—that is to say it is considered to happen by mere operation of law, without the intervention of any person. From this arises the maxim *dies interpellat pro homine.*
>
> The maxim applies where a certain date has been fixed upon for performance of the obligation. If no such date has been fixed the creditor must make the usual formal demand ; and this will be the case where the performance by the debtor depends upon the fulfilment of a certain condition by the creditor "—Vide Nathan's Common Law of South Africa (1913) Edition Vol. 2 page 676).

In " The Law of Wills in South Africa " (1935 edition page 87) Steyn says " the rule that interest runs on a debt only from that time that the debtor is in *mora* applies to legacies, and interest in a legacy of a sum of money can, therefore, only be claimed from the date of demand."

In his " Introduction to Roman-Dutch Law " (2nd edition pp 405 & 406) Professor Lee deals with the question of *mora*—interest and says —

> " We have seen that if B owes A a sum of money and, when payment falls due, fails to pay, A may claim the amount due with interest even where there is no agreement for interest in the contract. This is *mora interest.* It begins to run from the time the debtor is in default ; and, therefore, where demand is necessary, from the date of demand. But what constitutes demand for this purpose ? Some writers consider an extra judicial demand sufficient ; others require a judicial demand, *i.e.* a writ of summons ; others postpone the currency of interest to the amount of *litis contestatio* (Grot. 3-1-46 and Groenewegen *ad loc.* V. d.K. Th. 483 and *Dictat.* ad. Gr. *loc. cit.*) which in modern practice is reached when the pleadings are closed and matters are at issue between the parties. *Meyer's Exors vs. Gericke* (1880) Foord at p. 18, per de Villiers, C.J. In *Victoria Falls and Transvaal Power Co. vs. Consolidated Langlaagte Mines* (1915) A.D. at p. 31 Innes, C.J. said "The Courts of Holland would seem to have adopted the rule that in all cases where liability for interest depended upon the existence of *mora ex persona* the stage of *litis contestatio* constituted the due demand from the date on which *mora* existed and interest began. It may be that close investigation would reveal a tendency on the part of South African Courts to depart from Dutch rule and to regard the letter of demand or failing that a summons as marking the inception of liability for interest.

In *Labuschange vs. Schoeman* N.O. * Searle, J. said "There are Roman-Dutch authorities from which it may be gathered that where a specific date is fixed under a will at which a sum of money is to be paid, there is *mora ex re* if the money is not paid on that date, quite independantly of whether any interest has been earned or not. No case has been quoted, however, where that has been actually followed with regard to legacies, but the court has rather seemed to throw out that the legatee should claim such interest as has actually accrued to the estate.....There are authorities which certainly seem to point in the direction that where the testator has said nothing about interest in his will, and where it is not shown that any interest has accrued, the interest cannot be exacted from the Estate." The decision of Hopley, J. in *South African Bible Union vs. Estate Schnugh and Another* † appears to suggest that a legatee entitled to a legacy on marriage should claim interest only from the date of demand. He also refers to the fact that the executor in that case had funds from which the payment could have been made.

In *Estate Lloyd vs. Estate de Jong and Others* § a testator bequeathed different sums of money to several legatees on respectively attaining the age of 25 years and "subject to the payment of such legacies" he bequeathed the residue of his estate to his wife. The question raised was whether the legatees were entitled to claim interest from the death of the testator. Answering the question in the negative, de Villiers, C.J. said in the course of his judgment:—

> The general rule seems to be correctly stated by Pothier (on legacies C.2 S10) as translated by Van de Linden "when the legacy consists in a sum of money, the interest is due to the legatee from the day of demand, provided he did not make the demand before the sum was due." In other words it is delay on the part of the heirs in paying a legacy which entitles the legatee to claim interest and if there is no delay, then there is no interest.

The principles that appear to be deducible from the various authorities on Roman-Dutch Law examined by me and relevant to the present case are:—

a. Where the obligation to pay a legacy is suspended until an uncertain date or an uncertain condition (*e.g.* marriage of the legatee), the executors cannot be put in *mora* except by demand.
b. that such demand, if extra judicial, should be more or less of a formal nature.
c. that interest runs only from date of *mora*.
d. that in certain circumstances lack of funds may be pleaded as an excuse by the executors for their *mora* in which case the estate will not be liable to pay interest.

The Civil Procedure Code 1889 contains certain provisions which appear to throw some light on the question whether the estate will be liable to pay interest if the delay in the payment of the legacy was due to want of funds. While section 720 (*b*) gives a legatee the right to petition a Court asking for an order directing an executor or administrator to pay the legacy,

* (1915) South African Law Reports, Cape Provincial Division 19.
† (1908) 25 Cape Supreme Court Reports 717
§ (1908) 25 Cape Supreme Court Reports 136,

section 721 enacts that where the Court receiving the petition is not satisfied that there is money applicable to the payment of the legacy, the court shall dismiss the petition.

When the present action came up for trial certain issues were framed. The only issues dealing with the liability of the defendants to pay interest were issues 1, 5 and 6. The learned District Judge ruled that the onus of proof in respect of these issues was on the plaintiff and the plaintiff's counsel then submitted to court that he would present his argument on those issues without calling any evidence. The defending counsel called the first defendant to give evidence on the issues on which the burden was ruled on him. When the case for the defendants was closed, the plaintiff's counsel called evidence in rebuttal and in the course of giving evidence on matters relevant to other issues, the plaintiff, in very general terms, and the plaintiff's husband spoke of a demand having been made from the executors.

I do not think it would be fair and just to the defendant to decide those issues except on the basis on which the plaintiff's counsel agreed to present his case. If the plaintiff's counsel led evidence on issues 1, 5 & 6, the counsel for the defence would have had an opportunity of combating such evidence and proving that either the demand was not properly made or that certain circumstances existed which freed them from liability to pay.

There is also another fact that may be taken into consideration. The last will D4 was made in 1923. Though for certain purposes a will is no doubt said to speak from the death of the testator, I think the date of 1923 cannot be ignored in considering whether the testator could have reasonably anticipated that the plaintiff who had consistently expressed her desire to take the veil, would get married a few months after his death in 1926 or that at such time as there would be a difficulty in paying the legacy to the legatee. On the evidence led in this case it has been proved that until 1935 it was not possible for the executors to pay the legacy. There is no evidence to justify me in holding that, in the words of Voet, " at the time the liability was undertaken, the difficulty of fulfilment was already in existence and known " to the testator.

I hold, therefore, that the defendants are not liable to pay interest.

I set aside the judgment of the District Judge and direct that decree be entered for the plaintiff for Rs. 970/80 and legal interest from date of action to date of payment. The plaintiff will be entitled to half the taxed costs of the trial in the District Court. I make no order as to the costs of the appeal.

MOSELEY, J.

I agree.

Set aside.

Present : SOERTSZ & NIHILL, J.J.

AMARATUNGA vs GEORGE DE ALWIS & GASPER GOMES

S. C. No. 147*L*—*D. C. (Final) Colombo No.* 407.

Argued & Decided on 9th February, 1939.

Fideicommissum—Do the words " the heirs descending from her, and authorised persons such as executors, administrators and assigns " designate or indicate clearly the parties to be benefited.

A deed of gift stated *inter alia* that :—

(*a*) " it is hereby declared or directed by the two of us the said donors, that the said Christina Fernando shall have no right to sell, donate, mortgage, give as security, exchange for other lands, or alienate in any other manner the said lands, except to possess only the lease during her lifetime, *and that the children and heirs descending from her and authorised persons, such as executors, administrators and assigns*, shall have the right to sell.....or to do whatever they please with the same.....

(*b*) It is hereby directed by the two of us.....*that when the time comes for the children of the said Christina to become entitled to these lands, her children by the second marriage shall be entitled to the portion of the land called Millegahawatta*.....*and her children of the first and second marriages shall divide in like manner the remaining lands.*

(*c*) We the said donors hereby give the right to the said Christina to possess indisputably after our death.....and after the death of the said Christina to *her heirs and authorised persons such as executors, administrators and assigns to possess the said properties and to do whatever they* liked with them."

Held : That the deed created no valid *fideicommissum* inasmuch as the words " the heirs descending from her, and authorised persons such as, executors, administrators and assigns " do not designate or indicate with sufficient clearness the parties to be benefited.

Cases referred to :—*Hormusjee vs Cassim* 2 N.L.R. 190.
Wijetunga vs Wijetunga 15 N.L.R. 493.
Ex-parte Van Eden & Others 1905 *Transvaal Reports* 151.
Salonchi vs Jayatu 27 N.L.R. 360.
S. C. 34, D. C. Colombo 666, S.C.M. 21-9-1938.*

N. E. Weerasooriya, K.C., with *E. G. Wickramanayake* and *Wanigatunga*, for 1st defendant-appellant.

J. E. M. Obeyesekere, for plaintiffs-respondents.

SOERTSZ, J.

One question that arises in this case is whether the deed P8 of 1895 created a valid *fideicommissum*. That deed according to the translation accepted by the learned trial judge, stated *inter alia* that :

(*a*) " it is hereby declared or directed by the two of us the said donors, that the said Christina Fernando shall have no right to sell, donate, mortgage, give as security, exchange for other lands, or alienate in any other manner the said lands, except to possess only the lease during her lifetime, *and that the children and heirs descending from her and authorised persons such as executors, administrators and assigns*, shall have the right to sell.....or to do whatever they please with the same.....

* See page 133

(*b*) It is hereby directed by the two of us.....*that when the time comes for the children of the said Christina to become entitled to these lands, her children by the second marriage shall be entitled to the portion of the land called Millegahawatta*.....*and her children of the first and second marriages shall divide in like manner the remaining lands.*

(*c*) We the said donors hereby give the right to the said Christina to possess indisputably after our death.....and after the death of the said Christina to *her heirs and authorised persons such as executors, administrators and assigns to possess the said properties and to do whatever they* liked with them."

A consideration of these terms in the deed enables me to reach without difficulty the conclusion that no valid *fideicommissum* was created. One condition for the creation of a good *fideicommissum* is satisfied. There is a clear prohibition against alienation. But the other necessary condition fails in that there is no clear designation or indication of the parties to be benefited. The words " the heirs descending from her, and authorised persons such as executors, administrators and assigns " are both too vague and too general. As Bonser, C.J. observed in *Hormusjee vs Cassim* 2 N.L.R. 190.

> " The word assigns means any person in the world to whom the donee may be pleased to assign the property, and it cannot be contended that this condition was meant to benefit the whole world."

Since that date there has been a welter of decisions on *fideicommissa*, some of which have gone the length of saying that once an intention to create a *fideicommissum* is apparent, words like assigns, executors and administrators should be treated as ' surplusage ' or ' notarial flourish' and struck out or ignored. I can see no jurisdiction for taking such liberties with words chosen by parties or their agents. There are other decisions which say that even if parties indicate their intention to create a *fidei commissum* by employing such words as " under the bond of *fidei commissum*, those words are of no avail if the parties to be benefited are not clearly designated or indicated. I share that view. In *Wijetunga vs Wijetunga* 15 N.L.R. 493 Pereira, J. said:—

> " If the intention of a donor or testator to create *fidei commissum* is clear, and the words used by him can be given an interpretation that supports that intention, I should be slow to embark on a voyage of discovery in search of possible interpretation that defeat that intention."

In regard to this observation, I would only say that when, despite an intention to create a *fidei commissum* to be gathered from such words as " under the bond of *fidei commissum*, the testator or donor fails to designate or indicate clearly the parties to be benefited, there does not seem to be any occasion to embark on a voyage of discovery in order to construct a *fidei commissum* for the testator or donor by striking out or ignoring words on the assumption that they are ' surplusage, or ' notarial flourish.' If a testator or donor clearly impose a prohibition against alienation and then goes on to frustrate his intention to create a *fidei commissum* by employing words which do not designate or indicate clearly the beneficiaries, he must be left just where he placed himself, on the threshold of a *fidei commissum*. It may well be that he has deliberately placed himself in that position. In the words of Innes, C.J. in *ex-parte Van Eden & Others* 1905 *Transvaal Reports*

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151, " what the Court has to do is to endeavour to arrive at the intention of the testator " or I would add, donor—, and to arrive at that intention not by considering what we think it would have been a good thing if they did mean, or what they ought to have meant; but by ascertaining the plain meaning of the words used. If these words are capable of more than one construction, then, of course, the Court would leave towards the one most in favour of freedom of alienation." Roman-Dutch Law writers say that *fidei commissa* are odious in the eye of the Law, and must be strictly construed. Now, in the case before us, the trial Judge says that on the authority of the case of *Salonchi vs. Jayatu* 27 N.L.R. 360 he would have held that " the presence of the words heirs and authorised persons.....refers to an indeterminate class of persons to be benefited and that, therefore, no valid *fidei commissum* has been created." But, he goes on to say that in the second passage cited from the deed the persons to be benefited are sufficiently designated, namely the children of the donor and that, for that reason he holds that there is a *fidei commissum*. I regret, I am unable to accept this reasoning. In my view, the resulting position is—to use the words of Innes, C.J. from the passage I have quoted—that, at best, " the words are capable of more than one construction, and that therefore " the Court would lean towards the one, most in favour of freedom of alienation." To uphold the view taken by the Judge, one has to strike out the words on passages (*a*) and (*c*) cited above, " the children and heirs descending and authorised persons such as executors, administrators and assigns." In my view that is an utterly unwarranted course to take. All the terms of the deed must be considered and when this is done I find it difficult, if not impossible, to say that the intention of the donor was to impose a *fidei commissum*. At any rate, even if that was their intention, they have failed to give effect to it. Counsel for the respondent relied upon the judgment of my brother Wijeyewardene in an unreported case appearing in the S. C. Minutes of 21st September, 1938, in regard to case No. S. C. 34—D. C. Colombo 666.* In that case a deed in very similar terms to these so far as the first and third passages cited by me from the deed are concerned was construed by him as creating a *fidei commissum*. He took the view that too much emphasis should not be placed on such words as " heirs descending from them and their authorised persons such as executors, administrators and assigns," because a clear intention on the part of the donor to create a *fidei commissum* could be gathered from the whole document. I have already made my comment on this view. I would add that this view was expressed *obiter*. The case was decided on another point. My brother Hearne disagreed with this *obiter dictum* and I find myself in agreement with the view taken by him. I am, therefore, of opinion that the deed in question did not create a *fidei commissum*. In that view of the matter, it is not necessary to consider the other questions discussed during the argument of this appeal. The appeal is allowed and the plaintiff's action is dismissed with costs in both Courts.

NIHILL, J.

I agree.

Appeal allowed.

* See page 133

Present: HEARNE, J.

FERNANDO vs FERNANDO

S. C. No. 771—P. C. Panadura No. 49356.
Argued on 13th & 14th February, 1939.
Decided on 22nd February, 1939.

Maintenance—Wife's agreement with husband under a notarial deed to live in separation—Waiver of rights to claim future maintenance in consideration of a lump sum of money—Wife without means of support—Offer to return to husband—Refusal—Is wife entitled to an order for maintenance—Ordinance No. 19 of 1889—Section 5.

The applicant separated from her husband under a deed, at the execution of which she received a sum of Rs. 250/– in consideration of her waiving all her claims to future maintenance from her husband. Having spent this sum of money, she offered to return to her husband who refused to take her back. Thereupon, being without means of support, she sued the husband for maintenance.

The respondent resisted the application on the ground that the deed of separation was a bar to the proceedings. The learned Magistrate held against the respondent and ordered maintenance in a sum of Rs. 20/– per mensem. The respondent (husband) appealed. In appeal it was further contended on behalf of the appellant that section 5 of the Maintenance Ordinance disqualified the applicant from seeking the assistance of the Court on the ground that the parties were living in mutual separation under a deed.

Held : (i) That the deed of separation was no bar to maintenance proceedings under the circumstances.

(ii) That, when the applicant offered to return to the respondent, mutuality ceased to exist, and consequently section 5 of the Maintenance Ordinance was no bar to her claim.

Per HEARNE, J. "It is not so much that a wife is permitted to resile from an agreement into which she has entered in the past. It is that in law a husband's duty to maintain his wife overrides any agreement which absolves him from discharging his duty unless such agreement, founded upon mutual consent, subsists in the present in which case, as I have indicated, it would be against the policy of the law to interfere. That is how I read the Ordinance."

Cases referred to :—*Micho Hamine v. Girigoris Appu* (1912) 15 N.L.R. 191.
Maliappa Chetty v. Maliappa (1927) 29 N.L.R. 78.
Soysa v. Soysa (1916) 19 N.L.R. 146.
Approved :—*Goonewardene v. Abeywickrema* (1914) 18 N.L.R. 69.

H. V. Perera, K.C., with *H. E. Amarasinghe* and *D. M. Weerasinghe* for defendant-appellant.

G. P. J. Kurukulasuriya, for applicant-respondent.

HEARNE, J.

The applicant who had separated from her husband under a deed sued him for maintenance. The deed (R 1) was executed in 1934 and she came into Court in 1938 alleging that the defendant had not maintained her

The Case to which reference is directed to this page has been reported on p. 31.

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for one year. On the execution of the deed she had received Rs. 250/– and this sum had been exhausted. The Magistrate found that she is now without means of support.

Section 5 of the Maintenance Ordinance provides, that no wife shall be entitled to receive a maintenance allowance from her husband if they are living separately by mutual consent. The Magistrate held that R 1 was no bar to maintenance proceedings, and this appeal turns on the interpretation that is to be given to section 5 of the Ordinance.

In *Micho Hamine v. Girigoris Appu* (1912) 15 N.L.R. 191, Wood Renton, J. said that he interpreted the words " if they are living separately by mutual consent " as meaning " if they have separated by mutual consent." This interpretation involves the view that once a husband and wife agreed to live separately by mutual consent and separated, the wife could not thereafter compel her husband to take her back or pay her maintenance. Although the head note is to this effect I have considerable doubt that the learned Judge intended to lay this down as a proposition of law. He was dealing with a case in which " the applicant had parted from her husband a great number of years ago on her own initiative (since when) to all intents and purposes they had been living separate by mutual consent." It would appear that they were living separately by mutual consent right up to the time proceedings in the Magistrate's Court were initiated.

Pereira, J. in *Goonewardene v. Abeywickrema* (1914) 18 N.L.R. 69, certainly understood that these were the facts to which the dictum of Wood Renton, J. should be applied ; for, in his judgment, he says :—

> " The case.....applies only where the parties remain of one mind as to separation, and the wife applies for maintenance while she lives separated from her husband."

It has, however, been argued that the reasons given by Pereira, J. in 18 N.L.R. 69 (supra) for holding that " where a husband and wife agree to live separately by mutual consent, the wife may claim maintenance from her husband if she undertakes to return to him and live with him as his wife," were not sufficient reasons.

In *Maliappa Chetty v. Maliappa* (1927) 29 N.L.R. 78, Lyall Grant, J. thought the passage from Voet (24–2–19, 20) on which reliance was placed was " too vague to be of much assistance " and with respect I do not think the quotation from Maasdorp carried the point much further.

Maasdorp in the Institutes Vol. 1 p. 76, cites a South African decision to the effect that an extra-judicial separation was held not to be binding on the spouses, unless circumstances existed at the date of the separation which would have justified a Court in granting a decree of separation. The *ratio decidendi* was that such an agreement, being without legal consideration, would amount to a donation between husband and wife. This reason, however, does not apply in Ceylon where donations *inter virum et uxorem* are expressly made legal. *Soysa v. Soysa* (1916) 19 N.L.R. 146 (at p. 148.)

It may be that it is possible to extract from Voet (24, 2–29–20), as a principle of Roman-Dutch Law, that the continuance of an extra-judicial separation depends for its validity upon the continued consent of the parties, although like Lyall Grant, J. I am unable to do so ; but I suppose in this appeal, to follow the conclusion of Pereira, J. for reasons which, as it appears to me, arise from a consideration of the Ordinance itself.

A husband is under a statutory obligation to maintain his wife, and the purpose of the Ordinance (No. 19 of 1889) is to enforce that obligation, on proof that he has sufficient means and neglects or refuses to maintain her.

If the Court finds that the husband and wife are living separately by mutual consent, it can pass no order for the reasons, as I think, that a Court is not intended to be used for creating facilities for separation between husband and wife or for fixing alimony.

If they have separated by agreement and the wife, though anxious to terminate the separation, is under the agreement in receipt of an allowance which is being punctually paid, and to which she agreed outside Court, it can, I think, no longer be said that the husband is guilty of neglect or refusal to maintain, and the jurisdiction of the Magistrate comes to an end.

But if, notwithstanding the agreement to separate, the wife, when she comes into Court, is not being maintained by her husband, she is disqualified from asking the assistance of the Court only if she is living in adultery or without sufficient reason refuses to live with her husband, or is living separately from him by the continuing consent of both parties. If she is prepared to live with him mutuality ceases to exist, her disqualification to obtain relief disappears, and the law imposes on the husband, as his paramount duty, the duty of maintaining his wife. It is not so much that a wife is permitted to resile from an agreement into which she has entered in the past. It is that in law a husband's duty to maintain his wife overrides any agreement which absolves him from discharging his duty, unless such agreement, founded upon mutual consent, subsists in the present in which case, as I have indicated, it would be against the policy of the law to interfere. That is how I read the Ordinance.

The Magistrate did not consider the question of whether the applicant's offer to return to her husband is a *bona fide* one. To this he should address himself. If he is satisfied that her undertaking to return to her husband is *bona fide*, and the defendant refuses to take her back, or if he takes her back, makes her life intolerable the applicant would be entitled to an order in her favour.

The appeal is dismissed with costs.

Appeal dismissed.

Present: KEUNEMAN, J. & NIHILL, J.

WIJESEKERA vs MEEGAMA

S. C. No. 212—*D. C. Kalutara* 19741.
Argued on 26th & 27th January, 1939.
Decided on 6th February, 1939.

Right of person planting land to retention—Circumstances in which jus retentionis is granted and to whom—Compensation for improvements.

Held : (i) That under our law the right of retention is only granted to persons who have the *possessio civilis* and to certain special classes of persons whose position has been held to be akin to that of a "possessor."

(ii) That this right of retention has been extended by decisions of our Courts to certain classes of persons who may not come under the strict definition of "possessors" *e.g.* persons who are entitled to a " planter's share " and to persons who make the improvements in the *bona fide* expectation of receiving a formal title.

(iii) That a person entitled to compensation for improvements is not entitled to a *jus retentionis* unless he falls within the class of persons to whom the right is granted under our law.

L. A. Rajapakse, for plaintiff-appellant.

N. E. Weerasooriya, K.C., with *E. G. Wickremenayake* and *Wijemanne*, for defendant-respondent.

KEUNEMAN. J.

The plaintiff-appellant brought this action against the defendant for declaration of title to 1/8 plus 1/9th shares of two contiguous allotments of land called lots Nos. 13 and 14 of Millegahawatte alias Hermitage. He alleged that the original owner was Don Peter Meegama who died intestate leaving as his heirs eight full-brothers and sisters and two children of a deceased half-brother. The defendant was one of the full-brothers of Don Peter Meegama, and the plaintiff purchased from some of the other heirs on deed No. 169 dated the 14th December, 1935. The plaintiff also claimed damages of Rs. 150/- and further damages at Rs. 50/- a month till he was restored to the possession of his shares. The defendant admitted that Don Peter Meegama was the original owner, but contested the correctness of the shares which the plaintiff was entitled to. He also prayed that he be held to be the owner of a certain rubber plantation, and claimed that he was entitled to be in possession of it until to was compensated.

At the trial the following issues were framed :—

1. Is Don Peter Meegama the owner of the land in dispute.
2. What share if any of the soil of this land is the plaintiff entitled to.
3. How many children did Cecilia leave surviving her.
4. Did the defendant make the rubber plantation on the land in dispute.
5. Is the defendant entitled to remain in possession of the rubber plantation until he is compensated

6. Can the plaintiff maintain this action without joining all the co-owners.
7. What damages if any is the plaintiff entitled to.

Issue No. 1 was never really in dispute, as both parties agreed that Don Peter Meegama was the original owner. Issues (2), (3) and (6) were decided in favour of the plaintiff, and no question arises with regard to them in this appeal. Issues (4) and (5) were decided in favour of the defendant and under issue (7) the learned District Judge held that the plaintiff was not entitled to any damages. The District Judge awarded half the costs of the action to the defendant. From these findings the plaintiff appeals.

On the evidence as accepted by the District Judge, Proctor Shelley Edirisinghe and the original owner Don Peter Meegama entered into a planting agreement by deed P 2 of the 20th November, 1912. Proctor Edirisinghe planted a portion of the land with rubber, but subsequently neglected the plantation, with the result that cattle destroyed nearly all the young plants except about 50 rubber trees. Don Peter Meegama and the defendant then persuaded Proctor Edirisinghe to give up the land on the payment of Rs. 250/– and the defendant then planted the rest of the property with rubber, roughly about 550 other trees. The District Judge has given convincing reasons for accepting this evidence, and I do not think we can disagree with his finding in this respect. Counsel for the plaintiff however argued that the defendant, though entitled under these circumstances to compensation, was not entitled to a *jus retentionis*. Further he argued that the plaintiff was entitled to damages for the year 1936. As regards the year 1937 there was evidence that the plaintiff received his share of the rubber coupons, and so no claim for damages arose in respect of that year. It is clear, that the plaintiff is in any event entitled to damages in respect of his undivided share of the 50 rubber trees planted by Proctor Edirisinghe. The question whether he is entitled to damages in respect of the rest of the plantations, depends upon the determination of issue (5). Counsel for both parties agreed, that in the event of the plaintiff succeeding, the damages should be fixed at Rs. 12/– in respect of the 50 trees, and Rs. 130/– in respect of the balance of the plantation.

It is necessary to consider on the evidence, first whether the defendant was a 'possessor,' i.e. had the *possessio civilis*, and next whether such possession was *bona fide* or *mala fide*. The only person who gave evidence on this point was the defendant. He said "Peter Meegama got me to plant this land on the agreement that I should get half the land and plantations. Peter said he would give me a deed. I did not get a deed, as Peter was my brother and I wanted to get the whole by buying the other half." In his answer the defendant stated "This defendant made the .....plantation.....upon the understanding that the owner the said Don Peter Meegama would convey to this defendant a half-share of the soil and of the contemplated plantation standing thereon, but the said Don Peter Meegama died while he was contemplating the transfer of such half-share in favour of the defendant."

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Now considering that the plantation was made in 1914 or 1915, and that Peter Meegama died in 1924, there was ample opportunity for him to implement his promise if he ever made such a promise. Further, the defendant made a very unfavourable impression on the District Judge who was not willing to accept his evidence, except where there was reliable corroboration. On the point under consideration there was no corroboration at all. Taking into consideration the fact that defendant was the brother of Peter Meegama, and that his evidence with regard to the alleged promise cannot be depended on, I think we must hold that in this case the planting was done without any agreement or understanding with Peter Meegama, although it is clear that Peter Meegama was aware of and acquiesced in the planting.

The case falls within the principle decided in *Fernando et al v. Menchohamy et al* (10 C.L. Rec. 124). In that case Drieberg, J. stated "In their answer the 1st and 2nd defendants said Juan Naide had planted the land with coconut and jak trees, and was in possession of it as the agent of Avu Lebbe, and they limited Mathes' planting to the rubber only. They did not say what the terms were of the agreement with Juan Naide and Avu Lebbe, under which the plantation was made, and there is no proof that it is customary in the case of rubber planting, for the planter to get a half-share of the plantation. The rubber was not tapped until 1923 or 1925—there is a conflict of evidence on this point—so that Mathes and his heirs have not acquired an independent title to a 'planter's share' by prescriptive possession. Their position, therefore, is that of persons who held the land on an agreement with the owner, which gave them the right of possessing it and improving it for a remuneration not yet given or agreed upon. I cannot regard such a person as in a better position that a lessee."

In *Soyza et al v. Mohideen* (17 N.L.R. 279) it was held that a lessee has no *possessio civilis*, nor can his enjoyment of the land be deemed to be *bona fide* possession. This is a decision of three Judges.

In *Silva et al v. Banda et al* (26 N.L.R. 97) it was held that a lessee who made improvements was not entitled to a *jus retentionis*. A similar opinion was expressed in *Saibo v. Baba et al* (19 N.L.R. 441), but a distinction was drawn there as regards a planter who is admitted to be entitled to a "planter's share." Sampayo, J. held that such a planter was not in the same precarious position as a lessee, but had sufficient interest in the land to constitute him a *bona fide* possessor.

Much reliance was placed by Counsel for the respondent on certain cases. In *Mohamadu v. Babun* (2 C.A.C. 86) Pereira, J. held that where the defendant built a house and made a plantation with the leave and license of the owner, he was entitled to all the rights of a *bona fide* possessor, including the *jus retentionis*. No dispute, however, was raised in that case as to whether the defendant had the *possessio civilis*. I may mention that Pereira, J. was a member of the Court which decided *Soyza v. Mohideen* (supra) and concurred in that decision. Again in 406 *D.C. Kandy* 29879 *S.C. Mins.* 29.6.23 a wife who built on her husband's land with the consent of the

husband, and on his promise to transfer the land to her, was held to be entitled to compensation, and to retain the property until compensation was paid. Sampayo, A.C.J. held there that the wife " believed that she was entitled to the land and to the house and to its possession." In *G.A. Central Province v. Letchimanen Chetty et al* (24 N.L.R. 36), it was held that a person who takes possession of land and executes improvements thereon on expectation of a formal title, which in good faith he believed himself certain to obtain, may be a *bona fide* possessor. It should be noted here also that the question discussed was not with regard to the possession, but to the fact whether the possession was *bona fide* or *mala fide*. Bertram, C.J. himself said that his interpretation was a " development " of the law.

In *Nugapitiya v. Joseph* (28 N.L.R. 140) improvements had been made by a person who had entered into an informal agreement with the owner, by which the improver was to have the right to the enjoyment of the boutique built by him as long as he wished upon the payment of ground rent of Rs. 5/–. Garvin, J. was satisfied that the improver did not have the *possessio civilis*, but held that under certain circumstances even such a person could be granted the rights of a *bona fide* possessor. " The case of *Mohamadu v. Babun* (supra) is referred to by Bertram, C.J. in the case of *Davithappu v. Bahar* (26 N.L.R. 73), who regards it as a 'development' of the law by the extension of the doctrine of the rights of a *bona fide* possessor to compensation for improvements to a class of persons who have not the *possessio civilis*. With all respect it does not seem to me that relief in this case was granted by treating these persons as having a *utilis possessio* which is akin to *possessio civilis*.....The result is reached by the extensive application of another rule, which is that an owner who acquiesces in the making of improvements is estopped from disputing the right of the improver to be compensated on the same footing as a *bona fide* possessor." It is to be noted however, that Garvin, J. based his finding on a passage in Maasdorp where it was laid down that a *mala fide* possessor was entitled to the same rights as a *bona fide* possessor including the right of retention, where " the owner of the ground has stood by and allowed the building to proceed without any notice of his own claim."

Though his language is wide, I doubt whether Garvin, J. had any intention of extending the right of compensation and of retention in these circumstances to all classes of persons including lessees and persons in a similar position to lessees. If so, a fundamental distinction in the law of compensation was lost sight of, and his finding was at variance with express decisions of our Courts. Walter Pereira in his Laws of Ceylon (2nd Ed.) page 353, 354 said " before entering into a discussion of these questions it is necessary to arrive at a correct understanding of the word ' possessor ' when used in connection with the law with reference to compensation for improvements. Clearly the word ' possessor ' means the person who in law is in enjoyment of what is known as the *possessio civilis*." He adds " A lessee's right if any, to compensation for improvements is subject to

considerations totally different from those applicable to the rights of a person having the *possessio civilis*." Maasdorp also in his Institutes of South African Law (5th Ed.) Vol. 2 page 15 discussed 'possession' as follows :— "It is a compound of a physical situation and of a mental state....The intention must also absolutely be to hold the thing for one's self and not for another, for a lessee, a person who has a thing on loan, or a depositary cannot in strict law be said to possess or, if he possesses at all, he possesses not for himself but in the name of the owner." He dealt at page 17 with the classification of 'civil' and 'natural' possession. "Voet uses the term 'civil' possession as possession which is held by a person as owner, or by a *bona fide* possessor with the intention of being or becoming owner." Further, at p. 61 he stated definitely that "a lessee has in no case the right of retaining or remaining in possession of the land leased after the expiration of the lease. His right to compensation will depend upon whether the improvements were made with or without the consent of the owner."

I am of opinion that under our law, the right of retention is only granted to persons who have the *possessio civilis*, and to certain special classes of persons whose position has been held to be akin to that of a 'possessor.' There can be no doubt that this right has been extended by decisions of our Courts to certain classes of persons who may not come under the strict definition of 'possessors' e.g. persons who are entitled to a 'planter's share' which is a special right, and to persons who make the improvements in the *bona fide* expectation of receiving a formal title. In *Nugapitiya v. Joseph* (supra) there was an informal agreement, that the improver should have the right of retaining his improvements as long as he wished.

In this case the defendant has not proved any circumstances which show that his enjoyment of the land approximated in any degree to 'possession.' It is clear that all along he acknowledged the title of Peter Meegama, and there is no proof which can be accepted that any agreement was arrived at between himself and Peter Meegama, whereby he was to be invested with title either to the whole, or to any part of the soil or plantation, or that he was to retain his improvement until he was compensated. I think, therefore, that he occupied no better position than that of a lessee. I follow the decision in *Fernando et al v. Menchohamy et al* (supra). This is the latest of the decisions, cited to us, and I do not think this case conflicts with any of the earlier decisions. In view of the fact that Peter Meegama consented to and acquiesced in the making of the improvements, I hold that the defendant is entitled to claim compensation. He has made claim to no specific amount in this action, and I reserve to him the right to make such claim in subsequent proceedings. But I hold that he is not entitled to a *jus retentionis* in respect of these improvements. I vary the District Judge's order in this respect.

I further hold that the plaintiff is entitled to damages in respect of the year 1936 and set aside the District Judge's order that he is not entitled

to damages and enter judgment for the plaintiff in the sum of Rs. 142/–, the amount agreed upon by Counsel for both parties.

As regards costs, the plaintiff has succeeded on most of the issues, but the defendant has succeeded on the issue relating to the planting, and the bulk of the evidence was directed to that issue. I think the fairest order to make is that there will be no costs to either side of the trial. The plaintiff has partially succeeded in the appeal, and I give him half the costs of appeal.

NIHILL. J.

I agree.

Set aside and varied.

Present: KEUNEMAN, J. & NIHILL, J.

SAVARIMUTTU AND OTHERS vs THE SAIVA PARIPALANA SABHA

S. C. No. 96 — *D. C.* (*Inty.*) *Jaffna No.* 52.

Argued on 24th January, 1939.

Decided on 2nd February, 1939.

Stamp duty in proceedings under the Trusts Ordinance — Proceedings under section 112 *of the Trusts Ordinance—Properties affected by the trust valued at Rs.* 100,000/–. *How should the petition of appeal to the Supreme Court be stamped.*

Held : That in proceedings under section 112 of the Trusts Ordinance where the value of the trust properties was Rs. 100,000/– *ad valorem* stamp duty should have been paid on the petition of appeal to the Supreme Court as if the value of the action was Rs. 100,000/–.

N. Nadarajah, for the 3rd to the 11th and the 13th to the 15th respondents-appellants.

J. E. M. Obeyesekera, for petitioners-respondents.

KEUNEMAN, J.

The petitioners-respondents, a body incorporated under Ordinance 17 of 1931, by petition moved the District Court for an order to be entered in terms of section 112 of the Trusts Ordinance No. 9 of 1917, vesting in the petitioners, the properties described in the schedule. They averred that Punnianachchy widow of Arulambalam Mudaliyar founded and established a charitable trust under the name and style of " Sidamberam Ambalawana-swamy Punnianachchy Tharmam " and endowed the trust with all the properties in the schedule aggregating to the value of Rs. 100,000/–. They stated that some of the trustees previously died, and that those who were substituted did not take an interest in the work, and that at a public meeting of the Hindus of Jaffna held on the 2nd December, 1933, it was unanimously resolved that the petitioners should be appointed trustees, in place of the

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former Board of Trustees, and that the resolution was implemented by deed No. 3116 of the 10th February, 1934 filed of record. They alleged that the respondents were in wrongful possession of some of the properties in the schedule, and that it was necessary for these petitioners to obtain an order under section 112 of the Trusts Ordinance to enable them to institute action against the respondents, as well as others, for the better preservation and management of the trusts properties. To this petition the respondents filed objections, *inter alia* putting the petitioners to the proof of the allegation that the property in the schedule was of the value of Rs. 100,000/–, but it is to be noted that no issue was framed at the inquiry on this point, and for the purpose of the appeal I think we must proceed on the footing that the properties in the schedule were worth Rs. 100,000/–.

After enquiry the learned District Judge made his order, and from that the appellants appeal.

At the appeal the preliminary objection was taken that the petition of appeal was not duly stamped. The stamps actually employed was for Rs. 3/60 which would only have been correct if the value of the proceedings had been regarded as of Rs. 1,000. It was contended that an *ad valorem* stamp was necessary, and that the proceeding was of the value of Rs. 100,000. I am of opinion on the allegations in the petition that the subject matter of the proceeding was valued at Rs. 100,000/–. I am unable to follow the contention of counsel for the respondents that the right of the trustee to claim the vesting order should be appraised at a lower amount than the value of the properties in the schedule. There is nothing in the proceedings to indicate that the value of the subject matter of the proceedings is of any less value.

The finding in *Thambiah v. Kasipillai* (12 C.L.W. 92 ; 3 C.L.J. 124) is in point, and the question of stamping of a petition of appeal in a proceeding of this nature has been fully discussed there. In that case also application was made for a vesting order under section 112 of the Trusts Ordinance in connection with the temporalities of a Hindu Temple. It was argued in that case, that an earlier decision in *Sathasivam v. Vaithianathen* (24 N.L.R. 94) to the effect that actions relating to public charities under chapter 10 of the Trusts Ordinance were chargeable as of the value of Rs. 1,000 should be extended to a proceeding under section 112 which is to be found in chapter 11 of the Trusts Ordinance. The whole matter was fully argued in the judgment of Hearne, J. and Wijeyewardene, J. who rejected that argument. In *Sathasivam v. Vaithianathan* (supra) Bertram, C.J. was dealing with the effect of the provision in Schedule B of the Stamp Ordinance which stated that " actions relating to public charities under chapter 45 of the Civil Procedure Code shall be charged as of the value of Rs. 1,000." He held that chapter 45 of the Civil Procedure Code " was repealed and re- enacted in a very large form by sections of chapter 10 of the Trusts Ordinance," and came to the conclusion that the provision in Schedule B of the Stamp Ordinance applied to actions in chapter 10 of the Trusts Ordi-

nance as well, in that the sections in that chapter had replaced chapter 45 of the Civil Procedure Code.

I agree with the remark of Hearne, J. in *Thambiah v. Kasipillai* (supra.) " I am unable to give the benefit of the provision in Schedule B of the Stamp Ordinance to a person initiating proceedings under the Trusts Ordinance, unless those proceedings are under one of the sections of the Trusts Ordinance, which re-enacted chapter 45 of the code, and section 112 is not one of those sections."

It has been pointed out by Wijeyewardene, A.J. in the same case that the Trusts Ordinance of 1917 replaced not only chapter 45 of the Civil Procedure Code but also Ordinance No. 7 of 1871, and that proceedings under the latter Ordinance were not entitled to the relief granted in Schedule B of the Stamp Ordinance. It is to be noted that section 4 of Ordinance No. 7 of 1871 gave power to the District Court to nominate trustees in certain cases, and section 5 dealt with the vesting of the property in new trustees, and it may well be considered that section 112 of the Trusts Ordinance is an extension of sections 4 and 5 of Ordinance No. 7 of 1871. I may also mention that section 112 of the Trusts Ordinance extends to any trust and is not restricted to public charitable trusts.

*Saddanatha Kurukkal v. Subramaniam et al** (15 Times L.R. 47) is an authority for the proposition that a petition of appeal to the Supreme Court from an order made by a District Judge in a special proceeding under the Trusts Ordinance, must be duly stamped. In that case the proceeding was under section 42 of the Trusts Ordinance. In *Sathasivam v. Vaithanathan* (supra) Bertram, C.J. discussed the effect of section 116 of the Trusts Ordinance, and held that the special provision therein contained relating to petitions to the District Court did not affect other documents liable to stamp duty. He added " they are governed by the first sub-section of section 116 which says that the enactments and rules relating to Civil Procedure, at the time being in force, shall apply to them. These words bring into operation the general provisions of the Stamp Ordinance with regard to legal proceedings."

I cannot see that an appeal by a respondent stands in any different position to an appeal by the petitioner and I think I must follow the decision in *Thambiah v. Kasipillai* (supra) and hold that an *ad valorem* duty was payable in respect of the petition of appeal in this case. The petition of appeal has been insufficiently stamped, and the appeal must accordingly be rejected with costs.

NIHILL, J.

I agree.

Appeal dismissed.

* 10 C.L.W. p. 106 (Edd.)

Present: POYSER, S.P.J.

POROLIS DE SILVA vs ISMAIL CASSIM

S. C. No. 748—M. C. Galle No. 1752.

Argued on 6th December, 1938.

Decided on 15th December, 1938.

Colombo Municipal Council Constitution Ordinance—Section 23—Can a voter registered in one ward object to a name in the list of voters of another ward.

Held : That a voter registered in one ward is not qualified to object to a name in the list of voters of another ward.

U. A. Jayasundera, for objector-appellant.

No appearance for respondent.

POYSER, S.P.J.

In this case the objector lodged an objection to the respondent's name appearing in the list of voters for ward No. 6 of the Galle Municipality, marked with a double qualification mark.

The grounds for the objection were, that the respondent is an undischarged bankrupt.

The Magistrate disallowed the objection, holding on the authority of *Junaid v. Meeran Pillai** (38 N.L.R. page 364), that the objector being a registered voter in another ward, had no status to maintain or raise his objection.

The Magistrate was of course bound by the above decision which has been followed in *Abdul Wahab v. Ismail* (38 N.L.R. page 344), and other cases.

Counsel for the appellant sought to distinguish this case on the ground that there is a difference between an objection to a person being included in a list of voters, and an objection to a person being marked with the double qualification mark. I am unable to see any such difference. The material section of Ordinance No. 60 of 1935 is as follows :—

> " 23 (2) Every person whose name appears in any such new or revised list at the time when they are open to inspection, and who objects to the name of any other person appearing therein or being marked with the double qualification mark (such first mentioned person being hereinafter referred to as " the objector ") may apply to the Commissioner to have the name or the double qualification mark of such other person erased therefrom."

Abrahams, C.J. in *Junaid v. Meeran Pillai* (supra) pointed out that the proper reading of that part of sub-section (2) down to the word 'therein ' is as follows : —" Every person whose name appears in any one of such new or revised lists at the time when those lists are open to inspection and who objects to the name of any other person appearing therein." and that consequently the objector could only raise objections under this sub-section to persons whose names appear in the same list as he does himself.

It is impossible, if this reasoning is followed, to dis-associate an objection to a person being included in a list, from an objection to his name being marked with the double qualification mark.

The appeal is dismissed.

Appeal dismissed.

* 7 C.L.W. 71

Present: KEUNEMAN, J. & NIHILL, J.

DHARMATILAKE vs BRAMPY SINGHO AND ANOTHER

S. C. No. 165—*D. C. Kalutara No.* 19654.
Argued on 14th & 15th December, 1938.
Decided on 21st December, 1938.

Res judicata—Claim to property seized in execution of decree—Absence of judgment-creditor at inquiry though noticed—Order upholding claim without investigation—Failure to bring action under section 247 of the Civil Procedure Code—Is such order res judicata between the parties in an action under section 247 of the Civil Procedure Code consequent on a second order upholding claim at a subsequent seizure.

Does section 243 of the Civil Procedure Code place an imperative duty on the claimant to adduce evidence in support of his claim whether the judgment-creditor is present or not—Is a claim inquiry governed by the sections of the Civil Procedure Code relating to summary procedure—Scope of presumption under section 114 illustration (e) of the Evidence Ordinance.

Held : (i) That the terms of section 243 of the Civil Procedure Code places an imperative duty on the claimant to adduce evidence whether the judgment-creditor is present or not at the inquiry.

(ii) That where the requirements of section 243 of the Civil Procedure Code have not been observed, any allowance of a claim cannot be regarded as an order under section 244 or as having conclusive effect within the terms of section 247 of the Civil Procedure Code. Nor does such an order operate as *res judicata* between the parties.

(iii) That the words " in a summary manner " in section 241 of the Civil Procedure Code do not authorise the use of the sections relating to summary procedure in the investigation of claims to property seized.

Per KEUNEMAN, J.—" But it is urged that in virtue of Section 114, illustration (*e*), we must presume that the necessary evidence had been adduced by the claimant under section 243. But that illustration only raises a presumption as to the regularity of official acts. I think it is not possible to stretch it to a presumption that all necessary evidence has been taken before an order is made, *cf.* the dictum of Woodroffe, J. in *Navendra Lal Khan vs Jogi Hari* (I.L.R. 32 Cal. 1107.)"

Cases referred to :— *Chelliah vs Chinnacutty* 18 N.L.R. 65.
Isohamine vs Munasinghe 29 N.L.R. 277.
Kiri Banda vs Assen 2 N.L.R. 27.
Sinnatamby vs Ramanathan 2 Bal. Rep. 38.
Perera vs Fernando 1 C.W.R. 17.
Marikar vs Perera 29 N.L.R. 61.
Sardhari Lal vs Ambika Pershad I.L.R. 15 Cal. 521.
Koyyana Chittemma vs Doosy Gavarama I.L.R. 29 Madras 226.
Bal Makund vs Maqsud A.I.R. 1917 Oudh 99.
Navendra Lal Khan vs Jogi Hari I.L.R. 32 Cal. 1107.

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N. Nadarajah with *Jayasundera* and *V. F. Gunaratne*, for plaintiff-appellant.

N. E. Weerasooriya, K.C., with *Gilbert Perera* and *Corea*, for 2nd defendant-respondent.

KEUNEMAN, J.

This action was brought by plaintiff under section 247 of the Civil Procedure Code. The plaintiff was the substituted plaintiff in D. C. Colombo 53771, where in execution of the decree against the present 1st defendant, the premises were seized and were claimed by the present 2nd defendant. The claim of the 2nd defendant was upheld on the 20th January, 1936, and plaintiff thereafter brought the present action against the 1st and 2nd defendants. In this action the 2nd defendant pleaded that an earlier order of the 30th August, 1934, upholding his claim in D. C. Colombo 53771 was *res judicata*. Certain issues were framed, but issues 4 and 5 relating to the question of *res judicata* were by agreement taken up for decision first. The learned District Judge decided these issues in favour of the 2nd defendant, and dismissed the plaintiff's action, and the plaintiff appeals from that judgment.

In D. C. Colombo 53771 the original plaintiff obtained judgment and decree on the 5th October, 1933, and writ was issued on 10th October, 1933 returnable on the 9th October, 1934. Thereafter on the 29th January, 1934, the original plaintiff assigned his decree to the present plaintiff by deed, and on the 5th February, 1934, an application was made by the present plaintiff to have himself substituted as plaintiff in that case. The original plaintiff consented to the substitution on the 9th March, 1934, but objections were filed by the defendant in that case, and substitution was not in fact allowed by the District Judge till the 19th November, 1934. An argument was addressed to us that substitution was effected earlier, but I think that argument cannot be maintained.

Meanwhile on the 12th July, 1934, the Fiscal had seized under the decree the property in question, and claim was made by the present 2nd defendant on the 30th July, 1934. The right under which the claim was made was stated to be deed No. 1735 dated the 16th January, 1934. As the land was situated in Kalutara, the claim was referred to the District Court of Kalutara. On the 31st July, 1934, the learned District Judge ordered stay of sale, and notice for the 30th August, 1934. On that latter date the journal entry by an Acting District Judge runs as follows :—

> "Claimant in person—present.
> Notice served on plaintiff personally—
> Absent.
> Claim upheld."

It seems clear that the original plaintiff addressed a letter P3 dated 25th August, 1934, to the District Judge stating that he had assigned the decree and that the present plaintiff had been substituted as plaintiff. This

letter certainly reached the permanent District Judge whose initials appear on it as against the date 28th August. But there is nothing to show that it was brought to the notice of the District Judge who acted on the 30th August. The statement in the letter that the present plaintiff had been substituted plaintiff by that date was however not correct, and the plaintiff on the record was still the original plaintiff.

Neither the original plaintiff nor the present plaintiff instituted an action under section 247 of the Civil Procedure Code within 14 days of the 30th August, 1938, and the 2nd defendant now claims that this order is *res judicata*.

Counsel for the appellant argued that the District Judge, in view of the letter P3, should have postponed his order, and issued notice on the present plaintiff. As far as the notice was concerned, it was served on the party who was then plaintiff on the record, and I do not agree that any notice had to be given to the present plaintiff at that stage of the proceedings.

Counsel for the appellant next argued that the order made by the learned District Judge could not be regarded as an order under section 244 of the Civil Procedure Code, in view of the fact, that the claimant had not adduced any evidence to show that at the date of the seizure he had some interest in or was possessed of the property seized. He depended on the wording of the order which I have quoted earlier, and argued that the District Judge upheld the claim merely because the judgment-creditor was absent. He argued that under section 243 it was the imperative duty of the claimant to adduce evidence in support of his claim, and that it was only when such evidence was adduced that an order releasing the property from seizure could be made under section 244. He also argued that under both those sections an investigation was necessary even though the judgment-creditor was absent, and that no investigation had been made by the District Judge. He accordingly argued that this order could not be regarded as conclusive within the terms of section 247.

Under section 241 after the Fiscal sends a report of the claim, the Court proceeds to investigate the claim "in a summary manner." Under section 242 the sale may be postponed for the purpose of making this investigation. Section 243 states that :—

> "the claimant.....must on such investigation adduce evidence to show that at the date of the seizure he had some interest in or was possessed of the property seized."

Section 244 states that :—

> "If upon the said investigation the Court is satisfied that, for the reason stated in the claim or objection, such property was not, when seized, in the possession of the judgment-debtor.....or that.....it was so in his possession not on his own account or as his own property, but on account of or in trust for another person.....the Court shall release the property.....from seizure."

Under section 245 if the Court is satisfied that the property was at the time of seizure in possession of the judgment-debtor as his own property, the Court shall disallow the claim. Section 243 is in its terms imperative, and places a duty on the claimant to "adduce evidence." In *Chelliah vs Chinnacutty* (18 N.L.R. 65) Pereira, J. stated :—

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> " Under section 243 of the Code it is incumbent on the claimant to adduce evidence in the first instance."

In fact so heavy was this burden, that the learned Judge held that if the claimant was absent on the date of the inquiry after notice, his claim should be disallowed. Justice Garvin in the case of *Isohamine vs Munasinghe* (29 N.L.R. 277, Divisional Court) emphasised the importance of section 243. He made certain interesting comments on the sections relating to claims. First he held that :—

> " The words ' on such investigation ' can only mean at the sitting of the Court for investigation of the claim."

He continued :—

> " If the sitting of the Court or, to use the language of section 243 ' on such investigation ' the claimant fails to adduce evidence, the Court can but disallow the claim since the claimant having failed to establish that he had an interest in or was possessed of the property, it may surely be inferred that the judgment-debtor and not the claimant is in possession."

It was held by the Divisional Court that when a claim was disallowed under these circumstances, that amounted to an order under section 245, which became conclusive when the claimant failed to bring an action under section 247.

The learned District Judge was of opinion, that where the judgment-creditor was absent at the date of the inquiry, it was equally open to the Court merely in consequence of that fact to uphold the claim. I do not think that this result follows from the judgments cited. No duty is placed by the relevant sections of the Code on the judgment-creditor to adduce evidence, while an imperative duty is imposed on the claimant to do so. The *ratio decidendi* of these judgments accordingly does not apply. On the contrary, I think that the terms of section 243 make it necessary for the claimant to adduce evidence, whether the judgment-creditor is present or not at the inquiry, and where the requirements of section 243 have not been observed. I do not think that any allowance of the claim can be regarded as an order under section 244.

The District Judge rested his finding in this connection, partly on the form of notice issued to the judgment-creditor, who was noticed to appear and " show cause, if any, why the claim preferred by the above named claimant should not be upheld with costs." It was contended before us that this matter was governed by the sections relating to summary procedure, and that the effect of the District Judge's order taken in conjunction with the notice was to establish an order *nisi* under section 377 (*a*). In the first place the claim sections 241 *et seq.* do not authorise the use of summary procedure, but section 241 merely says that the " investigation " shall be made " in a summary manner." Next, the sections relating to summary procedure require petition and affidavit to be filed before order is obtained, and that requirement has no application to claim enquiries. Again, the only order made by the District Judge on the 31st July, 1934 was " notice for 30th August, 1934." No order *nisi* was entered by the Judge, nor does the

notice indicate that any such order *nisi* had been entered. Further, I do not think that the District Judge was entitled to enter an order *nisi* in view of the burden placed on the claimant under section 248.

The only case cited to us which most nearly resembled the present one was *Kiri Banda vs Assen* (2 N.L.R. 27). In that case a claim was made in 1891 to a property seized, where after investigation the property was released from seizure. Three years later the same property was seized under the same decree, and was again claimed and the claim allowed. In the action under section 247 which followed, it was held that the order in the original claim inquiry was conclusive. There is however, the vital difference that in the case cited, there had been investigation of the claim in the first instance, before the order allowing the claim was made.

Counsel for the respondent next argued, that the order allowing the claim was an order which the District Judge had jurisdiction to make, and that we must not look behind that order. He relied on the case of *Sinnatamby vs Ramanathan* (2 Bal. Rep. 38) In that case all that appeared on the record was "parties absent, claim set aside," Pereira, J. said :—

> "I do not think it is competent in this case to look behind the order setting aside, or, in other words, disallowing the claim. The order is one that the Court had jurisdiction to make under section 245 of the Civil Procedure Code. Being an order made in the absence of the claimant, he might possibly have moved on proper material that it be vacated, but so long as the order stood it was operative although made on insufficient materials."

It is to be noted that this also was a case where the claimant was absent on the date of inquiry, and it is difficult to know whether the special considerations applicable to the case of the absence of the claimant were taken into consideration by the learned Judge. At any rate, in the later cases in Ceylon the question whether an order was properly made under section 244 or 245 has been considered, and the proceedings examined for the purpose of deciding the question. For example, in *Perera vs Fernando* (1 C.W.R. 17) where a claim was dismissed on a preliminary objection taken by the other side without hearing evidence or going into the merits, this was held not be a disallowance of the claim under section 245 and the claimant was later allowed to vindicate title to the property, although he had failed to bring an action under section 247. Again in *Marikar vs Perera* (29 N.L.R. 61) an order was made by the District Judge after obtaining certain information from the Secretary, without a sitting-in-court directed to the investigation of the claim. It was held that this was not an order made under section 245 and that it was not conclusive, in the absence of an action under section 247. In this case Garvin, J. refers to "a long series of judgments of the Court, based upon an examination of sections 244 and 246 and the kindred sections of the Code, that the order which is made conclusive by section 247 is an order passed by the Court after investigation of the claim."

The case of *Sardhari Lal vs Ambika Pershad* (I.L.R. 15 Cal. 521) was also cited to us. Lord Hobhouse delivering the judgment of the Their Lordships of the Privy Council said ;—

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> "The Code does not prescribe the extent to which the investigation should go; and although in some cases it may be proper that there should be as full an investigation as if the suit was instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time leaving the aggrieved party to bring the suit which the law allows to him. However..... the order was made, and it was an order within the jurisdiction of the Court that made it."

It is to be remembered that (In the words of Lord Hobhouse) "the sole question in this suit is whether it is brought in time to satisfy the exigencies of the Law of Limitations." Further there was nothing before their Lordships to show what took place before the Subordinate Judge, except that both parties were before him, and it was possible that they had so far agreed on the facts that he was enabled to deliver his opinion off-hand. The main point discussed was not the absence of any investigation, but the extent of the investigation necessary. This Privy Council judgment has been discussed in subsequent cases in India. In *Koyyana Chittemma vs Doosy Gavarama* (I.L.R. 29 Madras 226) it was held that an order that purports to be an adjudication on the merits of the case can be regarded as made after investigation, and in *Bal Makund vs Maqsud* (A.I.R. 1917 Oudh 99) that an order passed is not operative only if there has been no investigation whatever, but that it is operative if there has been some investigation whether perfunctory or satisfactory.

In the present case it appears to me that there has been no investigation however perfunctory, and that there has been no adjudication on the merits from which we may presume that there has been some investigation. The journal entry of the 30th June, 1934 read :—

> "claimant in person—present. Notice served on the plaintiff personally—Absent. Claim upheld."

The natural presumption is that the claim was upheld, because of the absence of the plaintiff. But it is urged that in virtue of section 114 illustration (*e*) we must presume that the necessary evidence had been adduced by the claimant under section 243. But that illustration only raises a presumption as to the regularity of official acts. I think it is not possible to stretch it to a presumption that all necessary evidence has been taken before an order is made, *cf.* the dictum of Woodroffe, J. in *Navendra Lal Khan vs Jogi Hari* (I.L.R. 32 Cal. 1107).

> "The meaning of section 114 (*e*) of the Evidence Ordinance is that if an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence and the proof of which is essential to the plaintiff's case."

In this case, I think it was incumbent on the 2nd defendant to show that the order of the 30th August, 1934, was an order which was conclusive under section 247, and I think the burden lay upon him to establish that the requirements of section 243 were satisfied. Further, the fact whether he had

adduced evidence on that occasion was a matter which was especially within his knowledge under section 106 of the Evidence Ordinance and if he wished to supplement the entries on the record, it was within his power to do so.

In all the circumstances I hold that the order of the 30th August, 1934 was not an order duly made under section 244 of the Civil Procedure Code, and that it was not conclusive under section 247. The issues 4 and 5 must be answered in favour of the plaintiff. I allow the appeal and set aside the judgment of the learned District Judge, and send the case back for the decision of the other issues. The plaintiff is entitled to the costs of the appeal and of the trial already had. All other costs will be costs in the cause.

NIHILL, J.

I agree.

Appeal allowed.

Present: ABRAHAMS, C.J.

DULFA UMMA AND OTHERS vs U. D. C. MATALE

S. C. No. 172—*C. R. Matale No.* 4737.
Argued on 26th January, 1939.
Decided on 31st January, 1939.

Notice of action—Action against Urban District Council—Sections 228 and 230 of the Local Government Ordinance—Action filed by the parties mentioned in the notice and another—Is the action bad—Can the action be continued by the parties mentioned in the notice—Civil Procedure Code section 461—Is a notice of action addressed to the Chairman of the Council bad.

Objection was taken to this action on the ground that :—

(*a*) " notice of action had not been given as required by section 230 of the Local Government Ordinance ;

(*b*) that the a notice of action to be valid must be addressed to the Secretary of the Council as required by section 228 of the Local Government Ordinance, and not to its Chairman ;

(*c*) that if one of the parties to an action against an Urban District Council has not been disclosed in the notice the action cannot be continued even by those who had given notice."

The plaintiff relied on the following letter in proof of due notice :

" Dear Sir,

" My clients Dulfa Umma, Abdul Sattar, and M. M. Haniffa (the latter as father and natural guardian of the minors Abdul Sakkur and Abdul Faroof), the owners of all those houses and premises bearing assessment No. 12, Taralanda Road, Matale, complain that some workmen of your Council without any intimation to them did demolish a pavement in extent 50′ × 3′, built opposite the said houses with bricks and cement, and built a drain taking in the said portion

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of pavement and also a portion of bare land, of the total extent of 97′ × 3′. My clients complain that their tenants in occupation of those houses are greatly aggrieved at the demolition of the said pavement and have given notice to quit the said houses.

"My clients are very greatly aggrieved that this arbitrary and high-handed method should have been adopted in this connection, especially because at the time the road was first widened a large portion of the said land was given to the Council without compensation.

"My clients estimate the damages sustained by them at Rs. 500/- and instruct me to demand the same from your Council, with further instructions to sue your Council in default of payment for the recovery of the same with costs of suit.

"I shall thank you for an early reply."

Yours faithfully,
(*Sgd.*) M. Y. Sallay,
Proctor, S.C.

In answer to the third objection they moved to amend the plaint by reducing the claim and omitting the party that had not been disclosed in the notice.

Held : (i) That a communication addressed to the Chairman of the Urban District Council and received and considered by the Council was a valid notice under section 230 of the Local Government Ordinance even though it had not been addressed to the officer authorised by section 228 of the Ordinance to receive notices.

(ii) That the letter of 30th August, 1937 was a sufficient compliance with the provisions of section 230 of the Ordinance

(iii) That in an action brought by several plaintiffs against an Urban District Council some of whom had given notice and some of whom had not, there is no objection to those who have given notice continuing the action in respect of their claim alone.

Per ABRAHAMS, C.J.—(*a*) "I do not think that one should demand a particular form of words for a notice. The question as to whether there was an actual notice of the intention to institute an action, should be decided by seeing whether the injury complained of is properly stated, and an intimation disclosed that an action will be brought claiming some specified relief. The fact that communication states that the action will be instituted unless the claim is met, does not, I think, remove it from the category of notices to place it in the category of a mere letter of courtesy the writing of which indicates that negotiations for a rectification of the wrong are expected."

(*b*) "It happens, perhaps too frequently in this Court, that the language which the Legislature has chosen to employ in enacting certain rules of procedure compels the Court in applying the principles of construction to hold that non-compliance with a rule is fatal to an action. But I see no such compulsion on me in this case. Civil Procedure should be a vehicle which conveys a litigant safely, expeditiously and cheaply along the road which leads to justice, and not a juggernaut car which throws him out and then runs over him leaving him maimed and broken on the road."

B. H. Aluvihare, for the plaintiffs-appellants.

Cyril E. S. Perera with *S. N. D. Wijeyekoon*, for the defendant-respondent.

ABRAHAMS, C.J.

This case has been admirably argued by counsel on both sides, though the points taken were mostly of a highly technical nature. The appellants in this case brought an action against the Urban District Council of Matale

for recovery of a sum of Rs. 286/75 damages sustained by reason of the respondents having demolished a cement pavement and having encroached upon a piece of land belonging to the appellants for the purpose of constructing part of a public road.

Under section 230 of the Local Government Ordinance, No. 11 of 1920, no action shall be instituted against a District Council for anything done or intended to be done under the powers granted by the Ordinance or by any bye-law or regulation made thereunder, until the expiration of one month next after notice in writing shall have been given to the Council, stating with reasonable certainty the cause of such action, and the name and place of abode of the intended plaintiff and of his proctor or agent, if any, in the cause.

On the 23rd of November, 1937, the plaint was filed. On the 30th of August of the same year, Mr. Sallay, Proctor, wrote the following letter to the Chairman of the Urban District Council, Matale :—

"Dear Sir,

"My clients Dulfa Umma, Abdul Sattar, and M. M. Haniffa (the latter as father and natural guardian of the minors Abdul Sakkur and Abdul Faroof), the owners of all those houses and premises bearing assessment No. 12, Taralanda Road, Matale, complain that some workmen of your Council without any intimation to them did demolish a pavement in extent 50′×3′, built opposite the said houses with bricks and cement, and built a drain taking in the said portion of pavement and also a portion of bare land, of the total extent of 97′×3′. My clients complain that their tenants in occupation of those houses are greatly aggrieved at the demolition of the said pavement and have given notice to quit the said houses.

"My clients are very greatly aggrieved that this arbitrary and high-handed method should have been adopted in this connection, especially because at the time the road was first widened a large portion of the said land was given to the Council without compensation.

"My clients estimate the damages sustained by them at Rs. 500/– and instruct me to demand the same from your Council, with further instructions to sue your Council in default of payment for the recovery of the same with costs of suit.

"I shall thank you for an early reply."

Yours faithfully,
(*Sgd.*) M. Y. Sallay,
Proctor, S.C.

and on the 8th of September Mr. Sallay followed up this letter, by another in the following terms :—

"PREMISES No. 12, TARALANDE ROAD.

"Sir,

"Yours of the 4th instant, in reply to mine of the 30th ultimo is duly to hand ; and the contents of the same were duly conveyed to my clients. My clients take exception to the bitter adjectives employed by you—'exacting,' 'silly,' 'preposterous,' 'absurd,' 'want to drink the blood of the Council' &c.,—and say that you are only adding insult to the injury already committed by you in most arbitrary fashion.

"They therefore instruct me to give you notice in terms of section 641 of the Civil Procedure Code that an action will be instituted against you for the recovery

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of Rs. 300/- (restricted damages) caused to them by your demolishing without any notice to them of the cement pavement 53 feet by 3 feet, built with bricks and foundation, opposite their houses bearing assessment No. 12, Taralande Road, by the misappropriation of the bricks and foundation stones used for building the said pavement, and the encroachment and wrongful appropriation of an extent of 97 feet by 3 feet out of their land Polwatte. My clients state that by the destruction of the pavement the value of their houses has been prejudicially affected.

"The above would constitute the causes of the action, which my clients instruct me to file at the expiration of a month from this notice, unless you have the fairness to admit the wrong inflicted by you and pay them the damages due.

"My clients, as already stated in letter of the 30th ultimo, are 1. Dulfa Umma, 2. Abdul Sattar and S. M. M. Haniffa of No. 633, Trincomalie Street, Matale."

Yours faithfully,
(*Sgd.*) M. Y. Sally,
Proctor, S.C.

When the case was called, a preliminary objection was taken on behalf of the Council to the effect that due notice in terms of section 230 of the Local Government Ordinance had not been given. The plaintiffs contended that the letter of the 30th of August was a sufficient compliance with the section. On the other hand it was contended for the Council that as the minor Abdul Faroof (third plaintiff in the plaint) had not been mentioned in the notice, compliance had not been made with the section, which, it was argued, demanded that the name of every intending plaintiff should be stated with reasonable certainty. The proctor for the plaintiffs appeared to realise the difficulty which existed, for he moved to delete the name of the 3rd plaintiff from the plaint and to reduce the amount of the claim to Rs. 250/91. This the learned Commissioner refused to permit. In his judgment he agreed with the contention put forward on behalf of the Council, that the notice did not comply with the section, namely in that the third plaintiff's name had been omitted. He went on to say that he did not permit the amendment asked for, because to do so "would have altered the whole character and scope of the action and would not have been permitted."

He said that as the notice did not correctly set out the persons claiming relief, he held that it was not a due notice as required by law and he dismissed the plaintiffs' action with costs.

It has been argued on behalf of the appellants that first of all the real plaintiff is Haniffa, the natural guardian of the three minors. That is an argument that I have no difficulty in rejecting. The father in this case cannot be the plaintiff because he himself claims no rights nor have any wrongs been done to him, and the law does not enable a minor to institute a suit himself but somebody must do it on his behalf. It is also argued that even if the minor Faroof is a plaintiff the required information has been given with reasonable certainty, because in the letter of the 8th of September it is mentioned that Haniffa is one of the clients. It is further argued that there has been a substantial compliance with section 230 because even if

Abdul Faroof is a plaintiff no difference will be made by leaving out his name, considering that Haniffa was mentioned in his capacity as guardian. I fail to follow that argument because in spite of the fact that Haniffa is only a guardian, it is certainly desirable that the Council should have known the number of people whose rights it was alleged to have infringed, as it might have desired to meet the demand made upon it, and the omission of one of the minors from the notice would not have precluded an action being brought on his behalf at a subsequent date.

It was argued for the Council that the notice was bad as regards everybody mentioned in it, because according to the terms of section 228 of the Ordinance the notice should have been sent to the Secretary whereas it was directed to the Chairman. I have no difficulty in rejecting that argument because the section states that the notice may be received by the Secretary of the Council, and that does not satisfy me that a communication directed to the Chairman, as in this case, and obviously received and considered by the Council ought to be regarded as invalid because it is addressed to an officer of the Council not authorised to receive it

Then it was contended that the letter of the 30th of August was not a proper notice but might be taken rather as a threat of criminal proceedings which would leave the door open to negotiations between the parties. In support of this argument I was referred to *Norris vs Smith*, (10, Ad. & El. 188), which led me to the consideration of *Lewis vs Smith*, (Holt. 27. E.R. 171). Both those cases are distinguishable from this case on the facts. I do not think that one should demand a particular form of words for a notice. The question as to whether there was an actual notice of the intention to institute an action, should be decided by seeing whether the injury complained of is properly stated, and an intimation disclosed that an action will be brought claiming some specified relief. The fact that the communication states that the action will be instituted unless the claim is met, does not, I think, remove it from the category of notices to place it in the category of a mere letter of courtesy, the writing of which indicates that negotiations for a rectification of the wrong are expected. Mr. Aluvihare said very aptly that both the letters from the plaintiffs' proctor merely contain specifically, what they otherwise would contain impliedly, since the defendant can always prevent the action by payment of the demand made.

In my opinion the notice is not as regards those plaintiffs who are mentioned therein. The question arises as to whether the learned Commissioner was wrong in refusing to permit an amendment of the plaint in the manner sought by the plaintiffs' proctor, that is by the deletion of Abdul Faroof's name and the consequential reduction of the claim for damages. I am quite unable to understand what the learned Commissioner means when he says, that the amendment sought would have altered the whole character and scope of the action and would not have been permitted.

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It has not been shown to me how the Council would have been prejudiced had the amendment been permitted, nor has any authority been cited to me in support of the refusal. It seems to me that to deprive the other plaintiffs of their cause of action, merely because by some slip the name of Abdul Faroof was not inserted in the notice, would be a grave injustice. Of course compliance with the provisions of section 230 is necessary, and non-compliance with respect of any particular plaintiff disables him from joining in the action brought by the others, whatever may be his rights to bring an action separately and subsequently. But that is a very different thing from disqualifying the rest of the parties on account of a tiny error made as regards one of them.

It happens, perhaps too frequently in this Court, that the language which the Legislature has chosen to employ in enacting certain rules of procedure compels the Court in applying the principles of construction to hold that non-compliance with a rule is fatal to an action. But I see no such compulsion on this case. Civil Procedure should be a vehicle which conveys a litigant safely, expeditiously and cheaply along the road which leads to justice, and not a juggernaut car which throws him out and then runs over him leaving him maimed and broken on the road.

This appeal must be allowed with costs. I set aside the judgment and order the case to proceed in due course.

Appeal allowed and sent back.

Present : MAARTENSZ, ACTG. S.P.J. & KEUNEMAN, J.

DE LIVERA & OTHERS vs AMARASEKERA & OTHERS

S. C. No. 16/1938—*D. C.* (*Inty.*) *Galle No.* 33082.

Argued on 20th, 21st & 22nd, and further argued on 29th June, 1938.

Decided on 8th July, 1938.

Evidence Ordinance section 63—*Can an English translation be regarded as secondary evidence of an original in some other language—Res judicata—Civil Procedure Code section* 207.

In this action for the partition of a land it was sought to prove the contents of a will executed in Dutch in 1793. The original itself was not produced, but the parties relied on:—

(*a*) an English translation,

(*b*) oral evidence of the existence of the will and its contents given in other cases,

(*c*) a judgment of the District Court in a previous case holding that the will created a *fidei commissum*.

Held : (i) That an English translation cannot under section 63 of the Evidence Ordinance be regarded as secondary evidence of an original document in some other language.

(ii) That the mere admission by the parties to a partition action of the existence of a document which is not produced cannot be regarded as amounting to proof of the document.

(iii) That where an appeal has been taken from a decision of a court and the appeal court disposes of the appeal on issues other than those on which the original court made its decision, the decisions of the original court cannot be regarded as *res judicata*.

Hayley, K.C., with *E. B. Wickremenayake*, for the 139th & 140th defendants-appellants.

N. Nadarajah, with *Chitty*, for the plaintiffs-respondents.

MAARTENSZ, J.

This is an action for the partition of a land called Pokunabodawatte *alias* Walauwa which belonged to Nicholas Maha Mudaliyar.

The plaintiffs brought this action on the footing that Nicholas Dias by his last will dated 21st May, 1793, devised the property to his children Ana Gertrude, Johannes Wilhelminus and Don Abraham subject to a *fidei commissum* in favour of their descendants.

Don Abrahan. left six children one of whom was William Alexander. He had five children one of whom was Abraham whose children are the 133rd to the 140th defendants. The 139th and 140th defendants filed answer in which they pleaded *inter alia* that Nicholas Dias did not leave a last will and that he did not subject the property to a *fidei commissum*.

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At the trial the 137th defendant associated himself with the contents raised by the 139th and 140th defendants (See page 142 of the record).

The 4th plaintiff produced the document P1 as evidence that Nicholas Dias left a will executed in 1793. Counsel for the 139th and 140th defendants submitted that it was inadmissible and moved that this question and certain other legal questions should be tried first.

The District Judge acceded to this request and adjudicated on the following legal points regarding the will.

"(*a*) Did it create a *fidei commissum* binding to the 4th degree of succession ?

(*b*) Are plaintiffs only the 3rd and 4th degree of succession ?

(*c*) If so is this action maintainable ?

(*d*) Is the document P1 admissible in evidence ? "

The 139th and 140th defendants appeal from the District Judge's rulings on these points.

The questions which have to be decided in this appeal are :—

(1) Whether P1 is secondary evidence of the will,

(2) whether the plaintiffs have led other evidence which amount to secondary evidence of the will,

(3) whether the 139th and 140th defendants are bound by the judgment and decree in case No. 33087 of the District Court of Galle.

I have had the advantage of reading the judgment of my brother Keuneman and I agree, for the reasons given by him, that the decree in case No. 33087 does not bind the appellants. I also agree that P1 is not secondary evidence of the will as it is a translation of the will which is in Dutch and therefore does not come within the categories of secondary evidence prescribed by section 63 of the Evidence Ordinance, and that that the plaintiffs have not led any other evidence which amounts to secondary evidence of the will.

The question arises whether the District Judge's order should be set aside *in toto* or only so far as it affects the appellants.

In this case there can be no doubt that Nicholas Dias was the owner of the property in question nor in my opinion can there be any doubt that he left a will dated 21st May, 1793. The authenticity of the will is also beyond doubt. It has been acted upon and interpreted by this Court and the District Court of Galle in a series of cases of which the first was case No. 23376 of the District Court of Galle which was decided in 1868 and affirmed in the Supreme Court in 1869.

The 140th defendant filed a copy of the will or a translation of it in case No. 3170 D. C. Galle (Land Acquisition) and it was returned to him (See journal entries P6.) The 140th defendant in that case, in support of his application to draw a share of the compensation, filed an affidavit dated 25th October, 1920, in which he swore that Nicholas Dias Abeysinghe by his will dated 21st May, 1793 created a *fidei commissum* in favour of his heirs and died leaving as heir a son one of whose descendants was the deponent. The 139th defendant addressed a petition to the Attorney-General claiming his share of the interest earned by the compensation deposited in that case (P6).

The 139th and 140th defendants for purposes of their own now put the parties to the partition action to the proof of the contents of the will. The objection though a highly technical one must be upheld, but I am not prepared in the circumstances of this case to exercise the powers vested in this Court by section 760 of the Civil Procedure Code, even if it was applicable, and reverse or modify the decree in favour of all the defendants.

I accordingly make the following order: The order of the District Judge is varied and the shares or interests if any of the 139th and 140th defendants are declared free from the burden of a *fidei commissum*. This exemption will not extend to the interests, if any, of which the 139th and 140th defendants have divested themselves and the owners of which are parties to the suit and have not appealed.

It is now settled law that a partition suit can be brought by one of two or more *fidei commissaries* as *fidei commissaries* and the objection that the action is not maintainable fails.

Subject to the above variation the order of the District Judge is affirmed. The 139th and 140th defendants will be entitled to the costs of appeal and the costs of contest in the Court below, payable by the plaintiffs.

KEUNEMAN, J.

The five plaintiffs brought this action under the Partition Ordinance against 203 defendants for the sale of the land Pokunabodawatta *alias* Pokunewalauwa. There were many points of contest, but a certain number of these points were taken up by way of preliminary enquiry viz. the points numbered 4, 5 and 6, which are set out as follows in the judgment appealed from.

" The alleged points are

(4 and 5) 139th and 140th defendants deny that Nicholas Dias Abeysinghe left a Last Will dated 21-5-1793. If the Court holds that there was such a will,

(*a*) Did it create a *fidei commissum* binding to the 4th degree of succession and

(*b*) Are the plaintiffs only the 3rd and 4th degree of succession.

(*c*) If so is this action maintainable

(6) Is the document P1 admissible in evidence."

The contention of the plaintiffs is that the original owner of the land in question was Nicholas Dias Abeysinghe Amarasekera, Chief Mudaliyar, who left a Last Will dated 21st May, 1793, whereby he devised the land in question to his heirs, subject to a *fidei commissum* which was binding to the full extent allowed by law viz. for four generations. This was denied by the 139th and 140th defendants.

In proof of the said will, the plaintiffs produced document P1, which was objected to by the appellants, and the question arose whether that document was admissible,

The learned District Judge held on these points in favour of the plaintiffs. The learned District Judge further held that the *fidei commissum* attached to the donees and three generations following.

The appellants appeal from this judgment.

The 1st question to be decided is whether the document P1 is admissible in evidence. P1 is not the original will, nor a certified copy of that will. P1 purports to be an English translation of a document in Dutch which had been deposited in the office of the Secretary of Police on the 21st May, 1793, during the time of the Dutch Government of Ceylon. A copy of this document had been granted to Mudaliyar Don Bastian Dias Abeysinghe Siriwardena on the 4th May, 1793. P1 may, be a translation of the original document deposited or of the copy granted as shown above. There is an endorsement that the copy agrees with the original, so probably the translation was of the copy. Now the terms of P1 show that Nicholas Dias Abeysinghe Amarasekera appeared at the office of the Secretary of Police and made certain declarations, but P1 purports to bear the signature of G. C. Dias as executant. No explanation has been given for this difference in initials. In an old action D. C. Galle 23376 about the year 1865 one Nicholas Dias Mudaliyar, a grandson of the original owner produced what he described as the "old Dutch deed of 1793." A translation was also filed in the case. In April 1872 one Petrus Dias, a member of the same family moved for permission to withdraw the will, leaving the translation behind in the case. The reason given was that there was no person procurable who was competent to make a copy of the will. The will was accordingly handed to Petrus Dias, who signed as having received the same.

In D. C. Galle 38454 about the year 1880, Fred Dias the son of Petrus Dias produced this "will" for the purposes of the case, and was allowed to withdraw it again. (Vide document P1).

The 4th plaintiff stated in evidence that on the death of Fred Dias, "the contesting defendants i.e. Abram Dias' family got the will. In D. C. Galle 3170 land acquisition, 140th defendant produced a copy of this will and withdrew it later.....The will cannot now be found." No explanation in this connection has been offered by the present appellants.

The document P6—the journal entries in case D. C. Galle 3170 — shows that the 140th defendant moved to withdraw the last will No. 1543 filed by him and was allowed to do so on 18-7-1930. This is the number appearing in P1. Apart from the evidence of the 4th plaintiff there is nothing to show definitely whether the document withdrawn was a certified copy of the Dutch Will or a translation. The appellants produced documents 139 D1 which is an English translation in similar terms to P1 except for the fact that the first page is missing. 139 D1 contains an endorsement at the back of the last page under date 18-7-1930. "Doct. filed in D. C. Galle case No. 3170 returned to P. B. Dias Abeysinghe deft." i.e. to the present 140th defendant.

The contention for the plaintiff is two-fold (1) that the Dutch last will is in the possession of the 140th defendant, and (2) in the alternative that it is lost. It is urged that secondary evidence can be given of the contents of the will under section 65 (1) and (3) of the Evidence Ordinance.

As regards the first contention, it is only necessary to state that the notice to produce the document required by section 66 has not been given to the 139th and 140th defendants, and that no circumstances have been established which dispense with the necessity of the notice. But there is another and more serious objection which is applicable to both the contentions viz. that P1 is not secondary evidence of the document within the meaning of section 63 of the Evidence Ordinance. P1 purports to be a translation of the Dutch original or of the copy supplied by the office of the Secretary of Police. In *Abdul Rahiman vs Kani Umma* (14 N.L.R. 279) Lascelles, C.J. stated

> " The different kinds of secondary evidence that are admissible to prove the contents of a document are enumerated in section 63 of the Evidence Ordinance, and the enumeration does not include translations. That section 63 is intended to be exhaustive is clear from the language of the section, and in India the section has been so construed. *Ram Prasad vs Raghunandan Prasad* (1 L.R. 7 All. 739 at 743)."

It has also been held in India that a translation is not secondary evidence of the contents of the original, vide *Jagannatha Naidu vs Secretary of State for India* (A.I.R. Madras 1922 page 334). In this case what was sought to be put in was a translation contained in a judgment in a suit not between the same parties or their representatives in interest. In this case, however, mention is made of two other Indian cases not obtainable here in which it was held that a translation is not secondary evidence.

I am in agreement with these findings and hold that an English translation cannot under section 63 be regarded as secondary evidence of an original document in some other language. Accordingly P1 cannot be admitted in evidence. In addition to the fact that strict interpretation must be given to section 63, it does not appear to me that any probative value is to be found in the translation P1. We do not know who made the translation, and there is no certificate that it is a correct translation from the Dutch.

Counsel for the respondents further argued that there was other secondary evidence of the existence and the contents of the old Dutch will of 1793.

The first line of proof offered is the evidence of Nicholas Dias Mudaliyar in D. C. Galle 23376, P1. The evidence of this witness who was 5th defendant in that case and gave evidence in 1865 was produced. Witness himself was the son of Abram Dias and grandson of the original owner. He stated " the land was the property of my grandfather. He left an old Dutch deed of 1793 which I produce." It is sought to bring this evidence under section 63 (5) of the Evidence Ordinance viz. " oral accounts of the contents of a document given by some person who has seen it,"

The difficulty in the respondent's case is that, while this evidence does tend to prove the existence of the will of 1793, it is silent as to the contents of the will.

A similar difficulty applies to the recorded evidence of Fred Dias in D. C. Galle 39454, P5. Here also the existence of the will is spoken to, but not the contents of the will.

Reference has also been made to P10 the last will of Abraham Dias made on the 13th December 1830. Here there is undoubtedly a reference to the terms of the old Dutch will of 1793 as far as it relates to the property in question. The authenticity of this document however has not been established. The notary's attestation is to the effect that P10 is a correct translation from the Dutch of a paper writing purporting to be the last will of Abraham Dias, but produced by Nicholas Dias on the 30th December 1830. There is no production of the original Dutch will of Abraham Dias. But apart from this infirmity, it is not possible to regard this as an " oral account " of the contents of the old will of 1793, and it cannot be regarded as a copy made admissible under section 63.

Further it has been contended that the contents of the old Dutch will of 1793 have been admitted by the appellants. The present case is an action under the Partition Ordinance, and I do not think that admissions of this nature can be regarded as establishing the high degree of proof which is required in such cases.

Counsel for the respondent relied in this connection on an affidavit marked P6 sworn by the 140th defendant and filed in the land acquisition case D. C. Galle 3170. Here the appellant stated that the land originally belonged to Nicholas Dias Abeysinghe " who by his will dated 21st May 1793 created a *fidei commissum* in favour of his heirs and died leaving 3 children who became entitled to the same." In a later paragraph he added that " so far as myself any my brothers and sisters are concerned the said restriction is at an end." I do not think that we can find here an admission that a *fidei commissum* was created which had the effect of binding the 139th and 140th defendants, or in fact any admission that there was a *fidei commissum* binding on four generations. Further the admission if any related to the land Poloyamoderawatte and not to the land at present in question.

Counsel for respondent also relied on a petition filed by the 139th defendant in the same case D. C. Galle 3179, also marked P6, but I am not able to find any admission of the contents of the old Dutch will in this document.

Counsel for the respondents also argued that the question by the appellants of the document 139 D1 must be construed as an admission of the contents of the old Dutch will of 1793. This document again is an English translation—the first page is missing. Apparently this translation was produced by the 140th defendant in the land acquisition case D. C. Galle 3170, either with or without a Dutch copy of the original, and was

subsequently withdrawn from the case by the 140th defendant. Now it appears clear that this document was not produced to prove the contents of the will, and that there was no consent by the appellants that it should be treated as proving the contents of the will. The apparent reason for producing it was to show what document had actually been filed in D. C. Galle 3170 by the 140th defendant and removed by him. The same objection applies to 139 D1 under the Evidence Ordinance which applies to P1. Under these circumstances the language of Reilly, J. in *Marri Narasayya vs Perrui Krishnamurthi* (A.I.R. 1928 Madras 1255) becomes relevant. " even if a document is admitted to the record by consent, that alone will not enable either party to prove by that document anything which under the Evidence Ordinance cannot be proved. But if the parties consent that for the purposes of the case it shall be treated as showing the contents of some other document, then although the contents of that other document could not be proved under the act by the document proved, that is of no consequence." With respect, I think this is a salutary rule and I do not think there is any admission in this case of the contents of the original Dutch will, even supposing that in an action under the Partition Ordinance, such admission can have any effect.

A further point raised by counsel for the respondent is that the 139th and 140th defendants are barred from denying the existence and contents of the old will of 1793 in consequence of the decree in D. C. Galle 33087, which it is claimed is *res judicata* on this point. The question of *res judicata* was not one of the points originally reserved for preliminary determination, but the learned District Judge was of opinion that *res judicata* was established, and I think it is possible to decide this matter in appeal. It is clear that all the parties to the present action including the plaintiffs and the 139th and 140th defendants were parties to D. C. Galle 33087, and that in the District Court the identical questions arising in this case were in question in respect of the land Poloyamoderawatte, and the same or similar documents were produced and similar evidence was given. In that case the document P1 was admitted in evidence in proof of the contents of the will of 1793, and the learned District Judge held that the existence and contents of the will were proved, and that the terms of the will were as contained in the translation P1, and created a *fidei commissum* binding on the heirs of the original owner, and three generations next succeeding them. Had the matter stood there a strong case might perhaps have been made out in favour of *res judicata*. Thereafter the 139th and 140th defendants appealed against the judgment. In appeal the Supreme Court gave no decision on the merits of the appeal, but dismissed the appeal on the ground that the appellants had transferred all their interests in the land in question and accordingly had no interest in the decree.

It has been held in the Privy Council in *Annamalay Chetty vs Thornhill* (33 N.L.R. 41) that no decree from which an appeal lies and has in fact been taken is final between the parties so as to be *res adjudicata*. This

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effect arises from section 207 of the Civil Procedure Code. In India it has been held that

> " where the decision of a lower Court is appealed to a superior tribunal which for any reason does not think fit to decide the matter, the question is left open and is not *res judicata*."

See Caspersz on *Modern Estoppel* and *Res Judicata* Vol. 3 page 156. So where a lower Court had decided issues as to title and possession, but on special appeal the question of possession alone was adjudicated upon, it was held that the question of title was still open to the parties. *Gungabishen Bhugut vs Raghoonath ofha* (I.L.R. 7 Cal. 381). In a later case *Nilvaru vs Nilvaru* (I.L.R. Bom. 110) the reason for the rule was laid down as follows.

> " When the judgment of a Court of first instance upon a particular issue is appealed against, the judgment ceases to be *res judicata* and becomes *res sub-judice*, and if the appellate Court declines to decide that issue and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than if that judgment had been reversed by the Court of appeal."

This rule was based upon the interpretation of section 13 of the Civil Procedure Code of 1877 which said that no Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction in a former suit.

The section in our Civil Procedure Code is section 207 which runs as follows :—

> " All decrees passed by the Court shall, subject to appeal, when an appeal is allowed, be final between the parties, and no plaintiff shall be non-suited."

I think the word 'allowed' in this section must mean 'permitted.' In the case of *Annamalay Chetty vs Thornhill* supra, their Lordships of the Privy Council said

> " where an appeal lies, the finality of the decree, on such appeal being taken, is qualified by the appeal, and the decree is not final in the sense that it will form *res adjudicata* as between the parties."

I think the words ' subject to appeal ' contained in section 207 brings into force a similar rule to that explained in *Nilvaru vs Nilvaru* supra, and that on appeal the matter once more becomes *sub judice*. Since the Appeal Court declined to decide the issues in D. C. Galle 33087 and disposed of the case on other grounds, the decree in that case is not *res judicata*.

I accordingly hold that the judgment and decree in D. C. Galle 33087 is not *res judicata* of the issues raised in the present action.

In view of these findings the further questions of law specially reserved for consideration as preliminary issues do not arise.

It is with considerable reluctance that I have arrived at these conclusions, as the existence, contents and the effect of the old Dutch will of 1793 have been considered and established in several previous cases. The oldest judgment available in respect of this matter is in the year 1869 and is reported in *Vander Straaten* at page 32. This is a judgemnt of this Court and there

have been other judgments of this Court. I do not however, think that I can escape from the conclusions at which I have arrived.

The pedigree in this case has been proved and I can see no valid objection to the plaintiff bringing the present action.

The matter was set down for further hearing as to what order should be made in this appeal. I agree with my brother Maartensz that we should not exercise our powers under section 760 of the Civil Procedure Code in this case. I also agree to the order my brother has made in this appeal.

Decree varied.

Present: HEARNE, J.

FERNANDO vs COMMISSIONER FOR WORKMEN'S COMPENSATION

*Reference * under section 39 of the Workmen's Compensation Ordinance No. 19 of 1934 by the Commissioner* (461)

Argued on 17th February, 1939.

Decided on 21st February, 1939.

Workmen's Compensation Ordinance—Section 9—Commutation of half-monthly payments—Effect of such commutation.

Held : (i) That a workman in arranging for commutation under section 9 of the Ordinance does not accept a lump sum in exchange for all claims.

(ii) That a workman by commuting the half-monthly payments under section 9 merely redeems his right to receive half-monthly payments and he does not thereby surrender or prejudice any rights which may later accrue to him.

J. R. Jayawardene, for 1st respondent in support.

Schokman, Crown Counsel, on behalf of the Attorney-General on notice, as *amicus curiae*.

HEARNE, J.

An accident took place on 9th October, 1937 and on 10th November, 1937. The wife of the injured man wrote to say she was removing him to India. The employers of the workman to whom a communication was addressed forwarded a Memorandum of Agreement dated 22nd November, 1937 for redemption of half-monthly payments. Notice was issued to the parties but it is doubtful whether the workman received notice. He had left for India on 26th November, 1937. The agreement was registered on 10th December, 1937.

On 18th August, 1938 the workman applied for compensation in respect of a permanent injury and the question is whether his claim for a lump sum as compensation in respect of permanent disability can be enter-

* See page 166

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tained by the Commissioner, assuming he is satisfied (section 16 (2) of the Ordinance) that the delay was due to sufficient cause. The workman under the registered agreement received, in addition to a sum of Rs. 17/–, being half-monthly payments from 17th October, 1937 till 16th November, 1937, a sum of Rs. 100/– in full settlement of all claims under the Workmen's Compensation Ordinance "in respect of all disablement of a temporary nature arising out of the accident, whether now or hereafter to become manifest."

It is , I think, clear from Section 9 of the Ordinance and the terms of the agreement that the workman in arranging for commutation does not accept a lump sum in exchange for all claims. He merely redeems his right to receive half-monthly payments. He does not thereby surrender or prejudice any rights which may later accrue to him. Of course an employer will be entitled to deduct from the amount of compensation due the amount he has already paid in the form of half-monthly payments and the amount he has paid in commutation.

The answer is, therefore, that on sufficient cause being shown the claim can be entertained.

I am indebted to Mr. Schokman, Crown Counsel who appeared on notice for the Attorney-General, for his assistance.

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* *Workmen's Compensation—Non-fatal accident to Sessiay Fernando.*

No. C 30/4041/37
Department of Labour
Colombo, 8th November, 1938.

Sir,

I have the honour to submit the following question of law for the opinion of the Supreme Court in terms of section 39 of the Workmen's Compensation Ordinance No. 19 of 1934.

An accident took place on 9th October, 1937 and on 10th November, 1937 a letter was received from the wife of the injured man stating that she intended removing him from hospital and taking him to India. Reference in this connection is invited to section 15 (1) of the Ordinance. The employers of the injured workman were addressed accordingly and they forwarded in terms of section 42 of the Ordinance a memorandum of agreement dated 22nd November, 1937 on Form "F" for redemption of half-monthly payments. A copy of the memorandum of agreement is attached. Notice on Form "I" as required by Regulation 38 was issued to the parties and the agreement was registered on 10th December, 1937. It is possible that the notice sent to the workman did not reach him as he left for India on 26th November, 1937.

Section 6 of the Ordinance deals with the various types of injuries and the method of calculation of the compensation payable. When the workman's wife wrote on 10th November, 1937 the injury was dealt with as temporary disablement under section 6 (1) (*d*) as there was no evidence to show that the disablement was permanent. The memorandum of agreement dated 22nd November, 1937 was accepted as an agreement for commutation of half-monthly payments under section 9.

On 18th August, 1938 the workman applied to me for compensation in respect of a permanent injury and forwarded a medical certificate in support of his claim. Sections 6 (1) (*b*) and 6 (1) (*c*) deal with the cases of permanent disablement.

Under section 16 (1) a claim for compensation in respect of an accident should be instituted within 6 months of the occurrence of the accident but under section 16 (2) I may admit a claim if the failure to do so was due to sufficient cause.

I desire to have their Lordship's ruling as to whether the claim for lump sum compensation in respect of permanent disability mentioned in para 4 can be entertained by me.

I am, Sir,
Your obedient servant,
(*Sgd.*)

Commissioner for Workmen's Compensation.

Present: HEARNE, J.

ASEERVATHAN AND ANOTHER vs SEVEITY AND FOUR OTHERS

S. C. No. 209—*C. R. Jaffna No.* 11547.
Argued on 10th & 11th February, 1939.
Decided on 21st February, 1939.

Jurisdiction—Court of Requests—Action for declaration that water-course "rightfully appurtenant" to land—Also claim for accrued damages and continuing damages—Are accrued damages incidental or subsidiary to the main action—Courts Ordinance—Section 77.

The plaintiff brought this action in the Court of Requests for a declaration that a water-course valued at Rs. 75/– was "rightfully appurtenant" to his land and *inter alia* claimed damages in a sum of Rs. 300/– being the value of the loss caused to his plants by reason of defendant's wrongful obstruction of the water-course. He further claimed Rs. 10/– per mensem as continuing damages.

The defendants objected to the jurisdiction of the Court of Requests on the ground that the claim to Rs. 300/– for damages already accrued was not a claim incidental or subsidiary and that therefore the plaintiff's remedy lay in a separate action.

Held : That the claim of Rs. 300/– as damages that had already accrued was incidental to the main cause of action and therefore did not affect the jurisdiction of the Court of Requests.

N. Nadarajah with *Curtis*, for defendants-appellants.
L. A. Rajapakse with *H. W. Thambiah*, for plaintiffs-respondents.

HEARNE, J.

The plaintiff sued the defendants in the Court of Requests, Jaffna, for a declaration that a watercourse, valued at Rs. 75/– was "rightfully appurtenant" to his land and for an order that the defendants be required

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Hearne, J.

Ascervathan and Another *vs* Seveity and Four Others

to remove obstacles placed by them which prevented him from using the water-course. He also claimed that by reason of the defendants wrongful obstruction his plants had died involving him in a loss of Rs. 300/–. This amount he asked as damages at the rate of Rs. 10/– per mensem.

The question of jurisdiction was raised both in the lower Court and on appeal.

It is agreed that the main cause of action falls within the meaning of the words " All actions in which the title to, or interest in, or right to the possession of, any land shall be in dispute " appearing in section 77 of the Courts Ordinance No. 1 of 1889.

It is conceded, on the authorities, that the test of jurisdiction in a land case is the value of the land or the interest in dispute irrespective of any damages or other relief claimed on the cause of action : but it is objected that, while the claim to damages at Rs. 10/– per mensem is incidental and subsidiary and does not affect the jurisdiction of the Court, the claim to Rs. 300/– for damages that had already accrued was a claim sounding only in damages and was therefore, not incidental or subsidiary.

In my opinion, the damage suffered by the plaintiff was the consequence of the denial to him, as he claimed, of his right to use the water-course : the loss of his plants was directly the result of the trespass on which he founded his action : and his claim to Rs. 300/– damages is therefore incidental to the main point. It is not in my opinion an independent head of claim for " debt, damage or demand " constituting within the meaning of those words in section 77 of the Courts Ordinance a distinct money claim.

It is argued that the plaintiff could in a separate action have maintained a claim to these damages. If he could it is clear that the main issues in such an action would have been whether the plaintiff was entitled to a right of way and water-course and whether the defendants had wrongfully obstructed the plaintiff in the use of the water-course, and these are also the main issues in the present case. This would have involved a conflict with the policy of the Civil Procedure Code, which is to prevent a multiplicity of actions. It is precisely on this principle that judgments of this Court, notably *Pedris vs Mohideen* (1923) 25 N.L.R. 105, have proceeded.

On the facts of the case I agree with the learned Commissioner and I dismiss the appeal with costs.

Appeal dismissed.