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VOLUME XIV

WITH A DIGEST

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Per SOERTSZ, A.C.J. "The Criminal Procedure Code makes no provision for inspection of scenes of offences by District Judges and Magistrates. Section 238 provides for a view by the Jury of the place where the offence was committed, but, perhaps, there can be no objection to an inspection by a District Judge or a Magistrate provided it is held with due care and caution."

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The 1st and 2nd accused are husband and wife, living together in the house where fermented toddy beyond the prescribed limit was found. The Magistrate found that when the Excise party approached the 1st accused started to run away, that the fermented toddy spoken to by the Inspector was found in the kitchen of that house, that the 2nd accused (wife) was in the compound when the Excise party were approaching and that she rushed in and broke a pot in the kitchen and fermented toddy was spilt on the floor. The Magistrate convicted both accused.

Held : That on these facts the wife cannot be said to have been in possession of the toddy.

Executors and Administrators

In a case where the expression lessee is defined to include his heirs, executors, administrators, and permitted assigns, an executor is in terms one of the lessees, and is just as much entitled to hold the lease as is a permitted assign.

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" In viewof Mr. Craib's exceptional services to the Company, and in consideration of the fact that he has to undergo medical treatment while at home, it was resolved to grant him a special bonus of Rs. 10,000/-" The income tax authorities claimed income tax on this amount. The assessee resisted the claim. The Board of Review decided against him and he applied for a case stated to the Supreme Court.

Held : That the payment was in the nature of a gift and did not attract Income Tax.

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Landlord and Tenant

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Held : (i) That the writing D1 was not a writing which the law required to be notarially attested and therefore was not debarred from being proved by section 92 of the Evidence Ordinance.

(ii) That the document D1 was legally effective as against A (1st plaintiff) only.

(iii) That as the deed of lease failed to specify the rent to which each was entitled and in the absence of evidence to the contrary, the two lessors should *prima facie* be regarded, as being entitled to equal shares of the rent.

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Held : (i) That sections 325 and 326 of the Civil Procedure Code (Chapter 86) did not apply to the order made by the learned District Judge inasmuch as the decree entered did not order the delivery of possession or the removal of a party bound by the decree.

(ii) That the orders to Fiscal directing him to deliver possession of the premises must be regarded as having been made under section 12 (1) of the Mortgage Ordinance (Chapter 74) and not under section 287 of the Civil Procedure Code (Chapter 86).

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(ii) That the word " whosoever " in the context of section 2 (12) of the Nuisances Ordinance (Chapter 180) means, whosoever being the occupier of premises.

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(ii) That a Commissioner under the Partition Ordinance is an Officer of Court and under section 114 (e) of the Evidence Ordinance his official acts should be presumed to have been regularly performed.

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(ii) That the burden of proving that the votes of the disqualified persons were cast for the successful candidate lay on the applicant for the writ of *quo warranto*.

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Proctor—Re-admission of proctor who has been struck off the rolls on conviction of offences of cheating and forgery—Principles which guide the court in considering applications for re-enrolment.

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Res judicata—When may the court examine material outside the decree to determine whether a matter is res judicata—Validity of deed executed during the period intervening between an order of abatement and the setting aside of such an order—Partition Ordinance (Chapter 56) section 17.

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Held : (i) That the Supreme Court cannot exercise its powers of revision in respect of cases decided by the Supreme Court itself.

(ii) That relief by way of *restitutio in integrum* will not be granted where parties are themselves to blame for having failed to place before the court the whole of their evidence which they had at their command.

(iii) That, to succeed in an application of this kind for *restitutio in integrum*, the petitioners must show that the mistake was not merely material but of such vital and essential materiality, that it must have altered the whole aspect of the case.

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(ii) That the Supreme Court will exercise its powers of revision in a case in which an appeal is pending only in exceptional circumstances.

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Land Settlement Ordinance—Crown Land (Claims) Ordinance—Land possessed by husband as wife's agent—Divorce of husband by wife—Possession of land by husband after divorce—Claim of land by husband—Issue of Crown grant to him—Is husband entitled to the land.

Held : (i) That the defendant was not entitled to the land.

(ii) That even after the divorce the defendant's possession must be regarded as the possession of an agent.

(iii) That the fact that the Crown had issued a grant in favour of the defendant, acting on his representation that he was entitled to it, did not affect the right of the plaintiff to claim the land from the defendant.

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Small Tenements Ordinance (Chapter 87)—Order against tenant—Objection to writ of ejectment by co-occupiers—Claim of title to tenement by co-occupiers—Points of decision by a court in a proceeding under the Small Tenements Ordinance.

Held : (i) That the co-occupiers were not in the circumstances entitled to succeed in their objection.

(ii) That once a landlord has established his title to relief under the Small Tenements Ordinance the jurisdiction of the court is not ousted by the tenant alleging title in a third person.

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Held : That the petition of appeal should have been stamped with duty payable on two petitions.

Stamp Ordinance (Chapter 189)—Appeal insufficiently stamped—How should action be valued.

Held : That the value of the subject-matter of the action was over Rs. 1,000/– and that the appeal had been insufficiently stamped.

Stamping of petition of appeal—Appeal by nineteen unsuccessful claimants to be registered as voters—One appeal petition—One five-rupee stamp affixed—Section 24 (2) of the Colombo Municipal Council (Constitution) Ordinance—Is the petition of appeal correctly stamped—Does the withdrawal of all bad appeals make the remaining appeal good.

Held : (i) That the petition of appeal was not correctly stamped inasmuch as in fact there were nineteen petitions of appeal and therefore as many five-rupee stamps were required.

(ii) That the withdrawal of eighteen bad appeals could not and did not make the remaining petition a good petition of appeal.

Supreme Court

The Supreme Court cannot exercise its powers of revision in respect of cases decided by the Supreme Court itself.

The Supreme Court has the power to revise any order made by any original court whether an appeal from that order is pending or not.

Trial

Trial of action—Application for postponement by counsel—Withdrawal of counsel after refusal of postponement—Is the appearance of counsel to be regarded as limited to the application for postponement only—Are proceedings in action thereafter ex parte *or* inter partes.

Held : (i) That the appearance of counsel was sufficient appearance for the parties and that the trial should despite his withdrawal be regarded as a trial *inter partes*.

(ii) That the refusal to grant a postponement is not a ground on which a party or his proctor or counsel may withdraw from a trial.

(iii) That there is no such thing as a limited appearance of counsel.

Trade Mark

Trade marks—Colourable imitation—Intent to pass off defendant's goods as plaintiff's.

Held : That, although the plaintiff may have no monopoly for the use of the individual features of his trade mark, if they are so combined by the defendant as to pass off the defendant's goods as the plaintiff's, then the plaintiff is entitled to an injunction to restrain the defendant from passing off his goods as the plaintiff's.

Valuation of Action

How should the value of the subject-matter of an action be determined.

Village Committee

Election of Village Committee Chairman—Equality of votes—Election by lot—Three voters later found to be disqualified—Is election of Chairman valid.

Waiver

A person who has waived a judgment-debt for consideration cannot under our law afterwards recover the debt.

Warrant of Attorney

Warrant of attorney to confess judgment—Attestation of mortgage bond and warrant of attorney by the same proctor on instructions from plaintiff — Failure to nominate a proctor by defendant's free choice—Civil Procedure Code (Chapter 86)—Section 31.

Held : That the warrant of attorney to confess judgment was of no force in law inasmuch as there had been a failure to comply with the requirements of section 31 of the Civil Procedure Code. (Chapter 86).

Withdrawal of Counsel from Civil Trial

Words and Phrases

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

KADIJA UMMA vs MOHAMED SULAIMAN & OTHERS

Application for Final Leave to Appeal to the Privy Council in S. C. No. 8—D. C. Colombo No. 25701—Application No. 299.

Argued on 1st & 2nd March, 1939.

Decided on 15th March, 1939.

Appeal to Privy Council—Security for costs of appeal—Security by hypothecation of immovable property—Bond executed before Registrar of the Supreme Court—Is the security valid.

The applicants were allowed to "give security in landed property" under rule 3 (*a*) of the Privy Council Appeal rules. The bond hypothecating the land was executed before the Registrar of the Supreme Court. When the application for final leave was made, objection was taken that no valid bond had been executed inasmuch as the bond satisfied neither the requirements of Ordinance No. 7 of 1840 nor Ordinance No. 17 of 1852.

Held : (i) That the security had not been properly tendered.

(ii) That the application for final leave to appeal to the Privy Council could not be granted in the circumstances.

N. E. Weerasooriya, K.C., with *Gratiaen*, for plaintiffs-petitioners.

H. V. Perera, K.C., with *Perisunderam* and *Rajapakse*, for 2nd defendant-respondent.

N. Nadarajah, with *W. W. Mutturajah*, for 3rd to 26th defendants-petitioners.

KEUNEMAN, J.

In this case two applications for leave to appeal to the Privy Council on the part of the plaintiffs and the 3rd to 26th defendants respectively have been consolidated. Application for final leave to appeal has now been made to us. The appellants have previously been permitted to "give security in landed property." The objection is now taken on behalf of the 2nd defendant-respondent that the bond by which the appellants hypothecated the property tendered as security is attested before the Registrar of this Court, and not in the manner required by section 2 of Ordinance No. 7 of 1840, or by Ordinance No. 17 of 1852. This objection was taken before Soertsz, J. and Nihill, J. who have ordered that the question involved be referred to us as a Divisional Court.

Admittedly the bond has not been executed in the form required by section 2 of Ordinance No. 7 of 1840, *viz.* before a Notary and two witnesses, nor before a District Judge and two witnesses, as required by Ordinance No. 17 of 1852. The bond is before us, and is one which has been signed and executed before the Registrar of the Supreme Court. The point for decision is whether this is a valid security under Ordinance No. 31 of 1909, and the Appellate Procedure (Privy Council) Order of 1921 made thereunder which relate to appeals from this Court to the Privy Council.

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On the 10th November, 1938, in consequence of an application by the petitioners, the Supreme Court made order that the two appeals be consolidated, and that it was open to the appellants to give security in landed property. In the first place the security was to be tendered to the Registrar. If the Registrar was not satisfied with the security tendered, he could refer the matter to the Supreme Court for further directions.

In pursuance of that order, on the 23rd November, 1938, the petitioners tendered as security a certain property to the Registrar. The matter was apparently referred by the Registrar to the respondent, and his Proctor took the objection that the title was not good, as some of the title deeds were not tendered, and a certain mortgage had not been cancelled at the Land Registry. Otherwise there was no objection to the title. The matters mentioned were apparently rectified and at any rate there is no objection made now that the title is bad, or the security insufficient. The appellants thereafter entered into the bond in question in this case.

On the 27th November, 1938, and the 30th November, 1938, the Registrar issued two certificates to the two sets of appellants, certifying that the appellants have complied with the conditions imposed under rule 3 (a) of the Scheduled Rules, *inter alia* that they had mortgaged and hypothecated by bond certain specified properties. These are not certificates which are required to be given under either the Ordinance or the Order but were apparently issued as a result of the Supreme Court order of the 10th November, 1938.

I mention these facts because it has been argued before us that the Supreme Court delegated to the Registrar the right of determining not only the sufficiency of the security tendered, but also the form in which the bond should be executed.

I am unable to see that any more was delegated to the Registrar, than the right of deciding or advising this Court on the sufficiency of the security. I can nowhere find any indication that this Court delegated to the Registrar the right of determining the validity as regards form of the bond, and I think it would not have been proper for the Court to have delegated any such power to the Registrar.

Under Rule 3 (a) of Schedule 1 of Ordinance No. 31 of 1909, the appellant is required within the period prescribed to " enter into good and sufficient security," to the satisfaction of the Court, in a sum not exceeding Rs. 3,000/- for the due prosecution of the appeal and the payment of such costs as may become payable to the respondent.

The question to be determined by us is whether the appellants have entered into " good" security. If the security is " good " as regards form, there is no question now as to its sufficiency.

It is abundantly clear that since Ordinance No. 31 of 1909 came into operation, the ordinary and almost invariable practice has been to call upon the appellant to deposit the required security in cash. In fact on inquiry made by this Court in 1927, it was discovered that in the previous ten years there

had only been one instance were the security accepted was by the hypothecation of immovable property. (*vide de Silva vs de Silva* 28 N.L.R. 350) In this case it was held that this Court had power to accept security by way of hypothecation of immovable property. Since 1927 there have been further instances where this kind of security has been accepted. It was, however, stated by counsel for the respondent and not contradicted, that in only one previous instance has this form of security *viz.* by executing the bond before the Registrar been employed. In the case of *de Silva vs de Silva* (supra) the Court specifically ordered that the bond should be executed before a Notary Public, and that appears to be the only authority of this Court available as to the form in which the bond may be executed.

Counsel for the respondent argued that the only form of bond relating to immovable property which has legal validity is a bond which is in accordance with section 2 of Ordinance No. 7 of 1840 or Ordinance No. 17 of 1852, and that the bond in the form employed in the present case is of no force or avail in law. He contended that this was a " mortgage " or at any rate " a promise bargain contract or agreement.....for establishing a security " within the terms of section 2 of Ordinance No. 7 of 1840. He further contended that this was in effect a conventional mortgage between the appellant on the one side and the Registrar on the other, and that the fact that it was made in favour of a public officer, on order of the Court, did not take it outside the scope of that section.

Apart from authority, I think it is impossible to disagree with that contention. The language of section 2 is very wide, and purports to cover all mortgages. It is to be noted that under the Charter of 1833 clause 52 (*Ninthly*) security required to be given in case of an appeal to His Majesty in Council when the security related to immovable property was to be " by way of *mortgage* etc " Nor can this form of mortgage be regarded in the strict sense as a " judicial mortgage." Maasdorp in his Institutes of South African Law (5th Ed.) Vol. 2 page 270 says " a judicial mortgage is at the present day established by an attachment of seizure of goods made by the Sheriff or Messenger of Court." Apparently there had been other forms of "judicial mortgage" under the Roman Law which had become obsolete. Further, this bond cannot be regarded as a legal or tacit mortgage " arising by mere force of law " *vide* Maasdorp Vol. 2 page 272.

There is, however, an authority *Queen's Advocate vs Thamba Pulle* (3 Lorensz Reports 303), which counsel for the appellants argues that we are constrained to follow. It is clear, I think, that this is a decision of three Judges, and that number of Judges at the period in question constituted a Full Bench. The question decided was the validity of a bond relating to immovable property given in 1843. The bond was given by way of security in favour of the Secretary of the Court and was attested by the District Judge.

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It was argued by the appellant in that case

(1) That this was a judicial security created by an act of Court.

(2) That the object of Ordinance No. 7 of 1840 was " to prevent frauds and perjuries," and where the bond was signed and attested by the presiding Judge of the Court, it was not intended that attestation by a Notary and two witnesses was needed in such a case.

(3) That the rules and orders prevailing at the period in question only required that bonds of this character should be " signed, sealed and delivered *in Court*," and made no mention of notarial attestation.

The judgment of the Court was delivered by Morgan, J. as follows :—

" It appears, however, to the Supreme Court that the bond in question creates a valid mortgage over the property. The provisions of section 2 of Ordinance No. 7 of 1840 evidently refer to conventions of parties, and not to judicial hypothecs constituted as this by order of the Court.....The forms referred to and embodied in the rules (— see form 9 p. 101, and form 2 p. 104) make express reference to mortgages of property, and these rules were declared valid by an Ordinance enacted long after Ordinance No. 7 of 1840, *to wit* Ordinance No. 8 of 1846."

It is argued that there is a clear finding in this case that the language of section 2 of Ordinance No. 7 of 1840 does not apply to a mortgage of this character. I cannot agree with this contention. There can be no doubt that during the argument considerable emphasis was laid upon the rules, and the fact that these rules had received the sanction of the Legislature after Ordinance No. 7 of 1840. It is to be noted that the 2nd point raised by counsel for the appellant was not dealt with at all by the Court, and I incline to the opinion that when the Court said that the provisions of section 2 of Ordinance No. 7 of 1840 " *evidently* referred to conventions of parties and not to judicial hypothecs " such as the bond in question, the *evidence* on which the court depended was the rules which had received legislative sanction in 1846. At any rate, I am of opinion, that the positive finding on that point was a sufficient ground on which to rest the decision of the Court, and that no necessity arose to decide the other question.

I accordingly am of opinion, that we are not fettered in any way in consequence of that decision in our determination of the question before us.

These rules were repealed by the Civil Procedure Code of 1889, which however, by section 4 enacted that " in every case where no provision is made in the Ordinance, the procedure and practice hitherto in force shall be followed." The Code provided not only for appeals to the Supreme Court, (sections 753 to 760) but also for appeals to the Privy Council (sections 779 to 789). Section 757 related to security for costs of appeal in the case of appeals to the Privy Council. Section 757 provided *inter alia* for security " by way of mortgage of immovable property," and a similar provision appeared in section 783. The forms applicable were forms No. 129 and 131 in the Second Schedule, and made no further reference to the form of the bond, beyond the instruction " follow the ordinary form of bond " and the setting out of certain words to be employed in the body of the deed. There was no precise reference to any particular form governing the bond, such as were present in the repealed rules.

Finally Ordinance 31 of 1909 repealed sections 779 to 789 of the Civil Procedure Code, and contained no section corresponding to section 4 of the Code.

It has been argued that a certain practice which has grown up in respect of appeals to the Supreme Court and has obtained the sanction of the Supreme Court, should be applied by analogy to appeals to the Privy Council. In *Mohamadu Tamby vs Pathumma* (1 C.L.Rec. 26) in an appeal to the Supreme Court a bond hypothecating immovable property was signed by the obligor before the Chief Clerk of the District Court, and objection was taken that it did not conform with the requirements of section 2 of Ordinance No. 7 of 1840 or of Ordinance No. 17 of 1852. Bertram, C.J. held against the objection. He stated " It is a bond substantially executed in accordance with the practice that had always prevailed in the District Courts of this Colony. We should hesitate very long before giving a decision contrary to that general practice." He suggested as a possibility that this bond came within the exception created by section 20 of Ordinance No. 7 of 1840, and referred to the dictum of Morgan, J. in *Queen's Advocate vs Tamba Pulle* (supra) that section 2 of Ordinance No. 7 of 1840 evidently referred to conventions between parties and not to judicial hypothecs of that character. He dealt specifically with the argument of counsel which differentiated the earlier case, as the bond was not executed in the presence of the Judge, but of the Chief Clerk of the Court, and held that the objection failed.

A similar objection was taken to a bond executed in the presence of the Secretary of the Court in *Menikhamy vs Pinhamy* (23 N.L.R. 189), but was overruled. Ennis, J. followed the case of *Mohamadu Tamby vs Pathumma* (supra) " with some diffidence " as he was not sure that section 4 of the Civil Procedure Code was " sufficient to carry forward the practice which is in direct conflict with the express terms of Ordinance No. 7 of 1840 and Ordinance No. 17 of 1852."

Shortly after, in certain cases, the Supreme Court resolutely set its face against the extension of the decision in *Mohamadu Tamby vs Pathumma* (supra).

In *Fernando vs Fernando* (23 N.L.R. 453) Bertram, C.J. himself refused to " extend the exception to cover a case in which a Proctor acting on behalf of his client executed a bond in his office and afterwards filed it in Court." He also definitely held that a bond such as the one in question did not fall within the exception created by section 20 of Ordinance No. 7 of 1840.

In *Kanapathippillai vs Kannakai* (23 N.L.R. 455) a bond hypothecating immovable property, executed before a Justice of the Peace was held not to have been properly executed. Ennis, C.J. dealt there with the question whether *Queen's Advocate vs Thamba Pulle* (supra) established the principle that " judicial hypothecs " did not fall within the provisions of Ordinance No. 7 of 1840. " In my opinion that case did not go so far, because it

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expressly stated that a bond signed before the Secretary of the Court, fulfilled the requirements of certain rules and orders which were then in force, and which had received statutory recognition after Ordinance No. 7 of 1840 came into operation." He also mentioned the case of *Mohamadu Tamby vs Pathumma* (supra) as "a special exception."

Again in *Fernando vs Ranhamy* (23 N.L.R. 456) an objection was upheld by Ennis, J. in a case where the bond had been signed before a Proctor without any other witnesses. I cannot think that this current of authority commencing in 1918 can be regarded as establishing the proposition that "judicial hypothecs" of the nature of the bond in the present case are not governed by the terms of Ordinance No. 7 of 1840 and Ordinance No. 17 of 1852. I think the inference to be drawn is to the contrary. If such bonds fell outside the two Ordinances, and the special form required by the rules in existence before the Civil Procedure Code of 1889 was swept away by that Ordinance, it is difficult to resist the conclusion, that a bond in any such form should have been regarded as good. Clearly the Supreme Court did not agree with that view. I accordingly cannot regard the decision of Bertram, C.J. in *Mohamadu Tamby vs Pathumma* (supra) as doing more than giving judicial sanction to a practice of respectable antiquity in the case of appeals to the Supreme Court.

We are not called upon in this case to decide whether that decision is right or wrong. But I think we should resist the application to extend that decision by analogy to appeals to the Privy Council. There is no evidence that there has been a well established practice to regard as valid bonds dealing with immovable property executed before the Registrar of the Supreme Court, or that the Supreme Court has recognised the validity, of such bonds. The only decided case may afford an argument to the contrary. In any event the cases in which security by way of hypothecation of immovable property has been allowed, in the case of appeals to the Privy Council, were of such infrequent occurrence, that it can hardly be contended that any *cursus curiae* has been established.

I accordingly hold that the bond in this case is invalid, as it does not conform with the requirements of section 2 of Ordinance No. 7 of 1840, or of Ordinance No. 17 of 1852.

One further question remains for determination, *viz.* whether we have any power to grant relief to the appellants in this case, by permitting them to enter into a proper bond at this time. Counsel for the appellants contended that such a power is implied in rule 4 of schedule 1 of Ordinance No. 31 of 1909. We are, however, confronted with the peremptory terms of rule 3 (a) of that schedule which runs as follows :—

> "Upon the condition of the appellant within a period of one month from the date of the hearing of the application for leave to appeal, unless the Court shall, on the ground of the absence of the appellant from the Colony or for some other special cause, on application made to it, before the expiration of such period have granted an extension thereof, entering into good and sufficient security, to the satisfaction of the Court, etc."

The period of time fixed has now expired, and no application for extension of time was made or allowed before that period expired. If we give relief now, it will be in contravention of rule 3 (a), and I am of opinion that we have no power to do so.

I also think, that in the circumstances of this case, in giving such relief we cannot be regarded as making further directions " on cause shown " under rule 4. In this appeal the appellants contended that the form of the security given was valid in law, and a sufficient compliance with the requirements of Ordinance No. 31 of 1909. It was suggested for the first time in the argument of counsel before us, that as an alternative, in the event of our finding being against the appellant on the point referred, we should exercise our powers under rule 4. No such application appears to have been made to Justices Soertsz and Nihill, nor has this matter been referred to us by them.

The application for final leave to appeal to the Privy Council is refused with costs.

ABRAHAMS, C.J.

I agree.

HEARNE, J.

I agree.

Proctors :—

J. H. Rasiah Joseph, for plaintiffs-petitioners.
C. Sevaprakasam for 2nd defendant-respondents.
M. J. Akbar for 3-26 defendants-petitioners.

Application refused.

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

TILLAKARATNE & ANOTHER vs DASSANAIKE

S. C. No. 194—*D. C. Ratnapura No.* 6100.

Argued on 25th, 26th & 27th January, 1939.

Decided on 2nd February, 1939.

Land Settlement Ordinance—Crown Land (Claims) Ordinance—Land possessed by husband as wife's agent—Divorce of husband by wife—Possession of land by husband after divorce—Claim of land by husband—Issue of Crown grant to him—Is husband entitled to the land.

The defendant was in possession of a land known as Tennehenewatte on behalf of his wife. While he was in possession of this land his wife divorced him, but he continued to possess the land. This land was later dealt with by the Crown under the Crown Lands (Claims) Ordinance. The defendant claimed the land and it was sold to him after due advertisement. The plaintiff, the defendant's former wife and her child claimed the land from the defendant. The defendant resisted the claim.

Held : (i) That the defendant was not entitled to the land.

(ii) That even after the divorce the defendant's possession must be regarded as the possession of an agent.

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(iii) That the fact that the Crown had issued a grant in favour of the defendant acting on his representation that he was entitled to it, did not affect the right of the plaintiff to claim the land from the defendant.

Per HEARNE, J.—"It was argued on behalf of the appellant that as the Crown did not recognise the title of either of the claimants to the land in dispute it could make a grant of it to either. This argument was advanced in *Ceylon Exports Ltd. vs Abeysundere* (1933) 35 N.L.R. 417 at pp. 421 and 436, and was definitely rejected. On appeal the view taken by Dalton, A.C.J. was approved by the Privy Council 38 N.L.R. 117 at page 124.† Shortly, the policy and practice of the Crown is "to recognise and give effect to claims based on village title and possession." It was not intended by the legislature that it should act arbitrarily."

N. Nadarajah, with *E. B. Wickremanayake*, *S. W. Jayasuriya*, and *Kottegoda*, for defendant-appellant.

H. V. Perera, K.C., with *N. E. Weerasooriya, K. C.*, and *A. E. R. Corea*, for plaintiffs-respondents.

HEARNE, J.

This appeal concerns a dispute in regard to a lot of land between the 2nd plaintiff who sues with her mother, the 1st plaintiff, and the defendant who had been the former's husband. The plaintiffs succeeded and the defendant has now appealed.

The land in question known as Tennehenewatta is chena land in the Kandyan provinces.

After his marriage in 1914 the defendant took over the management of the properties in his wife's possession, including Tennehenewatta. His occupation, therefore, was initially on behalf of his wife.

In 1925, the 2nd plaintiff obtained a decree of divorce, but notwithstanding the dissolution of marriage the defendant remained in occupation of Tennehenewatta.

In 1931 an inquiry by the Land Settlement Department was held into claims made to land included in notices issued under the Waste Lands Ordinance, and according to Mr. Jansz "of the lands brought under the Waste Lands Ordinance, an offer was made of 450 acres.....to the plaintiff in consideration of her paying a sum of Rs. 900/- and withdrawing her claims to all other lands brought under the Waste Lands Ordinance notice." This she accepted. "Under the Waste Lands Ordinance also plaintiff was given about 20 acres of tea land in Pagoda village which had been planted by Mr. Vanderpoorten."

Tennehene could not be brought under the Waste Lands Ordinance by reason of the age of its cultivation, and in the agreement signed by the plaintiff she did not withdraw her claim to this property. Mr. Jansz, however, informed the defendant that Tennehene would be sold to him outside the provisions of the Waste Lands Ordinance and this was effected after an advertisement for sale under the Crown Lands Ordinance (1931).

Crown Grant in respect of Tennehenewatta was issued to the defendant on 7th March 1935, and it is this title which he asserted against the plaintiff who filed her action on 7th February, 1935.

Assuming that Mr. Jansz was competent to act as he did under the Crown Lands Ordinance (1931) and disregarding for the moment the argu-

† 6 C.L.W. 69 (Edd.)

ment that the defendant's defence was not open to him as it was based on a title which had not formally vested in him at the time the action was filed, the Judge's finding of fact that the defendant misled Mr. Jansz in his inquiries must be approved.

Mr. Jansz was aware that the defendant had no village title to support his claim and the considerations which led him to decide in defendant's favour, were his representations that " he was in exclusive possession and that he had expended a lot of money on planting the land." Against this there is a strong finding of fact which, in my opinion, the appellant has by no means succeeded in displacing, that he used his wife's money and resources in planting the land. It is remarkable that the defendant who is a lawyer did not produce any books of account " regarding expenditure incurred by him " although, as he alleges, he was in a position to do so.

In this connection reference was made by Counsel for the appellant to P23. The facts relating to this document are these. In D. C. Ratnapura 4191 the 2nd plaintiff sued the defendant in respect of certain lands (not Tennehenewatta) to which she claimed exclusive title and, in the course of the action the defendant moved that a decree be entered in accordance with terms of settlement (P23) which, as was alleged, had been reached in the divorce proceedings. The Judge described the agreement as abortive for the reason, as it would appear from the evidence of the 1st plaintiff, that " the defendant's application to have judgment entered in terms of the settlement was eventually refused." Considerable reliance, however, was placed by appellant's counsel upon clause 8 of P23 in which the defendant agreed to execute a deed of gift in respect of the improvements made by him on the land known as Tennehene block.....in equal shares to the four children of the marriage. No claim can, in my opinion, be founded on that clause in detachment from the rest of the document. Neither party can be said to have conceded any of the rights claimed by the other. It was no more than an attempt to settle outstanding differences in the interests of the children.

On the oral evidence that was given, the Judge unhesitatingly preferred the word of the 1st plaintiff to that of the defendant.

It was argued on behalf of the appellant that as the Crown did not recognise the title of either of the claimants to the land in dispute it could make a grant of it to either. This argument was advanced in *Ceylon Exports Ltd. vs Abeysundere* (1933) 35 N.L.R. 417 at pp. 421 and 436, and was definitely rejected. On appeal the view taken by Dalton, A.C.J. was approved by the Privy Council 38 N.L.R. 117 at page 124†. Shortly, the policy and practice of the Crown is " to recognise and give effect to claims based on village title and possession." It was not intended by the legislature that it should act arbitrarily.

It was also argued that as the 2nd plaintiff and the defendant claimed adversely to each other before the Settlement Officer it cannot be said that the latter was bound in a fiduciary capacity to protect the interests of the

† 6 C.L.W. p. 69 (Edd.)

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former, and that, therefore, the provisions of section 90 of the Trusts Ordinance were wrongly applied by the Judge to the facts of the case. I am unable to agree. The defendant's possession was originally on behalf of his wife. The agency that arose when he took possession " was not " as Counsel for the respondents argued " an incident of their marriage although it was occasioned by their marriage " When the marriage was dissolved he continued to remain in possession not in his own right but in the right of a person who had been his wife. The change in their personal relationship did not affect the character of his possession, and he did not cease to be bound in a fiduciary character merely because he concealed the fact from the Settlement Officer.

It was finally argued that even if the Settlement Officer for the purpose of deciding who is entitled to a grant, recognises the equitable interests of claimants, the 2nd plaintiff had waived her equitable interests.

Three issues were framed on this matter.

Issue 15. Was an extent of 550 acres of Crown Land in the village of Gilimale settled on the 2nd plaintiff in lieu of all her interests, if any, to lands claimed by the Crown, including the lands in dispute.

Issue 16. Were plaintiffs aware before the said settlement of 550 acres on them, that defendant would be given by the Crown in lieu of all rights claimed by him in Pagoda and other villages in Gilimale, a Crown grant for the lands in dispute and a settlement of other lands.

Issue 17. Did the plaintiffs acquiesce in the above settlement between the Crown and the parties to this case.

The Judge decided issue 15 in favour of the plaintiffs, holding that the land in dispute was expressly excluded from the settlement proceedings, and he answered issues 16 and 17 in the negative, also in favour of the plaintiffs.

Counsel for the appellant has drawn our attention to a particular passage in the evidence of Mr. Jansz. It reads " the rest of the land in lot 417 was settled by the Crown on third parties, not the 2nd plaintiff. She (2nd plaintiff) withdrew her claim to the remainder of lot 417 *i.e.* to all the lands in Pagoda excepting 50 acres settled on her." He argues that this passage indicates that the 2nd plaintiff withdrew her claim to Tennehene, and that the Judge disbelieved an impartial witness whose honesty was not in question. Even if this passage does bear the interpretation Counsel for the appellant seeks to give it, it is inconsistent with other passages which imply that the only lands to which the 2nd plaintiff withdrew her claims were those which were included in the notices under the Waste Lands Ordinance. I do not for a moment think, the Judge doubted the *bona fides* of Mr. Jansz. At the most it can be said that he preferred the recollection of the 1st plaintiff in regard to the attitude that she and her daughter adopted. The position she took in Court was the same, according to Mr. Jansz, as was taken by her in 1931, when for the first time she heard the Settlement Officer intended to give Tennehene to the defendant she objected emphatically. In my opinion the finding of the learned Judge must be accepted.

Even on the assumption that Tennehenewatta was land in the disposal of the Crown, I would hold that the Judge was right in his decision that it should have been settled on the plaintiffs, that they had not waived their interests, and that the grant to the defendant was due to his having misled the Settlement Officer.

Had it been necessary to do so, I would also have supported the Judge's finding that " the presumption in favour of the Crown that ordinarily attached to chenas in the Kandyan provinces has been rebutted " in the case of the land which was the subject of the action.

I would dismiss the appeal with costs.

POYSER, S.P.J.

I agree.

Proctors :—

D. J. S. Goonawardene, for defendant-appellant.
A. & E. Wijetilake, for plaintiff-respondent.

Appeal dismissed.

Present : SOERTSZ, J. & HEARNE, J.

GIRIHAGAMA vs APPUHAMY

S. C. No. 216 — *D. C.* (*F*) *Kandy No.* 48817.
Argued on 23rd February, 1939.
Decided on 3rd March, 1939.

Co-owner of land — Right of co-owner to house erected by him on common land Can another co-owner enter into possession of it without the consent of the co-owner who built it—If he does what remedy.

Held : (i) That where a co-owner builds a house on common land another co-owner has no right to enter into possession of the house without the consent of the co-owner who built it.

(ii) That a co-owner, who is kept out of possession of a house built by him on common land, by another co-owner, is entitled to claim damages for the period during which he is deprived of his possession of the building.

E. F. N. Gratiaen, with *M. M. I. Kariapper*, for defendant-appellant.
L. A. Rajapakse, with *S. W. Jayasuriya*, for plaintiff-respondent.

SOERTSZ, J.

I have no doubt that the trial Judge reached a correct conclusion when he found against the defendant-appellant's claim to be the owner of the whole land, the subject matter of this case. On the documentary evidence I think that was the only possible conclusion. But, in my opinion, the trial Judge erred when he declared the plaintiff entitled to a 1/3rd share of the land. The plaintiff and his Counsel had restricted the plaintiff's claim to a 1/4th on the footing that Mudalihamy had a fourth son Siyatu. It was later found that the defendant-appellant's vendor on deed D7 was an illegitimate son of Siyatu and, therefore, inherited nothing. It is for this reason that the trial Judge increased the plaintiff's share to one-third. But, he overlooked the fact that although Appuhamy the vendor to the defendant was shown to be illegitimate, it did not follow that Siyatu's share went to his brothers. It may well be that Siyatu has illegitimate issue.

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Soertsz, J.

Girihagama *vs* Appuhamy

I would, therefore, vary the decree by declaring the plaintiff entitled to a one-fourth share of this land. The only other matter for consideration is whether the trial Judge was right when he decreed the plaintiff entitled to the house in the occupation of the defendant and directed that the defendant be ejected therefrom. There can be no question that this house was built by Kirihamy, the plaintiff's father and that in regard to it, the plaintiff occupies the position of his father, the builder. That is to say, in a partition case for this land, the plaintiff would have a claim to be allotted that portion of the land on which this house stands if that can be done consistently with the rights and claims of the other co-owners of this land. Or, he would be entitled to compensation in respect of this building. A partition case seems clearly indicated in the best interests of all parties. But, what is to be done in the meantime in regard to this house ? In the case of *Kathonis vs Silva*, 21 N.L.R. 452, Ennis, A.C.J., said " I have some doubt as to the accuracy of the learned Judge's statement that the plaintiffs could not evict the defendant without proving that the defendant was without a vestige of co-ownership in the soil. A co-owner has the right to build and live on the common land..... If a co-owner exercises his rights and builds a house for his private use....., I am quite unable to see why he should not eject any other co-owner who attempted to occupy that house without his permission."

Jayawardene, A.J. following this ruling in *Sopie Nona vs Pethanhamy*, 25 N.L.R. 318. Now, in the present case although I agree with the appellant's counsel that the appellant did not enter into occupation of this house as the plaintiff's tenant, I am convinced that he went in on the strength of his having paid off the plaintiff's mortgage. That was in June 1934. This action was instituted in July 1937. The defendant had been in occupation, three years at the date of the action. The parties have agreed on the sum of Rs. 2/50 a month as a reasonable price for use and occupation. So that the defendant has had ninety rupees' worth of occupation.

The amount of the mortgage the defendant paid off was forty rupees. D4 and D5 show that the plaintiff has received from the defendant 5 plus 5 plus 17 rupees, that is 27 rupees. Add this to the forty rupees, and we have 67 rupees. Therefore, at the date of action the defendant owed the plaintiff twenty-three rupees. The plaintiff is no longer willing that the defendant should occupy this house, and the defendant's continuing to do so would amount to what Ennis, A.C.J. said, was an attempt to occupy the house without the builder's permission, and in that view of the matter, the plaintiff is entitled to eject the defendant from the house (see the passage on page 454 of 21 N.L.R.) I would not, therefore, interfere with the order of ejectment made by the trial Judge. I would set aside the decree entered in the court below and direct that decree be entered declaring the plaintiff entitled to a one-fourth of this land, and to the rights of Kirihamy the builder of the house in question and ejecting the defendant from the said house. The defendant will pay to the plaintiff rupees twenty three as amount due up to the date of action and will also pay as from July 1937 at the rate of Rs. 2/50 per mensem till he vacates or is ejected from this house. In regard to costs, I think the fairest order will be that the defendant do pay to the plaintiff 3/4ths of the costs here and below.

I would only add that if there is a partition case for this land, this decree should not be construed as deciding anything in regard to Siyatu's share. The plaintiff and the defendant will be free to claim under him.

HEARNE, J. I agree.

Proctors :— *Walter Beven* for defendant-appellant. *H. A. Wickremaratne* for respondent.

Set aside.

Present: LORD ALNESS, LORD ROMER & LORD PORTER.

JAYAWARDENE vs JAYAWARDENE AND OTHERS*

Privy Council Appeal No. 58 of 1937.

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

Decided on 24th February, 1939.

Crown lease—Prohibition against alienation, sub-lease or mortgage of subject-matter of lease without written consent of lessor—Gift of leasehold to sons of lessee without consent of lessor—Fidei commissum—Subsequent devise of leasehold by lessee by his last will to one of his sons who was also appointed executor—Acceptance of devisee by Crown as lessee on testator's death—Payment of rent by devisee—Is the devise to prevail over the gift.

One J. V. G. A. W. Jayawardene, the lessee of a Crown land, gifted *inter alia* the leasehold to his four sons in equal shares subject to a *fidei commissum*. The lease contained a clause prohibiting a donation of the leasehold without the written consent of the lessor, the Crown—The donor failed to get the consent of the lessor but unsuccessfully tried to persuade the Crown to approve the gift made by him. Thereafter the donor by his last will devised all his property save a sum of Rs. 3000/- to the appellant, one of his sons, whom he appointed executor of his last will. On the testator's death the appellant was substituted as lessee and his name was entered in the Government rent register. He continued to pay the rent until he was dispossessed by the first and third respondents. The appellant thereafter brought this action to vindicate his title.

Held : (i) That a donation of a leasehold, made in contravention of a condition of the lease that a donation without the written consent of the lessor shall be absolutely void, was voidable at the instance of the lessor.

(ii) That an invalid donation of a leasehold did not operate as a breach of a condition prohibiting donation without the lessor's consent.

(iii) That the passing of property through the executor to the devisee is no breach of covenant not to assign.

(iv) That in a case where the expression lessee is defined to include his heirs, executors, administrators, and permitted assigns, an executor is in terms one of the lessees, and is just as much entitled to hold the lease as is a permitted assign.

(v) That the leasehold did not in the present case pass to the donees.

H. I. P. Hallet, K.C., with *Stephen Chapman*, for the plaintiff-appellant.

L. M. D. de Silva, K.C., with *Kenelm Preedy*, for the Attorney General of Ceylon.

No appearance for the defendants-respondents.

LORD PORTER.

The appellant in this action, who was also the plaintiff, is one of the sons of the late J. V. G. A. W. Jayawardene, Gate Mudaliyar. The first three respondents are also his sons.

* For judgment of the Supreme Court see 7 C. L. W. p. 16

The deceased man was apparently a considerable landowner in the Island of Ceylon, and amongst his other properties was tenant under the Crown by an indenture No. 29 executed on the 29th October, 1919, and on the 23rd February, 1920, by the respective parties, of a certain allotment of Crown land called Kajugahaudumulleduwa, Kajugahaudumullelanda and Galagodakele in Maggon Badda, Kalutara Totamune and Eladuwa Village, Iddagoda Pattu, Pasdun Korale West, Kalutara District, Western Province.

The lease was entered into by the Governor of Ceylon on behalf of the Crown as lessor on the one part and by the deceased man as lessee (an expression which was stated to include his heirs, executors, administrators and permitted assigns) of the other part.

The estate was to be held in perpetuity subject to the covenants and general provisions contained in the lease.

The covenants contained provisions for clearing and planting, paying rent, and the non-erection of buildings on the land. The tenth covenant must be set out in full. It read :—

> "The Lessee and his aforewritten shall not sub-let, sell, donate, mortgage, or otherwise dispose of or deal with his interest in this Lease, or any portion thereof, without the written consent of the Lessor, and every such sub-lease, sale, donation, or mortgage, without such consent, shall be absolutely void."

The second general provision was also important, and is as follows :—

> "That if any rent hereby reserved shall remain unpaid and in arrear for the space of more than one year after the time hereby appointed for payment thereof, whether the same shall have been lawfully demanded or not, or if any breach shall be committed by the Lessee of any of the Covenants herein on the Lessee's part contained, or if the Lessee shall abandon or cease to cultivate the said land in manner provided in Part IV of this lease, or if the Lessee shall become bankrupt or compound with his creditors or if the said land or the interests of the Lessee or his aforewritten be sold in execution of a decree against him or his aforewritten, then, and in any of the said cases, this demise and the privileges hereby reserved together with these presents, shall forthwith cease and determine, and the Lessor his agent or his agents, may thereupon enter into and upon the said land and premises, or any part thereof in the name of the whole, and the same have, re-possess and enjoy as in his former estate, and the said land and premises shall forthwith revert to the Crown, without any claim on the part of the Lessee or his aforewritten against the Lessor for compensation on account of any improvements or otherwise howsoever."

The deceased man took possession under the lease and continued in possession until his death on the 19th January, 1930.

Meanwhile, in May, 1927, he was for some reason anxious to make a deed of gift of the whole or at any rate a large portion of his properties to his four sons in equal shares, and amongst those properties he desired to include the Crown lease.

Accordingly he wrote on the 16th May, 1927, to the Assistant Government Agent asking that permission to assign might be granted. Without waiting for the permission to be obtained, however, he executed four deeds

of gift between the 27th and 30th May, 1927, giving one quarter of his estates to each of his four sons. Each donation was subject to his own life estate and to each was attached a *fidei commissum*. These deeds included the Government lease amongst the properties given, and were in identical terms save in one matter. That in favour of the second respondent recited that his father had applied for and obtained the written consent of the Governor, whereas the other three recited only that he had applied for such consent.

The Government Agent did not reply until the 27th July, 1927, when he asked to be furnished with a draft of the proposed deed and laid down certain conditions upon which alone permission would be granted. He ended by saying that the donee should understand that the lease was liable to cancellation for any default. The deceased man did not comply with the Government requirements but endeavoured without success to persuade the Government authorities that the deed was in order. When he failed in this attempt, he caused four deeds of cancellation to be prepared and apparently a draft copy was sent to the Government Agent. Finally on the 8th March, 1928, the Agent returned the draft copy and wrote in the following terms :—

> " Sir,
>
> I have the honour to return the draft deed of cancellation and to inform you that the deed of gift already executed of your own accord is invalid by reason of Government Consent not having been given thereto. If you are legally advised that cancellation is necessary no question of obtaining Government Consent arises.
>
> I am, Sir,
> Your obedient Servant,
> (Signed) E. T. Dyson,
> Assistant Government Agent."

The deeds were never in fact cancelled, but at the bottom of this letter is to be found the words, " Deed of Gift invalid. Son heir under the Will," but there is no evidence as to the hand by which these words were penned, and their Lordships can derive no assistance from them.

On the 23rd October, however, of the same year, the deceased man made his will, leaving all his property, save for a gift of Rs. 3,000 to his granddaughter, to the appellant, whom he also appointed his executor.

After the death of his father the appellant's name was entered in the Register of Rents of Government lands leased in perpetuity, as substituted lessee, and he entered into and remained in possession of the property in dispute until November, 1932, when the third defendant dispossessed him. Later on the first defendant entered into possession. Both the third and first defendants are said by the appellant to have entered into possession on behalf of the three defendants and not on his behalf. It appears from the appellant's evidence that whilst he was in possession he paid the Government rent, but that after he was dispossessed he could not pay the entire rent and the respondents made certain payments, but there is no evidence

that the Government accepted them as tenants. Indeed the payments were credited in the Government books to the account of the appellant as substituted lessee.

The respondents did not give evidence. Whether the appellant accepted the deed of gift or not, is not clear—probably he did, as he said in cross-examination, "I got a gift of a one-fourth share of this land. I was present when all the gifts were made. I signed as a witness to deed No. 178." This last-mentioned deed was that giving a one-fourth share to one of his brothers.

The plaintiff having been dispossessed in this way brought the present action against the first three respondents claiming a declaration of title, that the three respondents be ejected and the appellant quieted in possession, damages, and an injunction. Inasmuch as the premises were held on a lease from the Crown, he made the fourth respondent a party to the action, but claimed no relief against him.

His case was that no consent had been given to the disposition of the estate and that the purported gift passed no property either to himself or any of his brothers, because by the terms of clause 10 of the lease any disposition of the property without the consent of the Crown was absolutely void.

In answer the first three respondents pleaded the four gifts which they said were subject in each case to a *fidei commissum* in favour of their children, or, in default, in favour of the lawful heirs of each of the donees; acknowledged that the appellant was entitled to a one-fourth share; pleaded the covenant in the deeds of gift by the donor that he had full authority to donate the estate thereby given and would warrant and defend the same to the donees; and pleaded that the appellant, as claiming under the deceased testator, was bound by that covenant and was estopped thereby from questioning their title.

Alternatively they said that by reason of clause 10 of the lease the testator had no power to dispose of the property by will.

At the trial of the action both parties agreed to waive damages of all nature (if any) due to them up to the hearing, leaving the substantial issue whether the property passed by the deeds of gift or whether at any rate the appellant was estopped from denying that it had.

The District Judge who heard the case in the first instance gave judgment in favour of the appellant, but was reversed by the Supreme Court by judgment dated the 4th December, 1936.*

The appellant has appealed against this decree to His Majesty in Council.

The Crown took no part in either of the Courts in Ceylon, but have attended their Lordships' Board in order to preserve their rights in case it should be held that the appellant was in the wrong and in order to give any assistance which they were able.

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* See 7 C. L. W. p. 16 (Edd.)

These being the facts, the first question to be determined is whether the purported deeds of gift of this land pass any property or not. The answer to this question depends upon the terms and effect of clause 10 of the lease.

It is not necessary in construing the clause to determine precisely the limits of the acts prohibited by each word of the clause. Admittedly the gifts to the sons were donations. No written consent to a donation was obtained and donations are prohibited without the written consent of the lessor. Without such consent the clause declares every donation to be absolutely void.

In a series of cases where a lease has been granted upon the terms that if certain conditions are not fulfilled or are broken it shall be " void " or " utterly void " or " null and void to all intents and purposes," it has been held that upon a failure by the tenant to fulfil the conditions, the leases are not *ipso facto* void but are only voidable at the option of the lessor. The principle is explained in *Davenport vs Reg.*, (1877) 3 App. Cas. 115, and the cases quoted therein in reference to English law, and a similar principle is to be found in Roman-Dutch law. See *Fernando vs Fernando*, (1916) 19 N.L.R. 193, and *Silva vs Mohamudu*, (1916) 19 N.L.R. 426, in Ceylon, and *Breytenbach vs Frankel*, (1913) S.L.R. App. Div. 390, in South Africa. It is to be observed that in those cases it is the lease which is declared to be void, not, as in the present case, the assignment of the lease, but their Lordships, without expressing any opinion upon the question, will assume that these decisions are applicable to the latter as to the former class of case.

Even if this assumption be made, it is clear that in the present case the lessor never by word or act assented to or acknowledged the donations. On the contrary, as appears by the letter of the 8th March, 1928, the Government claimed that the donations were invalid.

Some misapprehension appears to have arisen in the Supreme Court as to the effect of this letter. That Court seems to have thought that despite the terms of the communication the Government by their subsequent acts affirmed the lease. In this they were mistaken. The Government affirmed the lease because of not in spite of their refusal to acknowledge the donations. If the donations were invalid there was no breach of condition because there had been no dealing with the land contrary to the terms of clause 10. If, on the other hand, the donations had been valid, notwithstanding the lessor's refusal to give its written consent, then there would have been a breach of condition such as might entitle the lessor to avoid the lease. Indeed the Government were represented at the hearing before their Lordships for the express purpose of contending in case the donations were held valid, that the right which they claimed to possess of forfeiting the lease was unaffected.

In their Lordships' view the lessee had validly contracted that any donation made by him was at least voidable by the Crown, the Crown had avoided the attempted donations, and those donations being void did not

operate as a valid assignment of the tenant's interest in the lease and therefore there has been no forfeiture. See *Doe vs Powell*, (1826) 5 B. & C. 308.

If the lease remained in force and the attempted donations of the lessee were void, the tenant retained his full interest and was capable of disposing of that interest by will to whom he pleased, subject to two questions :—

(1) Did clause 10 prohibit the tenant from disposing of the lease by will ?

(2) Whatever the position between the Crown and the lessee, could the appellant as executor of his father repudiate his father's gifts which had never been cancelled ?

(1) Had the lease been granted to the testator *simpliciter*, the difficult and doubtful question whether a devise would have been a " disposal of " or " dealing with " his interest in the lease would have arisen. Even if the true view be that a devise is not a breach of a covenant not to *assign*—see *Crusoe d Blencowe vs Bugby*, (1771) 3 Wils. K.B. 234—it does not follow that it may not be a breach of a covenant not to *dispose of* or deal *with* the lease. Their Lordships, however, do not find it necessary to express any opinion on this matter.

The lease was not granted to the testator alone. It was granted to the lessee, and that expression is defined to include his heirs, executors, administrators, and permitted assigns. An executor is therefore in terms one of the lessees, and is just as much entitled to hold the lease as is a permitted assign.

The true view, as their Lordships think, is expressed by Bayley, J. in *Doe vs Bevan*, (1815) 3 M. & S. 353. That was a case in which the lease passed to the trustee in bankruptcy of the tenant, and it was contended that though the lease might pass to the trustee without a breach of the covenant not to assign, yet there was a breach if they in their turn assigned for the benefit of the estate. To this argument Bayley, J. replied :—

> " Shall the assignees have capacity to take it and yet not dispose of it ? Shall they take it only for their own benefit, or be obliged to retain it in their hands to the prejudice of the creditors for whose benefit the law originally cast it upon them ? Undoubtedly that can never be."

So an executor takes not for himself, but for the devisee under the will which appoints him executor, and the passing of the property through the executor to the devisee is no breach of covenant not to assign. If it were not so the naming of an executor as included in the expression " lessee " would be meaningless, since his function is to transfer the lease to some devisee even if that devisee be himself.

Their Lordships would further point out that if, as the respondents contended, " void " in clause 10 means " voidable," then even had a devise of the estate been a breach of the condition, the Crown who have entered the appellant's name as substituted tenant and accepted rent, and who before their Lordships disclaimed any desire to interfere with his tenancy, have, if they could, waived the alleged forfeiture,

(2) If, as their Lordships think, the attempted donation was void as against or avoided by the Crown, no estate in the land could pass to the donees. The testator had not at the time of the donation any right to dispose of the land as he purported to do. Indeed permission to do so was expressly refused. Nor has the appellant now any right to dispose of it except with the requisite consent. The only rights, if any, which the donees could claim, would be some right by way of estoppel.

Their Lordships find no evidence in the record on which an estoppel could be based. Save that the first three respondents apparently accepted the donations, they neither acted upon any representation nor altered their position to their prejudice. Nor, indeed, did their father make any representation. All that he did was to purport to make a donation of a lease—a donation which by the terms of that lease he could not make, and in making which he recited the lease itself.

All of the three respondents had express notice from the wording of their respective donations that consent to assign had to be obtained and it appeared from two of the donations that it had not yet been obtained. The third, namely, No. 175, did contain a recital that that consent had been obtained, but the donee Frederick Nicholas Jayawardene was not called as a witness and gave no evidence that he had been misled by the recital.

Nor does the fact that a *fidei commissum* was attached to each of the deeds of gift affect the result. It is true that a *fidei commissum* properly constituted and accepted cannot be revoked—see *Soysa vs Mohideen*, (1914) 17 N.L.R. 279—and it is no doubt also true that a solemnly executed and duly registered instrument must stand until set aside by a competent Court; see *Breytenbach vs Frankel* (u.s.). It was accordingly contended in the Courts in Ceylon on behalf of the respondents that the donations being solemnly executed could not be set aside, or at best could only be set aside by an application to the Court in an action for *vindicatio* or *restitutio in integrum*—in Ceylon the exact form of action would not matter. See *Silva vs Mohamudu* (u.s.) *per* Ennis, J. at p. 428.

So far as any of the property included in the donations was at the testator's disposal the argument may have force, but even if the donations are valid gifts, the question, so far as this lease is concerned, is not whether the donations are valid, but what property passes under them. In their Lordships' opinion, whatever may be the case as regards the other property, the leasehold estate, the subject-matter of the present action, could not, for the reasons given, pass to the donees.

The case differs from those in which a minor purports to grant a lease or to sell land during his minority as in *Silva vs Mohamudu*, (u.s.) and *Breytenbach vs Frankel*, (u.s.). In the latter, the lease or sale is not void *ab initio*—it is voidable at the option of the minor or perhaps, as Ennis, J. expresses it, it does not bind the minor unless he ratifies it expressly or

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impliedly on attaining his majority. But in such cases the affirmance or avoidance of the lease or sale depends on the minor's action after he attains his majority and in such a case he may well be compelled to apply to the Court to have the lease or sale set aside before he can effectively dispose of his interest in the property to someone else if indeed he retains any right to deal with it at all. Where, however, the lease has, as in the present case, been disposed of contrary to the terms contained in it, and that disposition is void or has been avoided by a landlord, there is, in their Lordships' view, no room for the application of such a doctrine even in the case of a sale or other disposition for value, much less where the disposition is a gift.

In the cases quoted the option to affirm or avoid was the option of the minor himself. Had the right in the present case to avoid or affirm rested with the appellant or even with his father, this case might have had some analogy to those. But in this case the option is with the Crown, the appellant has no choice in the matter, and there seems no reason for holding that he must bring an action in order to make the Crown's election effective.

For the same reason the statement by Voet in Vol. 1, Lib. VI, Tit. 1, section 17 as quoted by the Supreme Court, that " the seller cannot himself vindicate property belonging to another, which has been sold by him, on the ground that he is not the owner even if he subsequently becomes the owner or is heir to the true owner." is not applicable to the present case.

Even though one accepts the view of the Supreme Court that the principle upon which the rule is founded is that no one ought to gainsay his own act, or (one may add) the act of his predecessor in title, yet the appellant has never gainsaid his father's act. It was the Crown who gainsaid it, and the appellant cannot hold the lease for those whose title the Crown has refused to recognise.

For these reasons their Lordships will humbly advise His Majesty that the appeal be allowed, the decree and judgment of the Supreme Court set aside and the judgment of the District Judge restored. The first three respondents must pay the appellant's costs of the hearing in the Supreme Court and before their Lordships' Board.

Appeal allowed.

Present: ABRAHAMS, C.J.

COURTS INSPECTOR, MUNICIPAL ENGINEER'S DEPT. vs MURUGAPPA CHETTIAR AND ANOTHER

S. C. No. 631–632—*M.C. Colombo No.* 17686.
Argued on 17th January, 1939.
Decided on 24th January, 1939.

Building—Re-erection of—Meaning of the term 're-erection' in section 5 of the Housing and Town Improvement Ordinance No. 19 of 1915.

Held : (i) That the question whether a building has been repaired, altered or re-erected is a pure question of fact.

(ii) That the expression "re-erect any building" in section 5 of the Housing and Town Improvement Ordinance No. 19 of 1915, is equivalent to the words "erect a new building."

Per ABRAHAMS, C.J. The learned Chief Justice said, "Now the question whether a building is a new building or not, has been decided over and over again to be a question of fact; it is a question of degree. For instance, if a building were nearly all taken away and then rebuilt, it clearly would be a new building; on the other hand, it is quite clear that by a small addition of, say, a door, the building would not thereby become a new building. Between these two extreme cases there may be thousands of cases, and it would be impossible to give a definition in each particular case as to what is, or is not, a new building, and it must be left to the discretion of each Judge to decide for himself what is a new building. So that the question is and must be a question of fact."

Cases referred to : *Jansz vs Municipal Council of Colombo* (34 N.L.R. 337.)
James vs Wyvill (51 n.s.L.T. 237.)

N. Nadarajah, with *E. B. Wickremanayake* and *N. Kumarasingham*, for accused-appellants.

L. A. Rajapakse, with *M. M. I. Kariapper*, for complainant-respondent.

ABRAHAMS, C.J.

This is an appeal against a conviction in the Municipal Court of Colombo, in which the 1st appellant was ordered to pay a fine of Rs. 75/– and the 2nd appellant a fine of Rs. 30/– for an offence against section 5 of the Housing and Town Improvement Ordinance, No. 19 of 1915, which reads as follows :—

> "No person shall erect or re-erect any building within the limits administered by a local authority, except in accordance with plans, drawings and specifications approved in writing by the Chairman."

It was alleged by the Courts Inspector of the Municipal Engineer's Department, Colombo Municipality, that the appellants re-erected three tenements without the requisite plans, drawings and specifications. It was admitted by the appellants that they had not submitted any plans,

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drawings and specifications, but they contended, and they still contend, that the building operations which they had undertaken in respect of the tenements did not amount to the re-erection of buildings.

The evidence of the building operations was given by the Surveyor Inspector of the Municipality, and no attempt has been made before me to controvert those facts. The Inspector said that on the 12th of March he inspected the premises and he found that the roof of the tenements had been totally removed. The front short walls and wood work of two of the tenements had been removed, and the two cross walls of one were in course of demolition. A pillar of one of them was being built. The 2nd appellant was supervising the work and the Inspector required him to stop it. A further inspection of the premises on the 17th of March found the work still in progress. The demolished front walls had been rebuilt, the roof practically reconstructed and the two cross walls re-erected. Every position of the building except one cross wall had been taken down and rebuilt with new walls and new pillars. Counsel for the appellants admits that most of the original buildings had been demolished and were in the process of being rebuilt.

Now there is no definition of 're-erection.' I invited Mr. Wickremanayake, who appeared for the appellants, to say how much of an old building was to be left to justify his contention, when building operations were undertaken resulting in the completion of a new building of which the remaining portion of the old building formed a part, that there was no re-erection but only, as he contended, repairs or alterations to the old building. He said that he was arguing that re-erection demanded the construction of a totally new building upon the site of an old building that had been completely demolished, and he was prepared to accept the proposition that I put before him, namely, that so long as one brick stood upon another re-erection could not be performed. He based such an astonishing argument upon the language used by Garvin, S.P.J. in *Jansz vs Municipal Council of Colombo* (34 N.L.R. 337, at p. 339). In this case where certain building operations had taken place the point at issue related to the construction of section 18 (4) of The Housing and Town Improvement Ordinance which, however, has nothing to do with the present case. In section 18, for the purposes of the application of that section, the word is given an extended meaning, but that extended meaning does not apply to section 5. However, this is what Garvin, S.P.J. says "the word 're-erection' in the provisions of section 18 in its original form has reference to the replacement of an existing building by another, substantially similar in structure to the one which it replaced," and later at page 340 he refers to a later Ordinance No. 32 of 1917, which amended section 18 by enlarging the meaning of the term 're-erection' to include operations which did not involve the entire replacement of a building by another. Mr. Wickremanayake argues from that that Garvin, S.P.J.'s interpretation of the word 're-erection' goes so far as the last brick argument to which I have referred above, because

presumably he has used the words "entire replacement." I think Garvin, S.P.J. would have been horrified if it had been put to him that the language he used involves such a *reductio ad absurdum*. I think his language was approximate only.

In my opinion it is a pure question of fact whether a building has been repaired or altered or re-erected. It is not possible to lay down any hard and fast rule. Assuming that there is not a complete demolition, removing the very foundations themselves, the question would be, I conceive, as to how much of the original building was left and what were the new operations. To say that because the old foundations had been left to support a new building merely amounts to alterations or repairs to the old building is as good as saying that if one had a pair of shoes made, using the soles of an old pair, that amounts to repairing the old pair of shoes.

Although the wording of the enactments is not identically the same, I think that the words of Coleridge, C.J. in *James vs Wyvill* (51 n.s. L.T. p. 237 at p. 240) can be adopted in this connection. This was a case in which the language of the bye-laws made under the Local Government Act of 1858 was considered, and the question of what was the meaning of the expression "to erect any new building" was discussed. The learned Chief Justice said, "Now the question whether a building is a new building or not, has been decided over and over again to be a question of fact; it is a question of degree. For instance, if a building were nearly all taken away and then rebuilt, it clearly would be a new building; on the other hand, it is quite clear that by a small addition of, say, a door, the building would not thereby become a new building. Between these two extreme cases there may be thousands of cases, and it would be impossible to give a definition in each particular case as to what is, or is not, a new building, and it must be left to the discretion of each Judge to decide for himself what is a new building. So that the question is and must be a question of fact."

I think that the expression "re-erect any building" can in the absence of any definition binding us to any particular meaning be clearly taken as the equivalent to the words "erect a new building." I therefore am of opinion that the Magistrate came to a proper conclusion and I dismiss the appeal.

Proctors :—

S. Ratnakaram, for accused-appellant.

Wilson and Kadirgamer, for complainant-respondent.

Appeal dismissed.

Present: SOERTSZ, J. & HEARNE, J.

VEERAPPA CHETTIAR vs NAGAMUTTU

S. C. No. 89—D. C. (Inty.) Negombo No. 9846.

Argued & Decided on 23rd February, 1939.

Preliminary objection—Appeal—Is a judgment-creditor who successfully claimed concurrence a necessary party to an appeal from an order adjudicating the claims of competing judgment-creditors.

A and B claimed concurrence in the proceeds of an execution sale lying to the credit of case No. 10050 D.C. Negombo of which C was the judgment-creditor. The learned District Judge found that A and B were entitled to concurrence while C was not entitled to it. C appealed but failed to make A a party to the appeal.

Held : That A was a necessary party to the appeal and the failure to join him as a party was fatal to the appeal.

S. Nadesan, with *C. Renganathan*, for the petitioner-appellant.

N. Nadarajah, for the plaintiff-respondent.

SOERTSZ, J.

Mr. Nadarajah takes a preliminary objection to this appeal. He says that it is not properly constituted in view of the fact that Pitche Muppan, who is a necessary party, has not been made a respondent to the appeal. Pitche Muppan was the judgment-creditor in case No. 9834, D.C. Negombo. He and the judgment-creditor in another case, No. 9846, D.C. Negombo, claimed concurrence in the proceeds of an execution sale which were lying to the credit of case No. 10050, D.C. Negombo. The journal entries to which our attention has been called and the order made by the learned District Judge make it quite clear that Pitche Muppan was a party to these proceedings, although he was not a party to the case itself, and the learned District Judge proceeded to adjudicate upon this question as to who were entitled to claim concurrence on the footing that Pitche Muppan was a party before him. After a consideration of the submissions made on behalf of the different parties, the learned trial Judge found that the judgment-creditors in cases No. 9834 and 9846 were entitled to concurrence while the judgment-creditor in case No. 10050 was not entitled to concurrence. The judgment-creditor in case No. 10050 is the present appellant and if he succeeds it is obvious, indeed it is admitted, that Pitche Muppan will be prejudicially affected. He was therefore a necessary party to this appeal and should have been joined. He was also obviously a necessary party and therefore no occasion arises for us to consider the question of giving relief to the present appellant in terms of the amendment of section 756 of the Civil Procedure Code.

The appeal is therefore rejected with costs

HEARNE, J.

I agree.

Proctors :—

Wijeyeratne for petitioner-appellant.

A. V. Pereira for plaintiff-respondent.

Appeal rejected.

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

THE KING vs KIRIWASTHU & ANOTHER

Case stated under section 355 (3) of the Criminal Procedure Code in P. C. Matale 22162—S. C. Kandy 38.

Argued on 27th & 28th February, 1939.

Decided on 15th March, 1939.

Evidence Ordinance section 25—Statement made by accused person to a Police Officer under section 122 (1) of the Criminal Procedure Code—Can such a statement be used to impeach the credit of the accused as a witness when giving evidence on his behalf—Case stated under section 355 (3) of the Criminal Procedure Code.

In this case two prisoners were indicted,

(*a*) with having committed murder,

(*b*) with having caused evidence of the commission of the offence of murder to disappear,

and found guilty of the offence of murder and sentenced to death.

In the course of the trial the second prisoner who gave evidence on his own behalf was asked by his counsel to state what he had told the Police Sergeant who had taken him into custody. The learned presiding Judge then pointed out to counsel that, as he had not elicited any evidence regarding this statement from the Police Sergeant when he gave evidence, the evidence of the prisoner would be secondary evidence and not the best evidence, and requested Crown Counsel to give to the defending counsel a copy of the statement recorded by the Sergeant so that he might after perusing it decide whether or not he should elicit the statement from the prisoner. After perusing the statement the counsel for the 2nd prisoner desired to read only portions of it and leave the other portions out. At that stage, the proctor who represented the 1st prisoner indicated that it would not be fair merely to select portions of the statement because, if the whole of the statement was put in, the first prisoner could rely on it to show that the second accused must be treated as an accomplice in the murder. The learned Judge, therefore, ruled, that counsel should elect either to put the entire statement to the second accused or not question him at all on the contents of that statement. Counsel thereupon elected to put to the second prisoner the entirety of the statement. The prisoner admitted having made certain parts of the statement and denied the rest. Thereafter the prisoner was cross-examined both by the proctor for the first prisoner and by Crown Counsel. At the close of the defence, Crown Counsel moved to recall the Police Sergeant to show that the second prisoner had made a different statement to the Sergeant. The learned Judge permitted Crown Counsel to prove the whole of the statement, not he said as substantive evidence of any fact stated therein and denied by the accused, but solely for the purpose of impeaching his credit as a witness, and directed the jury accordingly.

The Attorney-General acting under section 355 (3) of the Criminal Procedure Code (Chapter 16—Vol. I p. 457) certified the following questions for decision by the Supreme Court :—

(i) Was counsel for the second prisoner entitled to ask his client to state orally the statement made by him to the Police Sergeant when it was in evidence that that statement was taken down in writing by the Sergeant and signed by the second prisoner, unless the document itself was put in evidence ?

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(ii) Was the statement of the second prisoner to the Police Sergeant, which amounted to a direct confession that he was guilty of the charge relating to the disposal of the body of the deceased, and which also suggested the inference that he and the first prisoner were associated together in killing the deceased, rightly admitted in evidence for the purpose of impeacing the credit of the second prisoner ?

The Supreme Court expressed its opinion on the second question only, and questioned the conviction of the second prisoner and directed a retrial of the first.

Held : That a confession made to a Police Officer is inadmissible as proof against the person making it whether as substantive evidence or in order to show that he has contradicted himself.

H. V. Perera, K.C., with *J. R. Jayawardene* and *C. C. Rasaratnam*, for the two petitioners.

J. W. R. Illangakoon, K.C., Attorney-General, with *D. W. Fernando Crown Counsel*, in support of the application.

ABRAHAMS, C.J.

In this case the Attorney-General acting under the provisions of section 355 (3) of the Criminal Procedure Code has submitted for our consideration two questions of law that arose on the joint trial of two prisoners who were charged (i) with having committed murder, and (ii) with having caused evidence of the commission of the offence of murder to disappear. The jury returned a unanimous verdict finding both prisoners guilty of murder. They were accordingly sentenced to death. No verdict was returned on the second count as Crown Counsel, according to the usual practice, informed the jury, that if they found the prisoners guilty on the first count, he would not ask for a verdict on the second count.

It emerged during the course of the trial, that the Police Sergeant who investigated the crime and took into custody the two accused who had already been arrested by the Aratchy, took down in writing a statement made by the 2nd accused. Presumably in doing so he acted under the provisions of section 122 (1) of the Criminal Procedure Code, though in disregard of the provisions of that section the signature of the 2nd accused was affixed to the statement. The 1st accused at the trial did not give evidence or call any witnesses. The 2nd accused gave evidence, and during the course of his examination-in-chief his counsel asked him to state what he had told the Police Sergeant when he was taken into custody. Thereupon Soertsz, J., who was the presiding Judge, pointed out to counsel that when the Police Sergeant was in the witness-box giving evidence on behalf of the Crown, no attempt was made to elicit from him any statement made by the 2nd accused taken down by him. The learned Judge said that in those circumstances any evidence given by that accused in regard to the statement taken by the Sergeant would be secondary evidence and not the best evidence, and he requested Crown Counsel to give to the defending counsel a copy of the statement recorded by the Sergeant so that he might after perusing it decide whether or not he should elicit the statement from his client.

After perusing the statement of the 2nd accused, his counsel desired to read only portions of it to the 2nd accused and leave the other portions out. At that stage, the proctor who represented the 1st accused indicated that it would not be fair merely to select portions of the statement because, if the whole of the statement was put in, the 1st accused could rely on it to show that the 2nd accused must be treated as an accomplice in the murder. The learned Judge, therefore, ruled that counsel should elect either to put the entire statement to the 2nd accused or not question him at all on the contents of that statement. Counsel for the 2nd accused, after consideration, elected to put to the 2nd accused the entirety of the statement. The 2nd accused admitted having made certain parts of the statement and denied the rest. Thereafter, the 2nd accused was cross-examined both by the proctor for the 1st accused and by Crown Counsel.

At the close of the defence, Crown Counsel moved to recall the Police Sergeant to show that the 2nd accused had made a different statement to the Sergeant. The learned Judge permitted Crown Counsel to prove the whole of the statement, not he said as substantive evidence of any fact stated therein and denied by the accused, but solely for the purpose of impeaching his credit as a witness, and in his charge to the Jury the learned Judge gave an emphatic direction to them not to treat the portions of the statement said to have been made by the 2nd accused to the Police Sergeant but not admitted by him at the trial, as substantive evidence against him, but to use them, if at all, to discredit him. He also directed them not to use the statement for any purpose at all as against the 1st accused. The questions submitted for our consideration by the Attorney-General are these :—

> (i) "Was counsel for the 2nd prisoner entitled to ask his client to state orally the statement made by him to the Police Sergeant, when it was in evidence that that statement was taken down in writing by the Sergeant and signed by the second prisoner, unless the document itself was put in evidence ?
>
> (ii) "Was the statement of the 2nd prisoner to the Police Sergeant, which amounted to a direct confession that he was guilty of the charge relating to the disposal of the body of the deceased, and which also suggested the inference that he and the first prisoner were associated together in killing the deceased, rightly admitted in evidence for the purpose of impeaching the credit of the 2nd prisoner ?."

Mr. H. V. Perera, K.C., who with Mr. J. R. Jayawardene was good enough to appear *pro deo* on behalf of the accused dealt with the questions in the reverse order. In view of the decisions which we are about to give, we shall deal with the second question only. Mr. Perera argued that the evidence of the Police Sergeant, placing before the Jury both portions of the statement of the 2nd accused which amounted to a confession, was inadmissible for the reason that it violated the provisions of section 25 of the Evidence Ordinance which reads, "No confession made to a Police Officer shall be proved as against a person accused of any offence," and he contended that the fact that the 2nd accused had himself given in

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evidence certain portions of that statement and denied the rest, had not justified the admission of the rest of the statement. We think it proper to say here that without giving any evidence upon the obligation or otherwise of the 2nd accused to put before the court his written statement, the correct course which should have been directed to be followed was not that the accused should give evidence of what he alleged that he told the Police Sergeant, which, in our opinion, is not sanctioned by any provisions of the law of evidence, but that he should have called the Police Sergeant and invited him, under the provisions of section 157 of the Evidence Ordinance to corroborate his testimony. It may be that if that course had been taken, the difficulties that subsequently arose would have been avoided.

The learned Judge's justification for permitting the Police Sergeant to give evidence of the 2nd accused's incriminatory statement is very concisely expressed in his summing up. He says this. "Now ordinarily, a statement made by an accused person to a Police Sergeant or to any Police Officer and later denied by him, cannot be used as substantive evidence. This is what I mean. Suppose A has told a Police Officer, 'I struck B with a club.' He comes into Court and in the witness-box says, 'I was never near the place. I did not see B on this day at all. I did not strike him with a club.' Then the Crown is entitled to confront him in the witness-box with this statement which he had previously made, 'I struck B.' Then, suppose he denies that he made that statement to the Police Sergeant, and the Police Sergeant swears that he made that statement; in those circumstances you cannot treat that statement as a piece of substantive evidence. All that the evidence serves to do is to discredit the man as a worthless kind of witness, as a man who cannot be relied upon. In order to convict him you have got to look for independent evidence; in other words you cannot take this evidence, which the Police Officer swears the witness made to him and which the witness in the witness-box denies, as substantive evidence of the witness, because the evidence that applies in a Court of Law is the evidence which the witness chooses to give upon oath or affirmation and subject to cross-examination. That is quite clear law. You cannot make use of a statement made by a witness and subsequently denied by him as substantive evidence. Now, that is why I say a difficulty arises in this case as to how to regard this statement which has been brought into this case by the 2nd prisoner himself and not brought into the case by way of being used to contradict the 2nd prisoner in the box when he gave evidence. But I think, out of an abundance of caution, and in order to be as generous as possible towards the 2nd prisoner, I would invite you not to treat that statement recorded by the Police Sergeant Fernando where portions of that statement have been impeached by the 2nd prisoner—not to regard those impeached portions as substantive evidence of the prisoner, but you may use that statement for the purpose of saying: Well, we cannot pay much regard to this man when he says this or that because we find that he is shown to have said different things at different times. You can use that to discredit him.'

We must observe upon these remarks of the learned Judge that it is not accurate to say, "You cannot make use of a statement made by a witness and subsequently denied by him as substantive evidence," because had this confession been made to a person not a Police Officer it could manifestly have been used not to contradict but as substantive evidence of its truth, and it is only because the confession was made to a Police Officer that there is a bar to its proof. The learned Judge appears, if we may say so, to have endeavoured to identify a statement made by an accused person which is, if there is no statutory bar to its admission, an admission in evidence against the person making it, with a statement made by a witness in the case which statement that witness subsequently denies and which, therefore, as the learned Judge properly says, can only be employed to show that the witness is unreliable because he is inconsistent. We are of the opinion that a confession made to a Police Officer is inadmissible as proof against the person making it whether as substantive evidence or in order to show that he has contradicted himself. The observations of the learned Judge would, if acceptable, compel us to treat section 25 of the Evidence Ordinance as if it read as follows :—

> "No confession made to a Police Officer shall be proof as against a person accused of any offence as substantive evidence, but any such confession may be admitted in evidence if the accused gives evidence in contradiction of such confession in order to impeach his credit by showing that he has made two contradictory statements and is therefore inconsistent."

We can find no warrant for expanding the terms of section 25 in this manner. It would obviously be dangerous to expect a Jury with a confession before them, no matter how much it was emphasised in the summing-up that the confession must not be taken as true, not to draw the ordinary inference one draws from an admission of guilt that the person making such an admission is in fact guilty.

We are of opinion that in view of the wrongful admission of a confession by the 2nd accused, the Jury not only may have been, but very probably were, influenced against both of the accused, considering what the terms of that confession were. That in such circumstances the conviction cannot stand is obvious. The question then is what other order we should make in addition to quashing the conviction. As regards the 2nd accused, we think that he is entitled to be acquitted for there was very little against him beyond the confession as regards the charge of murder. As regards the 1st accused, however, there was a considerable volume of evidence direct and circumstantial against him upon which, had it not been for the confession of the 2nd accused, the Jury might well have convicted. As we have only the dry bones of the case in front of us, so to speak, we cannot say what impression the witnesses made on the Jury. Under section 355 (3) of the Code, under which we are acting, we may reverse, affirm or amend the judgment, or make such other order as justice may require, and this wide power has been held to include the power to direct a new trial in a proper case, see *The King*

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v. Pila, (15 N.L.R. 453). We think then that in view of the volume of evidence referred to above, the charge of murder against the 1st accused should be tried out and we direct a new trial accordingly to take place before another Judge and a different Jury. The accused will be remanded to the custody of the Fiscal for that purpose.

ABRAHAMS, C.J. I agree

HEARNE, J. I agree

KEUNEMAN, J. I agree

Convictions quashed.
1st accused ordered to be retried.
2nd accused acquitted.

Present: KEUNEMAN, J. & WIJEYEWARDENE, J.

KUMARAHAMY AND ANOTHER vs GNANAPANDITHAN

S. C. 238—*D. C. Badulla* 6353.

Argued on 24th and 28th March, 1939.

Decided on 31st March, 1939.

Action for rent—Joint-lease by two persons—Subsequent variation of the rental by non-notarial writing given by one of the lessors—Does the law require such a writing to be notarially attested—Section 2 of Ordinance No. 7, of 1840—Evidence Ordinance, section 92—Omission in deed to specify share of rent each lessor entitled to—How should their claims be determined.

In 1934 A & B (plaintiffs) leased a rubber estate to the defendant on a deed notarially attested. The monthly rental provided for under the lease was Rs. 75/–. Subsequently by a non-notarial writing D1, A agreed to the variation of the rental sum of Rs. 75/– a month to Rs. 20/– a month. In 1938 A & B sued the defendant for arrears of rent amounting to Rs. 875/– at the rate of Rs. 75/– a month. The defendant contended in the lower court that by virtue of the document D1 he was liable to pay only at the rate of Rs. 20/– a month. The learned District Judge held that D1 was of no legal effect even against A as it was not notarially attested and entered judgment for plaintiffs. The defendant appealed.

Held : (i) That the writing D1 was not a writing which the law required to be notarially attested and therefore was not debarred from being proved by section 92 of the Evidence Ordinance.

(ii) That the document D1 was legally effective as against A (1st plaintiff) only.

(iii) That as the deed of lease failed to specify the rent to which each was entitled and in the absence of evidence to the contrary, the two lessors should *prima facie* be regarded as being entitled to equal shares of the rent.

Per WIJEYEWARDENE, J.—" Now section 2 of Ordinance No. 7 of 1840 requires a lease to be notarially attested only if the lease refers to immovable property and if the period of the lease exceeds one month. The nature of the property to be leased and the period of the lease are the two factors which determine the necessity for a notarial document. The amount of the rent has no bearing on this question. The document D1 which merely reduces the rent is not a document ' for establishing any security, interest or incumbrance affecting land " or for any of the other purposes mentioned in section 2 of Ordinance No. 7 of 1840.' "

Cases referred to :— (1) *Kiri Banda vs Ukku Banda* (1911) 14 N.L.R. 181.
(2) *Buddharakita Terunanse vs Gunasekera* (1895) 1 N.L.R. 206.
(3) *Panis Appuhamy vs Slenchi Appu* (1903) 7 N.L.R. 16.
(4) *Appu et al vs Silva et al* (1922) 24 N.L.R. 428.

N. E. Weerasuriya, K.C., with *P. Thiagarajah*, for defendant-appellant.
N. Kumarasingham, for plaintiffs-respondents.

WIJEYEWARDENE, J.

By indenture of lease P1 which is notarially attested the plaintiffs-respondents leased a rubber estate to the defendant-appellant for a period of four and a half years commencing from 1st June, 1934.

The plaintiffs filed this action in May, 1938, claiming a sum of Rs. 875/– as arrears of rent upto the end of April, 1938 at Rs. 75/– a month as provided for under the lease, and asking for a cancellation of the lease. At the trial the plaintiffs did not press their claim for a cancellation of the lease.

The defendant contested the claim of the plaintiff for Rs. 875/– on the ground that the rent of Rs. 75/– a month reserved under the indenture of lease was reduced to Rs. 20/– a month by agreement between the parties. He also claimed that he was entitled to be given credit in a sum of Rs. 130/– being expense incurred by him in getting a plan of the leased premises at the request of the plaintiffs.

The learned District Judge held that by a non-notarial writing marked D1, the 1st plaintiff agreed to the variation of the rental sum of Rs. 75/– a month to Rs. 20/– a month, but that the writing had no legal effect even as against the 1st plaintiff as it was a non-notarial document. He held further that the defendant was entitled to claim the sum of Rs. 130/– mentioned above and therefore entered judgment for the plaintiffs for Rs. 745/– as rent due up to the end of April, 1938, and awarded them half the costs of the action.

In appeal it was argued for the defendant-appellant that on the facts as found by the District Judge, the defendant was legally entitled to claim that the rent should be assessed at Rs. 20/– a month.

The counsel for the defendant-appellant contended that the contract of lease embodied in P1 was rescinded and the defendant continued to possess the leased premises under a subsequent oral agreement by which the rent for the premises was fixed at Rs. 20/– a month. The contention put forward is at variance with the allegations in the defendant's answer and the terms of

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the document D1. The answer does not refer to any rescission of the indenture of lease but mentions an agreement to vary the rental fixed by P1. The document D1 shows that the 1st plaintiff who executed it contemplated the subsistence of the indenture of lease P1, but agreed to reduce the rental from Rs. 75/- a month to Rs. 20/- a month. The defendant who gave evidence did not state that the lease P1 was rescinded or that he gave up possession of the leased premises under P1 and continued to occupy it under an informal lease.

I shall, therefore, consider the present appeal on the footing that the defendant is trying to reduce the claim of the plaintiff by proving a variation of the term of the contract P1, as regards the rent due in respect of the leased premises.

The claim of the 2nd plaintiff presents no difficulty. She is one of the lessors under P1 which fixed the rental at Rs. 75/- a month for the entirety of the leased premises. The document D1 which refers to the reduction of the rental is not signed by her. Section 92 of the Evidence Ordinance debars the defendant from proving a variation of the terms of P1 by an oral agreement. The defendant's attempt, therefore, to contest the claim of the 2nd plaintiff on the ground that the rent was subsequently reduced, must necessarily fail.

I shall now proceed to consider the claim for rent so far as it affects the 1st plaintiff. Section 92 of the Evidence Ordinance does not prevent a variation or modification in a notarial instrument from being proved by a subsequent non-notarial writing provided that the latter writing is not itself of such a nature as to require notarial execution under Ordinance No. 7 of 1840. *vide Kiri Banda vs Ukku Banda.* (1) There is, therefore, nothing in the Evidence Ordinance to prevent the defendant from claiming a reduction of rent by virtue of D1. There remains, however, the further question to consider whether D1 is a document which the law requires to be notarially attested. Now section 2 of Ordinance No.7 of 1840 requires a lease to be notarially attested only if the lease refers to immovable property and if the period of the lease exceeds one month. The nature of the property to be leased and the period of the lease are the two factors which determine the necessity for a notarial document. The amount of the rent has no bearing on this question. The document D1 which merely reduces the rent is not a document " for establishing any security, interest or incumbrance affecting land " or for any of the other purposes mentioned in section 2 of Ordinance No. 7 of 1840. I hold therefore, that the document D1 is legally effective as against the 1st plaintiff.

The Indenture of lease P1 is an ordinary contract of lease by two lessors stipulating for the payment of a certain sum by way of rent and in the absence of a clear indication of the intention of the contracting parties that the obligation shall be indivisable, each of the lessors is entitled to claim his share of the rent *Buddharakita Terunanse vs Gunasekere* (2) and *Panis*

(1) 14 N.L.R. 181. (2) 1 N.L.R. 206.

Appuhamy vs Slenchi Appu (3). The deed of lease P1 does not specify the share of the rent to which each of the lessors is entitled but in the absence of evidence to the contrary the deed should be regarded as *prima facie* evidence of the fact that the lessors are entitled to equal shares of the rent *Appu et al vs Silva et al.* (4)

I hold, therefore, that the amount of the rent due to the 1st plaintiff should be assessed at Rs. 10/- a month and the rent due to the 2nd plaintiff at Rs. 37/50 a month. Subject to the above modification the judgment of the District Court is affirmed.

I make no order as to the costs of this appeal.

I agree,

KEUNEMAN, S.P.J.

Decree modified.

Proctors :—

F. Sebastian, for defendant-appellant.

Rambukpotha and Abeysekera, for plaintiff-respondent.

Present: SOERTSZ, J.

THE CHAIRMAN MUNICIPAL COUNCIL KANDY vs MUTTUSAMY AND OTHERS

S. C. No. 848.

Argued on 7th March, 1939.

Decided on 14th March, 1939.

Stamping of petition of appeal—Appeal by nineteen unsuccessful claimants to be registerd as voters—One appeal petition—One five-rupee stamp affixed—Section 24 (2) *of the Colombo Municipal Council* (*Constitution*) *Ordinance No.* 6 *of* 1935—*Is the petition of appeal correctly stamped—Does the withdrawal of all bad appeals make the remaining appeal good.*

Held : (i) That the petition of appeal was not correctly stamped inasmuch as in fact there were nineteen petitions of appeal and therefore as many five-rupee stamps were required.

(ii) That the withdrawal of eighteen bad appeals could not and did not make the remaining petition a good petition of appeal.

Obeysekera, for claimants-appellants.

Van Geyzel, for respondent (Municipal Council Kandy).

SOERTSZ, J.

Nineteen claimants who were dissatisfied with the order made by the Commissioner that they were not qualified to be registered as voters in Ward No. 2 Kandy, joined in one petition to prefer an appeal to this Court against the said order. They affixed one five-rupee stamp to this joint petition.

(3) 7 N.L.R. 16. (4) N.L.R. 428.

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Soertsz, J.

The Chairman Municipal Council Kandy *vs* Muttusamy and Others

Respondent's counsel took the preliminary objection that the stamping of the petition is inadequate and contrary to section 24 (2) of Ordinance No. 6 of 1935 which says that every appeal shall bear uncancelled stamps to the value of five-rupees.

He contends that although there is only one paper there are, in fact as many petitions of appeal as there are appellants and that therefore, as many five-rupees stamps are required.

In my opinion, this contention is sound. It is supported by authority In *Siriwardene vs Meera Saibo and Others* (13 C.L.W. 116,) My Lord the Chief Justice upheld a similar objection.

Counsel for the claimants-appellants however invites me to treat the petition as the petition of appeal of the last named claimant Karuppen Muttusamy. He moves to withdraw the appeals of other claimants and submits that the motion paper filed on the 14th of December, 1938 authorised him to do so. That motion is filed by Karuppen Muttusamy. He says that he desires that his appeal be accepted by the Supreme Court and that the stamp of five-rupees affixed to the petition of appeal be accepted as duty for his appeal. The other claimants consent to this arrangement. I do not think it possible to allow this application. It proceeds on the assumption that when the 18 other claimants withdrew their appeals, there remained one good appeal, that of Karuppen Muttusamy. In my view, that is a fallacious assumption. The procedure that claimants adopted when they made their appeal on one paper resulted none the less, in 19 appeals. Each claimant was preferring an appeal from one order in so far as it affected him. The position was not different from what it would have been if each claimant had presented a separate petition. When they affixed one five-rupee stamp to this joint petition, they did no more than hand in a five-rupee stamp to cover 19 appeals. Each appeal, therefore, bore stamps to the value of 5/19ths of a rupee, about four rupees and 24 cents below the value required. Consequently, there was not a single good appeal, and the withdrawal of 18 bad appeals could not and did not make the remaining petition a good petition of appeal. Even if I treat the application made by the appellants counsel as a request by the other appellants that the stamps on each of their petitions, namely 5/19ths of a rupee be notionally removed from those petitions and affixed to Karuppen Muttusamy's petition,—assuming this course to be feasible—still that will not avail him because that would only amount to the perfecting of this petition of appeal long after the appealable time had expired. The petition of appeal is dated the 13th November, 1938, the motion paper is dated 14th December, 1938.

I have no alternative but to uphold the objection and reject the appeal with costs.

Objection upheld. Appeal rejected.

Proctors:—

Albert Godamunai, for appellants.

De Vorce, for respondent.

Present: DE KRETSER, J.

KAMELA AND ANOTHER vs ANDRIS

S. C. No. 242—*C. R. Kalutara No.* 13240.

Argued on 15th March, 1939.

Decided on 21st March, 1939.

Order of Abatement—Application to vacate such order—Order that abatement to stand, but leave granted to file fresh action—Validity of such order—Civil Procedure Code—Sections 403 *and* 839.

Held : (i) That when an action has abated a Court has no power to grant leave to file a fresh action.

Per KRETSER, J. "Section 839 was not intended to apply to such a case as this. It was intended to emphasise that the provisions of the Code were not exhaustive and that the Court may have occasion to make other orders of the nature indicated in the section. But it was never intended to override such express provision as had been made and I find that the corresponding section in the Indian Code has been interpreted as not authorising a Court to override the express provisions of the law.

L. A. Rajapakse, with *H. A. Wijemanne*, for 2nd and 3rd defendants-appellants.

U. A. Jayasundera, for plaintiff-respondent.

DE KRETSER, J.

Mr. Rajapakse for the appellants raised two preliminary objections viz. (i) that the trial court had no jurisdiction, (ii) that an order of abatement had been made in a previous case brought by the plaintiff against the same defendant for the same subject matter and on the same cause of action.

The second objection had not been taken in the trial Court nor in the petition of appeal, but it was open to Mr. Rajapakse to raise the point as the necessary material was before the Court and as Mr. Jayasundera for the respondent, took no exception.

In the previous case an order of abatement was entered on the 20th of June, 1934. On the 5th of July, 1934, an application was made to have the order of abatement vacated. The learned Commissioner of Requests ordered that the abatement should stand but he gave the plaintiff leave to file a fresh action.

Section 403 of the Civil Procedure Code enacts that when an action abates no fresh action shall be brought on the same cause of action. This section enacts a statutory bar which no Court can ignore.

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De Kretser, J.

Kamela and Another *vs* Andris

Mr. Jayasundera contended however, that the Court had power under section 839 of the Civil Procedure Code to grant leave to the plaintiff to file a fresh action.

In the first place the learned Commissioner has not purported to act on this section for, if he had, he ought to have stated how the ends of justice would be met or abuse of the process of Court prevented by his order.

It is quite as likely, that because in the Court of Requests provision is made for such leave being given when a plaintiff is in default of appearance, the Commissioner thought that such leave may be given when there is any default on the part of the plaintiff.

Section 839 was not intended to apply to such a case as this. It was intended to emphasise that the provisions of the Code were not exhaustive and that the Court may have occasion to make other orders of the nature indicated in the section. But it was never intended to override such express provision as had been made and I find that the corresponding section in the Indian Code has been interpreted as not authorising a Court to override the express provisions of the law.

Therefore, the leave given by the learned Commissioner was irregular and the order of abatement is of full effect and the present action cannot be maintained.

It must therefore be dismissed. But as this objection was not taken in the trial Court there will be no costs of the trial in the Court below and the appellant will only have the costs of the appeal.

In the circumstances it is unnecessary to discuss the question of jurisdiction.

Appeal dismissed.

Proctors :—

Peter G. Fernando, for defendants.
J. A. W. Kannangara, for plaintiff.

In the matter of a case stated by the Board of Review, Income Tax, on the application of B. A. Thornhill of Patakada Estate, Ratnapura.*

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

THORNHILL vs THE COMMISSIONER OF INCOME TAX

S. C. No. 137—(*I*).

Argued on 13th and 14th March, 1939.

Decided on 23rd March, 1939.

Income Tax Ordinance (*Chapter* 188)—*Section* 9 (1)—*Outgoings and expenses—Tea Factory—Depreciation of building in which plant and machinery is housed—Can an allowance be allowed for such depreciation.*

Held : That an allowance for the depreciation of the building in which the plant and machinery of a tea factory is housed cannot be made under the Income Tax Ordinance.

H. V. Perera, K.C., with *Iyer Ranganathan* and *Rasaratnam*, for appellant.

Schokman, Crown Counsel, for Commissioner of Income Tax.

SOERTSZ, J.

The question that arises on this appeal is whether the assessee, a tea-planter, is entitled to deduct a sum of Rs. 8,893/– on account of 'the depreciation by wear and tear' of his factory, that is to say, of the building itself, as distinguished from its contents.

The Commissioner of Income Tax and the Board of Review held against him on this point.

Mr. H. V. Perera who appeared in support of this appeal contended, that this allowance was claimed as an 'outgoing' or expense 'incurred by the assessee' in the production of his 'profits' or 'income,' and falling within the specially enumerated instance in section 9 (1) (*a*), which provides for such a deduction as the Commissioner considers reasonable for "the depreciation by wear and tear of *plant, or machinery and fixtures*, arising out of their use by the owner thereof in a trade, business, profession, vocation, or employment carried on or exercised by him." Alternatively, he argued that if the assessee's claim did not fall within that particular provision, it was none the less good, inasmuch as it still was an 'outgoing' or 'expense,' and was not taken out of the general operation of section 9 (1), by section 10 or any other section of the Income Tax Ordinance.

The case put forward for the Commissioner of Income Tax, was that this claim was not an allowable deduction under section 9 (1) (*a*) because it could not be described as a claim made on account of wear and tear of

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'*plant, machinery, and fixtures*,' and that section 10 (*c*) took it out of the general scope of 'outgoings' and 'expenses' provided for by section 9 (1), and that claims in respect of the maintenance and upkeep of buildings had not been ignored by the Ordinance, but that there is provision made, for instance by section 9 (*c*) for deductions on account of their repair and renewal.

Mr. Perera submitted that words and phrases occurring in this Ordinance should be construed liberally in favour of the tax payer, and that the meaning that they ordinarily bear should be extended, within reasonable limits, because the same words and phrases have been used in respect of a variety of activities – professions, trades, vocations and employments, in some of which they are very much at home, while in others they appear somewhat exotic. While agreeing with that submission, I am unable to say that a reasonable extension of the meaning of the word 'plant' can be made to include the building or shed which holds it. This view is in accord with that taken by Finlay, J. in *Margrett vs The Lowestoft Water and Gas Company, Reports of Tax cases Vol. XIX p.* 481. In that case, the tax-payer contended that a water tower which replaced an engine and pumps for the purpose of increasing the pressure of the supply of water through the pipes, was 'plant' for which he could claim on account of depreciation by wear and tear. Finlay, J. said "you have to examine what the thing is. It is not enough to say it was used in a particular way. Clearly if one takes the case of a factory with machinery in it, the bricks and mortar would not be plant. One would anticipate, I think, that the same principle would apply here, that the pipes and so forth would be plant, but the actual structure, would not be plant."

In the present case one cannot, I think, say as much as could have been, and was said in support of the claim in that case, for there was the fact that the water tower replaced an engine and pumps, and performed their functions. Again, in *Daphne vs Shaw, Reports of Tax cases Vol. XI p.* 256, Rowlatt, J. commenting on a contention addressed to him that the books of a lawyer are 'plant' observed as follows—"I cannot bring myself to say that such books.....are plant. It is impossible to define what is meant by plant and machinery. It conjures up before the mind something clear in the outline, at any rate; it means apparatus, alive or dead, stationary or immovable to achieve the operations which a person wants to achieve in his vocation." In *Nutley and Finn*, 1894 *Weekly notes p.* 64, it was sought to include within the expression 'whole of the fixed plant and machinery at the brewery,' (*a*) a chimney shaft which was built just outside the boiler house, but formed no part of it; (*b*) a double boarded partition forming a malt and grain store. This had been erected solely for the purpose of the business; (*c*) staging erected by placing joints on the stout bearers built into the walls of the brewery premises. In an affidavit made by an experienced valuer it was stated that the articles enumerated were invariably included under the head of fixed plant on sales of freehold breweries. But,

Kekewich, J. disallowed the claim. He said that he "thought that as, speaking generally, 'machinery' included everything which by its action produces or assists in production, so 'plant' might be regarded as that without which production could not go on. It was, so to speak, dead stock; it did not itself act, but was that through and by means of, and in which, action took place, and included such things as brewer's pipes, vats and the like." If it had been intended to allow for depreciation of the structure itself in which 'plant, machinery and fixtures' are placed, it would have been quite simple for the Legislature to do so by the addition of a word or two. It seems to me that the scheme of the Legislature was to allow deduction only for depreciation of such things as physically deteriorate by wear and tear in the course of constant use, and to make provision for premises employed in producing income such as tea-factories which apart from natural decay, may in a sense, be said to depreciate by wear and tear, for instance, by being subjected to constant vibration, by allowing for sums expended in their repair or renewal. It is instructive that in 1878 the English Act made allowance for depreciation by wear and tear of plant and machinery. It was only in 1918 that, by another act, an allowance was made to cover depreciation of mills, factories and similar premises.

For these reasons, I am of opinon that when ascertaining the profits or income of any person from any source by deducting all outgoings and expenses incurred in the production thereof, no allowance can be made in respect of premises such as a tea-factory building employed in producing income, for depreciation by wear and tear. Such an allowance is impliedly disallowed by section 9 (1) *a*. An allowance is, however, expressly made for such premises so employed by section 9 (1) *c* on account of repair and renewal.

The appeal, therefore, fails and must be dismissed with costs.

MOSELEY, J.

I agree.

Appeal dismissed.

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* CASE STATED

By the Board of Review, Income Tax, under the provisions of Section 74 of the Income Tax Ordinance, 1932, on the application of

B. A. Thornhill of Patakada Estate, Ratnapura.

Appellant.

1. The Appellant was assessed under the Income Tax Ordinance for the Year of Assessment 1937/38 as being liable to pay a tax of Rs. 5,258/16 on a taxable income assessed at Rs. 19,159/–. The Appellant claimed an allowance of Rs. 8,893/– being the amount of the depreciation in the value of the buildings on his Tea Estates as being deductible in computing his income which is liable to taxation. The Assessor refused to allow the deduction which was claimed.

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2. The Appellant appealed to the Commissioner of Income Tax who upheld the assessment of the Assessor and refused the deduction, for the reasons given in his decision, which, appears on the copy of the Appeal Minute marked " A " which is annexed and forms part of this Case Stated.

3. Thereupon the Appellant appealed to the Board of Review constituted under the Income Tax Ordinance, upon the Grounds of Appeal appearing in his Petition of Appeal, dated 8th June 1938, a copy of which is annexed to this Case Stated, and is marked " B."

4. At the hearing it was urged that as the Appellant was a tea planter who converted his own greenleaf into tea upon his own Estate, he was carrying on a "business," inasmuch as " business " includes an " agricultural undertaking," under the Ordinance, and that he required certain buildings to carry on that business. The buildings themselves, in respect of which he had claimed the depreciation were of the value of Rs. 177,869/75, but upon the Appeal, he restricted the claim only to the depreciation in respect of the Tea Factory which, it was contended, was essentially used for the purposes of his " business ' as it was there that the various processes of converting green-leaf into tea were carried on. It was contended that as " profits " were only restricted to " net profits," for the purposes of arriving at the taxable income, there must therefore be deducted all necessary expenses or business losses from the gross income before arriving at the " net profits." Authorities were cited as deciding that " profits " mean surplus after deducting expenses and replacing capital which is lost. It was argued that the authorities laid down the proposition that any expense legitimately and properly deductible to ascertain the net profits should be allowed to be deducted unless any such deduction was disallowed by any express provisions of the Ordinance. The absence in any provision in our Ordinance like Section 209 (1) (*a*) of the English Income Tax Act of 1918 was stressed. It was urged that if no deduction for depreciation was allowed, then it would amount to a taxation of capital and not of income. The deduction was claimed either under the words " plant, machinery and fixtures" or under the words " outgoings and expenses " in section 9 (1) of the Ordinance ; or else it must be allowed to be deducted as a " business loss " before arriving at the Appellant's profits or income from his Estates.

5. The Assessor contended that depreciation is a capital loss which cannot be deducted in view of the provisions of Section 10 (*c*) that the depreciation of buildings was not an " outgoing " or an " expense " under Section 9 (1) and could not be claimed under Section 9 (1) (*a*) as there was no depreciation by way of wear and tear arising out of its use in a trade or business ; that the Appellant was not carrying on a business ; that all expenses of a capital nature and all capital lost sunk or exhausted should be ignored in computing income for Income Tax ; and that depreciation is not a loss of income.

6. The Board dismissed the Appeal as appears from the copy of its Decision marked " C " and anexed to this Case Stated.

7. The Appellant being dissatisfied with the decision of the Board, asked a case to be stated on a question of law. The question is whether the appellant is entitled to any deduction for the amount of the depreciation of the value of his tea factory in respect of the year of assessment in ascertaining his profits or income from his tea estates for Income Tax purposes. We have accordingly stated and signed this case.

Colombo, 14th day of October, 1938.

1. (Sgd.) S. Obeyesekere
2. ,, G. T. Hale
3. ,, T. B. Jayah

Members of the Board of Review.

Proctors:—

Perera & Perera, for appellant.

Present: ABRAHAMS, C.J.

MARTIN SILVA vs KANAPATHYPILLAI

S. C. No. 525—*P. C. Trincomalee No.* 4223
with application in revision No. 394.
Argued on 18th & 19th January, 1939.
Decided on 24th January, 1939.

Criminal Procedure—Complaint by two owners of adjacent boutiques regarding loss of money—Report by Police that certain money found in one of the complainant's boutiques claimed by the other—Production of such money in Court—Further report by Police that 'culprits could not be traced.'

Return of money claimed by both complainants—Inquiry—Order made against the complainant from whose possession money was brought to court—Has Magistrate jurisdiction to make such order—Absence of any formal complaint—Sections 148, 150 (3) *and* 413 *of the Criminal Procedure Code.*

S and K owners of two adjacent boutiques complained to the Inspector of Police that their establishments had been burgled and that they lost Rs. 160/– and Rs. 700/– respectively in cash. On this complaint the Police submitted a report to the Magistrate the material portion of which stated that the Inspector discovered in S's boutique cash in notes and coins to the value of Rs. 407/– and that K claimed that money. This money was produced in court where it was ordered to be retained. On a further report by the Police stating that the 'culprits could not be traced' notwithstanding all possible inquiries, S and K both claimed the return of the money retained in court and the Magistrate fixed the matter for inquiry.

In the course of the inquiry Proctor for S objected to the inquiry as the Police were not prosecuting. Further, as the money was found in his client's possession and as there was no evidence of any offence committed by him, proctor for S moved that the money be returned to his client. Proctor for K replied that he proposed to place more evidence to prove that his clients' money had been stolen by S, and that the court was empowered by section 150 (3) of the Criminal Procedure Code to inquire into his complaint. The Magistrate held with the latter and proceeded with the inquiry and at its conclusion ordered that the money be restored to K.

Held : (i) That the Magistrate had no jurisdiction to proceed to make the order restoring the money inasmuch as there was no proper complaint before him as required by section 148 of the Criminal Procedure Code that an offence had been committed.

(ii) That under the circumstances, the report submitted by the Police was not sufficient to confer jurisdiction on the Magistrate to make such order which could have been done only under section 413 of the Criminal Procedure Code.

(iii) That a criminal court should not be employed as a tribunal to investigate rival claims to proerty.

L. A. Rajapakse, with *S. Alles*, for appellant.
N. Nadarajah, with *H. W. Thambiah*, for respondent.

ABRAHAMS, C.J.

This is an appeal ; and is also an application for revision as apparently the aggrieved party is not sure whether the order made against him is appealable. However, I am dealing with the case on its merits as it is obviously

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a matter which requires investigation. The appellant, I call him so for the sake of convenience, is a man named S. Martin Silva. He had a boutique adjacent to that of a man called S. Kanapathypillai. There was a common wall dividing these two boutiques. On the 9th of June last both Kanapathypillai and Silva complained to the Inspector of Police, Trincomalee, that their establishments had been burgled. Kanapathypillai said that cash had been stolen from his boutique to the total value of Rs. 700/–; Silva said that he had similarly lost Rs. 160/– and a quantity of clothing. On the 22nd of June the Inspector submitted a report to the Police Magistrate in accordance with section 131 of the Criminal Procedure Code. It is not necessary to examine the details of this report, but there is one fact that should be mentioned as it was the cause of all the trouble.

On examining the *locus in quo* the Inspector discovered in Silva's boutique cash in notes and coin to the value of Rs. 407/– and he said that Kanapathypillai claimed this money. The money was brought to Court, and the Police Magistrate ordered it to be retained there. On the 6th of July the Magistrate recorded the following, "Police files further report and states that all possible inquiries were made to trace the culprits but without success," and then appears the following, "Mr. Rajaratnam (who appeared for Silva) moves that the sum of Rs. 407/– be delivered to Martin Silva. Mr. Subramaniam states that that money belongs to his client Kanapathypillai. I fix the respective claims of both complainants for inquiry on 12th July, 1938."

On the 14th of July the Magistrate proceeded to take evidence, and Mr. Subramaniam called Inspector Ratnam. At a certain stage of this witness's evidence Mr. Rajaratnam objected to certain facts being elicited as he stated that the suggestion from Kanapathypillai was that Silva stole his money. The Magistrate overruled the objection on the ground that the evidence elicited was with regard to the complaint made by Silva as the complainant in respect to his property. At the close of this witness's evidence Mr. Rajaratnam said that he objected to the inquiry being called as the Police were not prosecuting, and the property was found in the possession of his client and must be returned to him as there was no evidence to support that an offence had been committed. Mr. Subramaniam answered to that that his client wished to go on with the case and to prove that his property had been stolen by Silva, and that he proposed to place more evidence before the Court and that the Court was empowered to inquire into his complaint. He quoted section 150 (3) of the Criminal Procedure Code. The learned Magistrate said that Mr. Subramaniam was entitled to be afforded an opportunity of "placing the case of his client before Court," and said that he would make an order with regard to the disposal of the money after the case had been decided. Mr. Rajaratnam said that as the inquiry had commenced as to whether Kanapathypillai or Silva was entitled to the money in Court, if Kanapathypillai now abandoned that position Silva was entitled to an

order for the restoration of the money. Mr. Subramaniam submitted that he had at no stage asked for an inquiry as to the restoration of the money in Court, that the Inspector had made a report to Court, and that it was incumbent on the Court to hold an inquiry under section 150 (3) of the Criminal Procedure Code. The learned Magistrate agreed that Mr. Subramaniam was right when he said that he did not ask for an inquiry into the restoration of the money, and that the Court, on the 6th of July, was probably under a misapprehension as to what Mr. Subramaniam intended to convey on that date. He finally said that he proposed to proceed with the inquiry into the complaint that Kanapathypillai now preferred against Martin Silva (the 2nd complainant) and to make an appropriate order as to the disposal of the money in Court at the conclusion of the inquiry. Certain witnesses were called by Kanapathypillai and he himself gave evidence. Mr. Rajaratnam called no evidence, and finally the Magistrate said that this was an inquiry into a complaint by one of the two complainants against the other of theft of property belonging to him, and after reviewing the evidence he said that the conclusion was irresistable that the sum of Rs. 407/- produced before the Court was the property of Kanapathypillai, and had been stolen from him, although the evidence was insufficient to sustain a charge of theft against Martin Silva against whom the evidence coupled with the attendant circumstances gave rise to strong suspicion. He said that on the evidence there was no alternative than to hold that this sum was the property of Kanapathypillai and had been stolen from him, and he ordered it to be restored.

Now the only provision of law under which such and order could possibly have been made, although the learned Magistrate does not state under which provision he proceeded, is section 413 of the Criminal Procedure Code, and this reads as follows :—

> 413 (1) When an inquiry or trial in any criminal court is concluded the Court may make such order as it thinks fit for the disposal of any document or other property produced before it regarding which any offence appears to have been committed or which has been used for the commission of any offence.

It is perfectly true that the learned Magistrate came to the conclusion that an offence appears to have been committed in respect of the sum of Rs. 407/- claimed by Kanapathypillai, namely the offence of theft, and in view of the fact that he found that the money was that of Kanapathypillai the inference that it had been stolen from him was, in the circumstances, the only inference that he could logically make. But it is complained against the Magistrate by Martin Silva that he had no jurisdiction to proceed with such a finding. How did he come to proceed with such a finding ? Section 148 of the Criminal Procedure Code lays down the manner in which proceedings can be instituted in a Police Court. These are (*a*) on a complaint being made that an offence has been committed (*b*) on a written report that an offence has been committed being made to a Magistrate by a Police Officer, and there are other grounds, but it is not necessary for the purposes of this case to mention

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what they are. Now there was undoubtedly a written report by the Police, but from the way in which it is worded it is very difficult to gather that the Police allege that any offence has been committed, and in spite of the manner in which the Magistrate dealt with Mr. Rajaratnam's objections to his taking evidence, it is very difficult indeed to collect the inference that the order that the Magistrate made on the 6th of July was that there was to be an inquiry into the ownership of the money which was claimed by both parties and not an inquiry into whether an offence had actually been committed in respect of that sum of Rs. 407/–. The Magistrate of course had power to continue the inquiry if he did infer from the Police report that Kanapathypillai's Rs. 700/– had in fact been stolen. But it does seem to me an extraordinary thing that if that was so, he should not have made some record to that effect. Then on the 14th of July Mr. Subramaniam asserted that he had never asked for an inquiry into the restoration of the money but that his client was complaining that Martin Silva had stolen the money, and that since the Inspector has made a report it was incumbent on the court to hold an inquiry under section 150 (3). Now that statement contains two contradictory elements. If Kanapathypillai cared to make a complaint under section 148 (*a*) against Martin Silva, the Magistrate would have been competent to investigate that complaint and to take evidence for that purpose, but that complaint must be entirely independent of the report of the Inspector upon which the Magistrate was certainly not proposing to act, seeing that first of all no offence appears to have been alleged in that report, and secondly, if it could be gathered from the report that an offence had been alleged, that no person was mentioned, Martin Silva or anybody else.

Then comes a further complication, namely the invocation by Mr. Subramaniam of section 150 (3). That provision of the law merely permits a Magiatrate to hold an inquiry in respect of an alleged offence and to examine witnesses, even although no person by name is accused of having committed the offence. That of course is completely inconsistent with an accusation against Martin Silva of having stolen the money. It looks to me as if Mr. Subramaniam realised that the Magistrate had no jurisdiction to make any order for the restoration of property unless and until he was satisfied that an offence had been committed in respect of the property, so that he first alleged that no formal complaint was made by Kanapathypillai to the Magistrate that Martin Silva had stolen the Rs. 407/–, and then, either realising no formal complaint had been made or perhaps being unwilling to make a formal complaint, he argued that the Magistrate founded his jurisdiction on the report of the Police to the effect that they could not trace "any culprits," and invoked the aid of section 150 (3) as an authority for the power of the Magistrate to take evidence despite the fact that no person had been accused.

It is, in my view, quite impossible for a Magistrate to exercise jurisdiction in such a contradictory set of circumstances. I think that what Mr. Subramaniam was after, was an inquiry into his client's claim to the

Rs. 407/- which had been removed from Martin Silva's premises by the Police for reasons which were not explained in the Police Court. A criminal court is not to be employed as a tribunal to investigate rival claims to property.

Mr. Rajapakse, for Martin Silva, has stated that even on the evidence called on behalf of Kanapathypillai no order was warranted because certain vital facts were founded upon the evidence inadmissible because it was heresay. I preferred to hear counsel on the questions of law first and should then have gone into the facts upon which the order was based if Mr. Nadarajah had not frankly said that he would find it very difficult to sustain the order without the impermissible evidence, but that he thought there was enough evidence to leave the matter in doubt and to ask me to direct a new inquiry. I do not see my way to doing that because whatever the evidence might have been, good or bad, the Magistrate acted without jurisdiction and I do not think that Kanapathypillai wanted anything else but to get an adjudication upon his claim to the money.

The order made by the learned Magistrate must be quashed and the money returned to Martin Silva. If Kanapathypillai genuinely believes that the Rs. 407/- belongs to him, he is not barred from advancing his claim to it before an appropriate tribunal.

Appeal allowed.

Proctors :—

Rajaratnam, for appellant.
Subramaniam, for respondent.

Application of D. S. Wijesinghe to be re-enrolled as a Proctor of the Supreme Court.

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

IN RE WIJESINGHE

Argued on 6th March, 1939.

Decided on 20th March, 1939.

Proctor—Re-admission of proctor who has been struck off the rolls on conviction of offences of cheating and forgery—Principles which guide the court in considering applications for re-enrolment.

Held : That, in considering an application for re-admission to the profession of a lawyer who had, upon conviction of offences of cheating and forgery, been struck off the rolls, the court has not only to be satisfied that the applicant has re-established his character but also that it is safe to re-admit him to the profession having regard to the nature of the crime he has committed.

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Hearne, J.

In re Wijesinghe

C. V. Ranawake, with *C. E. A. Samarakkody* and *Dodwell Gunewardene*, in support.

Illangakoon, K.C., Attorney-General, with *D. W. Fernando, Crown Counsel*, on notice.

HEARNE, J.

This is an application by Mr. D. S. Wijesinghe to have his name restored to the roll of proctors of this court. His name was removed from the roll sixteen years ago on conviction of the offences of cheating and forgery. He makes the application on the ground that during the thirteen years that have followed his release from prison he has shown himself to be a fit person to practise once again the profession to which he was called.

I am not altogether impressed with the petition. The petitioner has sought to minimise the very serious crimes of which he was convicted. He says that he had failed to keep his own money separate from his client's money and that "he had utilised the latter with the result that, when required, it was not available." The truth is, however, that the fraud he committed on his client was carefully planned and concealed and extended over a period of several months. He says that he did not consider very serious what later proved to be a gross dereliction of duty. It is impossible to believe, in the light of the facts disclosed at the trial, that he did not realise the serious nature of his acts and that they amounted, not merely to dereliction of duty, but to grave offences against the law of the land. There is, at the least, an absence of frankness in the petition.

The principles on which this court would act with applications similar to the present one have been stated on previous occasions.

In the case of an advocate who was convicted of a criminal offence in 1920 and disbarred in 1922 it was held in 1928 that it would be premature to reinstate him (30 N.L.R. 299). Eight years later he renewed his application. On this occasion Abrahams, C.J. said "I do not think we can now say that the case was so bad that under no circumstances could we admit the applicant to the ranks of the profession." The Chief Justice then proceeded to hold that the applicant had redeemed his past and that "it would be unjust to prevent him from once more earning his living in the profession for which he is qualified" (39 N.L.R. 476).*

Considerable reliance has been placed on this case. It is argued that it lays down that the sole question a court is required to decide is whether a person who has been convicted of a crime of dishonesty has redeemed his character. I do not agree. Re-establishment of character, so far as it can be inferred from certificates or affidavits is an indispensable condition, but reading the judgment of the court as a whole it is clear to me that the

* 6 C.L.W. 123 (Edd.)

question of the safety of re-admitting the advocate concerned, having regard to the nature of the crime he had committed, was also present to the minds of the Judges of the court.

I see no difference between the principle enunciated by this court and the principle enunciated in (1910) 12 Cal. L.J. 625 that a court may in its discretion re-admit a proctor who has been struck off the rolls "if satisfied that during the interval that has elapsed since the order of removal was made, he has borne an unimpeachable character, and may with propriety be allowed to return to the practice of an honourable profession." I stress the word propriety. It means, I think, that the matter must be regarded not merely from the point of view of the applicant but also from the point of view of the public. That, I think, is the significance of the words of Abrahams, C.J. "I do not think we can now say that the case was so bad that under no circumstances could we admit the applicant to the ranks of the profession." He indicated that in his opinion the reinstatement of the advocate involved no risk to the general public who in their dealings with him had the right to expect the highest standard of honour and trustworthiness.

The same idea appears in the judgment of Bertram, C.J. when he says "We are prepared to exercise the jurisdiction of this Court in favour of the applicant because we are satisfied that in so doing we are not in danger of re-admitting to the roll a person who is not entitled to be treated with professional confidence." (39 N.L.R. 517).*

In 39 N.L.R. 176 the question of restitution was not considered, possibly because the amount involved was small, or possibly because restitution had been made. The crime of which the advocate concerned had been convicted was the result of a single act of dishonesty and related to a sum of Rs. 1,000/–. In the case reported in 39 N.L.R. 517, however, it was stressed, while in *Visser vs Cape Law Society*, S. A. Law Reports, Cape P. Division, 1930, where the court was not satisfied that an attorney, who had been struck off the rolls, on conviction of the crimes of forgery, perjury and theft, had made any attempt to repair the wrong he had done, an application for reinstatement was refused. An honest attempt to make reparation has, I think, rightly been regarded as some evidence of reformed character.

In the present case the proceedings at the applicant's trial indicate that he systematically defrauded his client, Mr. Rustomjee. The amount involved was considerable, Rs. 12,000/–. No restitution has been made, and although the applicant appears to have been in fairly regular employment, no explanation has been offered of his failure to make restitution even on a small scale. On the subject of his earnings the petition is silent.

Certain "certificates" which have obviously been prepared for the purpose of supporting the application have been brought to our notice. The writers express the hope that the applicant will be regarded as having

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* 6 C.L.W. 125 (Edd.)

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lived down his misfortune and that he will be reinstated. Misfortune is a word that would more appropriately have been applied by them to the lot of Mr. Rustomjee. In phrases borrowed from previous judgments of this court they also express the opinion that the applicant has "reconstructed his life" and "rehabilitated his character." In the case of some of the certificates it is doubtful whether the opinions are based on first hand knowledge.

Those who have employed the applicant are much more restrained in their language. The Editor-in-Chief of the Times of Ceylon for which he worked as proof-reader describes his work as "satisfactory", while Mr. Crowther of the same paper says that he discharged his duties with credit and fidelity. Mr. Goonesinghe of the Ceylon Labour Union states that his work in the management and editorship of the "Comrade" and "Viraya" was performed diligently and to his entire satisfaction, and that as a social worker he has been of great use to the members of the Labour Union.

There is nothing out of the ordinary in these certificates and I do not gather from them that the applicant in any of the positions held by him, was entrusted with financial responsibility.

Looking to all the facts and the principles on which this court has acted in the past, I regret I am unable to say that we could with propriety accede to the application which, in my opinion, should be dismissed.

KEUNEMAN, J.

I agree.

DE KRETSER, J.

I agree.

Application dismissed.

Proctors :—

A. C. Abeyewardena, for applicant.

Present: SOERTSZ, S.P.J.

WIJESINGHE vs RAJAPAKSE

In the matter of an application for an order to have the election of Mr. D. M. Rajapakse, Chairman, Village Committee, Walasmulla, declared null and void (323).

Argued on 10th March and 6th April, 1939.

Decided on 17th April, 1939.

Quo warranto—Election of Village Committee Chairman—Equality of votes—Election by lot—Three of the voters found later to be disqualified to be elected or to be members of the Committee—Is election of Chairman valid—No evidence that they voted for the Chairman.

At the election of a Chairman for a Village Committee the votes were evenly divided and the election was decided by lot. Three of the persons who participated in the election were subsequently found to be disqualified to be elected or to be members of the Committee. The election of the Chairman was questioned on the ground that three of those who participated in the election were not qualified to vote but there was nothing to show that the disqualified voters cast their votes for the successful candidate.

Held : (i) That the election was valid.

(ii) That the burden of proving that the votes of the disqualified persons were cast for the successful candidate lay on the applicant for the writ of *quo warranto*.

Per SOERTSZ, J.—" I think it is clear law that in a matter of this kind it is sufficient, so far as the respondent is concerned, that he was elected at least by a *de facto* committee. The applicant must establish, if he can, his case that the votes of the disqualified persons or of any of them were cast for the respondent. It would be manifestly unfair to require the respondent to show that those votes or any of them were not given in his favour. He is not, and can never be in a position to show that, for the voting was by secret ballot. Where voting is by secret ballot, the proper view to take is, I think, the view that the manner in which the votes were cast, must be regarded as undiscoverable in law, even if in fact, it is discoverable, unless of course, there is provision for a scrutiny of the ballot, and a scrutiny is practicable."

N. E. Weerasooriya, K.C., with *E. B. Wickremanayake*, for applicant.

S. J. C. Schokman, Crown Counsel, appears as *amicus curiae*.

SOERTSZ, S.P.J.

This is an application made by an inhabitant of the sub-division of Walasmulla who describes himself as a qualified and registered voter for that sub-division, for a writ of *quo warranto* on the respondent requiring him to show by what authority he claims and exercises the office of Chairman of the Village Committee of Walasmulla.

The applicant impeaches the right of the respondent to this office on the ground that the Committee that elected him to that office was not a

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properly elected committee inasmuch as there were in it three persons who were disqualified to be elected or to be members of the Committee by virtue of section 18 (*a*) of Ordinance No. 9 of 1924.

The applicant also alleges that the respondent and another were candidates for the office of Chairman, that there were twenty-four members of the Committee present at the meeting held for the purpose of electing a Chairman, that the voting resulted in a tie, twelve votes being cast for each candidate, and that the respondent became Chairman as a result of the 'drawing' which took place in consequence of the equality of votes. He states that one of the three disqualified persons 'was a supporter of the respondent and voted at the meeting,' and that if his vote or the votes of the two other disqualified persons 'had been rejected by the Chairman as invalid in law, the result of the voting would not have been a tie and there would have been no necessity for a drawing.'

The case put forward by the applicant raises two questions, first, was the Committee that met to elect a Chairman a properly elected committee; second, what was the effect of the three disqualified persons taking part in the voting for a Chairman.

In regard to the first question, it is clear that twenty-one of the twenty-four members were duly qualified and duly elected, and therefore, in my opinion, it cannot be said that there was no Committee that had been properly elected. For instance, on his own showing, the applicant must concede that if the three persons he complained against, had refrained from voting, the election of a Chairman at that meeting would have been a valid election. It is not necessary to consider what the position would have been if the majority of those present were not qualified to be elected or to be members. The second objection would, therefore, appear to be the real question for decision. I think it is clear law that in a matter of this kind it is sufficient, so far as the respondent is concerned, that he was elected at least by a *de facto* Committee. The applicant must establish, if he can, his case that the votes of the disqualified persons or of any of them were cast for the respondent. It would be manifestly unfair to require the respondent to show that those votes or any of them were not given in his favour. He is not, and can never be in a position to show that, for the voting was by secret ballot. Where voting is by secret ballot, the proper view to take is, I think, the view that the manner in which the votes were cast, must be regarded as undiscoverable in law, even if in fact, it is discoverable, unless of course, there is provision for a scrutiny of the ballot, and a scrutiny is practicable. In this case there is no such provision. Indeed, as far as I am aware, no scrutiny will reveal how the voting went on this occasion. All we have here is the statement that one of the three persons was a supporter of the respondent, and the inference drawn therefore is that he gave his vote for the respondent. This is, probably, a good guess, but none the less it is a guess. It is notorious that there are last minute 'conversions' in matters pertaining to elections, and it would be extremely dangerous to assume that even

the most vigorous supporter, as far as appearances went, cast his vote for the candidate he preferred to support. I, therefore, am of opinion that it has not been established that the respondent's election was the result of the participation of any of these voters. I desire to add that, in my opinion, the matter would hardly have been different if these three persons now came forward to say that they voted for the respondent. It would be against the principle of the ballot to admit such statements. Even if they could be and were admitted, their probative value would be very questionable. I would here refer to the decision in, and to the remarks in the course of the argument in *The King vs Jefferson*. (English Reports Vol. 110 p. 1007.)

For these reasons, I hold that the applicant has not made out a case for the wirt to be enforced, and I dismiss his application. I wish to express my thanks to the Attorney-General and to the Crown Counsel who appeared as *amicus curiae*.

Application dismissed.

Proctor :—

E. P. Rupesinghe, for petitioner.

Present: KEUNEMAN, J. & WIJEYEWARDENE, J.

VALLIAPPA CHETTIAR vs SUPPIAH PILLAI AND ANOTHER

S. C. No. 210/1937—*D. C. Kandy, No.* 48531.

(*With application for Restitutio in Integrum No.* 156)

Argued on 23rd March, 1939.

Decided on 29th March, 1939.

Warrant of attorney to confess judgment—Attestation of mortgage bond and warrant of attorney by the same proctor on instructions from plaintiff —Failure to nominate a proctor by defendants' free choice—Civil Procedure Code (*Chapter* 86)—*Section* 31.

On instructions given by the plaintiff, a proctor attested a mortgage bond in plaintiff's favour. On the same occasion the same proctor attested a warrant of attorney to confess judgment purporting to act as defendants' proctor. Plaintiff obtained judgment against the defendants by virtue of the power of attorney. The defendants moved to set aside the judgment alleging *inter alia* that the proctor who attested the warrant purporting to be proctor for the defendants was not nominated by the defendants.

At the inquiry the proctor concerned gave evidence to the effect that the defendants and plaintiff gave him instructions to prepare the bond ; that he informed the defendants of it ; that they consented to execute the power of attorney ; that he did not tell the defendants to nominate a proctor on their behalf ; that he was really watching the interests of the plaintiff in getting the warrant of attorney.

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Keuneman, J.

Valliappa Chettiar *vs* Suppiah Pillai and Another

The District Court refused to set aside the judgment. The defendants appealed and also applied for *restitutio in integrum*.

Held : That the warrant of attorney to confess judgment was of no force in law inasmuch as there had been a failure to comply with the requirements of section 31 of the Civil Procedure Code. (*Chapter* 86).

Cases referred to :— *Mason vs Kiddle* (1839) 151 English Reports 217.
Sanderson vs Westley & Walters. 151 English Reports. 337.

N. Nadarajah with *Jayamanne*, for defendants-petitioners.
N. E. Weerasooriya, K.C., with *Gratiaen*, for plaintiff-respondent.

KEUNEMAN, J.

This is an application by the defendants for *restitutio in integrum*. The plaintiff sued on mortgage bond 739, dated 7th May, 1926, and obtained judgment against the defendants by virtue of a warrant of attorney to confess judgment, and decree was entered on 28th May, 1937. The defendants allege that the warrant of attorney filed in the case is bad and invalid, in that Proctor Yatawara, who attested the warrant purporting to be the proctor for the defendants, was not nominated by the defendants. It is also alleged that the plaintiff's claim was fraudulent.

The mortgage bond 739 was attested by Proctor Yatawara, who also attested the warrant of attorney to confess judgment, purporting to be the defendants' proctor. It is admitted that as regards the mortgage bond 739 Proctor Yatawara was acting at the instance of, and under the instructions of the plaintiff, and it is clear that this proctor had received the instructions of the plaintiff to have the warrant of attorney executed. Both documents were executed on the same date and on the same occasion.

Under section 31 of the Civil Procedure Code no warrant of attorney, given by any person to a proctor, to confess judgment is of any force, unless there is present at the execution thereof a proctor " on behalf of such person expressly named by him and attending at his request " to inform him of the nature and effect of such warrant, before the same is executed.

One important requirement in this section is that the proctor must attend " on behalf of the defendant." There are authorities under similar enactment in 1 & 2 Victoria, c. 110, relating to warrants of attorney and cognovits. In *Mason vs Kiddle* (1839. 151 English Reports 217) the agents of the plaintiff's attorney sent down the writ to an attorney at Shaftesbury to be served on the defendant. The defendant employed this same attorney to get him time for payment of the debt, and agreed to pay him for his trouble. Thereafter the plaintiff agreed to take a cognovit, and his agents sent it down to the same attorney at Shaftesbury for execution. This attorney then sent for the defendant and asked him to name some attorney to attend on his behalf. The defendant said " I name you," and the cognovit was executed by the defendant in the presence of this attorney and was attested by him, no other attorney being present on behalf of the defendant. It was held

by the court that the cognovit was bad. Alderson, B stated that "there must be an attorney, other than the plaintiff's, expressly named by the defendant, and attending on his behalf."

Similarly, in *Sanderson vs Westley & Walters* (151 English Reports 337) Parke, B stated "We are of opinion that Goddard was the attorney of the plaintiff prior to his being employed, and was his attorney in this transaction. If so, the act is not complied with, since it required that there must be a separate attorney, employed by the defendant to take care of his interests only;" and Alderson, B stated "where there is not one attorney present, it ought to be perfectly clear that he is not the plaintiff's attorney."

Further, the proctor must be expressly named by the defendant and attend at his request. This means that "there should be some distinct expression of request or appointment by the person who executes, and such request or appointment must be the result of a free choice."—Chitty's Archbold's practice of the Court of Queen's Bench. 12th Edition, p. 954.

In the present proceedings Proctor Yatawara has given evidence with frankness, and there is no reason to think that he has been a party to any fraud, but it is clear that he has misinterpreted the section and misunderstood its requirements. In his evidence he states :—

> "Defendants and plaintiff gave me instructions to prepare the bond. Plaintiff said he wanted a power of attorney to confess judgment. I informed defendants about it. They consented to execute that power of attorney..... I explained the contents of the mortgage bond to the defendants. After the mortgage bond was signed, I explained the power of attorney to confess judgment."

In the cross examination he added :—

> "I told the defendants that plaintiff wanted me to execute a warrant of attorney to confess judgment and that for that purpose I shall have to act as their proctor for the said purpose. Defendants consented to my acting as their proctor. I did not tell the defendants to nominate a proctor to act on their behalf. I was really watching the interests of the plaintiff Chettiar, in getting a warrant of attorney to confess judgment.

In is clear on this evidence that Proctor Yatawara was present on the occasion in question as the plaintiff's proctor. It was therefore his duty to request the defendants to get some other proctor to look after their interests, and not to combine in his own person the duties both of proctor for the plaintiff and of proctor for the defendants. I cannot therefore, regard his attestation as having been made "on behalf of the defendants." Further, it seems evident that the defendants were never given the opportunity of making a free choice of their proctor for the purposes of the section, and Mr. Yatawara cannot be regarded as the proctor expressly named by the defendants and attending at their request.

In view of these findings, it is not necessary to consider the allegation of fraud.

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I allow the application of the defendants, and set aside the judgment and decree already entered, and order that a date be fixed for the filing of the answer of the defendants, and that the case do proceed to trial in due course.

The defendants are entitled to the costs of this application.

WIJEYEWARDENE, J.

I agree.

Application allowed.

Proctors :—

M. Jothiratna Perera, for defendant-petitioner.

Beven & Beven, for plaintiff-respondent.

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

CHELVANAYAGAM vs THE COMMISSIONER OF INCOME TAX

In the matter of a case stated by the Board of Review, Income Tax on the application of S. J. V. Chelvanayagam of Colombo.*

S. C. 148 (*D. C. Inty.*) 1938.

Argued on 16th March, 1939.

Decided on 30th March, 1939.

Income Tax Ordinance (Chapter 188)—Section 9—Expenses incurred by lawyer in purchasing law books—Do they fall within the ambit of the expression "outgoings and expenses" in section 9—Can a deduction in respect of purchase of law books be allowed.

Held : That the expenses incurred by a lawyer in purchasing law books is not "outgoings and expenses" within the meaning of section 9 of the Income Tax Ordinance and is not a deduction allowable under the Ordinance.

CASE STATED*

Under the provision of the Income Tax Ordinance 1932, for the opinion of the Hon'ble The Supreme Court of the Island of Ceylon, on the application of

S. J. V. Chelvanayagam
Appellant.

1. The Appellant is an Advocate of the Supreme Court in private practice. The Appellant claimed a deduction of Rs. 354/- from the amount of his income, for the year of assessment 1937/38, which he claimed should be deducted for arriving at his taxable income, for Income Tax purposes. The said sum represented the cost of 48 Volumes, out of the complete set of 62 Volumes of the Law Reports Indian Appeals. The deduction was disallowed by the Assessor and so the Appellant appealed to the Commissioner of Income Tax who also disallowed it for the reasons which appear from the Appeal Minute of the proceedings before the Commissioner, a copy of which is annexed to this case stated marked "A."

2. The appellant thereupon appealed to the Board of Review constituted under the Income Tax Ordinance, upon the Grounds of Appeal dated 6th July, 1938, a copy of which is annexed hereto marked "B."

3. At the hearing before the Board on the 31st August, 1938, it was contended by the Appellant that the sum claimed was deductible as "expenses" under section 9 (1) of the Ordinance. The Law Reports he urged, were purchased not to equip himself but to quote to the Judges; they might be said to be analogous to the implements of trade of a trader, and so the item was not an expenditure of a capital nature under section 10 (c). He urged that the notion of "capital" was foreign to a lawyer's exercise of his profession and that if it could be imported into the exercise of his profession, then a Lawyer's brains constituted his capital.

4. The Assessor contended that the deduction claimed was expenditure of a capital nature and was therefore not allowable in view of the provisions of section 10 (c) of the Ordinance. Expenditure of a capital nature, it was submitted, was expenditure made from time to time, or at any one time only, to bring into existence an asset for the enduring benefit of his trade. It may enable the person concerned to deal with the particular job but if it also equips him for future work of a wider scope, the expenditure involved is capital expenditure.

5. The Board decided that the sum claimed was expenditure of a capital nature and so, even if it can be regarded as an expense incurred by the Assessee in the production of his income, its deduction in the assessment of his taxable income was not permitted by section 10 (c). A copy of the decision of the Board, marked "C," is annexed to this case stated.

6. Being dissatisfied with the determination of the Board the Appellant has requested the Board to state a case for the opinion of the Supreme Court on a question of Law. The question is whether the sum of Rs. 354/- expended by the Appellant in the purchase of the Law Reports referred to above is an outgoing or an expense incurred in the production of the Appellant's income as a Lawyer, and even if it is, whether it is expenditure of a capital nature and so not allowable under section 10 (c). We have accordingly stated and signed this case.

Colombo, 3rd day of November, 1938.

1. (Sgd.) A. C. G. Wijekoon
2. ,, Stewart P. Hayley
3. ,, S. Pararajasingham

Members of the Board of Review.

H. V. Perera, K.C., with *N. Nadarajah*, *Muttukumaru* and *C. C. Rasaratnam*, for assessee-appellant.

S. J. C. Schokman, Crown Counsel for Commissioner of Income Tax.

MOSELEY, A.C.J.

The appellant, an Advocate of the Supreme Court claimed that a sum of Rs. 354/- expended by him in the purchase of a number of volumes of the Indian Appeal Law Reports should be deducted for the purpose of arriving at his taxable income for Income Tax purposes. His claim was disallowed by the Commissioner of Income Tax and by the Board of Review to whom he appealed. The question has now come before this Court by way of a case stated.

The point is whether the expenditure referred to above is an "outgoing and expense" incurred by the appellant in the production of his income.

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It is apparently the practice of the Commissioner to allow deductions in respect of expenditure on the purchase of current reports, but not, as in the present case, in regard to other works of reference. Snelling in the Dictionary of Income Tax and Sur-Tax Practice (1931) at page 240 says " .....a lawyer may deduct sums paid for current reports *etc.* A clergyman or a minister of religion, however, may not be allowed the cost of purchasing books required for purposes of study. This rule would apply to lawyers and business-men in connection with any books which may be said to equip them for their business rather than to be used in the carrying on of their business."

In *Daphne vs Shaw* (XI Reports of Tax Cases p. 256) the appellant, a solicitor, claimed a deduction in respect of wear and tear and obsolescence of books forming part of his law library. Rowlatt, J refused to believe that the books which a lawyer consults on his shelves could be included in the expression " plant and machinery " and upheld the finding of the Commissioners disallowing the deduction.

In *Simpson vs Tate* (1925, 2 K.B. 214) a medical officer of health sought to deduct from his taxable income, money paid as subscriptions to professional and scientific societies. Rowlatt, J in finding against the assessee said " In my view the principle is that the holder of a public office is not entitled under this rule to deduct any expenses which he incurs for the purpose of keeping himself fit for performing the duties of the office such as subscriptions to professional societies, the cost of professional literature and other outgoings of that sort. If deductions of that kind were allowed in that case.....there would be no end to it."

In my view the principle expounded by Rowlatt, J may well be applied to the case of a deduction sought to be made in similar circumstances under the local enactment.

The appeal therefore fails. In view of the fact that the appellant will lose the sum of Rs. 50/- which he has deposited in accordance with section 74 (1) of the Ordinance, I do not propose to make any order as to costs.

SOERTSZ, J.

I agree.

Appeal dismissed.

Proctors :—

K. T. Chittampalam, for appellant

Present: DE KRETSER, J.

WIKRAMATUNGA vs PERERA

S. C. No. 236—*C. R. Colombo No.* 39710.
Argued on 15th March, 1939.
Decided on 17th March, 1939.

Civil Procedure Code—Section 218 (*j*)—*Are the wages of a conductor of a tramway car exempt from seizure.*

Held : That the conductor of a tramway car is not a ' labourer ' within the meaning of section 218 (*j*) of the Civil Procedure Code and his wages therefore, are not exempt from seizure under that section.

Cases referred to :— *Girigoris vs The Locomotive Superintendent.* 15 N.L.R. 117.
Reddiar vs Abdul Latiff 30 N.L.R. 95.
Morgan vs The London General Omnibus Co., 13 Q.B.D. 832.

S. Subramaniam, for defendant-appellant.
T. Nadarajah, for plaintiff-respondent.

DE KRETSER, J.

The only question raised in this appeal was whether the learned Commissioner of Requests was right in holding that the defendant was not a labourer and that therefore his wages were not exempt from seizure under section 218 (j) of the Civil Procedure Code.

The defendant has been described as the conductor of a tramway car and his duties have been described in the evidence to consist in issuing tickets to passengers and collecting the fare and it has been said that he has to control the passengers in the tramway car and in doing so exercises his discretion.

It has been said that in employing conductors the company looks to their character and honesty.

It is clear from this description that the defendant does not come within the meaning which one naturally and ordinarily attaches to the word " labourer."

In the case of *Girigoris vs The Locomotive Superintendent* (15 N.L.R. 117), Wood Renton, J. held that a mechanic employed by the Railway Department on a daily wage was not a labourer.

In the case of *Reddiar vs Abdul Latiff* (30 N.L.R. 95), Drieberg, J. held that a lorry driver was not a labourer.

In Stroud's Dictionary a labourer is defined to be " a man who digs and does other work of that kind with his hands. A carpenter or a bailiff or a parish clerk is not called a labourer."

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In *Morgan vs The London General Omnibus Co.* (13 Q.B.D. 832) Brett, M.R. dealt with the case of an omnibus conductor and although that decision was under the Employers' and Workmen's Act, it nevertheless is of assistance. In that case he refused to distinguish between the conductor of a tramway car and the conductor of an omnibus.

All there is said on the other side is that in the Bombay case referred to in the two previous local decisions a spinner was held to be a labourer and the opinion was expressed that the provision in the Code was meant to relieve those who had no other means of livelihood other than their daily earnings.

I do not think that the conductor of a tramway car can be put on the same footing as a spinner, nor do I see any reason for placing him on a lower footing than a mechanic or a lorry driver.

I therefore dismiss the appeal with costs.

Appeal dismissed.

Proctors :—

Martyn Joseph, for defendant.
R. Muttusamy, for plaintiff.

Present : MOSELEY, J.

ARUNACHALAM CHETTIAR vs FERNANDO & ANOTHER

S. C. No. 214—*C. R. Colombo No.* 34057.
Argued on 21st March, 1938.
Decided on 1st April, 1938.

Small Tenements Ordinance (Chapter 87)—Order against tenant—Objection to writ of ejectment by co-occupiers—Claim of title to tenement by co-occupiers—Points of decision by a court in a proceeding under the Small Tenements Ordinance.

An order absolute was made against one W. A. J. Perera under section 3 of the Small Tenements Ordinance (Chapter 87). Perera did not appeal. When it was sought to execute the writ of ejectment certain co-occupiers with Perera claimed to be entitled to the premises and denied the landlord's title.

Held : (i) That the co-occupiers were not in the circumstances entitled to succeed in their objection.

(ii) That once a landlord has established his title to relief under the Small Tenements Ordinance the jurisdiction of the Court is not ousted by the tenant alleging title in a third person.

Cases referred to :— *Rees vs Davies* (1858) 4 C.B. (N.S.) 56.
Sundram Pillai vs Ambalam et al 30 N.L.R. 358.

L. A. Rajapakse, with *S. P. Wijewickrema*, for defendant-appellant.

F. A. Hayley, K.C., with *H. V. Perera, K.C.*, and *N. E. Weerasooriya*, for plaintiff-respondent.

MOSELEY, J.

This is an appeal against an order absolute made under section 3 of the Small Tenements Ordinance No. 11 of 1882.* In the first place an order was made against one W. A. J. Perera, who appears to have accepted the situation inasmuch as he did not appeal. When, however, it was sought to execute the writ of ejectment, the appellants who were living in the premises refused to leave. A rule *nisi* was then served upon them, in reply to which they claim that the landlord has no title and that they and certain others are co-owners of the premises. Enquiry was held and the Commissioner found that the appellants were co-occupiers with the tenant Perera and made the rule absolute.

It is contended on behalf of the 2nd appellant that she has been in occupation for eighty years and that she has produced a deed which shows that she has legal title to the land. She admits, however, that she has not paid rates or taxes, and that she claimed no part of the compensation when part of the property was acquired for municipal purposes. I do not know that any of these matters are particularly relevant.

The points for decision are whether or not the appellants are occupiers within the meaning of section 3 of the Ordinance, and, if they are, whether they have shown good and valid cause why they should not deliver up possession.

The purpose of the Small Tenements Ordinance is to provide for the "more speedy and effectual recovery of the possession of tenements unlawfully held over after the determination of the tenancy." It is based almost wholly upon the Small Tenements Recovery Act, 1838. It is unfortunate that no useful authorities upon the interpretation of that Act are available. It must be accepted, however, that to invoke the aid of the Ordinance there must be proof of tenancy. Counsel for the appellants contends that there is no such proof here against the appellants. There was, however, proof of the tenancy of Perera, and it seems to me that, if it can be established that the appellants are co-occupiers, as the Commissioner has found them to be, with Perera, the case comes within the scope of the Ordinance. In view of the 2nd appellants statement that her son-in-law Perera supported her and that she lived with him, I agree with that finding of the Commissioner. It was therefore for the appellants to show good and valid cause why they should not deliver up possession. To this end the 2nd appellant produces a deed and alleges possession for a lengthy period.

It is clear on the authority of *Rees vs Davies* (1858 4 C.B.(N.S.) 56) that, if a landlord gives evidence of his title to relief, that is to say, that the requirements of the Act have been complied with, the jurisdiction of the

* Chapter 87—Vol II page 760 (Edd.)

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Court is not ousted by the tenant alleging title in a third person. That, I take it, is following the proposition that it is not open to a tenant to impugn the title of the landlord.

Counsel for the appellant relies largely on the decision of Akbar, J. in *Sundram Pillai vs Ambalam et al* (30 N.L.R. 358), but I fail to see that the case is particularly in point. The gist of the decision is to the effect that, when a writ of possession is issued pursuant to a rule absolute against a tenant, such a writ is inoperative against an occupier who is not a party to the proceedings. In the case before me the appellants, after refusing to vacate the premises, were served with a rule *nisi*, and proceedings were begun *de novo*. There is thus a clear distinction between the cases.

It is true that in *Sundram Pillai vs Ambalam et al* (supra) the occupier claimed title in his own right and that the Commissioner, after hearing evidence, held that he had been in possession. In the present case, however, the Commissioner also heard evidence and has found that the appellants were co-occupiers with the tenant. The Commissioner has indeed gone into the question of title, which appears to be beyond his jurisdiction, but such excess of jurisdiction is not, in my opinion, material to the main issue. He has found that no good or valid cause has been shown why the rule *nisi* should not be made absolute.

The Ordinance provides a remedy for the case where the landlord has no title. I think the learned Commissioner's order was a proper one. The appeal is dismissed with costs.

Appeal dismissed.

Proctors :—

J. G. Fernando, for defendant-appellant.

S. Ratnakaram, for plaintiff-respondent.

Present : KEUNEMAN, J. & WIJEYEWARDENE, J.

FERGUSON (NEE) HAWKE & OTHERS vs SABAPATHY & OTHERS

S. C. No. 202L—D. C. Kandy No. 45395.

Argued on 8th & 9th March, 1939.

Decided on 21st March, 1939.

Partition of land subject to a fideicommissum *—In what circumstances will it be allowed—The Entail and Settlement Ordinance (Chapter 54)—The Partition Ordinance (Chapter 56)—Prohibition against alienation—When is such a prohibition not valid.*

Held : (i) That a partition of *fideicommissum* property will not be allowed where such a partition will cause serious inconvenience to those becoming entitled to the shares, and it will become necessary on the death of the last surviving *fiduciarius* to ignore the previous partition and consolidate the lots and repartition on entirely new lines.

(ii) That a prohibition against alienation, wherein the persons for whose benefit the prohibition has been made are not designated, is of no effect in our law.

Cases referred to :—

(1) *Saidu vs Samidu* (1922) 23 N.L.R. 506.
(2) *Boteju vs Fernando* (1923) 24 N.L.R. 293.
(3) *Fernando vs Fernando* (1915) C.W.R. 46.

H. V. Perera, K.C., with *S. W. Jayasuriya*, for the appellants (6 to 17 added-defendants).

N. Nadarajah, for the plaintiff-respondent.

E. F. N. Gratiaen, for the 2 to 8 respondents (the defendants and 1 to 5 added-defendants).

WIJEYEWARDENE, J.

This is an action for the partition of a land called Kurugala alias Maryland. One James Thomas Hawke was admittedly the original owner of the land. By deed of gift P2 of 1893 Hawke donated " an undivided one-fourth part or share " to his mistress Rakoo and the remaining " three undivided parts or shares to the children begotten by her and also the children to be borne by her " to him to be held by them " for ever and for their own use and benefit absolutely." The gift was made subject to certain conditions and limitations which are set out in the deed as follows :—

1. " That in case of the death of all the said children their said shares shall devolve to me the said James Thomas Hawke.

2. " That the said donees or any of them shall not under any pretence whatsoever sell, mortgage, or alienate the said estate and premises or any portion thereof or their or any of their right title and interest therein and thereto during my life time without my consent thereto first had and obtained.

3. "That the said donees for any of them shall be allowed to take possession of the said estate and premises or any of their respective shares at any time that I the said James Thomas Hawke may be minded or desirous of giving over possession of the same to them in writing.

4. "That on no account shall the right title and interest of the said donees or any of them be liable or subject to any debt or debts incurred by the said donees or any of them or to be liable to be seized sequestered or sold in execution for the debt default or miscarriage of the said donees or any of them during my life time."

J. T. Hawke had eight children by Rakoo, namely, Agnes, Eleanor (6th added-defendant), Arthur (7th added-defendant), Alice, Beatrice, Mary Cecilia, Emily (8th added-defendant) and Winifred (12th added-defendant). Four of these children—Agnes, Alice, Beatrice and Mary Cecilia—predeceased J. T. Hawke who died in 1933. Rakoo died in 1935. The 9th added-defendant is the husband and the 10th, 15th, 16th and 17th added-defendants are the children of Mary Cecilia. Robert Macdonald married Alice and, on her death without children, married Beatrice and had by the latter one child, the 11th added-defendant. Robert Macdonald has not been made a party to this action. The 13th and 14th added-defendants are the children of Agnes.

The interests of Rakoo, Agnes, Eleanor, Arthur, Beatrice and Mary Cecilia were sold against them at Fiscal's sales and these interests have now devolved on the 1st and 2nd defendants and the 1st, 2nd, 3rd, 4th and 5th added-defendants. By a deed D3 executed in 1926 Emily conveyed her interests to the 1st defendant. A certain portion of the interests of Alice is also claimed by the 1st and 2nd defendants under deed D6 of 1927. By deed P3 of 1927 Mary Winifred conveyed her interests to Suppiah Pulle who in turn conveyed these interests to the plaintiff. There is no evidence to show that either the deed D3 or the deed P3 has been executed with the consent of J. T. Hawke as required by the deed of gift P2. In fact, the evidence shows that J. T. Hawke never visited Ceylon after he left for New Zealand in 1910.

On the facts as stated by me, the counsel for the appellants argued—

i That no interest in the property vested in the plaintiff by virtue of deeds P3 and P4.

ii That the present action for a partition of the land is not maintainable, as any partition that may be ordered will not be of a permanent character.

iii That on the death of any child of J. T. Hawke the share of such child does not devolve on the heirs of such child but accrues to the surviving children of J. T. Hawke to be held by them subject to the *fideicommissum* in favour of the estate of J. T. Hawke.

In support of his first argument, Mr. H. V. Perera stated that the alienation by Emily was invalid, as the deed of gift P2 contained a prohibition against alienation by Emily without the consent of the donor, and he contended that the prohibition had been imposed for the benefit of a class, to wit, the children of J. T. Hawke by Rakoo. It was argued by him that the deed P2 contained a gift to a class of persons composed of the children of the donor and that it was the intention of the donor that the three-fourths

shares given to his children should remain vested in that class to the exclusion of the heirs and assigns of the children until the death of the last survivor of the donees when the three-fourths shares were to vest in the estate of the donor. On these arguments, Mr. Perera put forward the proposition that the deed of gift created a *fideicommissum* in favour of the group of children of the donor and that, in spite of an alienation by one of the children, the property would continue to vest in the group including the alienor and that the alienee would get no interest. If this proposition is given its full effect, it follows that, if all the children of J. T. Hawke convey their undivided 3/4th shares to a third party, they will still continue to own the shares in spite of the alienation by them, until the death of the last survivor of them.

This proposition has to be considered, no doubt, according to the principles of the Roman-Dutch Law, but it should not be forgotten that these principles have been modified considerably by the provisions of the Entail and Settlement Ordinance, 1876. There are also several local decisions in which our Courts have considered whether a transfer executed by a grantee under a Crown Grant in violation of a prohibition against alienation contained in the Crown Grant operates to pass good title. These decisions, however, are not applicable to the present case, as, in these cases, the rights of the parties had to be determined independently of the provisions of the Entail and Settlement Ordinance, 1876, which were not binding on the Crown.

Section 3 of the Entail and Settlement Ordinance 1876 enacts that, if a deed executed after the proclamation of the Ordinance contains a prohibition against alienation but does not name, describe or designate the person or persons in whose favour or for whose benefit the prohibition is provided, then such prohibition shall be absolutely null and void. It is, therefore, necessary to examine the language of the deed P2 to ascertain whether the prohibition contained in it is valid. The deed states first that the shares have been given by the donor to his children " absolutely " and " for ever ". It then proceeds to create a *fideicommissum* in favour of J. T. Hawke on the death of all the donees. The creation of this *fideicommissum* has hardly any bearing on the present question. The deed then prohibits any alienation by the donees without the consent of the donor. The prohibition contained in the deed P2 does not differ from the prohibition in a simple deed of gift by which the donor gifts a property to a single donee and burdens the gift with a prohibition against alienation, without mentioning the person for whose benefit or in whose favour such a prohibition has been made. There is no clause in the deed P2 which names, describes or designates the person for whose benefit the prohibition has been provided. It is very probable that the donor inserted the clause containing the prohibition in an endeavour to protect this group of children against the consequences of their own improvidence. But such a prohibition is of no effect in our law. (Vide *Saidu vs Samidu* * and *Boteju vs Fernando* †). In his Laws of Ceylon

* 23 N.L.R. 506 † 24 N.L.R. 293

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Ferguson (nee) Hawke & Others *vs* Sabapathy & Others

(1904 Edition Vol. 2 page 320) Walter Pereira sets out the position with regard to prohibitions against alienation as follows :—

> " When anything is alienated against the express prohibition of the testator, those persons in whose interests the prohibition has been made are immediately called to the *fideicommissum* (Sande de Proh. AL. 3.6.1) This proposition is liable to be misunderstood. The *fideicommissum* here referred to is a *fideicommissum* induced by a prohibition against alienation coupled with an indication of a person to benefit in the event of such prohibition being disregarded. Ordinarily there need be no prohibition against alienation for the purpose of constituting a *fideicommissum* although in the creation of *fideicommissum* in Ceylon such prohibitions are usually inserted. If I give my property to A subject to the condition that it is to become B's property after the death of A, I create a complete and effectual *fideicommissum*. In such a case a prohibition against alienation is a mere superfluity, because A cannot interfere with B's rights and he cannot therefore alienate the property. All that he can alienate is his own interest in it which terminates at his death In such a case if A executes a deed purporting to alienate the property, B may recover it from the purchaser as soon as his right accrues, that is after the death of A."

I hold that the prohibition against alienation contained in the deed P2 is void and that Emily's share is now vested in the plaintiff, subject, however, to the *fideicommissum* created in favour of J. Thomas Hawke or his estate.

In support of his second argument, Mr. Perera contends that the partition effected under a decree in the present action will have to be superseded when, on the death of all the children, these undivided three-fourths shares will vest in the estate of J. T. Hawke. In order to appreciate the force of this argument, it is best to consider in detail the nature of the undivided shares of each party to the present action. For convenience of reference I shall describe the undivided one-fourth share which was given to Rakoo as " Rakoo's share " and the remaining three-fourth shares as " children's share." The parties to this action will be entitled, more or less, to the following shares :—

Plaintiff—24/192 of "children's share"

1st Defendant—35/192 of "children's share" plus 8/24 of "Rakoo's share"

2nd Defendant—46/192 of "children's share" plus 8/24 of "Rakoo's share"

1st added Defendant—20/192 of "children's share" plus 4/24 of "Rakoo's share"

2, 3, 4, 5 added Defendants—each 5/192 of "children's share" plus 1/24 of "Rakoo's share"

Unallotted—12/192 of "children's share"

It will thus be seen that each of the seven divided lots given to the 1st and 2nd defendants and 1, 2, 3, 4 and 5 added-defendants will be allotted in lieu of certain parts of " Rakoo's share " and certain parts of " children's share." Moreover the parts of " Rakoo's share " will not bear the same proportion to the parts of " children's share " in each of the 7 divided lots. On the death of the four remaining children of Hawke, the " children's share " will have to be separated off from " Rakoo's share " and given to the estate of Hawke. This would necessitate the consolidation of all the lots

into one lot and a fresh division of the entirety into a number of lots – at least 7 lots representing " Rakoo's share " to be given to the 1st defendant, the 2nd defendant and the 1st, 2nd 3rd, 4th and 5th added-defendants and a number of separate lots representing the " children's share " to be given to the several beneficiaries who may become entitled to claim the " children's share" under the deed of gift P2, on the happening of the contingency referred to in that deed. It will thus be seen that any partition ordered in the present action ceases to be of any benefit on the death of the last surviving child of Hawke. Such a partition will moreover cause serious inconvenience to those becoming entitled to possess shares in the land as the beneficiaries of Hawke's estate, and it will become absolutely necessary to ignore the partition and consolidate the various lots and sub-divide them according to a fresh scheme of partition.

I feel that the reasons against the entering of a decree for partition in the present action are even more cogent than in *Fernando vs Fernando* ‡, where the Supreme Court refused to allow a decree for partition, on the ground that any partition decreed will not be of a permanent character. The facts of that case may be briefly summarised as follows : A land was gifted in 1862 to one Maria subject to a *fideicommissum* in favour of her descendants and ultimately in favour of a certain church. In 1865 Maria gifted a 3/4th share of the land to her brother and two sisters. The remaining 1/4th share was sold against her in execution and purchased by the plaintiff in 1914. The plaintiff filed an action for partition making those claiming interests under the brother and two sisters of Maria parties to the action. de Sampayo, J with whom Wood Renton, A.C.J. agreed, stated in the course of his judgment,—' Moreover and this to my mind is the greatest objection, any partition of the land at the present time will not be of a permanent character for on the death of Maria the division would come to an end and those taking after her would be entitled to and possess the property in its entirety as an undivided land. I cannot think that such a case was contemplated by the Ordinance.'

It is no doubt well settled law that a property subject to a *fideicommissum* may be partitioned under Ordinance No. 10 of 1863. The subject matter of the cases, however, in which our Courts have allowed a partition of *fideicommissum* property has been generally a land owned by several fiduciarii, each with a separate set of *fideicommissarii*. In such cases, a partition was not only practicable but beneficial. On the termination of the *fideicommissum* the lot allotted to each fiduciarius would devolve on a separate set of *fideicommissarii* who could then possess such lot in common or divide it among themselves. In such cases, no necessity arises for consolidating all or some of the divided lots and then effecting a fresh sub-division. In fact, the partition of *fideicommissum* property has been permitted by our Courts on the basis that the decree for partition entered

‡ 1 C.W.R. 46.

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in an action to which the fiduciarii were parties would be binding on the *fideicommissarii*, even if they were not parties to the action. But any insistence on the binding nature of the decree entered in the present action on the ultimate beneficiaries of Hawke's estate will be so detrimental to their interests as to amount almost to a denial of their rights. In view of the terms of the deed of gift P2 and the manner in which the undivided shares are now held by the various parties, any partition that may be ordered in the present action will have to be superseded as soon as the *fideicommissum* in favour of the estate of J. T. Hawke takes effect.

The view I have expressed as to the inexpediency of the property being partitioned does not involve a finding by me that the plaintiff is not entitled to maintain an action under Ordinance No. 10 of 1863 for the sale of the land. I wish to add that no argument was addressed to this Court by any counsel in favour of a sale of the property. Such a sale and a deposit in Court of the proceeds of sale of the three-fourths shares donated to the children, to be retained subject to the terms of the *fideicommissum* in favour of the estate of J. T. Hawke, will not give rise to the difficulties indicated by me as likely to arise in the case of a decree for partition. Sections 2 and 4 of the Ordinance show clearly that a Court could enter a decree for sale if it appears to such court that " on account of the number or poverty of the owners, the nature, extent, or value of the land and *other causes* " a partition is impossible or inexpedient. It is open to the plaintiff in this case, if he is so advised, to apply for the sale of the property.

I am unable to accept the third proposition put forward by the counsel for the appellant. I think that, on the death of each of the children of J. T. Hawke referred to in the deed of gift P2, his or her share devolved on his or her heirs and did not accrue to the surviving children mentioned in the deed of gift. To hold otherwise would be to ignore the provisions of section 20 of Ordinance No. 21 of 1844. The heirs of a deceased child or a transferee obtaining title from a child of J. T. Hawke and Rakoo will hold such share subject to the *fideicommissum* in favour of the estate of J. T. Hawke.

I set aside *pro forma* the judgment of the learned District Judge. On a date to be fixed by the Judge after notice to the parties, the District Judge will inquire into the question whether a decree for sale should be entered in respect of the property, if the plaintiff makes an application for such a decree within a reasonable time to be allowed by the Court. If the plaintiff fails to make such an application or the District Judge decide on such application that a decree for sale should not be entered, then the plaintiff's action will stand dismissed. If the District Judge decides on such inquiry to enter a decree for sale, the necessary orders will be made by him to give effect to the decree. Any party dissatisfied with such decree or order will, of course, have the usual right of appeal to this Court.

The plaintiff respondent will pay the costs of this appeal to the appellants. All other costs incurred up to date in respect of the proceedings in the District Court will be in the discretion of the District Judge.

KEUNEMAN, J.

I agree.

Judgment pro forma set aside.

Proctors :

H. A. C. Wickramaratne, for appellants (6–17 added-defendants.)
Coomaraswamy & Wijayaratnam, for plaintiff-respondents.
Beven & Beven, for 2-8 respondent.

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

PALANIAPPA CHETTIAR vs HASSEN LEBBE AND ANOTHER

S. C. No. 95—D. C. (Inty.) Colombo 8310.
(with Application for Restitutio in Integrum No. 7.)
Argued on 24th March, 1939.
Decided on 3rd April, 1939.

Civil Procedure Code (Chapter 86) sections 31 and 32—Warrant or power of Attorney to confess judgment—Form No. 12 of First Schedule—Within what limits may the form be altered.

A warrant of attorney to confess judgment had been executed by the defendants under section 31 of the Civil Procedure Code in Form 12 of the First Schedule. The form was altered to include the assigns of the mortgagee by the addition of the word "assigns" after the words "his heirs, executors, or administrators." Objection was taken to the warrant of attorney on the ground that the alteration was unauthorised by law and it was, therefore, invalid.

Held : That the alteration was illegal and the warrant of attorney to confess judgment was, therefore, invalid.

H. V. Perera, K.C., with *N. E. Weerasooriya, K.C.*, and *U. A. Jayasundera*, for defendants-appellants and petitioners.

N. Nadarajah, with *E. B. Wickremanayake*, for plaintiff-respondent.

DE KRETSER, J.

These two matters were argued together as the appeal and the application were ancillary to each other and meant to prevent any possible technical objection to the hearing of the grievance which the appellant had.

The point of law involved is whether a warrant of attorney to confess judgment must be restricted to the form prescribed in section 31 of the Civil Procedure Code and cannot go beyond it, though it may be less extensive.

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de Kretser, J.

Palaniappa Chettiar *vs* Hassen Lebbe and Another

Warrants of attorney to confess judgment have now become obsolete in England. In view of certain matters which gave rise to the feeling that they were being improperly used, provision was made by statute that the debtor should always have independent legal assistance before he signs such a warrant, and that it should be filed in a public office within 21 days of its execution, also that every defeasance or condition should be written on the same paper before the filing of the warrant in the public office.

Except for these matters warrants of attorney seem to have been evolved in the course of practice. They find no place in the Indian Civil Procedure Code from which we borrow our Code, but they were introduced into Ceylon in the course of adopting the English practice, and in 1880 the Full Court of this Island recognised such warrants. A reference to this fact will be found in *Venaithirthan Chetty vs Sondeperune Aratchige Don Migel Jayatilleke Appuhamy* (6 S.C.C. 105), where it was pointed out that there should be limitations provided in Ceylon similar to those provided in England, and the provision in the Civil Procedure Code followed shortly afterwards.

It had been the practice in England to scrutinise the authority very closely and to limit the use of the warrant. It is unnecessary to quote the references and it is sufficient to say that a warrant of attorney handed to a creditor and empowering the attorney to confess judgment in a case brought by him was not extended to a case brought by his personal representatives. But when the warrant made provision for an action being brought by the creditor or his personal representatives, then it was held to be valid when used in such an action.

Curiously enough there is no instance of a warrant enabling its use in an action by the creditor's assigns.

A warrant of attorney to confess judgment, as far as I can see, seems to have been regarded as a personal matter. It ended with the death of the debtor ; when once used it ended with the death of the particular attorney or of one of them when it is in favour of two (24 N.L.R. 382 *Garvin vs Abeyawardene*).

It would not be given by an agent on behalf of his principal even though specifically authorised to do so (32 N.L.R. 15. *National Bank of India, Ltd., vs George Gill*).

Therefore the absence of any instance where such warrant was used by assigns is not without significance, nor is the fact that in the form provided in our Code there is no contemplation of such a situation.

It is useless to speculate as to the reason for such a restriction. It may be as Mr. Perera suggested that the debtor could trust the creditor and his personal representatives, but should not be called upon to put himself wthin the power of some absolute stranger.

A warrant of attorney to confess judgment is in the nature of a security. In this particular case, while the mortgage bond has been assigned to the plaintiffs, there has been no assignment of the warrant of attorney, and even

assuming that a warrant of attorney may be used for the benefit of assigns this can only be on the benefit being transferred to them. Here the assignment authorised the demand of the money and the grant of releases and discharges, but not the use of the Warrant of Attorney. On this ground too the use of it would be invalid.

But the main objection taken was that the only authority for the use of such warrant was to be found in section 31 and 32 of the Code, and section 31 having prescribed a form, nothing in excess of that form could be recognised I think that this argument is sound.

The District Judge was of opinion that the use of the word "may" in section 31 enabled a creditor to obtain a warrant in a form other than the one given in the Code. If the position had been that the Code was merely recognising the validity of warrants of attorney which otherwise by implication might be held to have been repealed by the Code, then of course it may be argued that the form of the warrant was of no consequence, but if that were the position, the language used in section 31 is inapt.

I think the section merely says that a warrant of attorney may or may not be given, but if given, it should be in the form 12 in the Schedule.

In drawing up the form, the legislators probably had in view the utmost limits to which the form had been extended in England, and they saw no reason to extend it any further in Ceylon. The combination of the words "executors, administrators and assigns" is so common that it is hardly likely they would have omitted the last word but for good reason.

It will be noted that the form is invoked in the section itself. Other forms are given in the Schedule, as for example forms 10 and 11 to be used in cases falling under section 28 and 30. but these forms are not referred to in those sections. I think, therefore, that the form given in the section must be substantially adhered to.

For the respondent it was contended that the judgment in *Vengadasalam Chetty vs Ana Fernando* (38 N.L.R. 92)* recongised the validity of a warrant of attorney such as the one we are now dealing with. I do not think that argument is sound nor did my brother Soertsz, who was one of the Bench which decided the case. Dalton, A.C.J. introduced his remarks with the words "it is sufficient to say" and he went on to hold that the particular warrant was bad. He did not apply his mind to the question whether the form given in the Code could not be added to, nor does the reported argument of Counsel indicate that the arguments proceeded on such a footing.

In my opinion all proceedings subsequent to the filing of the plaint should be set aside and the case sent back to be proceeded with from that stage, if the plaintiff be so inclined.

As the power *prima facie* justified the attorney in confessing judgment and the Court in acting on such confession, it seems to me that the remedy by way of *restitutio in integrum* is the proper one to adopt, but this question was scarcely alluded to as this Court has been approached by way of appeal also.

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* 5 C.L.W. 98 (Edd.)

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In the circumstances, there should be no costs in this Court, but the defendant is entitled to costs in the District Court.

SOERTSZ, J.

I agree.

Set aside and sent back.

Proctors :—

A. M. Markar, for defendants-appellants and petitioners.

C. M. Kumaravelpillai, for plaintiffs-respondents.

Present : HEARNE, J.

SUPPER & ANOTHER vs MUTTIAH & ANOTHER

S. C. No. 127—*C. R. Point Pedro No.* 28500.

Argued on 7th February, 1939.

Decided on 8th February, 1939.

Stamp duty—Stamp Ordinance (Chapter 189) *Joint petition of appeal improperly stamped.*

The appellants who had given separate proxies to the same proctor joined in stating this grounds of appeal in one petition, and stamped it with the duty payable on an appeal by one party only.

Held : That the petition of appeal should have been stamped with duty payable on two petitions.

N. Nadarajah, for defendants-appellants.

L. A. Rajapakse, with *H. W. Thambiah*, for plaintiffs-respondents.

Followed :—

James vs Karunaratne (1935) 37 N.L.R. 154

HEARNE, J.

The two defendants-appellants have joined in stating their grounds of appeal in one document. There is no objection to this. But as each of the defendants has chosen to appeal, then the document setting out the grounds of appeal must be treated as two petitions. I agree with Koch, J in *James vs Karunaratne* (1935) 37 N.L.R. 154, that the fact that the defence do not clash and that the redress claimed in the appeal is the same makes no difference. In this case there was not a joint proxy. I also agree with the answer of Soertsz, J to the argument based on section 760 which was advanced before him as well as before me.

On the preliminary objection which is covered by authority I reject the appeal with costs.

Appeal rejected.

Proctors :—

K. Muttukumaru, for defendants-appellants.

M. Esurapadhan, for plaintiffs-respondents.

Present : HEARNE, J.

FRANCISCU vs PERERA

S. C. No. 131/1937—*C. R. Panadure No.* 5840.

Argued on 25th November, 1937.

Decided on 26th November, 1937.

Partition—Final decree—Section 5 of the Partition Ordinance—No proof of affixing of notice on land—Report by Commissioner that he acted with notice to the parties—Presumption under section 114(*e*) *of the Evidence Ordinance—Validity of final decree.*

Plaintiff brought action No. 4705 in the Court of Requests of Panadure against the defendant and others claiming a declaration of title to a portion of a land on the footing that he was entitled to it on a final decree entered in 1928 in partition case D. C. Kalutara 13955. The defendants claimed title to the block in dispute on another final decree entered in 1918 in another partition case—D. C. Kalutara 6319. It was held in appeal that the plaintiff's final decree of 1928 prevailed over the defendants' final decree of 1918 but plaintiff's action was dismissed on the ground of misjoinder of parties and causes of action. The plaintiff then instituted the present action against the defendant claiming a declaration of title to a portion of the land in dispute in C.R. Panadure 4705 and basing title to it upon his final decree of 1928. The trial judge held that the plaintiff's final decree of 1928 was not binding and conclusive against the whole world under section 9 of the Partition Ordinance inasmuch as there was no evidence that the requirements of section 5 of the Ordinance had been complied with in regard to the affixing of the notice on the land although the Commissioner's report stated that he acted with notice to the parties and after publication by beat of tom-tom.

Held : (i) That inasmuch as the Commissioner's report stated that he acted with notice to parties and after publication by beat of tom-tom the requirements of the *proviso* to section 5 of the Partition Ordinance had been complied with.

(ii) That a Commissioner under the Partition Ordinance is an officer of Court and under section 114(*e*) of the Evidence Ordinance his official acts should be presumed to have been regularly performed.

Distinguished :—*Samarakoon vs Jayawardene*, 12 N.L.R. 316.

H. A. Wijemanne for plaintiff-appellant.

J. R. Jayawardene for defendant-respondent.

HEARNE, J.

In this case the plaintiff claimed title to the land in dispute by virtue of a partition decree of 1928 and it was admitted by the defendant that the land in dispute is included in lot 3 of plan 1672 (D. C. Kalutara 13955). The defendant claimed by virtue of a partition decree of 1918, and it was admitted by the plaintiff, that the land in dispute is included in plan 1679 (D. C. Kalutara 6319). In C. R. Panadure No. 4705 this Court expressed the view that the decree of 1928 must clearly prevail over the decree of 1918,

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and in the present case it was held by the Commissioner that the decree in No. 13955 D. C. Kalutara operated as *res judicata* in regard to the lot described in paragraph 3 of the plaint. He also held that the decree in No. 4705 Panadure did not in the circumstances of that case (it was decided on a question of misjoinder) operate as *res judicata* against the plaintiff. These findings were not attacked but it was argued for the defendant that the Commissioner was right in finding against the plaintiff for the reason that, in regard to D. C. Kalutara 13955, "the requirements of section 5 had not been complied with and therefore the decree could not be regarded as a decree of partition intended by section 9 of the Ordinance."

He purported to follow the ruling in *Samarakoon vs Jayawardene*, 12 N.L.R. 316, in which it was held that "as the Commissioner had *not* stated in his report and as there was no evidence to the effect that he had .....affixed on the land the notice required....." the requirements of section 5 had not been complied with. In the present case, however, the Commissioner did state in his report that he acted "with notice to the parties and after publication by beat of tom-tom....." and the two cases are by no means on all fours. The Commissioner was an officer of the Court and in view of his report it is to be presumed that his official acts were regularly performed, (section 114(*e*) Evidence Ordinance.)

The Commissioner relied upon the evidence of the defendant when he said that "he had no notice of the partition and was not aware of it....." but he has lost sight of the fact that at that time the defendant had no title and was not entitled to notice.

The case of *S. Chetty vs Talawasingham*, 28 N.L.R. 502, was also relied upon, but it does not help the respondent; for in that case it is clear, as Garvin, J. pointed out, that "it was impossible that the Commissioner could have given 30 days' notice."

I allow the appeal with costs. Judgment should be entered for plaintiff with costs.

Appeal allowed.

Proctors :—

Tirimanne & Meegama for plaintiff-appellant.
H. D. Perera for defendant-respondent.

Present : SOERTSZ, A.C.J.

VAITILINGAM vs VOLKART BROTHERS

S. C. No. 7—C. R. Colombo 44357.
Argued on 4th May, 1939.
Decided on 9th May, 1939.

Defamation—Master and Servant—Dismissal of servant—Intercession by President of Trade Union on behalf of dismissed servant—Reply of employers addressed to the Secretary of the Trade Union—Is the communication privileged.

The plaintiff, who was in the service of the defendants, was discontinued by them. Then the plaintiff sought the intercession of one Mr. Goonesinghe, the President of the Mercantile Union, a trade union to which the plaintiff belonged. The Mercantile Union was a member of the All Ceylon Trade Union Congress of which also Mr. Goonesinghe was President. The defendants are members of a body known as the Employers' Federation between which and the Trade Union Congress there was a pact by virtue of which it was possible for disputes and differences arising between them to be investigated and decided upon. On behalf of the plaintiff, Mr. Goonesinghe addressed certain requests to the defendants, who replied to the Secretary of the Trade Union Congress. Mr. Goonesinghe's letters indicated that his communications were addressed in his capacity of President of the Trade Union Congress.

Held : That the communications of the defendants were privileged.

H. W. Thambiah, for the plaintiff-appellant.
Grtiaen with *de Kretser*, for the defendants-respondents.

SOERTSZ, A.C.J.

The principal question in this case is whether the defamatory statement complained of was made on a privileged occasion. I see no room for doubt on that point. The defendants had been the employers of the plaintiff, but had discontinued his services on certain reports made to them by their Superintendent. The plaintiff's position was that he was the victim of the defendants' Superintendent who was ill-disposed towards him, and being a member of the Mercantile Union, the plaintiff went to Mr. Goonesinghe, the President of that Union and prevailed upon him to take his case up with his late employers. The Mercantile Union was a member of the All Ceylon Trade Union Congress between whom and the Employers' Federation of Ceylon of which the defendants were members, there was a pact by virtue of which it was possible for disputes and differences arising between them to be investigated and decided upon. When, therefore, Mr. Goonesinghe, at the instance of the plaintiff addressed certain requests to the defendants, the defendants' reply to them must be considered as a reply on a privileged occasion, for it is a reply made to a person who had such an interest in the matter as to entitle him to make the request or to put the question, and it was a reply made in pursuance of a duty imposed on the defendants by their pact with the Trade Union Congress. Mr. Thambiah

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contended that the privilege, if it did exist, was lost in view of the fact that the defendants addressed this reply in which the defamatory statement occurs to the Secretary of the Trade Union Congress and not to Mr. Goonesinghe himself. In my opinion, there is no substance in this contention. The evidence is clear that Mr. Goonesinghe is the President of the Trade Union Congress. It was on paper belonging to the body that Mr. Goonesinghe had written the letter to which the defendants were replying, and the names of the other office-bearers, among them that of the Secretary of the Congress appeared, and the defendants were acting in accordance with ordinary business methods when they addressed their reply to the Secretary. When the plaintiff invoked the assistance of the Mercantile Union and of the Trade Union Congress he must be taken to have consented to the matter being handled by them and the Employers' Federation, or by the members of that Federation in the usual way. *Volenti non fit injuria.* I, therefore, agree with the finding of the Commissioner that the occasion was privileged unless the plaintiff was able to show that the defendants were acting with malice as understood in law.

On this point, Mr. Thambiah's case was that the defendants were acting maliciously when they, without sufficient investigation, repeated in their letter of reply a defamatory statement said to have been made by one of their labourers in a petition presented to them complaining against the plaintiff.

Now in regard to this contention, I think the law is clear. I do not think I can do better than put it in the words in which Salmond summarises the case law on the point : " It is neither necessary nor sufficient to constitute liability that the statement was made without reasonable and probable cause. Not necessary—for if the statement is made maliciously, and is in fact false, the defendant is liable for it although he had good ground for believing it to be true ; malice destroys the privilege, and leaves the defendant subject to the ordinary law by which a mistake, however reasonable, is no defence. Neither is the absence of reasonable and probable cause sufficient in itself to constitute liability. The law requires that a privilege shall be used honestly, but not that it shall be used carefully. Negligence in making defamatory statements on a privileged occasion is not actionable. The unreasonableness of the defendant's belief may, however, amount to evidence of malice." The Roman-Dutch Law takes the same view of the matter.

In this case it cannot be said that the defendants' view of the plaintiff's conduct was so unreasonable as to show malice. The plaintiff acquits the defendants of malice in the sense of hatred or ill-will towards him, and that, in my view, has an important bearing on the question whether the defendants acted from an improper motive when they wrote as they did.

I dismiss the appeal with costs.

Appeal dismissed.

Proctors :—

A. Padmanathan, for plaintiff-appellant.

Julius & Creasy, for defendants-respondents.

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

DE SILVA vs RAMBUKPOTHA

S. C. No. 293—*D. C. Ratnapura* 6352.
Argued on 21st March, 1939.
Decided on 29th March, 1939.

Executors and Administrators—Does the property of an intestate vest in the administrator—Civil Procedure Code (Chapter 86) section 472.

Held : That under our law the property of an intestate vests in the administrator for purposes of administration.

Cases referred to : *Punchirala vs Kiri Banda* 23 N.L.R. 228.
Gunewardene vs Rajapakse 1 N.L.R. 217.
Abdul Azeez vs Abdul Rahamn 1 Cur. L.R. p. 271.
Silva vs Silva 10 N.L.R. 34 distinguished.

Choksy with *N. L. Jansz*, for defendant-appellant.
H. V. Perera, K.C., with *N. E. Weerasooria, K.C.*, and *E. S. Dassenaike*, for plaintiff-respondent.

SOERTSZ, J.

In this action, the official administrator of one Jayatunge Mudiyanselage Podisingho, sues the defendant-appellant to recover the value of rubber coupons obtained by him on the strength of a deed of transfer No. 557 of the 22nd of February, 1933, by which one Muhandiramage John Singho professing to be the full brother and sole heir of Podisingho purported to convey to him eleven parcels of land, including the two lands in respect of which the coupons were issued.

The question whether the appellant's vendor John Singho was the sole heir of the deceased arose between him and a number of others who claimed to be the lawful heirs, when all of them in opposition to one another, applied for letters of administration. While this question was pending, the District Judge, on the 13th of August, 1935 appointed the Secretary of the Court, that is the present plaintiff, official administrator "*pro tempore* until the rival claims are decided." On the 16th of January, 1936, the District Judge decided that John Singho is not a brother of the deceased Podisingho and that Mr. Proctor Peries' clients are the next of kin of the deceased. There was an appeal from this order and on the 27th of July, 1936, this Court dismissed the appeal. On the 13th of August, 1936, the District Judge made order directing the secretary to continue officiating as administrator. This order was most probably made with the consent or acquiescence of the next of kin, for when on the 26th of October, 1936, the official administrator filed this case, their proctor, Mr. Peries, was his proctor.

The defendant filed answer pleading *inter alia* " that any orders made or findings arrived at in D.C. Testamentary Case No. 987 of this Court to which this defendant was no party do not bind him. His vendor having

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divested himself of all title previously, deliberately failed to place all evidence before Court."

When the case came up for trial, a number of issues were framed, among them :

(5) Even if John Singho was not the sole heir or an heir of the estate of Podisingho, do the orders in the testamentary case No. 987 operate as *res judicata* against the defendant to the effect that John Singho did not inherit any rights from Podisingho. ?

(7) Was the plaintiff the administrator of the estate of the deceased Podisingho at the date of the institution of this action ?

(8) Has there been a judicial settlement of the estate in testamentary case No. 987, and if so, can plaintiff maintain this action ?

The District Judge decided to try these three issues as preliminary ones. He heard all the evidence adduced to him on these issues, and the argument of Counsel, and on the 27th of August, 1938, delivered judgment finding in favour of the plaintiff and entering judgment for him for Rs. 2,251/10, which was the amount the parties had agreed would be payable by the defendant in the event of it being found that he was bound by the earlier decision.

This appeal is from that judgment. The only question really debated on appeal was that raised by issue 5, and I wish to say that we were greatly assisted by the able argument of Counsel on both sides. After careful consideration of that argument, I have come to the conclusion that issue 5 must be answered in the affirmative, that is to say against the defendant-appellant. In brief, Mr. Choksy's contention was that although the defendant is the privy of John Singho, the plaintiff is a stranger to the proceedings in which it was held that John Singho was not Podisingho's heir, and that he cannot rely on that finding against the defendant ; that the only persons who could have repelled the defendant with that plea are Mr. Peries' clients who were found to be next of kin and that between them and the plaintiff there is no privity whatever ; that the only hypothesis on which it could have been sought to bind the defendant by the finding in the testamentary case is that that finding was a finding *in rem*, but that was not a sound legal hypothesis. (See the Divisional bench case of *Punchirala vs Kiri Banda* 23 N.L.R. 228).

Mr. Perera's contention was that although the official administrator is the nominal plaintiff, he is present as the representative in law of those who were found to be the lawful heirs of the deceased, and that, in effect, this question of *res judicata* now arises between those heirs and the defendant who is the privy of John Singho, the unsuccessful party. For this proposition, Mr. Perera relies on section 472 of the Civil Procedure Code which runs as follows : " In all actions concerning property vested in a trustee, executor, or administrator when the contention is between the persons beneficially interested in such property and a third person the trustee, executor or administrator shall represent persons so interested, and it shall not ordinarily be necessary to make them parties to the action. But the Court may, if it think fit, order them or any of them to be made such parties."

The reply made by appellants's Counsel to that argument is that that section is purely procedural and will operate when an appropriate case arises, namely a case in which the property of a deceased person is found to have vested in an administrator. He says he is not aware that any such case has arisen so far, nor can he visualise such a case, the law being what he contends it is, namely that title to immovable property belonging to the intestate estate of a deceased person does not vest in the administrator of the estate of such person, but in the heirs. He relies on the Divisional bench case of *Silva vs Silva* 10 N.L.R. 34 for this proposition.

The effective part of that judgment, as I understand it, is the decision that a conveyance by an heir of an estate under administration is not ineffectual merely because the administrator did not concur or assent to it. This finding is contrary to the view Bonser, C.J. took in two earlier cases, and it must now be regarded as settled law on that point. It has been recognised as such for nearly a third of a century. But I do not think that case compels us to hold that the property of the deceased can never vest in the administrator in any sense at all. It is notorious that frequently administrators sell and mortgage property belonging to their intestate in the course of administration. This obviously they cannot do, if in no case, and in no sense, they are vested with title to that property. Hutchinson, C.J. after examining a number of authorities concludes his judgment in the Divisional bench case I have referred to, by saying " the personal representative still retains power to sell it (i.e. immovable property) with the authority of the Court if the terms of the grant of administration so require, for the purpose of administration." Now, a power to sell implies a power to pass title and it is one who has title that can transmit it. Grenier, J. however, in his judgment in *Silva vs Silva* (supra) puts the matter on another basis. He said " a grant of administration, viewed by itself, is not a conveyance or assignment by the Court to the administrator of the title of the intestate....., a practice has, in consequence of the anomalous position which an administrator occupies as regards the immovable property of all intestate grown up in our Courts, which I think may correctly be described as inveterate, by which the Court where it has ordered the sale of immovable property belonging to an intestate estate, permits and sometimes expressly orders the administrator to execute the necessary conveyance.....It is a fallacy therefore to suppose.....that an administrator obtains an absolute title to the estate of his intestate. What happens is that on letters of administration being granted to him.....he is entrusted and charged with the estate of the deceased for purposes connected with the proper administration and settlement of it." Grenier, J. took this view and described the administrator as being "entrusted and charged" with the estate or as being "permitted or ordered" to execute a conveyance, because he refused to recognise the possibility that the title can be in both the administrator and the heirs at one and the same time. This is no doubt the correct logical view, but it sometimes happens that a logical inconsistency is tolerated

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and even encouraged by law for some very good reasons. Take for instance the case of a lessor and lessee. The modern view is that a lease creates not only contractual rights, but also proprietary rights. In *Gunewardene vs Rajapakse* 1 N.L.R. 217 Bonser, C.J. and Withers, J. held that a notarial lease was a *pro tanto* alienation and gave the lessee the rights of the owner during his term. In *Abdul Azeez vs Abdul Rahaman* 1 Cur. L.R. p. 271 a Divisional bench held that a lessee is *dominus* or owner for the term of the lease. " He is owner during that term against all the world including his lessor." But this does not prevent the lessor from conveying title to the leased land to a third party, during the term of the lease. The sale will of course ordinarily be subject to the lease. There is thus in a sense, concurrent title in two persons. Similarly for purposes of the law of registration, by a fiction a title may be considered to exist in two persons at the same time. A sells to B. From that moment, title is clearly in B as between the two of them. But, the law says that if notwithstanding his sale to B, A sells again to C who registers his deed before B, C gets the superior title. I adduce these instances to show that it is possible for a title to be regarded as vested in two different persons at the same time, for certain purposes. The positon is not different in the case of administration and heirs in relation to the property of their intestate, except that it results not from a legal fiction, but from the evolution of our law of succession which is derived from three different systems or jurisprudence, the Roman, the Dutch, and the English based on divergent theories relating to succession.

In my opinion, therefore, it would not be incorrect to say that the property of the intestate vests in the administrator for purposes of administration. Section 472 of the Civil Procedure Code in so far as it relates to executors and administrators can be given a meaning only in that view of the matter. The only alternative is to adopt appellants Counsel's suggestion that that part of the section is meaningless in the present state of the law. That, however, is a suggestion that I am not at all disposed to accept. I cannot regard that part of that section as some Utopian forecast. Section 218 of the Code seems to support the view I take of section 472.

The conclusion I reach is that section 472 of the Code furnished a complete refutation of the defendant's plea, for by virtue of it, the present plaintiff occupies the place of those who claimed to be the intestate's heirs and succeeded against John Singho the predecessor-in-title of the defendant. In other words, as far as the plaintiff and the successful claimants (i.e. the heirs) are concerned there is identity, and between John Singho and the defendant there is privity.

I dismiss the appeal with costs.

DE KRETSER, J.

I agree.

Proctors :— *Appeal dismissed.*

J. H. Rasiah Joseph, for defendant-appellant.

H. R. Peiris, for plaintiff-respondent.

Present: SOERTSZ, J.

THE MUTUAL LOAN AGENCY LTD. vs MRS. L. WEERASINGHE AND ANOTHER

S. C. No. 213—*C. R. Kandy* 24156/2.
Argued on 9th March, 1939.
Decided on 21st March, 1939.

Civil Procedure Code (*Chapter* 86) *section* 756—*Failure to serve notice of appeal and of security for costs in appeal to party named as respondent to an appeal—Action withdrawn as against party concerned before service of summons—Is the failure to serve notice fatal to the appeal.*

An action was brought against two persons. Before summons could be served on the 1st of the two persons, the plaintiff moved to withdraw the action as against him. Thereafter the court ordered the action to proceed as against the second. Judgment and decree was also in favour of the second. By an oversight, the first defendant in favour of whom there was no decree, was made a respondent to the appeal. Notice of appeal and security for costs were not given to him though he was made a respondent. Objection was taken to the appeal on the ground that it was not properly constituted.

Held : That, in the circumstances, the appeal was in order.

J. E. M. Obeysekere, with *Kumarakulasingham*, for the plaintiff-appellant.

E. B. Wikramanayake, for 2nd defendant-respondent.

SOERTSZ, J.

2nd respondent's counsel takes the preliminary objection that this appeal is not properly constituted, in that the 1st defendant who has been made a respondent to the appeal has not been served with notice of appeal and of security for costs in appeal in accordance with the provisions of section 756 of the Civil Procedure Code.

Appellant's counsel does not dispute this fact, but submits that the 1st defendant was not a necessary party to the appeal and that, therefore, notices need not have been served on him ; alternatively, that the appellant is entitled, in the circumstances of this case to relief under section 756 (3) of the Civil Procedure Code ; or, alternatively that, if the appeal is rejected, the respondent is not entitled to costs because this was an objection he could have and ought to have taken in the court below. In regard to the first submission made by the appellant's counsel, respondent's counsel says that it has been held in a number of recent cases that where a party is made a respondent and relief is claimed against him, it is not open to the appellant to say that such a party is not a necessary party. He points out that in this instance, the appellants pray in their petition of appeal that the judg-

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ment of the Commissioner be set aside and that judgment be entered as prayed for. The prayer in the plaint was that judgment be entered for the plaintiffs against the 'defendants jointly and severally.' Appellant's counsel says that the prayer in the plaint and in the petition of appeal should be construed in the light of the facts as they existed when decree was entered. The plaintiffs had stated on the 31st of August, 1938 that they were not proceeding against the 1st defendant, and that the decree entered was entered against the 2nd defendant alone, and that it was due purely to an oversight on the part of the appellant's proctor that the 1st defendant was made a respondent to the appeal. I have examined the record, and I find that the journal entry of the 31st of August is clearly to the effect that plaintiff's proctor states that he is not proceeding against the first defendant and that the Commissioner, thereupon, directed that the case be put down for trial against the 2nd defendant. This, I think, amounts to an application by the plaintiffs to be allowed to withdraw the case against the 1st defendant who had not been served with summons by that date, and an allowance of that application by the Commissioner when he ordered the case to be fixed for trial as against the 2nd defendant. When that occurred there was, in effect, an amendment of the plaint and, thereafter, the prayer must be read as a prayer for relief against the 2nd defendant. The 1st defendant was never an effective or real party to the case. The case against him was abandoned before he came into it. When decree was entered too, it was clearly against the 2nd defendant, it being duly noted in the decree that the plaintiffs were not proceeding against the 1st defendant. When, therefore, the plaintiffs named the 1st defendant a respondent on their petition of appeal, the position was not different from what it would have been if they had named an utter stranger to the case as a respondent. It was a proceeding devoid of meaning. No order could have been made on appeal that would in any way have affected the 1st defendant. In fact, it is hardly right to refer to him as 1st defendant. No summons was served on him. Although he had been named a defendant, he really did not become a party to the case. That fact, I think, distinguishes this case from the cases the respondent's counsel relied on.

I hold that the appeal is properly constituted and I direct that it be listed for argument in due course. There will be no costs of the discussion on the preliminary objection, because the appellants by naming a stranger to the case, a respondent invited this discussion.

Objection overruled.

Proctors :—

E. Carthigesar, for plaintiff-appellant.

Abeykoon and Dias Desinghe, for defendant-respondent.

Present: KEUNEMAN, J. & WIJEYEWARDENE, J.

ARANAPPU DE SILVA vs WILLIAM AND THREE OTHERS

S. C. No. 308—*D. C. Galle No.* 35440.
Argued on 21st and 22nd March, 1939.
Decided on 3rd April, 1939.

Res judicata—When may the court examine material outside the decree to determine whether a matter is res judicata—Validity of deed executed during the period intervening between an order of abatement and the setting aside of such an order—Partition Ordinance (*Chapter* 56) *section* 17.

Held : (i) That, where the decree is unintelligible, the Court may examine the judgment in order to ascertain the meaning of the decree.

(ii) That a deed executed during the period intervening between an order of abatement and the setting aside of such an order is not obnoxious to the provisions of section 17 of the Partition Ordinance (Chapter 56).

Cases referred to :— *Cooray vs Cooray* (1914) 17 N.L.R. 460.
Bulner vs Rajapakse (1926) 28 N.L.R. 250.

L. A. Rajapakse with *S. W. Jayasuriya* and *P. A. Senaratne*, for plaintiff-appellant.

N. E. Weerasooriya, K.C., with *G. P. J. Kurukulasuriya* and *A. E. R. Corea*, for 1st, 3rd, 7th and 8th defendants-respondents.

WIJEYEWARDENE, J.

The plaintiff-appellant filed this action for the partition of a land called Himburanawatta claiming to be entitled to certain undivided shares in the said land under deed No. 4304 of October, 4th, 1934, (marked P2) executed by one Gabriel de Silva.

There was an earlier partition case D. C. Galle 26256, in respect of the same land in which Gabriel de Silva the plaintiff-appellant's vendor was the 15th defendant. The other parties in the two cases are identical. Judgment was entered in that case on June, 30th 1930. In that action Gabriel de Silva claimed the shares which he conveyed later by P2. The District Judge held that Gabriel de Silva was entitled to a smaller share than he claimed. The share allotted to Gabriel de Silva in the judgment was represented in the decree by an arithmetical expression which if correctly interpreted gave him a larger share. Gabriel de Silva appealed against the preliminary decree and the appeal was dismissed by this court. Sometime after the dismissal of the appeal the plaintiff in D.C. Galle 26256 discovered the "error" in the preliminary decree and applied to the District Court to amend the decree. On an objection taken by Gabriel de Silva the District Judge disallowed the application on the ground that he had no jurisdiction to amend the decree as it had become a decree of the Supreme Court and made order on October, 7th 1932 that the plaintiff should if so advised move the

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Supreme Court to amend the decree. The plaintiff failed to take any steps after that order and the District Judge on February, 24th 1934 entered an order of abatement under section 402 of the Civil Procedure Code 1889. In December, 1937, the plaintiff's proctor applied to the District Judge under section 403 of the Code for an order to set aside the order of abatement. Notice of the application was issued on the parties but owing to the non-service of the notice on some of the parties the District Judge has not disposed of the application as yet.

The present action for partition was filed in June, 1937. After the parties led evidence at the trial the District Judge heard argument on the legal question which was formulated as follows :—" What is the effect of the preliminary decree in partition case No. 26256."? He held that the judgment in D. C. Galle 26256 and not the " erroneous " decree operated as *res judicata* and that the shares of the parties in the present action should be determined by reference to the judgment and not the decree in that case. The plaintiff-appellant has preferred the present appeal against that judgment.

I find it difficult to assent to the proposition of law as stated by the learned District Judge. Section 207 of the Civil Procedure Code states in unambiguous terms that it is the decree passed by a court that is final between the parties. It is, no doubt true, that frequently the judgment and even the pleadings in an action are examined in order to ascertain the questions of fact and law that have become *res judicata* by the passing of the decree. This is done for the obvious reason that the decree which states only the relief granted does not show the various questions of fact and law which were put in issue or could have been put in issue between the parties. But where a court has to decide a question of *res judicata* in respect of the shares allotted to the parties in a previous partition action, the decree alone need be considered as it contains normally all the necessary information with regard to the shares.

The preliminary decree entered in D.C. Galle 26256, however, does not admit of an intelligent interpretation. If the parties to the present action are declared entitled to the respective shares set out in that preliminary decree, it will not be possible to effect a partition of the land as the aggregate of the several fractions representing the several shares exceed unity. The decree, as it stands is unintelligible. I think, therefore, that in the circumstances of the present case it is eminently desirable and even necessary that the judgment in D.C. Galle 26256 should be examined in order to construe the decree entered in that case. When the decree is read in the light of that judgment it becomes clear that the draftsman responsible for the decree thought that the fraction 987/5760 was correctly represented by the arithmetical expression 1/2 plus 3/8 of 141/720 and did not know that the correct way of writing the arithmetical equivalent of 987/5760 was (1/2 plus 3/8) of 141/720 and not 1/2 plus 3/8 of 141/720. The learned District Judge has in the present action allotted to the plaintiff, in addition to some other

interests, 987/5760 shares which the draftsman of the earlier decree sought to represent by 1/2 plus 3/8 of 141/720. I think, therefore, that the District Judge has given the correct share to the plaintiff. In reaching this decision I have regarded the decree as the final judicial determination of the suit, but in view of the fact that certain arithmetical expressions used in the decree become unintelligible when read with the rest of the decree, I have construed the decree with reference to the judgment.

It was also argued before us by the counsel for the respondent that P2 did not convey any title to the plaintiff as it was executed during the pendency of D.C. Galle 26256. This deed, however, has been executed after an order of abatement was entered in that case. That order of abatement has not been set aside. This court has held in *Cooray vs Cooray** and *Bulner vs Rajapakse*† that a deed executed during the period intervening between an order of abatement and the setting aside of such an order is not obnoxious to the provisions of section 17 of Ordinance No. 10 of 1863.

I dismiss the appeal but make no order as to the costs of the appeal.

KEUNEMAN, J.

I agree.

Proctors :— *Appeal dismissed.*

F. W. E. de Vos for plaintiff-appellant.

D. and R. Amarasuriya for 1st, 7th and 8th defendants-respondents.

K. T. E. de Silva for 3rd defendant-respondent.

Present: SOERTSZ, A.C.J.

JAYAWICKREMA vs SIRIWARDENE AND OTHERS

S. C. No. 115–119/1939—*M. C. Tangalle No.* 7199.

Argued on 18th May, 1939.

Decided on 22nd May, 1939.

Criminal Procedure Code—(Chapter 16)—Inspection of the scene of offence by a District Judge or Magistrate.

Held : That the Criminal Procedure Code (Chapter 16) makes no provision for inspection of scenes of offences by District Judges and Magistrates.

Per SOERTSZ, A.C.J. "The Criminal Procedure Code makes no provision for inspection of scenes of offences by District Judges and Magistrates. Section 238 provides for a view by the Jury of the place where the offence was committed, but, perhaps, there can be no objection to an inspection by a District Judge or a Magistrate provided it is held with due care and caution."

H. V. Perera, K.C., with *Aelian Perera* and *Chandrasena*, for the accused-appellants.

C. V. Ranawake, for the complainant-respondent.

SOERTSZ, A.C.J.

The accused in this case were charged with offences under sections 332 and 410 of the Penal Code.

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* (1914) 17 N.L.R. 460. † (1926) 28 N.L.R. 250.

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and Others

On the 2nd of November, 1938, the Police Magistrate, who is also District Judge, made a note on the record, to the effect that he was trying the case in his capacity of District Judge.

After trial, the Judge acquitted all the accused of the charge under section 332, and convicted them all under section 410 and in sentencing them to pay each a fine of Rs. 100/- and to enter into a bond in Rs. 200/- to keep the peace for one year, he remarked "The sentence is a District Court sentence."

I suppose that when the Judge declared that he would try the case as District Judge, he purported to act under section 152 of the Criminal Procedure Code, but he overlooked the fact that that section applied to cases in which the offences appear to be triable by a District Court *and not summarily by a Magistrate's Court.* In this case, both the offences charged were triable not only by the District Court but also by the Magistrate's Court, and the Judge had, therefore, no power to assume the jurisdiction he did. In view, however, of the fact that there has been a protracted trial in this case and also of the fact that the punishment awarded is within a Magistrate's jurisdiction, I would have dealt with this defect under section 425 of the Criminal Procedure Code. But, there is another difficulty in this case. It is clear from the judgment that the Judge was greatly influenced in his view of the case by an inspection he made of what he understood to be the scene of the offences. I find on the record a note dated 30th November, 1938: "Mr. Wickremasuriya states that an inspection will be helpful." "Order: The place can be inspected later on if necessary." Again at the end of that day's proceedings another note: "It is 4 p.m. now. I have to go to inspect a land in a civil case. This road too can be inspected today in the same trip.....Inspection about 4.30 p.m. today." There is no further note in regard to the inspection, but the judgment shows that an inspection took place.

The Criminal Procedure Code makes no provision for inspection of scenes of offences by District Judges and Magistrates. Section 238 provides for a view by the Jury of the place where the offence was committed, but, perhaps, there can be no objection to an inspection by a District Judge or a Magistrate provided it is held with due care and caution. There is nothing on the record in this case to show whether the inspection took place in the presence of the parties, or to show how that inspection proceeded. If the Judge set out by himself, there is nothing to show that he went to the actual scene of the offence. And if he did, it is not clear whether parties made statements to him and who those parties were and what, if any, statements they made.

For these reasons, I am of opinion that the fairest course to take is to set aside the convictions and send the case back for trial before another Magistrate.

Proctors :— *Set aside and sent back.*

E. M. Karunaratne, for accused-appellants.

C. A. Wickramasuriya, for complainant-respondent.

Present: SOERTSZ, A.C.J.

SUB-INSPECTOR OF POLICE (Eheliyagoda) vs POSATHHAMY

S. C. No. 173 M. C. Avisawella No. 19480.
Argued on 18th May, 1939.
Decided on 24th May, 1939.

Penal Code section 198 (*Chapter* 15) *Causing evidence to disappear with the intention of screening the offender—What constitutes the offence.*

The accused, it was alleged by the prosecution, had requested two persons to whom one Podimahatmaya *alias* Dingirimahatmaya had sold some rubber, and who, he thought would be asked by the Police to identify the man who sold that rubber to them, to say that they could not be sure that it was Podimahatmaya *alias* Dingirimahatmaya the alleged offender, who had sold that rubber to them on that day. For this act the accused was charged under section 198 of the Penal Code. The accused was convicted by the learned Magistrate. He appealed from this finding.

Held : That the offence contemplated by section 198 of the Penal Code (Chapter 15) is causing evidence already in existence to disappear, and that the act of the accused does not amount to an offence under the section.

H. V. Perera, K.C., with *C. V. Ranawake*, for the accused-appellant.
D. Jansze, Crown Counsel, for the complainant-respondent.

SOERTSZ A.C.J.

The accused in this case was convicted of the offence of having attempted to cause evidence to disappear, with the intention of screening the offender from legal punishment, knowing or having reason to believe that the said offender had committed offences of housebreaking, theft and disposing of stolen property. It was alleged that the accused had committed this offence by requesting two persons to whom one Podimahatmaya *alias* Dingirimahatmaya had sold some rubber, and who, he thought, would be asked by the Police to identify the man who sold that rubber to them, to say that they could not be sure that it was Podimahatmaya *alias* Dingirimahatmaya the alleged offender, who had sold that rubber to them on that day.

The accused was convicted and sentenced to one month's rigorous imprisonment.

It is obvious that the conviction cannot stand. The offence contemplated by section 198 is causing evidence already in existence to disappear. Assuming all the facts to be as stated by the prosecution, the most that can be said against the accused is that he attempted to tamper with a probable source of evidence, or to put it in another way, he was trying to interfere with evidence *in posse* and not to make evidence *in esse* to disappear. The two men had not given any evidence in court. Not that, I think, it

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matters if they had, for instance, given evidence-in-chief and were approached while they were awaiting cross-examination, for in that case, whatever else the offence of the accused might have been, it is not the offence of causing evidence to disappear. What section 198 deals with and has in view is some present objective evidence. In Dr. Gour's comment on the corresponding Indian Section (201), I find it stated, " the disappearance of evidence does not include disappearance of a witness who would have given evidence in the case .....It is here used in its primary sense as meaning any *thing* that is likely to make the crime evident or manifest—in short, it means such facts as may probably lead to the proof of a crime. An eye-witness is not such a fact, for the value of his evidence depends on his credibility."

In other words, my view is that section 198 deals chiefly with such things as the *corpus delicti*, instruments or weapons of offence, marks, stains and other relevant indications of the commission of an offence. It may conceivably extend to cases of causing evidence already given by witnesses to disappear, for instance, the evidence given by a witness who is dead or cannot be called, but whose evidence could have been read under section 33 of the Evidence Act, but it certainly does not extend to a case like this.

I set aside the conviction and acquit the accused.

Conviction set aside.

Proctors :—

L. V. B. de Jacolyne Seneviratne, for accused-appellant.

Present: SOERTSZ, A.C.J.

JEEVANI vs ARUNACHALAM CHETTIAR

S. C. No. 30—*C. R. Colombo* 32452.

Argued on 4th May, 1939.

Decided on 23rd May, 1939.

Landlord and tenant—Monthly tenancy—Condition of tenancy that tenant should be " responsible for all Municipal regulations "—Premises sublet by tenant—Premises very filthy and insanitary—Closing order by Municipality—Premises unoccupied for two months—Notice of termination of tenancy—Is tenant liable for rent after closing order.

The defendant took certain premises on a monthly tenancy from 1st January, 1936 at a rental of Rs. 150/–. The defendant undertook to be "responsible for all Municipal regulations. " On 2nd February, 1937, the Municipal authorities made a closing order

in respect of a portion of these premises, on the ground that that portion was unfit for human occupation in that it was " very filthy and insanitary; gunny and plank partitions all over, walls and roof sooted, floor badly damaged, no proper dustbins, etc." In consequence of this closing order the defendant lost some of his subtenants. In the middle of March, 1937, he wrote to the plaintiff requesting him to take back possession of the leased premises on the 31st March and he addressed a circular letter to his remaining tenants to pay rent as from April to the plaintiff. Plaintiff sued the defendant for the rent from January to April, 1937 which he had failed to pay. The defendant claimed a remission of Rs. 100/– per mensem for each of the months January–March and denied liability to pay rent for April. The Commissioner of Requests held the defendant entitled to a remission of Rs. 75/– per mensem for February and March, and that he was exempt from rent for April. The plaintiff appealed from this decision.

Held : That the closing order was due to the tenant's default and that the plaintiff was entitled to rent for January–March at the full rate per mensem, and that as the defendant had given reasonable notice the plaintiff was not entitled to the rent for April.

V. A. Kandiah, with *Miss Mehta*, for plaintiff-appellant.

N. E. Weerasooriya, K.C., with *M. Somasunderam*, for defendant-respondent.

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Stated briefly, the facts relevant to this appeal are these. The defendant took certain premises belonging to the plaintiff on a monthly tenancy from the 1st of February, 1936, at a rental of Rs. 150/–. The defendant undertook to be "responsible for all Municipal regulations."

On the 2nd of February, 1937, the Municipal authorities made a closing order in respect of a portion of these premises, on the ground that that portion was unfit for human occupation, in that it was " very filthy and insanitary ; gunny and plank partitions all over, walls and roof sooted, floor badly damaged, no proper dustbins, goats being tethered in the garden, and the walls of the premises in a ruinous condition."

In consequence of this closing order, the defendant appears to have lost some of the tenants to whom he had sub-let some of these rooms. In the middle of March, 1937, he wrote to the plaintiff requesting him to take back possession of the leased premises on the 31st of March and he addressed a circular letter to his remaining tenants to pay rent as from April to the plaintiff. Plaintiff now sues to recover rent for the months January–April. The defendant claims a remission of Rs. 100/– for each of the months January–March inclusive and denies liability for April's rent in view of the notice he gave. The learned Commissioner held the defendant liable in full for January's rent, gave him a remission of Rs. 75/– in respect of each of the months of February and March, and exempted him altogether from rent for April. The appeal is from that order.

Voet (19.2.23) enumerates the grounds upon which a tenant is entitled to claim a remission or reduction of rent. In brief, a tenant is so entitled if he has been deprived in whole or in part, of the use of the leased premises for the purposes for which they were leased to him, where the deprivation is

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caused by *vis major*, *casus fortuitus*, or the default of the landlord, but not if it is due to his own default.

In this case, there is no question of *vis major* or *casus fortuitus*. The only question is whether the closing order was due to the default of the landlord or of the tenant. Of the issues framed, the one that deals with this question is issue No. 6, "did the defendant (i.e. the tenant) undertake to conform to and be responsible for all Municipal regulations and to pay damages ?" The Commissioner's answer to this issue is " I have no doubt he did ". But he goes on to add " but that would not exonerate the plaintiff for having let to him a building that was unfit for human habitation. It is not suggested that the closing order was due to any act or default on 'plaintiff's' (*sic*) part.?" (I think 'defendant's' was meant). There was no plea by the defendant that the building was not fit for human habitation when it was let to him, and there was no issue on it, and what is more, there is no evidence whatever to justify such a finding. The premises were let to the defendant from February 1936. The letter from the Public Health Department complaining of the state of the building is dated 1st December, 1936, nearly ten months after the letting, and the terms of that letter suggest that the default was that of the tenant, " at present, they are very filthy and insanitary." That fact is borne out by the defendant's failure to protest against the statements made in the plaintiff's letter to him P3.

In my opinion, therefore, the closing order was made because the defendant failed in his obligation to maintain the premises in conformity with Municipal regulations, and he is not entitled to any reduction in rent for the months of February and March.

In regard to the rent for the month of April, the Commissioner has exempted the defendant from it on the ground that he was entitled to quit without notice. I am unable to share that view. In my opinion the plaintiff was entitled to reasonable notice and I hold that in the circumstances of this case, the notice the defendant gave to the plaintiff was reasonable. The plaintiff is not entitled to claim rent for April.

In accordance with these findings of mine, I set aside the judgment of the Commissioner and enter judgment for the plaintiff for Rs. 150/- and half costs here and below.

Judgment set aside.

Proctors :—

F. Rustomjee, for appellant-plaintiff.

K. Sinniah, for defendant-respondent.

Present: SOERTSZ, A.C.J.

RAMALINGAM vs JONES

S. C. No. 176–176*A*—*C. R. Colombo* 27433.

Argued on 5th April, 1939.

Decided on 9th May, 1939.

Debt due on a promissory note—Waiver of claim after judgment—Can party waiving claim change his mind and recover the debt—Is the matter governed by English Law or Roman-Dutch Law.

The plaintiff waived his claim for a debt due on a promissory note for which he had obtained judgment. Thereafter, he changed his mind and sought to recover the judgment debt. There was no consideration for the waiver. The question was whether the matter should be decided according to principles of Roman-Dutch Law or English Law.

Held : (i) That although the law governing promissory notes is the English Law, once judgment has been entered on a note, the law applicable to the judgment debt is the Roman-Dutch Law.

(ii) That a person, who has waived a judgment debt for consideration according to Roman-Dutch Law, cannot afterwards recover the debt.

Cases referred to :— *Jayawickreme vs Amarasuriya* 1918 A.C. 869.*
Conradie vs Rossoneo 1919 A.D. 279.
Robinson vs Rondfontein Est. G.M. Co. 1921 A.D. 236.
Manuel Istaky vs Sinnatamby 13 N.L.R. 284.
Richards vs Heather 1887 Barn. & Ald. 35.

N. Nadarajah, for plaintiff-appellant.

No appearance for defendant-respondent.

SOERTSZ, A.C.J.

On the facts, in my opinion, the learned Commissioner reached a conclusion that was inevitable. The evidence that goes to establish a waiver of his claim by the plaintiff, is overwhelming. It is a pity that the plaintiff thought fit to repent of the generosity he had shown to his debtor when he was apprised of his desperate financial state.

The only question that calls for consideration on this appeal is whether the law gives him a *locus poenitentiae* and enables him to go back on his waiver in view of the fact that there was no consideration for that waiver. That question depends for its answer on another question, namely, whether this transaction is governed by English Law or by Roman-Dutch Law. If English Law applies, it seems clear that the 2nd defendant must fail because he has given no consideration, as understood in that law, for the waiver by the plaintiff of the debt due to him. If, however, it is the Roman-Dutch Law that governs the matter, the plaintiff is out of Court for there was an agreement entered into between him and the 2nd defendant seriously

* 20 N.L.R. 289 (Edd.)

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and deliberately or with the intention that a lawful obligation should be established between them. That is all that is required in Roman-Dutch Law see *Jayawickreme vs Amarasuriya* (1918 A.C. 869); *Conradie vs Rossoneo* (1919 A.D. 279); *Robinson vs Rondfontein Est. G.M. Co.* (1921 A.D. 236).

In my opinion, on this point too, the view taken by the learned Commissioner is correct—the Roman-Dutch Law applies. The contention that the matter is governed by the English Law is based on the fact that the decree, the benefit of which the plaintiff is said to have waived, was entered upon a claim made on a promissory note. It is agreed that, therefore, the English Law applies. I cannot take that view. The debt due on the decree is a new debt quite distinct from and independent of the debt on the promissory note. It is a debt called into existence by the process known to Roman Law as *novatio necessaria*. In the words of Voet "*novatio necessaria dicitur, quae fit per litis contestationem et sententiam, quatenus, uti per stipulationem, ita quoque judicio inter actorem et reum contrahi videtur, non tam spectata origine judicii, quam ipsa judicati obligatione.*" Once the decree was entered, the fact that it was entered in a case brought on a promissory note is only of historical interest, so to speak. It has no legal consequence such as is contended for here. The legal incidence of a promissory note is not imparted to the decree. The promissory note while it existed was governed by the English Law, but when decree was entered, the promissory note was swallowed up by it and lost its identity. The judgment merged and destroyed the original cause of action. The debt due on the decree is a new debt and is governed by the common or Roman-Dutch Law. Mr. Nadarajah relied on the judgment of Middleton, J. in *Manuel Istaky vs Sinnatamby* (13 N.L.R. 284). The point decided in that case was that a decree entered in a case on a joint promissory note in the terms "it is ordered and decreed that the said defendants do pay to the said plaintiff the sum of Rs. 276/82 with legal interest and costs," the liability of the defendants must be fixed by the English Law and each defendant was liable for the whole sum to the decree holder. I find it difficult to accept that decision. The attention of the learned Judge does not appear to have been asked or given to the fact that it was no longer a question of a debt due on a promissory note, but on a decree. While in English Law 'joint' has the meaning given to it in the passage cited by Middleton, J. from *Richards vs Heather* (1887 Barn. & Ald. 35), in Roman-Dutch Law persons jointly liable are liable *pro rata* and that is the ordinary liability of debtors unless there are clear words or indications pointing to an obligation in *solidum*.

For these reasons, I think the appeal fails, I dimiss it.

Appeal dismissed.

Proctors :—

K. Kandiah, for plaintiff-appellant.

S. Wickremasinghe, for defendant-respondent.

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

THIAGARAJAH vs BALASOORIYA AND OTHERS

Application for restitutio in integrum in D. C. Trincomalie No. 2144.

Argued and Decided on 22nd May, 1939.

Restitutio in integrum—Civil Procedure Code (Chapter 86)*—Where there is another remedy does remedy by way of* restitutio in integrum *lie.*

Held : That the remedy of *restitutio in integrum* does not lie in a case for which a remedy is provided by section 480 of the Civil Procedure Code (Chapter 86).

L. A. Rajapakse, with *A. C. Z. Wijeyratne*, for the petitioner.

N. Nadarajah, for the 1st and 2nd defendants-respondents.

SOERTSZ, A.C.J.

In my opinion this application must be refused with costs. Mr. Rajapakse who appears in support of it says that his clients in this case are seeking to be relieved from an agreement into which they entered, overlooking the fact that one of the parties purporting to have himself bound by the agreement was a lunatic at the time this agreement was entered into, and was not represented as required by chapter 35 of the Civil Procedure Code for the purpose of the litigation, in the case in which this agreement was entered into. It seems quite clear from the facts of this case that the 2nd plaintiff was a lunatic as found in case No. 877 of the District Court of Jaffna. The agreement was therefore an agreement which is liable to be dealt with under section 480 of the Civil Procedure Code, for by section 501 of the Code the provisions of chapter 35 are made applicable to both minors and lunatics. de Sampayo, J. in a case reported at page 510 of the 18th volume of the New Law Reports, *Muttu Menika vs Muttu Menika* and in another case reported at page 345 of the 20th volume of the New Law Reports, *Rupasinghe vs Fernando*, pointed out that in a case such as this the proper course for a party to take is to proceed under section 480 of the Civil Procedure Code.

Mr. Rajapakse contends that even if the remedy under section 480 is available to him, he has the right in addition to the remedy provided for by section 480, to ask to be relieved by way of *restitutio in integrum*. As I have understood this question of *restitutio in integrum*, it seems that the law is that no relief will be given by way of *restitutio in integrum* where there is any equally effective remedy open to a party. In this case it is quite clear that section 480 can be invoked by the party in question to obtain the fullest measure of relief and I have no doubt that on the true facts being brought to the notice of the court in which this agreement was reached, the court will in the circumstances of this case give relief.

DE KRETSER, J. I agree.

Proctors :— *Refused.*

D. Rajaratnam, for defendants-respondents.

S. Mailvaganam, for petitioner.

Present: SOERTSZ, J.

MAPALATHAN AND ANOTHER vs ELAYAVAN

Application for restitutio in integrum *or revision.*

S.C. No. 15—*C.R. Point Pedro* 28262.

Argued on 10th March, 1939.

Decided on 17th March, 1939.

Revision—Mistake in translation of a document produced by parties—Detection of mistake in translation after decision in appeal—Application to review decision on the ground that that decision was influenced by such mistake—Is the remedy of restitutio in integrum *available in such circumstances—Conditions necessary for such relief.*

Held : (i) That the Supreme Court cannot exercise its powers of revision in respect of cases decided by the Supreme Court itself.

(ii) That relief by way of *restitutio in integrum* will not be granted where parties are themselves to blame for having failed to place before the court the whole of their evidence which they had at their command.

(iii) That, to succeed in an application of this kind for *restitutio in integrum*, the petitioners must show that the mistake was not merely material, but of such vital and essential materiality, that it must have altered the whole aspect of the case.

Cases referred to :— *Loku Banda vs Assen* 2 N.L.R. 311.
Ex parte Gordon. Re Gordon vs Assignees of Brodie & Co.'s Estate 2 S.C.C. 108.
Thamotheram vs Hensman 4 Bal. 68.
Obeyesekere vs Haramanis Appu 14 N.L.R. 353.

S. J. V. Chelvanayagam, with *Muttucumaroe*, for petitioners.

N. Nadarajah, for respondent.

SOERTSZ, J.

In this matter the petitioners pray that " by way of *restitutio in integrum* or by way of revision," the judgment of this court pronounced by de Kretser, J. on the 31st of May, 1938, be set aside and that the judgment of the Court of Requests dated 30th September, 1937, be restored and affirmed.

This prayer is based on the allegation that my brother reached the conclusion he did, because the translation of document D2 filed in the copy supplied to him at the argument of the appeal, led him to think that there were only two transferors on that deed, whereas, in point of fact, the original deed filed of record shows that there were four transferors. The implication of this allegation is that, but for this misapprehension of the effect of deed D2, my brother must inevitably have reached a conclusion in favour of the petitioners. For it is only on that basis that the application can succeed, if at all.

Before I examine the facts, I would point out that this application, insofar as it purports to be an application for the exercise of this Court's revisionary powers, cannot be entertained. I respectfully share the view

taken by Withers, J. in *Loku Banda vs Assen* 2 N.L.R. 311. The combined effect of sections 21, 39 and 40 of the Courts Ordinance and of section 753 of the Civil Procedure Code is to give the Supreme Court power to deal by way of revision with cases tried or pending trial in original courts, and not with cases decided by the Supreme Court itself.

Withers, J. however, took the view that the Supreme Court could review its judgment passed in appeal. For this view he relied on *Ex parte Gordon. Re Gordon vs Assignees of Brodie & Co.'s Estate* 2 S.C.C. 108. That case was decided in 1879, ten years before the Civil Procedure Code. It takes for granted that in certain circumstances the Supreme Court has power to review its own judgment.

In *Thamotheram vs Hensman* 4 Bal. 68, Wendt, J. doubted this view of Withers, J. and I venture to share that doubt. It is significant as pointed out by Withers, J. himself that our Code of Civil Procedure enacted in 1889 did not take over the provisions in the Indian Code of 1882 in regard to the review of judgments, while it took over substantially the provisions in regard to revision. Perhaps this was due to the fact that it was thought the that object which the provisions relating to the review of judgments had in view, could be attained in our courts by proceedings for *restitutio in integrum.*

It is true that at one time the question was raised whether *restitutio in integrum* could be properly held to form part of the law of Ceylon in view of the absence from the Courts Ordinance and the Code of Civil Procedure of any provision enabling the Supreme Court to grant relief by way of *restitutio in integrum* and in view of the power of revision enjoyed by the Supreme Court. But in *Obeyesekere vs Haramanis Appu* 14 N.L.R. 353, it was held by Wood Renton, J. and Grenier, J. that the remedy of *restitutio in integrum* is one which has taken deep root in the practice and procedure of our courts and that it is too late to hold that this remedy ought no longer to be recognised.

I, therefore, address myself to the present petition only to consider the application for *restitutio in integrum.* Now, in the words of Voet "*restitutio in integrum* is *extraordinarium remedium*, not to be given (*a*) where there is some other remedy available to the person seeking *restitutio. Sed nec tunc plerumque restitutioni locus datur, cum aliud ordinarium aeque pingue adindemnitatem remedium a jure comparatum est,* (*b*) It is not to be given for the mere asking. *Non tamen cuivis restitutionem petenti, causamque alleganti, ea promiscue concedenda est, sed causa demum cognita, an nempe vera, an justa, an satis gravis sit.* (*c*) It is not to be given unless it is sought within a certain period. *Nec omni tempore ad restitutionis remedium patet aditus.*" In regard to (*b*) Voet goes on to say that "*causae justae restitutionis sunt, metus, dolus, minor, aetas, capitis, diminutio, absentia, alienatio judicii mutandi causa, & justus error.*" In addition to these, the discovery of fresh evidence, *res noviter veniens ad notitiam* is recognised as a good ground for giving this relief provided, of course, it is evidence which no reasonable diligence would have helped to disclose earlier,

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Mapalathan & Another *vs* Elayavan

So far as the present application is concerned, counsel for the respondent takes no objection to it on the ground either that there is some other remedy available to the petitioner or on the ground that the application is not made within reasonable time. But, he contends that the mistake which the petitioner relies on is not such a mistake as falls within the meaning of *justus error*. He says that the mistake referred to was a mistake which would not have occurred if the petitioner had presented his case with due care, and also that the petitioner is not in a position to show that but for the mistake the Judge who heard the appeal could not but have reached a conclusion in his favour.

The judgment delivered on the appeal makes it quite clear that the argument proceeded on the footing that only two of the four *thombu* holders were transferors on deed D2. The learned Commissioner had stated definitely in his judgment that all four of them had transferred. This, in my opinion, should have put the petitioner's counsel on inquiry as to the reason for that statement of the Commissioner, and the least he could have done was to examine the original of deed D2. If he had done that, he would have seen at a glance that all four had put their marks to that deed. He was, however, content to acquiesce in the view taken by the Judge on appeal, who went on the assumption that the translation of deed D2 in the copy furnished to him was correct, and that according to that translation only two of the four were transferors. These facts are similar to those in the case before Wendt, J. to which I have already referred, *Thamotheram vs Hensman*. In that case Wendt, J. refused to interfere by way of *restitutio in integrum* because as he said " It is not suggested that my conclusions are not warranted by the materials placed before me. The parties are themselves to blame for having put before the court only part of the evidence which they had at their command. There is no suggestion of any fraud." Here too, there is no suggestion of fraud, and the matter now relied upon must be regarded as a matter at the command of the petitioners if reasonable diligence had been exercised. It was not *res noviter veniens ad notitiam*. Moreover, in this case, I am not satisfied, that if the fact that all the four *thombu* holders were parties to D2 had been put before the Judge on appeal he would necessarily have reached a different conclusion. D2 was an unregistered deed of 1804 and as such it could not be relied upon for the purpose of creating or transferring the rights of the transferors. Indeed, D2 was produced expressly for the purpose of serving as a starting point for a prescriptive title the petitioners relied upon. In the result, the most that can be said on behalf of the petitioners is that, in view of the inadequate translation of D2 furnished to the Appeal Judge, he overlooked a material fact. But for the petitioners to succeed in an application for *restitutio in integrum* they must show that the fact was not merely material, but of such vital and essential materiality, that it must have altered the whole aspect of the case.

I, therefore, refuse this application with costs.

Proctors :—*M. Sivapragasam*, for petitioners.
S. Mailvaganam, for respondent.

Application refused.

Present: SOERTSZ, J.

AKBAR, (Inspector, Municipality) vs LEORIS APPUHAMY

S. C. No. 17—*M. C. C. Colombo* 20583.

Argued on 30th March, 1939.

Decided on 5th April, 1939.

Ordinance No. 15 *of* 1862 (*Chapter* 180) *Section* 1 (12)*—*Nuisance—When is an employer criminally responsible for the acts of his servants.*

The accused-appellant is the owner of a business in 5th Cross Street, Colombo. He was charged under section 1 (12) of Ordinance No. 15 of 1862,* as occupier of the said business premises for having swept or thrown or permitted to sweep or throw half a hand-cart load of onion peelings, paper and dust on to the public road from the premises in question.

The evidence of the accused, to the effect that he was not present in the premises at the time, that he had provided dustbins and that he had instructed his servants not to throw rubbish on to the road, was accepted.

Held : (i) That the master was liable although the servants acted contrary to his instructions and in his absence, because in law, the master must be held to have permitted them to do what they did, for the master ought at his peril, to have seen his prohibition obeyed.

(ii) That the word " whosoever " in the context of section 1 (12) of Ordinance No. 15 of 1862 (now section 2 (12) Chapter 180) means, whosoever being the occupier of premises.

Cases referred to :— *Allen vs Whitehead* (1930) 1 K.B. 211.
Mousell Brothers vs London & N.W. Railway (1917) 2 K.B. 836.

M. T. de S. Amarasekera, with *Koattegoda*, for accused-appellant.

L. A Rajapakse, with *Jayamanne*, for complainant-respondent.

SOERTSZ, J.

The accused-appellant carries on business on the premises bearing assessment No. 153, Fifth Cross Street, Colombo.

It has been proved that on the night of the 8th of September 1938, half a hand-cart load of onion peelings, paper and dust was swept on to, or thrown on the public road from these premises.

The accused was not present on the premises at the time. He says he has provided dustbins for all such rubbish to be deposited in for removal by the Municipal scavangers, and that he has instructed his servants to make use of those dustbins, and not to throw rubbish on the road. I accept the evidence.

The question, then, is whether the accused was rightly convicted. There are occasions on which in the view of the law a man may be said to permit a thing to be done although he is not present at the time it is done, and has given definite instructions to his servants not to do it. This case, in my view, if an instance of one of those occasions. In *Mousell Bros. vs London & N.W. Railway* (1917) 2 K.B. 836, Atkin, J. said "I think that the authorities.....make it plain that while *prima facie* a principal is not to be criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute ; in which case the principal is liable if the act is in fact done by his servants."

* Now section 2 (12) of Chapter 180, Volume IV p. 443.

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Akbar (Inspector, Mun.) *vs* Leoris Appuhamy

Now, one of the cases, in which the principle of non-liability of a principal for the criminal acts of his servants is departed from in legislation, is in the case of acts amounting to public nuisances. There is justification for a stringent view of the master's responsibility in such cases for the criminal acts (criminal, in the sense that they are *mala prohibita*), of his servant, because the master by the very fact of setting a servant upon work that may result in a nuisance, has induced a state of things which he ought, at his peril, to prevent. If he had given instructions to prevent it, he ought, at his peril, to have seen his prohibition obeyed.

In the present case, the charge is laid under Ordinance No. 15 of 1862*, which was enacted " for the better preservation of Public Health and the suppression of Nuisances." The section under which the accused was charged namely section 1 (12)† makes the occupier of premises liable if he or his servants throws or throw rubbish on any street or road. The relevant words are " whosoever shall throw or put, or permit his servants to throw or put.....rubbish on any street, road,....."

It is true that the accused was not present, but he has delegated his responsibility to his servants, and when they in the course of, and within the scope of their employment, threw the rubbish on the road, although they acted contrary to his instructions when they did so, it must be held that, in law, the master permitted them to do so, for the master ought, at his peril, to have seen his prohibition obeyed.

The case of *Allen vs Whitehead* (1930) 1 K.B. 211 is one of many cases that support this view. That was a case in which the licensee of a refreshments house was charged under the Metropolitan Police Act 1893 section 44, with having wilfully or knowingly allowed prostitutes.....to remain therein. The licensee had expressly instructed his manager that no prostitutes were to be allowed to congregate on the premises. But he was held liable to conviction, because the knowledge of the servant must be imputed to the master.

As was pointed out in the case of *Monsell Brothers vs N.W. Railway*, to ascertain whether a particular act was one in respect of which the master is criminally liable, the words used, the object of the statute, the nature of the duty, the person on whom it is imposed, the person upon whom the penalty is imposed must be taken into consideration. In this instance " whosoever " in the context of section 1 (12)† means whosoever being the occupier of premises and the liability and the penalty are imposed on him in respect of his acts and those of this servants. If in those circumstances, the employer were to be held not liable because he was not present or because he had given instructions, the statute would be rendered nugatory. It would fail of its purpose.

I dismiss the appeal with costs which I fix at Rs. 21/-.

Appeal dismissed.

Proctors :—

Munasinghe and Jayamaha, for accused-appellant.

Wilson and Kadirgama, for complainant-respondent.

* Chapter 180, Volume IV p. 443 Edd. † Now section 2 (12.)

Present : DE KRETSER, J.

SARDIYA vs RANASINGHE HAMINE

S. C. No. 29/1939—*C. R. Avisawella No.* 17811.
Argued on 26th May, 1939.
Decided on 7th June, 1939.

Deed of transfer subject to a promise to retransfer in favour of vendor when called upon within four years—Deed not signed by vendee—Can the vendor enforce the promise to retransfer.

Held : That an agreement embodied in a deed of transfer to retransfer a land in favour of a vendor within a stipulated period is enforceable although the vendee has not signed the deed.

P. A. Senaratne, for plaintiff-appellant.
C. V. Ranawake, for defendant-respondent.

DE KRETSER, J.

On P1, plaintiff transferred a land to the defendant "under the condition that if the said Ranasinghe Hamine within a term of four years from this date were paid the said sum of rupees one hundred and fifty and requested to retransfer the said premises, to retransfer the said premises under a valid deed." This is the translation filed, but the original makes it clear that the vendee promised to retransfer the land when called upon as aforesaid. She refused to retransfer and was sued. The Court of trial has dismissed the action on the ground that the promise or agreement to retransfer was not signed by the vendee.

For the appellant it is contended that a party who takes the benefit of a deed is bound by it though he does not execute it. The following authorities were cited in support of this proposition, viz. Norton on Deeds p. 26.

L.R. 2 Chancery (1903) 539,
" " (1905) 605,
" " (1908) 665,
13 Q.B.D. 886, and
2 Barnewall & Alderson 375.

It will be noted that this case requires no oral evidence to establish the agreement, and that it is not a contemporaneous oral agreement, but is a term of the deed itself and in fact forms part of the consideration for the transfer. It would be manifestly unfair to let the vendee take the benefit of the deed and refuse to be bound by its obligations. It would in fact amount to the Ordinance being used to perpetrate a fraud. The leading case on this point is *Nanayakkara vs Andris* 23 N.L.R. 193, where Bertram, C.J. in deciding the limits within which this equitable principle is to be applied mentioned in the first place "cases where the defendant has

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obtained possession of the plaintiff's property subject to a trust or condition and claims to hold it free from such trust or condition."

This is exactly the case here.

The decree will therefore be set aside, and the Court will enter an appropriate decree ordering the defendant to transfer the property.

The appellant is entitled to his costs in both Courts.

Decree set aside.

Proctors :—

D. C. Wijesinghe, for plaintiff-appellant.

E. A. V. de Silva and Percy Gordon de Silva, for defendant-respondent.

Present : DE KRETSER, J.

EYHANGHERT vs DE SILVA

S. C. No. 171—*M. C. Matara No.* 16763.

Argued on 26th May, 1939.

Decided on 2nd June, 1939.

Housing and Town Improvement Ordinance No. 19 *of* 1915 (*Chapter* 199)—*Permission of Chairman U.D.C. obtained to raise roof on existing walls of a building* 25 *feet from the centre of road—Existing walls unsafe—Demolition and erection of new walls without permission of Chairman—Conviction—Application for mandatory order to demolish that portion of building within* 25 *feet from the centre line of road on the ground it contravenes section* 80 (2) *of the Local Government Ordinance* (*Chapter* 195) *— Refusal of mandatory order —Can a magistrate impose a condition while refusing a mandatory order.*

The appellant who was the owner of a building that stood within 25 feet from the centre of the road called Broadway at Matara, obtained permission from the Chairman of the U.D.C. to raise the roof by building on the existing walls in accordance with a sketch submitted by him for the purpose. He, however, pulled down portions of some existing walls and built afresh upto the required height, as he thought the old walls would not be able to support the new superstructure.

The appellant, on being prosecuted under section 13 (1) (*b*) and 13 (1) (*c*) of the Housing and Town Improvement Ordinance (Chapter 199 Vol. V) for deviating from the approved plan and for effecting alterations without the written consent of the Chairman, pleaded guilty and was fined Rs. 2/50.

Thereupon the Chairman moved for a mandatory order under section 13 (2) requiring the appellant to demolish that portion of the building erected by him and which comes within 25 feet of the centre line of the road. This meant that he was required to demolish even the outer wall which stood nineteen feet from the centre of the road and which had not been re-erected, on the ground that the deviations were in contravention of section 86 (2) of the Local Government Ordinance (Chapter 195-Vol. V).

The learned Magistrate refused the application but imposed a condition that the appellant should remove the encroachment if and when called upon by the Chairman when necessity arose without any claim for compensation being preferred.

Held : (i) That the Magistrate had no authority under the Housing and Town Improvement Ordinance (Chapter 199) to impose the condition he did.

(ii) That a remedy given under the Housing Ordinance on a conviction under that Ordinance or any local by-law cannot be used to remedy breaches of some other Ordinance.

R. L. Pereira, K.C., with *U. A. Jayasundera*, for accused-appellant.
Colvin R. de Silva, for complainant-respondent.

DE KRETSER, J.

The appellant owned a building bearing assessment No. 1365 in the town of Matara. The building stood within 25 feet of the centre line of the road called Broadway.

He desired to raise the roof of this building by building on the existing walls, and he applied to the Chairman of the Urban District Council, who is the local authority under the Housing and Town Improvement Ordinance No. 19 of 1915, for permission to build as he proposed, and was granted permission to do so. He had submitted a sketch P1 when making his application, and this document indicates what additions and alterations were sanctioned, and is a plan of the entire building. Thereafter, the appellant did not merely make the additions which he had proposed, but he pulled down portions of some of the existing walls and built afresh up to the required height. It is explained that this was done as it was found that the old walls would not be able to support the proposed superstructure.

The Works Inspector of the Council noticed what was being done and reported the matter to the Chairman, who thereupon issued an order on the appellant that he should not proceed on with the work. It is conceded that the appellant may have completed the building of the walls before he received the Chairman's order.

The Chairman then required the appellant to enter into a notarial agreement. What form of agreement he was to enter into is not specified in the Chairman's letter, but it is said to have been one to the effect that he would not claim compensation in the event of the building being demolished for the purpose of widening the road. The appellant declined to enter into any such agreement.

The appellant was then prosecuted under section 13 (1) (*b*) and section 13 (1) (*c*) of the Housing and Town Improvement Ordinance. He first pleaded not guilty to the charge. The Magistrate then inspected the building, and on the next date the accused pleaded guilty and was fined Rs. 2/50.

The first charge against him was that he did "deviate from the approved plan of building No. 116 of 16th September 1937 amended on 23rd September 1937, by demolishing certain walls and by erecting new walls."

Now, the accused had not deviated from the approved plan, for walls stand where walls stood before, and the raising of the roof had been approved. There was no amendment of the approved plan, but the plan was approved with certain amendments shown thereon.

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"Building" is defined in the Housing Ordinance, and clearly carries its ordinary meaning. It applies to the whole structure including out-houses and other appurtenances. The charge seems to have proceeded on the assumption that the approved plan applied only to the additions to the walls—I confine myself to the relevant portions of the plan,—whereas it was a plan of the whole building showing the proposed alterations.

The Housing Ordinance is concerned mainly with the sanitary aspect of the building, and the plan was designed to shew that the building when altered would not offend against the provisions of the Ordinance. In fact, in his application the appellant stated that he proposed to effect repairs to the existing building, and the report, presumably by the Inspector, described the alterations as repairs and suggested that an agreement was desirable but was not provided for in the Ordinance, he suggested an inspection by the Chairman. If then, the Chairman considered that the raising of the roof was a desirable improvement, it is quite conceivable that he would have allowed even the re-erection of existing walls for that purpose. There is certainly no reason to believe that he would desire to have the building rendered unsafe, and there is no evidence that he would have refused such a request.

The point at present, however, is that the appellant seems to have pleaded guilty under section 13 (1) (*b*) unnecessarily. Section 13 (1) (*c*) would apply more directly, for he had perhaps executed a building operation in contravention of section 6 (1).

The accused having been fined, the Chairman moved for a mandatory order under section 13 (2), requiring the appellant "to demolish that portion of the building which comes within 25 feet of the centre line of the Broadway Road, erected by him, standing on the land called Hatbodiyawatte and bearing assessment No. 1365 at Gabadaweediya." This meant that he was required to demolish even the outer wall which stood 19 feet from the centre of the road, and which as far as I can see had not been re-erected; for the Inspector stated that the deviations from the plan had been marked X, Y and Z in pencil on plan P1, and these were not in respect of the outer wall but in respect of certain small portions of inner walls which joined it.

He described the deviations as being in contravention of section 86 (2) of the Ordinance, but section 86 (2) of the Housing Ordinance does not apply, and he was probably referring to section 86 (2) of the Local Government Ordinance No. 11 of 1920, under which no prosecution had been brought, and sub-section (*b*) of which refers to the re-erection or addition to any building or wall along a road intended for vehicular traffic.

The Magistrate, after giving very good reason for refusing the application, quotes from a judgment by Koch, J. and says that that would be an appropriate order to make. It is not easy to see what order the Magistrate has made, but I believe he refused the application and imposed a condition on the appellant by making his refusal "subject to the liability of the respondent to remove the encroachment if and when called upon by the Chairman

when necessity arises, and also subject to no claim being preferred by the respondent for compensation." He purported to follow the order made by Koch, J. in an unreported case, M. C. Matara No. 5694, decided on 21st May, 1936.

The appellant appeals against this order, and the one point made for the respondent is that it was a matter entirely within the discretion of the Magistrate, and this Court should not therefore interfere.

The facts of the case decided by Koch, J. are quite different. There a new building had been erected within 25 feet of a road in contravention of the permission granted, and in that case the offender was willing to enter into an agreement in the terms specified by Koch, J., and the Chairman was willing to accept the terms but had doubts as to his powers to enter into such an agreement. This Court upheld the order refusing a mandatory order and incorporated the condition which the offending party had been willing to accept. The power of this or any other Court to embody such a condition apart from the consent of the party affected, was not considered.

In the present case the appellant does not consent to such a condition being imposed.

Section 13 (2) does not seem to me to contemplate such an order as was made by the Magistrate. It authorises the issue of a mandatory order to demolish the building in question, *i.e.* the whole building, or to alter it in such a way as to bring it in accordance with law. The application was to demolish that portion of the building which came within 25 feet of the centre line of the road. The Inspector says that the building as it stands does not contravene the sections of the Housing Ordinance. The prosecution and conviction were under that Ordinance and the law in accordance with which it had to be brought were the provisions of the Housing Ordinance and any local by-law such as is referred to in section 13 (1) (*c*).

I find it difficult to hold that a remedy given under the Housing Ordinance on a conviction under that Ordinance or any local by-law can be used to remedy breaches of some other Ordinance. The building had always stood within 25 feet of the road, and there is no justification for ordering that it be brought into conformity with section 86 (2) of the Local Government Ordinance. No wall along the road had been re-erected and even if it had been it could not be altered to suit the requirements of section 86 (2). Clearly the Magistrate did not think the building should be demolished. He did not order that it be altered. What he did was to impose a condition, for doing which, he had no authority in the Ordinance. I find it difficult to see how one can refuse to make an order and yet make an order which is mandatory in character. At present no order to demolish has been allowed. The building will therefore stand, and the Magistrate's order with regard to compensation may never come into force. No time limit has been fixed, and the order is an elaborate device for saving the face of the Council.

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de Kretser, J.

Eyhanghert vs de Silva

I sympathise with the Magistrate's desire to uphold the authority of the Council, but I do not think the appellant deliberately flouted that authority, for he may have thought that he had permission to raise his roof in the safest possible way, and later he had to push on with what he had begun. If he did flout that authority the proper time to punish him was when he was prosecuted.

I agree that the mandatory order should be refused.

The further order made will be deleted.

Appeal allowed.

Proctors :—

A. S. de S. Amarasuriya, for accused-appellant.

Bastiansz, for complainant-respondent.

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

CRAIB vs THE COMMISSIONER OF INCOME TAX

In the matter of a case stated by the Board of Review, Income Tax, on the application of A. P. Craib of Lellopitiya Estate, Ratnapura.*

S. C. No. 136–S/1938.

Argued on 13th March, 1939.

Decided on 27th March, 1939.

Income Tax Ordinance (Chapter 188)—*Section* 6 (2) (*a*)—*Bonus to employee—In what circumstances is income tax payable on bonus.*

The assessee-appellant was paid a sum of Rs. 10,000/- in terms of the following resolution of the Directors of the Company by which he was employed:

" In view of Mr. A. P. Craib's exceptional services to the Company, and in consideration of the fact that he has to undergo medical treatment while at home, it was resolved to grant him a special bonus of Rs. 10,000/–."

The Income Tax authorities claimed income tax on this amount. The assessee resisted the claim. The Board of Review decided against him and he applied for a case stated to the Supreme Court.

Held : That the payment was in the nature of a gift and did not attract income tax.

H. V. Perera, K.C., with *Aiyar Rengnathan* and *C. C. Rasaratnam*, for assessee-appellant.

S. J. C. Schokman, Crown Counsel, for Income Tax Commissioner, respondent.

MOSELEY, A.C.J.

This is a case stated by the Board of Review constituted under the provisions of the Income Tax Ordinance, 1932, at the request of Mr. A. P. Craib the assessee-appellant, who is the Superintendent of Lellopitiya

* See case stated on p. 105

Estate, the property of the L. L. P. Estates, Ltd. The Directors of the Company passed a resolution in the following terms :

> " In view of Mr. A. P. Craib's exceptional services to the Company, and in consideration of the fact that he has to undergo medical treatment while at home, it was resolved to grant him a special bonus of Rs. 10,000/-."

The payment was included by the Company in the Return furnished under section 55 (2) of the Ordinance as a " bonus " paid to the appellant, whereupon the assessor included the sum as part of the appellant's income. The assessment was confirmed, upon appeal, by the Commissioner and the appellant appealed to the Board of Review. The Board dismissed the appeal and the appellant made an application as provided by section 74 of the Ordinance requiring the Board to state a case for the opinion of this court.

The point for decision is whether the payment to the appellant can be regarded as " profits from any employment " within the meaning of section 6 of the Ordinance. Sub-section 2 (*a*) of that section defines the expression " profits from any employment " as including " any wages, salary, fee, pension, commission, bonus, gratuity or perquisite, whether derived from the employer or others." Counsel for the appellant contended that in order to be taxable, such a payment must be profits *from employment*, and relied upon the wording of the resolution as indicating that the appellant's " exceptional services to the Company " provided merely a motive for the payment which was not, said he, a reward for those services. He cited the case of *Seymour vs Reed* (1927, A.C. 554), in which Seymour the appellant, a professional cricketer, had been assessed on a certain sum, the proceeds of a benefit, which had been paid to him by the Club which employed him. The assessment was made under schedule E rule 1 of the Income Tax Act 1918, which renders liable to tax the " salaries, fees, wages, perquisites or profits whatsoever " from " an office or employment of profit." It was held that the appellant was not assessable in respect of the payment, inasmuch as it was a personal gift, and not a profit or perquisite arising from his employment within the meaning of the schedule and rule. Lord Atkinson, who dissented, thought that when no reason is shown for such a gift it must be assumed that it was given for the efficient and satisfactory discharge of the duties, the recipient was employed to discharge. It will be observed that the term " bonus " which appears in the corresponding passage of the local Ordinance does not appear in the English Act.

In the case before us, can it be said that the payment to the appellant, notwithstanding that it is described as a bonus, is anything more than a personal gift or testimonial ?

Seymour vs Reed (*supra*) was considered and approved in *Dewhurst and Another vs Hunter* (1932–146 L.T.R. 510) in which Lord Warrington expressed the view that *Seymour vs Reed* (*supra*) showed that the mere fact that the payment was made to the employee as the result of or in connection with his employment is not enough to render it liable to tax,

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Moseley, S.P.J.

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In *Blakiston vs Cooper* (1909, A.C. 104) the assessability of voluntary easter offerings given to a vicar for his personal use was considered. The view was taken that the object of the gifts was to increase the stipend of the vicar, and that the offerings were therefore assessable as profits accruing to him by reason of his office.

Counsel for the Commissioner contended that the guiding factor should be the actual wording of the resolution authorising the payment which, as has been seen, was described as a " special bonus ", and so, said he, was clearly within the meaning of section C (2) (*a*). The wording of the resolution seems to me to be beside the point. It may well have been the intention of the Company to make the payment a proper deduction from their own profits, and it was open to them to give to the payment any name which, in their opinion, would best serve that end. It would be manifestly unfair to bind the assessee to the strict meaning of a word, the selection of which might be a mere whim of his employer. Counsel referred to the non-appearance, in the corresponding English provision, of the word " bonus," the effect of which is to make the local section wider, and to require care in applying English decisions to the local enactment.

We were referred, on behalf of the Commissioner to the case of *Denny vs Reed* (18 Tax cases, 254), in which the appellant, a managing clerk to a firm of stock-brokers, received for three years in succession varying sums in addition to his salary. These payments were held to be assessable since, in the opinion of Finlay, J. there was no evidence that it was paid in respect of anything but the work done by the appellant on behalf of the firm. That case is clearly distinguishable from the one before us, particularly if we do what the Commissioner asks us to do and allow ourselves to be guided by the phraseology of the resolution.

In *Mudd vs Collins* (9 Tax cases, 297) the appellant was assessed in respect of a payment for services rendered outside the scope of his duty. Even so, it seems to me that the mere fact that the payment was for services rendered, granted that those services were additional to the appellant's ordinary duties, clearly brings it within the profits of his employment.

In *Davis vs Harrison* (11 Tax cases, 707) a payment to a professional footballer " as a reward for loyal and meritorious service " was held to be remuneration for services rendered in his employment, and assessable. Rowlatt, J. expressed the view that it must always be a question of fact how a particular payment is to be regarded.

A consideration of all the authorities cited to us on behalf of the Commissioner leads me to the conclusior that in each case the payment which was held to be assessable, was beyond all doubt, in respect of services rendered, and as such, is distinguishable from the payment to the appellant in the present case. This payment I prefer to regard in the light of a personal gift the motive for which, no doubt, but not the consideration, was the long service rendered to the Company by the appellant. The present situation has arisen out of the description of the payment as a " bonus " and, as I have

already hinted, I do not think the appellant should be penalised for the choice of a word, whether it be deliberate or accidental, by the party making the payment.

For these reasons I think the appeal should be allowed with costs. The sum of Rs. 50/– deposited by the appellant under section 74 (1) of the Ordinance will be refunded to him.

SOERTSZ, J.

I agree.

Appeal allowed.

*** CASE STATED**

Under the provisions of the Income Tax Ordinance 1932 for the opinion of the Hon'ble The Supreme Court of the Island of Ceylon, on the application of

A. P. Craib of Lellopitiya Estate,

Ratnapura.

Appellant.

1. The appellant who is the Superintendent of Lellopitiya Estate, Ratnapura, was assessed for the year of assessment 1937/38 to pay a tax of Rs. 3,434/50 on a taxable income of Rs. 47,796. The taxable income included a sum of Rs. 10,000 paid to him by his employers as a special bonus, in accordance with a resolution of the Board of Directors as follows :

> " In view of Mr. A. P. Craib's exceptional services to the Company, and in consideration of the fact that he has to undergo medical treatment while at home, it was resolved to grant him a special bonus of Rs. 10,000/–."

The assessor included this sum as a part of the income of the appellant. The appellant claimed to exempt this sum of Rs. 10,000 in arriving at his taxable income, but the assessor refused his application.

2. The appellant accordingly appealed to the Commissioner of Income Tax. After hearing, the Commissioner confirmed the assessment as appears from the Appeal Minute, a copy of which is annexed to this case stated marked "A". His reason for doing so appear on the said Appeal Minute.

3. The appellant thereupon appealed to the Board of Review constituted under the Income Tax Ordinance on the grounds in his Grounds of Appeal dated 30th June, 1938, a copy of which is annexed to this case stated marked "B".

4. At the hearing on the 19th August 1938, it was contended on behalf of the appellant that the said sum of Rs. 10,000/– was not " profits " or " income," under section 6 (2) (*a*) of the Ordinance ; that it was not a " bonus " or " gratuity " but was a voluntary gift proceeding from goodwill, without any obligation on his employers part to pay any such sum, and was prompted by the fact that the appellant was ill and needed special treatment. The motive prompting the expression of gratitude, it was argued, may have been the appellant's good services, but it was nevertheless a personal gift on personal grounds, for a particular purpose, namely, to provide for a holiday and to enable the appellant to recuperate his health. Exemption for the sum was also claimed under section 7 (1) (*k*) on the ground of its being " consolidated compensation for injuries." The appellant had contracted amoebic dysentry whilst in his employers' employment, and it may have been possibly, due to the employment, said his counsel. (The further point raised in the Grounds of Appeal that the assessment of the annual value of the appellant's residence on the estate was excessive, was expressly not argued).

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5. The assessor contended that the payment was a "gratuity" or "bonus" within the meaning of section 6 (2) (*a*) which, he contended, was wide enough, to include all voluntary payments of whatsoever nature. He argued that the reason for payment, or the object to which it is to be applied, is immaterial. He produced four letters that passed between the Income Tax Department and the Company regarding the payment of this Rs. 10,000/–. Copies of these letters are annexed to this case stated, as follows :

Letter dated 15-2-38 from the assessor to the Company marked "C."
Letter dated 22-2-38 from the Company to the assessor marked "D."
Letter dated 4-4-38 from the assessor to the Company marked "E."
Letter dated 5-4-38 from the Company to the assessor marked "F."

6. The Board of Review dismissed the Appeal holding that the Rs. 10,000 was a bonus or gratuity under section 6 (2) (*a*) and that it was not exempt from taxation under 7 (1) (*k*), for reasons given in its decision, a copy of which is annexed hereto marked "G."

7. Being dissatisfied with the decision of the Board the appellant has requested that a case be stated for the opinion of the Hon'ble The Supreme Court on a question of law. The question which arises for determination is whether the aforesaid sum of Rs. 10,000 is "profits" or "income" under section 5 of the Ordinance and, if so, whether it is exempt from taxation by virtue of the provisions of section 7 (1) (*k*). We have accordingly stated and signed this case.

Colombo, 17th day of October, 1938.

1. Sgd. A. R. A. Razik
2. ,, Illegible
3. ,, H. E. de Kretser

Members of the Board of Review.

Proctors :—

Perera and Perera for assessee-appellant.

Present : SOERTSZ, A.C.J.

PERERA, (Police Inspector) vs KANNANGARA, (Police Vidane)

S. C. No. 715/1938—*P. C. Colombo No.* 25081.

Argued on 19th May, 1939.

Decided on 23rd May, 1939.

Penal Code (*Chapter* 15) *sections* 158 *and* 109—*Abetting the acceptance of an illegal gratification by a public servant—Ingredients of the offence—Burden of proof.*

Held : (i) That in a charge of abetting the acceptance of an illegal gratification by a public officer under sections 158 and 109 of the Penal Code (Chapter 15), the relevant state of mind is not that of the person to whom the offer is made, but of the person making the offer.

(ii) That in a prosecution under sections 158 and 109 of the Penal Code it is sufficient if the prosecution proves that the money offered could not have been offered by way of legal remuneration.

Per SOERTSZ, A.C.J.—"In cases of this kind, I believe the law to be as stated by Kenny in his Outlines of Criminal Law that when the prosecution has adduced so much evidence as may reasonably be held to establish the positive elements of the offence, the burden is cast upon the accused of disproving the negative element by producing affirmative counter evidence. If the accused fails to produce that evidence, the failure may be construed as proving that no such affirmative evidence exists and accordingly as establishing the prosecutor's negative allegation."

Colvin R. de Silva, with *C. S. Barr Kumarakulasingham*, for the accused-appellant.

J. W. R. Illangakoon, *Attorney-General*, with *D. Jansze*, *Crown Counsel*, for the Crown, respondent.

SOERTSZ, A.C.J.

The admitted facts in this case are that the accused-appellant who is the Police Officer of Attidiya was interested in one Peter Perera, a resident of Attidiya, against whom a charge of theft of a bicycle had been made by a man of Cotta. On that charge Peter Perera was in custody. The Inspector of Police, Cotta, made inquiries into this charge, and on his return to the Police Station where Peter Perera was being held in custody, he ordered his release, and calling him and the accused in this case before him, he informed them that he would report to Court that the charge was a false one and that if the Magistrate agreed with that view, he would prosecute the man who made the charge, for giving false information. Thereupon, Peter Perera and this accused went away. About five minutes later this accused returned and offered the Inspector fifteen rupees saying "here, Sir, for the trouble you have taken." The Inspector declined the offer.

On these facts, the accused-appellant was charged under sections 158 and 109 of the Penal Code with having abetted the acceptance by the Inspector for himself of an illegal gratification other than a legal remuneration, as a motive or reward for shewing in the exercise of his public functions, favour to one K. Peter Perera, which offence, however, was not committed in consequence of the abetment.

The accused-appellant was convicted and sentenced to pay a fine of Rs. 100/–, in default six months' rigorous imprisonment.

On appeal, it was submitted that the offence charged was not made out because the evidence established that the Inspector had not shown any favour to Peter Perera, nor had he pretended to have done so, and that therefore the offer of the money by the appellant to the Inspector could not be related to a necessary ingredient of the offence charged, namely the acceptance of the money, if it was going to be accepted, on the footing that the Inspector had shown favour to Peter Perera or had pretended that he had done so. In this instance, on the Inspector's own evidence he had neither shown nor pretended to have shown favour and could not accept the money on that footing. I cannot entertain this submission at all. In a case like this where an abettor is charged, the relevant state of mind is not

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that of the person to whom the offer is made, but of the person making the offer. There can be no doubt whatever, that the accused made this offer because he *thought* the Inspector has shown some favour. That is sufficient for the constitution of the offence. It was also submitted for the appellant—and this was the main contention — that the conviction was bad because the burden was on the prosecution to prove that this was a " gratification " " *other than legal remuneration* " and that the prosecution had not discharged that burden, and had not led any evidence to show that this offer was not by way of legal remuneration. The Attorney-General who very kindly appeared to help the court referred to the Full Bench ruling in the *Mudaliyar, Pitigal Korale North vs Kiri Banda*, (12 N.L.R. 304). In that case the accused was charged under section 21 of Ordinance 16 of 1907 which enacts that " no person shall clear, set fire to, or break up the soil of any forest *not included in a reserved or village forest.*" It was contended that the burden was on the prosecution to show that the forest in question was not included in a reserved or village forest, but the Bench held that the burden was on the accused to show that it was, because the words " not included in a reserved or village forest " are in the nature of an exception within the meaning of section 105 of the Evidence Act.

I find the law stated thus in *The King vs Audley*, (1907–1 K.B. 383) by Lord Alverstone, C.J. who cites from the judgment of Lord Mansfield, C.J. in *Rex vs Jarvis* (1 East, 643, n., at p. 646, n), " It is a known distinction that what comes by way of proviso in a statute must be insisted on by way of defence by the party accused ; but where exceptions are in the enacting part of a law, it must appear in the charge that the defendant does not fall within any of them." But, I do not think it necessary to consider this matter further, for it seems clear that the prosecution in this instance has placed sufficient evidence before the court to show that the money offered could not have been offered by way of legal remuneration. The Inspector says, and it is admitted, that when the accused offered the money, he said, " Here, Sir, for your trouble." In Sinhalese the words are more expressive and negative the idea of legal remuneration. In cases of this kind, I believe the law to be as stated by Kenny in his Outlines of Criminal Law that when the prosecution has adduced so much evidence as may reasonably be held to establish the positive elements of the offence, the burden is cast upon the accused of disproving the negative element by producing affirmative counter evidence. If the accused fails to produce that evidence, the failure may be construed as proving that no such affirmative evidence exists and accordingly as establishing the prosecutor's negative allegation.

For these reasons I think the appeal fails and I dismiss it.

Appeal dismissed.

Proctors :—

Merril W. Perera, for accused-appellant.

Present : MOSELEY, J. & SOERTSZ, J.

ATUKORALE vs SAMYNATHAN

In the matter of an application for Revision in D. C. Ratnapura 5916.

Argued on 14th March, 1939.

Decided on 17th March, 1939.

Supreme Court—Power of revision—Courts Ordinance (Chapter 6) sections 19 and 37—Civil Procedure Code (Chapter 86) section 753—When may the Supreme Court revise an order from which an appeal is pending.

Held : (i) That the powers by way of revision conferred on the Supreme Court by sections 19 and 37 of the Courts Ordinance (Chapter 6)* and by section 753 of the Civil Procedure Code (Chapter 86)† are very wide and the Supreme Court had the right to revise any order made by an original court, whether an appeal has been taken against that order or not.

(ii) That the Supreme Court will exercise its powers of revision in a case in which an appeal is pending only in exceptional circumstances.

H. V. Perera, K.C., with *N. E. Weerasooriya, K.C., E. A. P. Wijeyeratne, E. B. Wickremanayake* and *U. A. Jayasundera*, for defendant-petitioner.

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

M. T. de S. Amarasekera enter appearance for O. M. L. Pinto, Proctor.

SOERTSZ, J.

On the 10th of January, 1939, the District Judge of Ratnapura entered decree declaring the plaintiff-respondent entitled to certain lots of land and ordering the defendant petitioner to pay as damages which had accrued at the date of the action, a sum of Rs. 2,000/– and further damages at Rs. 150/– a month till the plaintiff is restored to possession of the blocks he was entitled to. The decree also made order for the payment of certain compensation in respect of improvements, by the plaintiff to the defendant. On the 11th of January, 1939, the defendant-petitioner appealed against the judgment and decree entered by the District Judge. On the 19th of January, the plaintiff-respondent applied for execution of the decree " by issue of writ for the recovery of damages allowed until delivery of possession and also by issue of order of delivery of possession of the lots decreed to the plaintiff." This application was opposed by the defendant-respondent on the 23rd of February, 1939, which, so far as I can gather from the material before me, was the date fixed for inquiry into the matter of the legality and sufficiency of the security tendered for costs in appeal.

The learned Judge made order on the question of security and then addressing himself to the application for writ of execution said " no objection by affidavit or otherwise was made by the defendant against the allowance

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of the application. I would, therefore, allow the application of the plaintiff for execution." From this order too, the defendant has appealed. In the ordinary course, these appeals will not come up for hearing for some time, and the petitioner makes this application for the revision of the order made by the District Judge in regard to execution, on the ground that if the writ is executed in the manner execution is prayed for, the event of his appeal turning out successful will be of doubtful, if of any, value to him.

Counsel for the plaintiff-respondent opposes this application for revision on a matter of law, and on the merits. He contends firstly that in the circumstances as alleged by the petitioner, this court has not the right to exercise its powers of revision, because there is already an appeal pending. He relies on two Indian cases in support of this proposition, namely the cases reported in the All India Reports 1923 (P.C.) p. 128, and All India Reports 1931 (Bombay) p. 232. I have examined those cases, and in my opinion, they have no application at all on the point with which we are concerned in this case. They deal with the question of the occasions on which the powers of review given by the Indian Code of Civil Procedure will, or will not be exercised.

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

In a matter similar to the present application, namely in the matter of an application to stay execution in D. C. Chilaw 5502, Shaw, J. and de Sampayo, J. held that " this court would have jurisdiction to stay execution, so that the decision of the appeal in this court should not be rendered nugatory."

In my opinion, the preliminary objection must be overruled. In regard to the merits of the application, it is desirable not to say too much in view of the fact that there is an appeal pending from the decision given by the trial Judge on the question of the rights of the plaintiff and of the defendant in respect of the land in question in this case. On this application made to us to stay the execution of the writ allowed by the trial Judge, it is sufficient, I think, to say that so far as the writ which the Judge has ordered to issue, directs that the plaintiff be placed in possession of the lots decreed to him, it was open to the petitioner to take steps under section 761 of the Civil Procedure Code, or if he failed to do that, to ask for security under section 763. He neglected to avail himself of those provisions, and his present plea that irreparable loss will accrue to him by the plaintiff being put in possession is not very convincing. In the case I have already referred to, Shaw, J. said " this action was brought claiming declaration of title to

* Now sections 19 and 37 respectively of the Courts Ordinance (Chapter 6) Vol. I p. 25

† (Chapter 86) Vol. II p. 428

a building used as a Baptist Meeting House, and judgment had been given for plaintiffs for declaration of title and ejectment. No loss will be suffered by the defendants, even if they win the appeal on the merits, should they be prevented from using the building pending the appeal. Should they succeed, they will be again placed in possession of the building." Those remarks are applicable to the facts of this case.

Counsel for the petitioner argued very strongly that the decree did not direct that the defendant be ejected from and the plaintiff be put in possession of the lots the plaintiff was declared entitled to. That would appear to be so according to the copy of the decree typed to us, but there is the fact that the trial judge orders in the decree that the defendants pay to the plaintiff damages at a certain rate per mensem *till the plaintiff is restored to possession.*

In his judgment, he says " the defendant will have to pay to the plaintiff as damages Rs. 2,000/- with further damages at Rs. 150/- a month till he (plaintiff) is restored to possession of the land decreed to him."

If the decree, as entered, is inadequate in that it does not specifically provide for ejectment of the one and restoration of premises to the other, it may, perhaps, mean an application to amend the decree to bring in into conformity with the judgment.

I would also point out in this connection that counsel did not take this objection when he opposed execution before the trial judge. I must, therefore, refuse this application so far as it relates to the placing of the plaintiff in possession of the lots decreed to him.

In regard to the issue of the writ for the recovery of the damages awarded to the plaintiff, there is the matter of the compensation for improvements made by the defendant. If the defendant is entitled to recover the sum of Rs. 17,500/- from the plaintiff on account of compensation, there is section 346 of the Civil Procedure Code to be considered, and I think it best that the issue of the writ for the recovery of damages be stayed, pending the hearing of these appeals. The petitioner will pay the respondent half the costs of this application.

Owing to a misunderstanding of the order made by us when we allowed substituted service of notice, Mr. Pinto, plaintiff's proctor, was also noticed to appear. We had directed that substituted service should be effected by the notice being affixed to the door of the plaintiff's last known residence, and also by a copy of it being served on the plaintiff's proctor. The petitioner's proctor should have seen to it that the notice went out in accordance with the directions given. I, therefore, order the petitioner to pay Rs. 31/50 as costs incurred by Mr. Pinto.

MOSELEY, J.

I agree.

Application refused.

Proctors :—

O. M. L. Pinto, for plaintiff-respondent.
A. C. Attygalle, for defendant-petitioner.

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

MAITRIPALA vs KOYS

S. C. No. 240/1938—*D. C. Ratnapura No.* 6465.
Argued on 31st May, 1939.
Decided on 7th June, 1939.

Stamp Ordinance (Chapter 189)—*Appeal insufficiently stamped—How should action be valued.*

An action was instituted for the recovery of a land worth Rs. 1,000/–, mesne profits amounting to Rs. 300/– and damages at Rs. 100/– a year. The appeal petition was stamped as if the action fell within class 2 of part II (In the Supreme Court) of Schedule A, on the footing that the value of the subject matter of the action was Rs. 1,000/–. Objection was taken to the appeal on the ground that the subject-matter was over Rs. 1,000/– and that the appeal was insufficiently stamped.

Held : That the value of the subject-matter of the action was over Rs. 1,000/– and that the appeal had been insufficiently stamped.

N. Nadarajah with *S. J. V. Chelvanayagam*, for defendant-appellant.

N. E. Weerasooriya, K.C., with *U. A. Jayasundera* and *Corea*, for plaintiff-respondent

DE KRETSER, J.

A preliminary objection is taken that the papers connected with this appeal are insufficiently stamped, inasmuch as they are stamped as in the class of cases up to and including Rs. 1,000, whereas the case is for a land worth Rs. 1,000, mesne profits amounting to Rs. 300, and damages at Rs. 100 a year. The case of *Sinnappoo vs Theivanai* (39 N.L.R. 121)* is relied upon.

For the respondent it is urged that the plaintiff has valued the subject-matter of the action at Rs. 1,000, which includes the mesne profits, and incidental damages should not be reckoned.

The following cases were relied upon :

Silva vs Fernando (11 N.L.R. 375)

Studham vs Stanbridge (1895, L.R. 1 Q.B.D. 870)

Little's Oriental Balm & Pharmaceuticals Ltd. vs Ussen Saibo (12 C.L.W. 77)

Samiya vs Minammal (23 Madras 490)

Attention is also drawn to the fact that no objection to stamps was taken in the court below, and that a note at the head of the plaint says the claim is for Rs. 1,000. It is also attempted to prove the likely value of the land from the consideration paid for this land and other lands in the sale to the plaintiff by his master in 1925.

The plaintiff replies that what he valued was the subject-matter in dispute, which was the land, and defendants answer shows that that was how parties understood the matter.

* 9 C.L.W. page 82 (Edd)

I may say at once that we are not concerned with the attitude of the parties or of the secretary in the court below, nor can we try to extract the value of the land from the deed of sale in 1925. The note at the head of the plaint does not help, for the claim was not for Rs. 1,000, but for the land, mesne profits and damages, and the nature of the action being classified as land, damages indicate that the plaintiff realised that there were two claims at least.

The case of *Silva vs Fernando* only shews that the court decides for itself what the subject-matter of the action is and is not obliged to take the statement made by the plaintiff.

The case of *Studham vs Stanbridge* went on a rule of the county court which defined "subject-matter," and they defined it to include damages as well. The other cases have no bearing on the present question.

It seems to me that the plaintiff only valued the land when he described the subject-matter in dispute as being of the value of Rs. 1,000. What was in dispute was the land, and it is quite common in similar pleadings to refer to the land as the subject-matter of the action. The defendant did not plead to paragraph 8 of the plaint, but in paragraph 12 of his answer described the land as the subject-matter of the action, and plaintiff by his replication admitted the correctness of this averment in the answer.

Poyser, J. in *Sinnappoo vs Theivanai* stated that the practice of the courts had varied, some including damages and others valuing only the land. Here probably lies the explanation of the attitude of the parties and of the secretary in the court below. That case decided that damages should be included in computing the value of the action.

On this finding the objection must prevail and the appeal must be rejected with costs.

NIHILL, J.

I agree.

Objection upheld.

Proctors :—

C. F. Dharmaratne, for defendant-appellant.
A. Wijetileke and E. Wijetilake, for plaintiff-respondent.

SOERTSZ, A.C.J.

FRISKIN AND THREE OTHERS vs VANCUYLENBERG

Application for Revision in M.C. Batticaloa No. 49236 (No. 135)

Argued on 18th and 19th May, 1939.

Decided on 23rd May, 1939.

Prosecution under the Fauna and Flora Protection Ordinance—(Chapter 325) section 51 (a)—Plea of 'guilty' by accused to a charge which did not show that an offence had been committed by them—Who can launch a prosecution under the Ordinance.*

The accused pleaded guilty to a charge, under section 51 (*a*) of the Fauna and Flora Protection Ordinance, which stated that they "did shoot a wild boar on a crown land between sunset and sunrise; *to wit* 12-30 a.m." The words " outside a National Reserve " were omitted. The accused were fined and they moved in revision.

Held : (i) That the convictions should be set aside inasmuch as the pleas of guilt were tendered by the accused to a charge which did not show that any offence had been committed by them.

(ii) That a prosecution under the Fauna and Flora Protection Ordinance can be instituted only by the warden or with his written sanction.

C. T. Olegasegaram, for the 2nd, 3rd and 4th accused-petitioners.

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

SOERTSZ, A.C.J.

These convictions must be set aside, although the accused were convicted on their own pleas of " guilty ". I find that the pleas of " guilty" were tendered by the accused to a charge which did not show that any offence had been committed by them. The charge read out to them was that they " did shoot a wild boar on a crown land between sunset and sunrise ; *to wit* at 12.30 a.m., in breach of section 51 (*a*) of the Fauna and Flora Protection Ordinance, an offence punishable under section 56 of that Ordinance. Section 51 (*a*) makes it an offence for anyone to shoot, kill.....any animal on any crown land *outside a National Reserve*, not merely on any crown land. The charge should have alleged that the crown land on which the shooting took place was outside a National Reserve. If this had been done the accused might have shown that the land was not outside a National Reserve. As it is, it is possible that they pleaded guilty on the assumption that it was an offence to shoot on any crown land at all.

Another matter of which I feel I should take notice is that this prosecution has been launched by an Inspector of Police. Section 59 of the

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Ordinance enacts that "no prosecution for any offence under this Ordinance or any regulation made thereunder shall be instituted, except by the warden or with his written sanction."

For these reasons, I set aside the convictions of all the accused including the 1st accused who is not a petitioner. The fines will be remitted to them.

Convictions set aside.

Proctor :—

V. Sandrasagara, for accused-petitioners.

Present: SOERTSZ, A.C.J.

MUTUAL LOAN AGENCY, LTD. vs DHARMASENA

S. C. No. 213—C. R. Kandy No. 24156/2

Argued on 29th May, 1939.

Decided on 9th June, 1939.

Cheetus Ordinance (Chapter 128)—Cheetu started before the Ordinance came into operation—Effect of failure to obtain exemption under section 46 (4).

Held : That section 5 (2) of the Cheetus Ordinance (Chapter 128) is a bar to the recovery of money due under a cheetu started before the Ordinance, but not exempted under section 46 (2).

J. E. M. Obeyesekere, with *M. M. Kumarakulasingham*, for the plaintiff-appellant.

E. B. Wickremanayake, for the 2nd defendant-respondent.

SOERTSZ, A.C.J.

The Cheetus Ordinance is by no means easy to interpret and apply. It has the teasing quality of a crossword puzzle. It arises for examination in this case in the following circumstances. The plaintiffs who are a duly incorporated company, limited in liability, carried on a business of auctioning cheetus among its subscribers, on the condition *inter alia*, that each subscriber could buy the cheetu only once. The cheetu was sold to the subscriber who offered the largest discount. The first defendant who was a subscriber bought the cheetu that was auctioned on the 5th of September, 1936, and in respect of the liability she incurred on that occasion, she and the second defendant gave a joint and several promissory note. She made payments amounting to Rs. 117/28, and then defaulted,

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Soertsz, A.C.J.

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The plaintiffs, thereupon, instituted this action against both defendants and claimed the balance sum of Rs. 82/72 and interest. They did not, however, proceed with their claim against the 1st defendant. They did not even take summons on her, and on the 31st of August, 1938, they stated that they were not going on with the case against her.

On the 1st of April, 1937, the Cheetus Ordinance came into operation, and in view of section 5 (2) of that Ordinance, the learned Commissioner dismissed the plaintiffs' case holding the claim unenforceable.

Sections 5 (2) enacts that "no right or claim under any scheme or arrangement which only partakes of the nature of a cheetu within the meaning of section 4 shall be enforceable by action in any court or village tribunal in this Island."

On this finding of the Commissioner, two questions were raised on appeal, namely (1) whether the plaintiffs' scheme or arrangement was within section 4; (2) if so, whether the plaintiffs can enforce their claim on the ground that section 5 (2) did not apply to transactions entered into before the Cheetus Ordinance came into operation, in cases in which, the cheetu out of which the transaction arose, was abandoned after the Ordinance was proclaimed. It was said that that was the case here, and that the plaintiffs were doing no more than trying to collect debts that subscribers had incurred prior to the 1st of April, 1937.

In regard to the first of these questions, there does not seem to be room for doubt. The evidence of the plaintiffs' secretary clearly shows that their scheme or arrangement was not a cheetu within the meaning given to that word by section 3 of the Ordinance. It is inconsistent with some, at least, of the essential terms and conditions postulated by section 3. But although the plaintiffs' scheme did not reach the stature of the legislative cheetu, it did not fall entirely outside the Ordinance. The legislature had taken steps to prevent that by providing in section 4 that "every scheme or arrangement which notwithstanding that it purports to be a cheetu, is not based wholly on the essential terms and conditions set out in section 3 or which is based on terms and conditions inconsistent wholly or in part with those essential terms and conditions, shall for the purpose of this Ordinance be deemed only to partake of the nature of a cheetu." In this way, the legislature brought within the scope of the Ordinance the cheetus it would allow in order that they might be controlled by the Ordinance, as well as those cheetus which had flourished in the Island but were considered objectionable, in order to suppress them. For section 4 is followed by a section that, read with section 45, enacts that it shall be an offence to promote or conduct a scheme that "only partakes" of the nature of a cheetu, and that no right or claim under such a scheme, shall be enforceable in any court.

In regard to the second question raised on appeal, I am just as clearly of opinion that section 5 (2) catches up this transaction and renders the

claim unenforceable. Section 46 (1) requires that " within one month after the date on which this Ordinance comes into operation, the manager of every cheetu.....which is actually being conducted at that date, shall furnish to the Registrar of land.....a statement verified by affidavit and containing the terms and conditions of, and the following particulars....." In this context, it is obvious that the word cheetu is used to cover not only cheetus as understood in section 3, but all such schemes and arrangements as purported to be cheetus as popularly understood. Section 46 (2) enables the Registrar to call for further information or explanation, and 46 (3) requires the Registrar to register a cheetu in respect of which there was compliance with 46 (1) and 46 (2), as an existing cheetu. Then comes section 46 (4) to enable the Registrar-General to exempt any cheetu registered under 46 (3) from any or all of the other provisions of the Ordinance conditionally or unconditionally. It is manifest that this cheetu was being conducted at the time the Ordinance came into operation. The secretary says that it was discontinued in August, 1937. There is evidence to show that there was partial compliance with section 46 (1), but no evidence to show that it was registered under 46 (3). It is admitted that there has been no exemption obtained under 46 (4). The inevitable result is that section 5 (2) applies and makes this claim unenforceable.

In passing, I wish to comment on the case of *Paramsothy v. Suppramaniam*, (39 N.L.R. 529)* which was cited to us in the course of the argument. I cannot quite follow the concluding part of that judgment. Maartensz, J. referring to section 46 (4) says, " now the usual phrase in an exempting clause is that the exempting authority shall have power to exempt from ' all or any of the sections ' of a Statute. Is there any significance in the introduction of the word ' other ' before the word ' sections ' in subsection 4 ? Was the word ' other ' used to limit the applicability of the Ordinance to existing cheetus to sections which cast a duty upon the manager ? " It seems obvious that the word " other " was inevitable where it occurs, for if it was not inserted there, the Registrar-General would have the power to exempt parties from the duties imposed by section 46 itself, and that would have defeated the very object of the Legislature which appears to be to bring existing cheetus in line with the cheetus that the Ordinance creates and to control their future dealings.

Quite apart from sections 46 and 5 (2) of the Ordinance, this claim does not seem to be enforceable because it arises out of a transaction prohibited by section 5 (1) and penalised by section 45. It is true that the transaction was lawful at the time it was entered into and was rendered unlawful only by this Ordinance. But that, I think does not matter. The law appears to be that if the contract was lawful when it was made, whatever has been done under the contract remains unaffected. But if the Legislature alters the law so that the contract thereafter becomes illegal, no further lawful

* 11 C.L.W. 99 (Edd)

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acts can be done under it, and no action brought on it in the absence of special provision for that purpose.

For these reasons, I am of opinion that this appeal fails and I dismiss it with costs.

Appeal dismissed.

Proctors :—

E. Carthigeser, for plaintiffs-appellants.

Abeykoon and de Singhe, for 2nd defendant-respondent.

Present: SOERTSZ, A.C.J.

DUNUWILA vs POOLA AND ANOTHER

S. C. No. 88–89/1939—*Magistrate's Court, Kandy No.* 60786.

Argued on 2nd June, 1939.

Decided on 6th June, 1939.

Excise Ordinance (Chapter 42)—Charge of unlawful possession of toddy—Toddy found in house occupied by husband and wife—Circumstances which may warrant a presumption of guilt against wife.*

The 1st and 2nd accused are husband and wife, living together in the house where fermented toddy beyond the prescribed limit, was found. The Magistrate found that when the Excise party approached, the 1st accused started to run away, that the fermented toddy spoken to by the Inspector was found in the kitchen of that house, that the 2nd accused (wife) was in the compound when the Excise party were approaching, and that she rushed in and broke a pot in the kitchen and fermented toddy was spilt on the floor. The Magistrate convicted both accused.

Held : (i) That on these facts the wife cannot be said to have been in possession of the toddy.

Cases referred to : *Simon vs Jessie Nona* 4 C.L.W. 4.
Excise Inspector, Ambalangoda vs Podisingho 2 T.C.L.R. 143.
Samaraweera vs Babee 4 C.L.W. 48.
Gooneratne vs Ukku 1 C.W.R. 216.
Reg vs James Boober and Others 4 Cox 272.

L. A. Rajapakse, for the accused-appellants.

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

SOERTSZ, A.C.J.

As Ennis, J. observed in *Simon vs Jessie Nona* (4 Ceylon Law Weekly, 49), " the question whether or not a person who lives in a house in which fermented liquor is found is in possession of that liquor is one of fact." For this observation, he based himself on the case of *Excise Inspector, Ambalangoda vs Podisingho*, (2 Times Law Reports p. 143).

* Vol. I p. 687 (Edd)

In the case before me, the facts as found by the learned Magistrate are that the 1st and 2nd accused are husband and wife living together in the house in which the offending fermented toddy was found. The Magistrate in the course of his judgment says, " when the Excise party approached the house 1st accused started to run away.....I have no doubt that the quantity of fermented toddy spoken to by the Inspector was found in the kitchen of that house. 2nd accused was in the compound when the Excise party were approaching. She rushed in and broke a pot in the kitchen and fermented toddy was spilt on the floor. Her conduct stamps her with guilty knowledge of the presence of that toddy in the other pots. Her defence is that there was no toddy in the house that day and that she did not break a pot.....I hold that 2nd accused is guilty of possession of the fermented toddy in the kitchen of her house."

In this view of the case, the Magistrate sentenced the 1st accused to a term of four months' rigorous imprisonment, and imposed a fine of Rs. 300/– on the 2nd accused, in default of payment, six weeks' rigorous imprisonment.

I agree with the view taken by the Magistrate that the 1st accused was in possession of this toddy. It was found in the kitchen of the house in which he lives with his wife. As I had occasion to point out in the case of *Samaraweera vs Babee* (4 Ceylon Law Weekly p. 48) " the presumption is that the house occupied by a married couple is in the possession of the husband rather than of the wife." The Magistrate rightly, I think, inferred conscious possession of that toddy on the part of the husband, from his flight on the approach of the Excise party. The Magistrate rejected his denial of his presence in the village on this day. The result is that the 1st accused has not accounted for the presence of the toddy in his house in a manner consistent with his innocence. He was, therefore, rightly convicted.

The question that arises for consideration is whether on these facts the 2nd accused too can be said to have been in possession of the toddy. I do not think she can. All that can be found against her on the evidence before me is that she was well aware that her husband was carrying on an illicit trade in toddy, and that on the approach of the Excise party she tried to make evidence of the commission of an offence to disappear, in order to screen her husband. It might even be said that she, probably, helped her husband in this trade, in a wifely sort of way. But the fact seems clear that the toddy was toddy brought into the house by the husband, and was toddy under his control and at his beck and call, at the time the Excise party visited their house. There can, no doubt, be cases where a wife occupying a house with her husband, may be held to be in possession of something that is the subject-matter of an offence. For instance, there are cases in which a wife has been convicted of being in unlawful possession of excisable articles, when at the time the offence was discovered, she was found to be in possession of the key of a box in which the articles were kept and her husband was absent from home, and she had not given evidence to show, for example,

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that she had been given the key by her husband, or some other inmate of the house. Similarly in the case of *Gooneratne vs Ukku* (1 C.W.R. 216), where over four gallons of toddy were found in a house in which the accused woman, her two associated husbands, and another woman lived, and where the accused who was alone in the house at the time and threw away a vessel which must have contained toddy to judge from its smell, Shaw, J. upheld the conviction because she had not rebutted the presumption that arose under section 50 of the Excise Ordinance.

In the present case, on the facts as deposed to by the prosecution witnesses, the presumption that arose under that section arose against the fleeing 1st accused. It probably would have been different if at the time of the raid, the 2nd accused was the sole occupant of the house, and did not account for the presence of the toddy satisfactorily.

I find a case reported in 4 Cox 272, in which a husband and wife and a boy aged ten were charged with *having in their possession a mould* on which was impressed the obverse side of a shilling. The boy had been arrested when passing a counterfeit half-crown. When the Police searched the house in which the boy lived, the husband was found in an upper room. Several moulds and other coining instruments were found in a room below. During the search, the wife came in and destroyed one of the moulds. She was in possession of counterfeit shillings. There were no counterfeit coins on the husband. Telford, J. ruled that as the mould was found in a room of a house occupied by the husband, he must *prima facie* be presumed to be in possession of what that room contained, but it was only a presumption that might be rebutted. If the Jury were satisfied that the husband was in possession of the mould, they ought to acquit the wife, as she could not, in law, be said to have any possession separate from her husband ; but that if they thought that the criminality was on her part alone, and that he was guiltless, she might be convicted ; *that either husband or wife might be convicted on the evidence, but not both.* The fact that the wife attempted to break up coining instruments at the time of her husband's apprehension, if done with the object of screening him, *is no evidence of possession.* He further ruled that in regard to the boy, it would be going too far to say that he was in joint possession with either of his parents.

If I may say so with respect, that is a correct statement of the law, and applying it to this case, I must find the 2nd accused not guilty of the offence with which she was charged.

I set aside her conviction and acquit her.

Conviction of 2nd accused set aside.

Proctors :—

K. Kumaraswamy for accused-appellants.

Present: LORD RUSSELL OF KILLOWEN, LORD ROMER & SIR GEORGE RANKIN.

EBRAHIM LEBBE MARIKAR (Appellant) vs
ARULAPPA PILLAI (Respondent)

Privy Council Appeal No. 22 of 1938.
Decided on 19th May, 1939.

Privy Council—Appeal on question of fact—Duty of appellant.

Held : That where the appellant in an appeal to the Privy Council in a civil case contends that the findings of fact in the courts below are erroneous, it is incumbent on him to satisfy their Lordships without any shadow of doubt that such findings are erroneous.

L. M. D. de Silva, K.C., with *R. K. Handoo*, for the appellant.
Stephen Chapman, for the respondent.

LORD ROMER.

This is an appeal from a decree of the Supreme Court of the Island of Ceylon dated the 27th September, 1937, affirming a decree of the District Court of Colombo dated the 6th February, 1936, in an action brought by the respondent against the appellant. The action was founded upon a mortgage bond dated the 21st March, 1930, executed by the appellant in favour of one H. B. Phillips and assigned by Phillips to the respondent on the 16th April, 1930. By his answer to the respondent's plaint the appellant raised various defences of which the only one now material to be considered is as follows. He alleged that he and Phillips, who is a broker, entered into certain forward contracts for the sale and purchase of rubber on the understanding that there should be no delivery or acceptance of the rubber purported to be sold or bought but that the contract should in each case be performed by the payment of the difference between the contract price and the market price on the due date, and that the bond in question was granted for the purpose of securing the payment to Phillips of a sum then owing to him by the appellant in respect of some of such differences. The appellant, in other words, was alleging that the bond in question was given for the purpose of securing money due from him to Phillips under a wagering contract and was in consequence unenforceable. This defence was rejected by the District Judge, and on appeal by the Supreme Court.

It is not contended by the appellant that any misdirection as to the law applicable to the case is to be found either in the judgment of the District Judge or in that of the Supreme Court. All that he alleges is that both Courts arrived at an erroneous conclusion of fact in finding, as they did, that no such wagering contract was ever entered into between Phillips and the appellant. But in the face of such concurrent findings of fact in the Courts below it is incumbent upon the appellant to satisfy their Lordships

without any shadow of doubt that such findings were erroneous. This in their Lordships' opinion the appellant has failed to do.

It is true that the appellant from time to time entered into forward contracts for the purchase of rubber from or through Phillips in such large quantities as to suggest that he did not intend that all of it or even the larger portion of it would ever be taken up by him. His intention no doubt was to resell the rubber before the date of delivery, hoping of course to resell at a profit. His hopes in this respect were seldom realised, but in the large majority of cases the resales were effected although at a loss. When therefore he said in his evidence before the District Judge that he never intended to take or deliver the rubber his evidence may be accepted. But it takes two to make a wagering contract, and if the appellant is to succeed he must show that it was a term of the arrangement between him and Phillips that no rubber was to be taken or delivered under the forward contracts but that the contracts were to result merely in the payment of differences. The answer to the question whether there was such an arrangement or not must obviously depend upon the oral evidence given by the appellant and Phillips. Certainly there was none in writing. As to the oral evidence the learned District Judge said this :

> " The defendant states that it was not intended that there should be any delivery of rubber but that he had arranged with Mr. Phillips that it was only the difference in price that was to be accounted for. Mr. Phillips denies this. I cannot for a moment believe that Mr. Phillips himself entered into any wagering contract. He was merely concerned to earn his brokerage....."

Then a little later he said this :

> " It is quite conceivable that a rubber dealer may buy a quantity of rubber under a forward contract and if before the date of delivery he finds it advantageous to himself to sell he would sell, so that in the result he does not actually handle the rubber. Mr. Phillips has stated that in all these contracts there was the rubber actually in existence, delivery being ultimately made to the final purchaser who chose to take delivery instead of in his turn selling beforehand."

And again :

> " This is not a case of buying and selling without the actual article being available. The article was always available for delivery."

The same view of the evidence was taken by the Supreme Court. Hearne, J. in whose judgment Maartensz, J. concurred, after pointing out that the District Judge had expressly rejected the evidence of the appellant upon the matter, said :

> " Of the two witnesses Mr. Phillips and the defendant the Judge has believed the former, that the contracts were not wagering contracts and that therefore the transactions between them did involve the obligation to take up or deliver rubber contracted to be bought or sold."

He then referred to certain parts of the evidence given by Phillips and the appellant and summed it up by saying that in his opinion the Judge was justified in rejecting the defence set up. The appeal was accordingly dismissed with costs.

The District Judge had the great advantage of hearing the evidence of these two witnesses at first hand and of observing their demeanour in the witness box. Having done so he unhesitatingly accepted the evidence of Phillips in preference to that of the appellant whom he was unable to regard as a witness of truth. In these circumstances it would be quite impossible for their Lordships to differ from the conclusions at which he arrived, even if, and this is very far from being the case, they felt inclined so to do on an examination of the printed evidence before them. In these circumstances their Lordships are of opinion, and will humbly advise His Majesty, that the appeal should be dismissed.

The appellant must pay the respondent's costs of the appeal.

Appeal dismissed.

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

HUNTER AND ANOTHER vs DE SILVA

S. C. No. 132/1938—*D. C. Colombo* (*Inter.*) *No.* 45279.

Argued on 25th May, 1939.

Decided on 7th June, 1939.

Civil Procedure Code (*Chapter* 86) *sections* 349 *and* 408—*Can a decree once entered be altered.*

On 16th September, 1931, decree was entered in favour of the plaintiff for the payment of Rs. 10,000/- with interest at 18% per annum on Rs. 10,000/- from date of action to date of decree, with further interest on the aggregate amount at 9% till payment in full.

In October, 1931, the plaintiffs applied for execution, and on 20th November, 1931, plaintiff's proctor filed a paper to the following effect signed by the defendants.

> "We consent to pay interest at the rate referred to in the Mortgage Bond No. 197 filed of record, from the date of decree till payment in full, in lieu of the rate of 9% provided for in the decree."

The Court minuted "Note and File" on this paper.

On 20th September, 1937, the plaintiff moved that the rate of interest specified in the decree be altered to 12%. This motion was disallowed. The plaintiffs then moved to certify of record the adjustment of the decree in accordance with the motion referred to.

The defendants objected. The District Judge allowed the application and certified of record the adjustment of the decree. The defendants appealed.

Held : (i) That section 349 of the Civil Procedure Code (Chapter 86) does not contemplate the alteration of a decree to give effect to an agreement reached by the parties after decree is entered.

(ii) That agreements reached after decree has been entered in an action cannot be made the subject-matter of a fresh decree in the same action.

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H. V. Perera, K.C., with *E. B. Wikramanayake*, for defendants-appellants.

N. Nadarajah, with *S. Nadesan* and *Manikavasagar* for plaintiffs-respondents.

DE KRETSER, J.

On the 16th September, 1931 decree was entered in favour of the plaintiffs for the payment of Rs. 10,800/- with interest at 18% per annum on Rs. 10,000/- from date of action to date of decree, with further interest on the aggregate amount at 9% till payment in full.

In October, 1931 the plaintiffs applied for execution, and on the 20th November plaintiff's proctor filed a paper signed by the defendants, and moved that the same be embodied in the decree.

The court minuted "Note and File." The paper is signed by all three defendants, and is to this effect:

> "We consent to pay interest at the rate referred to in the Mortgage Bond No. 197 filed of record, from the date of decree till payment in full, in lieu of the rate of 9% provided for in the decree."

On the 20th September, 1937 the plaintiffs moved that the rate of interest specified in the decree be altered to 12%. The court refused the application. The plaintiffs then moved to certify of record the adjustment of the decree in accordance with the motion referred to, and moved that the commission be reissued.

The defendants objected to this application and moved that the matter be fixed for inquiry. The District Judge after inquiry made order allowing the application and, certifying of record the adjustment of the decree, ordered that commission be reissued for the recovery of the balance due in accordance with the adjustment and in terms of the plaintiffs' application.

The defendants thereupon deposited a sum of Rs. 5,000/-, which is admitted to be due on account of principal, and appealed against the order certifying the adjustment in the way in which it has been certified.

The main contention for the appellants was that any agreement which added to the decree and increased the liability of the defendants was not an adjustment within the terms of section 349 of the Civil Procedure Code.

It became apparent during the argument that the plaintiffs were really asking that a new decree should be entered; in effect they were asking for an amendment of the decree.

It was also apparent that though the defendants conceded that the agreement was valid, they nevertheless hoped that if they succeeded in opposing the application they would be able to bring into an accounting the excess of interest which they had been paying.

In my opinion both these positions are unsound. When a decree is adjusted, section 349 does not contemplate that the original decree shall be superseded. It does not contemplate the entering of any decree based on the

agreement. The entering of decrees based on agreements is dealt with in section 408, where the court is expressly required to pass a decree in accordance with the agreement or compromise, and we have the very important qualification that the passing of the decree will be only so far as it relates to the action. We have here an indication that an action may be adjusted by an agreement which goes beyond the scope of the action. I see no reason why, when an action has proceeded to the stage where a decree has been entered thereafter, the agreement should be limited by the terms of the decree. In my opinion the agreement may go beyond the terms of the decree ; but the court will recognise and certify only so much of the agreement as adjusts the decree in whole or in part.

For example, if the defendants had agreed to pay more than the principal sum of the decree for some valid reason and the court was informed of the agreement, the court would recognise that the decree had been satisfied to the extent of the amount decreed, and would not concern itself with the excess.

Similarly, where a defendant had obtained time by agreeing to pay a higher rate of interest and had paid that higher rate, then the court would recognise that payment of the interest under the decree had been satisfied up to the time when the last payment was made, and would not concern itself with what had been paid in excess by way of interest on a private agreement between the parties, which would be perfectly valid and binding on them although it would not be binding on the court.

To allow an arrangement between the parties to supersede the decree already entered would be to detract from the sanctity which attaches to a decree of court.

We have repeatedly held that parties cannot by consent vary the terms of a decree, nor can the court itself vary its decree except in certain circumstances set out in the Code.

The provision in section 349 is intended to enable the court to see that its decree is not abused. And the precaution which the Legislature had taken is to provide means whereby one or other or both parties will inform the court of any private arrangements between them. There is nothing to prevent parties from abandoning the decree and suing on the private agreement, but the agreement not being made part of the decree cannot be executed as part of the decree, and the agreement not being embodied in the decree is no part of it.

In Broughton's work on the Indian Civil Procedure Code he refers to two authorities, viz. *Krishna Kamal Singh vs Kiru Sirdar* (4 B.L.R., (F.B.) 101) and *Madhub Chunder Dhundput vs Madhub Lall Khan* (14 B.L.R. 285), neither of which, unfortunately, is available to me. He quotes both these cases in support of the proposition I have just stated.

Mr. Perera referred me to Chitaley and Sarkar on the Indian Civil Procedure Code and to a case reported in I.L.R. 24 Madras, page 1.

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I have referred to Chitaley, Sarkar and Ameer Ali, also to the case cited by him. I can find nothing in them opposed to the view I am now taking.

From the fact that an adjustment in full extinguishes the decree one does not get the corollary that the adjustment must be equal to the decree. For an agreement that covers more than the decree also can extinguish the decree.

The real point is whether the adjustment takes the place of the decree, and whether in effect the decree is amended. In my opinion the decree remains unaffected by the adjustment except in so far as the execution of it is concerned.

Mr. Nadarajah quoted a case of the *Bristol Hotel Co., Ltd. vs Power* (3 S.C.R. 168). In that case the judgment-creditor entered into an agreement with the judgment-debtor to receive payment of the judgment-debt by monthly instalments, and the court held that he could not go back on his original decree. With all respect, this seems to me not to conflict with what I have stated, for the agreement extinguished the decree. Withers, J. went on to say that the judgment-creditor must either sue the debtor on the agreement, or if he wishes to execute it as a decree he must have it certified of record as an adjustment under section 349. This opinion was *obiter*. I quite agree with the first part,—that the creditor can sue on the agreement, —but I do not agree with the second part which suggests that if certified the agreement might be executed as a decree. As a matter of fact, the agreement had not been certified, but once it was admitted by the creditor and the court made aware of its existence and the adjustment brought to its notice, the further certification thereof was within the power of the court. The opinion of Withers, J. appears to have been given without any argument on the point. With all respect, I am unable to follow it.

Mr. Nadarajah also referred me to a case reported in the A.I.R. (1925) Oudh 364. In that case apparently execution was taken out on the subsequent agreement on the footing that it was an adjustment of the decree duly certified by the court but the grounds on which this was allowed are not stated, and in the absence of any reasoning I must decline to follow that judgment.

Mr. Nadarajah then referred me to a case reported in A.I.R. (1914) Calcutta 697. In that case it had been found that an oral agreement had been entered into to give the judgment-debtor time to pay, and it was sought to certify the agreement. The Subordinate Judge refused the application on three grounds, viz. (1) that the sanction of the court had not been obtained ; (2) that oral evidence was inadmissible ; (3) that there was no consideration for the agreement.

The High Court pointed out that the first ground was bad inasmuch as section 257 (A) of the Old Code had been omitted from the existing Code and therefore such agreements were tested as to their legality like other agreements and if valid could be given effect to. They held that oral evidence was admissible, that the agreement would be void if there had been no

consideration, and they sent the case back for inquiry. Mr. Nadarajah argues that they would not have sent the case back if they thought that such an agreement could not be given effect to. I am averse from imputing to a court a decision thus inferentially deduced and which they could have stated quite simply and clearly if their minds had been directed to the question, but assuming that the inference is correct and that the agreement might be given effect to in the case, all that happens is the operation of the decree, execution thereof, is affected and no new decree is entered. There was nothing to compel the judgment-creditor to execute his decree at once, and if the court admitted an agreement to defer execution it might see that he did not execute his decree contrary to the agreement. That would not be a variation of the decree at all but of the rights flowing from the decree.

In my opinion therefore, the agreement now relied upon has been properly recorded and may be certified. All payments made under it of interest will be recognised up to 9% (nine per cent.) The final result is that plaintiff can issue writ to recover the principal sum remaining unpaid and interest at nine per centum per annum from the date of the last payment of interest under the agreement, and he cannot issue writ on the footing of the agreement. Neither can defendant recover interest already paid under a valid agreement.

Both parties were wrong in the attitude they adopted, and there will be no costs either in this court or in the court below.

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I agree, but I wish to say that, in my view, section 349 of the Civil Procedure Code itself, considered apart from the cases to which we were referred, disposes of the difficulties that seem to arise in this case. In the first instance, the duty of certifying any adjustment is imposed on the judgment-creditor and he is required to certify any adjustment *made to his satisfaction*. In this case, there was such an adjustment, when the judgment-creditor and judgment-debtor entered into an agreement that was quite valid, and was to the effect that interest should be paid at 12 per cent. instead of at the 9 per cent. rate allowed in the decree. The result was that the additional three per cent. was paid on the agreement, but so far as the decree was concerned, it was adjusted just as if the 12 per cent. paid on the agreement was no more that the 9 per cent. due on the decree. The additional 3 per cent. was consideration given by the debtor for the extension of time he obtained. It was not paid under the decree. It had no bearing on the decree itself. Consequently, those additional payments cannot be taken into account when the amount still due on the decree is to be ascertained. That is so far as the judgment-debtor is concerned.

In regard to the judgment-creditor, his application to have the rate of interest provided in the decree at 9 per cent. to be altered to 12 per cent. on the ground that the judgment-debtor agreed to that alteration, cannot be

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entertained at all. That is not an adjustment of the decree. It is an attempt to substitute a decree of the parties in place of the decree entered by court. It cannot be tolerated. The judgment-debtor must proceed on his agreement to recover anything outside the decree.

Proctors :—

A. H. Abeyaratne and *E. L. Gomes*, for defendants-appellants.

H. T. Ramachandra, for plaintiff-respondent.

Present: SOERTSZ, A.C.J. & NIHILL, J.

BROWNE vs DAVIES AND ANOTHER

S. C. No. 118 (*F*) *of* 1939—*D. C. Nuwara Eliya No.* 2099.

Argued on 5th, 6th and 7th June, 1939.

Decided on 19th June, 1939.

Partnership—Action for dissolution on the ground that it cannot be carried on with any reasonable prospect of profit—Partnership Act, sections 32 *and* 35.

Held : That if a partnership cannot be carried on with any reasonable prospect of profit it is a ground for dissolution of the partnership.

J. E. M. Obeyesekere, with *O. L. de Kretser*, (*Jnr.*), for defendants-appellants.

H. V. Perera, K.C., with *E. F. N. Gratiaen*, for plaintiff-respondent.

NIHILL, J.

In this case the defendants-appellants appealed from a decree of the District Court at Nuwara Eliya dissolving a partnership which existed between them and the plaintiff-respondent. The nature of this business was that of a preparatory school known as Haddon Hill which is a school at Nuwara Eliya for the children of European parents. It is unnecessary for me to detail the history of this school as this is fully set out in the judgment of the learned District Judge. It will suffice to mention that it was founded by the first defendant-appellant, Mr. Davies, in 1918. Mr. Davies returned to England in 1926 and thereafter took no part in the actual management of the business. For some years the business prospered under the aegis of a popular head-master, Mr. Hawkins, who died under tragic circumstances on the 1st of January, 1933. The second defendant-appellant Mr. Hogg who had been a partner since 1930 carried on the school single-handed for a few months when he was joined by the plaintiff-respondent. Mr. Browne in July, 1933. Mr. Browne paid in cash for his share a sum of Rs. 56,000/–

odd and became entitled to an 18/45th share in the business. Mr. Davies retained a 20/45th share and Mr. Hogg's interest stood at 7/45ths. Under a deed of partnership which was executed in July, 1933, the partnership was to be for life subject to a retirement clause. By the same deed Mr. Browne was declared to be the head-master of the school with sole control on the educational side and Mr. Hogg was declared to be solely in control of the business administration. Both Mr. Browne and Mr. Hogg were to receive a salary of £450 per annum apart from profits and £ 300 of Mr. Hogg's salary was guaranteed to him as a prior charge after payment of the trading liabilities.

Since the inception of this partnership until the institution of this action, it is indisputed that the business had decreased steadily. If numbers be a true index of a school's prosperity, as they must be in an establishment which is run for profit, there are now about half as many pupils as there were in 1933. Further, the profits on whatever basis they be computed have dwindled to a negligible figure or less. It is the contention of the plaintiff-respondent that under no circumstances can this business in future under the present partnership be carried on except at a loss, and this was his main ground in asking for a dissolution.

The action went to trial on a number of issues but before considering these and the learned District Judge's answers thereto, it will be convenient first to deal with the point taken by learned Counsel for the appellants that the court cannot or should not exercise the discretion of dissolution in favour of a partner who has the remedy of retirement by the terms of the partnership agreement. Counsel has urged that the fact that section 32 of the Partnership Act 1890 (53 and 54 Vic. cap. 9) which applies to Ceylon is made subject to any agreement between the parties, shows that the Act sets store on that which has been agreed upon by partners and that it was not intended that the relief obtainable under the Act should provide a means by which a dissatisfied partner can run away from his partnership obligations. Undoubtedly under section 35 of the Act, the court must look at all the circumstances before coming to a decision based on equity and justice and it might well be that that the court would look with disfavour upon a partner who was anxious to leave his co-partners in the lurch prematurely merely because a business was proving hazardous whereas by a little courage and resolution he might bring himself as well as his partners safely into port. The contention cannot however be stressed so far as to rule out the court's powers to consider an application for dissolution where a right of retirement exists. In the first place there is nothing in the wording of section 35 similar to the wording used in section 32, neither do the two sections relate to the same thing. Section 32 enumerates circumstances under which partnerships, unless there is something to the contrary in the agreements, are dissolved *ipso facto*, whereas section 35 sets out the circumstances under which a partner bound by a partnership not otherwise dissoluble may apply to the court for dissolution. If then the court's powers under section 35 of the Act are

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unfettered the only question in which we are concerned in this appeal is to determine whether the court below has exercised its discretion judicially. Now it is clear from the judgment of the learned District Judge that his main ground for ordering a dissolution was because he was satisfied on the evidence that a continuation of the partnership must involve certain loss and that, therefore, it was just and equitable to all, that the partnership should be dissolved.

The case went to trial on nine issues some of which seemed to have been framed with the intention of attempting to fix responsibility for the present unhappy state of the business on either Mr. Hogg or Mr. Browne. The substance of the learned Judge's answers I think amounts to this : that whilst quite definitely Mr. Browne has not ruined the business, none of the partners are free from their share of responsibility for a situation which was brought about as it may have been to a large extent by external circumstances beyond their control and has been accentuated in its gravity by serious errors in business management, that, I think, on the evidence led before the learned Judge, was a correct conclusion. On one issue namely as to whether Mr. Browne had lost confidence in Mr. Hogg the learned Judge did make an error but it was a highly technical error which by itself cannot vitiate the decree for dissolution if otherwise the granting of the decree be founded on just principles. We are thus brought again to the crucial issue in this case as to whether this school can continue under its present partnership with any reasonable prospect of profit. If the answer be rightly in the negative, then from the language of the statute, that is, by itself, clearly a ground for dissolution and the courts have so acted. *Jennings vs Baddeley* (3 Kay and Johnstone 78), *Bailey vs Ford* (13 Simon's Reports p. 496) and *Wilson vs Church* (13 Chan. Div. p. 1).

The learned District Judge has no difficulty in coming to a conclusion adverse to the defendants-appellants on this issue and neither have I. Mr. Obeyesekere has insisted that a business which can and has met its trading liabilities cannot be said to be insolvent and that it is unsound to include as loss depreciation in fixed assets which are due to what may be a temporary adverse market. On the latter point learned Counsel for the plaintiff-respondent cited to us the case of *The Spanish Prospecting Co., Ltd.* (1911, L.R. 1 Chan. Div. p. 92) which although not directly in point, contains in the judgment of Fletcher Moulton, L.J. such a lucid exposition of the meaning of the term " profits " that it will I think bear quoting :

> " The word " profits " has in my opinion a well-defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. " Profits " implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during

the year. This can only be ascertained by a comparison of the assets of the business at the two dates. For practical purposes these assets in calculating profits must be valued and not merely enumerated. An enumeration might be of little value. Even if the assets were identical at the two dates it would by no means follow that there had been neither gain nor loss, because the market value—the value in exchange—of these assets might have altered greatly in the meanwhile. A stock of fashionable goods is worth much more than the same stock when the fashion has changed. And to a less degree but no less certainly the same considerations must apply to buildings, plant, and other fixed assets used in the business, because one form of business risk against which business gains must protect, the trader is the varying value of the fixed assets used in the business. A depreciation in value, whether from physical or commercial causes, which effects their realizable value is in the truth a business loss....."

Now if one looks at the affairs of this partnership with this definition of "profits" in mind, the parlous condition of this business is at once apparent. It is burdened with heavy debt charges, its goodwill has dwindled to nothing, its fixed assets owing to the general fall in land values in the district have depreciated heavily and are now valued by Mr. Vandersmaght at a figure which represents about a fourth of the value given them in 1933. At their present value the land and buildings together stand according to Mr. Vandersmaght at a figure some twelve thousand rupees short of the mortgages on them. Furthermore, according to the evidence of Mr. Hall, a consulting engineer, they are in such a state of disrepair that it would cost about Rs. 30,000/- to bring them into a satisfactory condition. That buildings should be in a good state of repair is necessarily of great importance in the case of a school.

Along with these adverse factors there has been the serious drop in pupils already referred to. That all the parties have recognised the seriousness of the position is clear from the correspondence and Mr. Hogg himself as the business manager preferred what has been called a reconstruction scheme in November, 1938. The scheme is based on the somewhat speculative hypothesis that a reduction in the school fees will bring about an increase in the number of pupils. On this assumption and with economies in staff and salaries the scheme is able to show a paper profit but it is a scheme which makes no allowance for depreciation of the fixed assets, nor does it provide for the creation of a fund from which to pay off the mortgage debts. In a word it repeats the same financial errors which has contributed to bring the business to its present state.

A good deal of time was taken up at the trial by attempting to assess the factors responsible for the school's decline in prosperity. It is not necessary to examine these in detail. If some of the attributed causes appear petty it must not be forgotten that parents are sometimes as difficult to catch as the trouts in the streams of Nuwara Eliya, and the assignment of reasons for their disinclination to bite may be just as difficult.

One cause however, is clearly important, namely the competition of the convent which did not exist in the prosperous times before Mr. Hawkins'

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death but which is now continuing. For obvious reasons this competition presents a real difficulty to the school. It is the old story of the concern with high overheads being unable to compete with the products turned out by a rival establishment whose overheads are low or with imports from a country where labour is cheap.

It is clear from the judgment of the learned trial Judge that he had all these facts in mind, and that on the evidence he was justified in finding that the business of the partnership could only be carried on in the future at a loss. That being so, the learned Judge had a discretion to order a decree of dissolution and it cannot be said that in exercising this discretion he has acted unjudicially or clearly contrary to justice and equity. The plaintiff-respondent may stand to lose most by a continuance of the partnership because he alone has paid up his partnership interest in full and being a man of some means he would be likely to find himself called upon to meet the increasing liabilities. Furthermore, the somewhat ostrich-like attitude of the other partners can in the long run bring them no benefit. As a day of reckoning must come, it is in the ultimate interest of everyone that it should come early rather than late.

I would accordingly dismiss the appeal with costs.

Appeal dismissed.

SOERTSZ, A.C.J.

I agree.

Proctors :—

V. C. Modder, for defendants-appellants.

V. Ponnusamy, for plaintiff-respondent.

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

ZEINADEEN vs SAMSUDEEN AND ANOTHER

S. C. No. 123 (*L*)—*D. C. Ratnapura No.* 6138.

Argued on 25th May, 1939.

Decided on 19th June, 1939.

Mortgage action—Decree—Sale of property mortgaged—Writ for delivery of possession—Resistance by wife of judgment-debtor claiming title on a deed of gift executed pending mortgage action—Complaint to court under section 325 *of the Civil Procedure Code but out of time—Second application for writ of delivery of possession on the ground that party resisting was bound by the decree under section* 6 (3) *of the Mortgage Ordinance* (*Chapter* 74)—*Allowed—Refusal to vacate premises—Applicability of sections* 287, 325 *and* 326 *of the Civil Procedure Code* (*Chapter* 86) *and sections* 6 (3) *and* 12 (1) *of the Mortgage Ordinance* (*Chapter* 74)—*Is the transferee bound by the mortgage decree.*

In an action on a mortgage bond dated 26th July, 1931, decree was entered on 8th of October, 1935. In execution of the decree the mortgaged property was sold by the Fiscal on 20th April, 1936, and the plaintiff duly became the purchaser. Prior to the sale, *i.e.* on 24th March, 1936, the appellant protested against the sale by petition to court, stating that she was entitled to the land in question by virtue of a deed of gift by her husband, the 1st defendant, dated 3rd May, 1933. No further steps were taken on this petition. After the confirmation of the sale the plaintiff obtained an order for delivery of possession, but the appellant refused to give up possession on the strength of the said deed of gift. A complaint was made to court but was rejected as it was not made within a month of the resistance as required by section 325 of the Civil Procedure Code (Chapter 86) and that the appellant was not bound by the mortgage decree.

A second application for writ of delivery of possession was made by the plaintiff through a new proctor stating that the appellant was bound by the decree under section 6 (3) of the Mortgage Ordinance (Chapter 74). (The appellant had registered her deed but failed to register her address). This application was allowed and she again refused to vacate the premises. Within a month of this resistance, the plaintiffs proctor complained to court by petition and affidavit. After inquiry the learned Judge directed the Fiscal to put the purchaser in possession of the premises and if need be, to remove the appellant therefrom.

This order was appealed from.

Held : (i) That sections 325 and 326 of the Civil Procedure Code (Chapter 86) did not apply to the order made by the learned District Judge inasmuch as the decree entered did not order the delivery of possession or the removal of a party bound by the decree.

(ii) That the orders to Fiscal directing him to deliver possession of the premises must be regarded as having been made under section 12 (1) of the Mortgage Ordinance (Chapter 74) and not under section 237 of the Civil Procedure Code (Chapter 86).

(iii) The appellant was bound by the decree in the mortgage action because she had failed to register her address.

PER SOERTSZ, A.C.J.—" Although section 12 (2) provides that in the case of a sale carried out by the Fiscal, it shall be carried out in like manner as if there had been a seizure under a writ of execution for the amount of the mortgage amount, and that sections 255 to 289 and 290 to 297 of the Civil Procedure Code shall be applicable, the District Judge

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has authority under section 12 (1) to give directions for delivery of possession and for the removal of persons bound by the decree, when such directions become necessary. In this case such directions were necessary because section 287 of the Code did not apply."

N. E. Weerasooriya, K.C., with *D. D. Athulathmudali* and *A. E. R. Corea* for the 3rd respondent-appellant.

Colvin R. de Silva, for the petitioner-respondent.

SOERTSZ, A.C.J.

This case has run a very erratic course in the court below. The plaintiff sued on a mortgage bond dated the 28th of July, 1931. Decree was entered on the 8th of October, 1936, directing the payment of the principal and interest due on the bond, subject to the condition that if a sum of Rs. 100/- was paid on or before the 11th December, 1935, an application for further time to pay the balance would be considered, but that if the defendant made default, order for sale of the mortgaged property would issue without notice to them. The defendants made default, and the Fiscal on an order made on the 20th of April, 1936, sold the mortgaged property on the 1st of August, 1936, and the plaintiff who had been authorised by the decree to bid for and purchase the property in reduction of his claim, became the purchaser. Before the sale took place, to be precise, on the 24th of March, 1936, the present appellant had submitted a petition stating that she held a deed of gift of the 3rd of May, 1933, from her husband the 1st defendant for this land and protesting against the proposed sale. That was an unstamped petition and no notice appears to have been taken of it. Again on the 29th of August, 1936, that is to say nearly a month after the sale the appellant wrote to the District Judge notifying her claim, but she was informed that her petition should be stamped and that an application to set aside the sale should be made by way of summary procedure. She took no steps, and on the 9th of September, 1936, the sale to the plaintiff was confirmed and Fiscal's transfer No. 2967 of the 12th of November, 1936, was issued to him. On the 1st of December, 1936, the plaintiff's proctor filed petition and affidavit and moved that an order for delivery of possession be issued to the Fiscal to the end that he might be placed in quiet and vacant possession of the house described in the petition and affidavit. This was allowed. On the 7th December, 1936, the Fiscal reported that the present appellant claimed the land and premises on the deed of gift dated the 3rd of May, 1933, and that she refused to give up possession and prevented the Fiscal's officer from delivering possession. The Fiscal's return on page 119 of the record shows that this resistance occurred on the 5th of December, 1936. On the 6th of January, 1937, the plaintiff's proctor filed petition and affidavit complaining of this resistance and praying for a notice on this appellant to show cause why she should not be dealt with according to law. The secretary of the court wrote a memorandum on the motion paper filed with the petition and affidavit laying down the law in peremptory terms with the result that plaintiff's proctor was called upon to see the Judge in chambers. (See pages 76 and 77 of the record). What transpired in chambers

does not appear, but on page 78 of the record appears another motion by the plaintiff's proctor asking for a notice on the appellant to show cause why she should not be ejected from the house " as the deed of gift in her favour executed by the 1st defendant is subject to the debt due on the bond." Notice was issued accordingly. It was served, and on the 15th of March, 1937, her proctor appeared and stated that she was not a party to the case and that she was not affected by the decree and could not be ejected. The court fixed a date for inquiry into the matter of the application and objection, and eventually on the 30th of April, 1937, made order that the application was out of time in that it was not made within a month of the resistance as required by section 325 of the Civil Procedure Code and that the appellant " was not bound by the decree not having been made a party to the mortgage action." The application was refused.

On the 13th of May, 1937, another proctor filed plaintiff's proxy and moved for a writ of delivery of possession. He stated that all necessary parties had been joined in the action and that the party who resisted the Fiscal was a party bound by the decree under section 6 sub-section 3 of the Mortgage Ordinance of 1927. This motion was allowed.

On the 2nd of July, 1937, the journal entry shows that the Fiscal reported once more that the appellant on the 30th of June, 1937, refused to vacate the house or to allow anyone to enter into it. On the 28th of July within a month of this resistance, plaintiff's proctor filed petition and affidavit and asked that a day be appointed for the determination of the matter of the petition. That was allowed and the matter came up for consideration on the 29th of June, 1938.

The appellant's proctor contended that the plaintiff is concluded by the order of the 30th of April, 1937, and that the matter of the resistance could not be re-agitated on the issue of a fresh writ; that the appellant was not bound by the mortgage decree; and that section 325 did not apply except in the case of proprietory decrees.

For the plaintiff it was urged that the present application was in respect of resistance to a writ of the 13th May, 1937, and that, therefore, the dismissal of the earlier application did not bar the plaintiff; that the appellant not having registered her address was bound by the mortgage decree; and that section 325 and 326 applied to an order under section 287 of the Civil Procedure Code.

The learned Judge by his order of the 27th of July, 1938, allowed the plaintiff's application and directed that " the Fiscal will proceed to put the purchaser in possession of the property purchased, and if need be, remove the respondents therefrom, should they refuse to vacate the same."

The appeal is from that order. As I have already observed, the learned District Judge and the Proctors appearing for the parties, treated the applications for delivery of possession, as made under the Civil Procedure Code. On the facts in this case, I do not think sections 325 and 326 of the Code apply. Sections 325 enacts that " if in the execution of a *decree* for the

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possession of property under heads B and C (that is of section 217 of the Civil Procedure Code) the officer charged with the execution of the writ is resisted " etc. In this case, the decree entered did not order the delivery of possession or the removal of a party bound by the decree as it might have done. The Fiscal proceeded to deliver possession on orders made by the court subsequent to the decree. These orders were regarded as orders made under section 287 of the Code. In the case of *de Silva vs de Silva* (3 N.L.R. 161), a Full Bench held that sections 325 and 326 applied only to cases of resistance to a decree for delivery of possession and not to an order made under section 287. That ruling was doubted in the case of *Silva vs de Mel* (18 N.L.R. 164), but the Divisional Bench that considered this case sought to escape from the Full Bench ruling by holding that it applied only to sections 325 and 326, and not to section 328 with which they were concerned. But that emergency exit is not open to us for we are occupied with a case dealing with sections 325 and 326 and we are bound by the Full Bench decision that is if this order is one under section 287. It is obvious, however, that section 287 does not apply. It provides for three specific cases—(*a*) where the property sold in the occupancy of the judgment-debtor, (*b*) where it is in the occupancy of someone on his behalf, (*c*) where it is in the occupancy of a person claiming under a title created by the judgment-debtor subsequent to the decree. The appellant is not the judgment-debtor. She is not in occupancy on behalf of the judgment-debtor, but she is setting up a right in herself. (*a*) and (*b*) do not therefore, apply. Nor does (*c*) because there was no seizure at all, the Fiscal having acted under section 12 (3) (*a*) of the Mortgage Ordinance. What then is the result ? Is the purchaser's only remedy a regular action against the appellant for declaration of title and ejectment ? I do not think so. It would be unfortunate if a purchaser were put to the expense and delay of a regular action to obtain possession from a party bound by the decree entered in his favour. The appellant is bound by the decree. The mortgage bond was registered, and although the appellant had registered her deed, it is admitted that she failed to register her address. She was not, therefore, a necessary party and the decree binds her. In my opinion, the order made by the District Judge is an order that he could have made under section 12 (1) of the Mortgage Ordinance. Although section 12 (2) provides that in the case of a sale carried out by the Fiscal, it shall be carried out in like manner as if there had been a seizure under a writ of execution for the amount of the mortgage amount, and that sections 255 to 289 and 290 to 297 of the Civil Procedure Code shall be applicable, the District Judge has authority under section 12 (1) to give directions for delivery of possession and for the removal of persons bound by the decree, when such directions become necessary. In this case such directions were necessary because section 287 of the Code did not apply.

I would therefore, treat the order made by the District Judge as one made under section 12 (1) of the Mortgage Ordinance and I would uphold

it. In my view, this is essentially a case to which the concluding part of section 36 of the Courts Ordinance * applies.

I think this is a case in which the parties should bear their costs in both courts.

DE KRETSER, J.

I agree.

Proctors :—

M. A. W. Goonesekera, for defendants-appellants.
J. P. W. Delgoda, for petitioner-respondent.

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

DE SILVA AND OTHERS vs PERUSINGHE

S. C. No. 239/1938—*D. C. Kandy No.* 47773.

Argued on 16th June, 1939.

Decided on 30th June, 1939.

Jus retentionis—*Compensation—Rights of a person in the position of a tenant effecting improvements—Can an improving lessee or tenant claim compensation from any party seeking to recover possession from him or only from the lessor or landlord.*

Held : (i) That a person who is in the position of a tenant and who effects improvements on the premises is not entitled to *jus retentionis*.

(ii) That an improving tenant or lessee is entitled to claim compensation only from the lessor or landlord and not from any party seeking to recover possession from him.

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

H. V. Perera, K.C., with *E. A. P. Wijeratne* and *E. B. Wickremanayake*, for the plaintiffs-respondents.

SOERTSZ, A.C.J.

In the absence of proper evidence of a *diga* marriage between Tikiri Kumarihamy and her second husband, there was nothing that could be said in support of the appeal. It was bound to fail. I dismiss it with costs.

There remains the cross appeal from that part of the judgment of the trial Judge that declares the defendant to be entitled to compensation for necessary improvements effected by him and to a *jus retentionis* till payment of that compensation as assessed by a party agreed upon in the course of the trial. The trial Judge holds the defendant to be a *mala fide* improver. But on the evidence, his position can only be, at best, that of a tenant who has effected improvements without the landlord's consent. The position of improving tenants is different from that of persons who enter upon property in the belief that it belongs to them, or knowing that it belongs to another, but intending nevertheless to treat it as their own, and effect improvements

* Chapter 6. Revised edition of the legislative enactment, Vol. I p. 25 Edd. C.L.W.

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during their tenure of it. In the former case, they are regarded as *bona fide* improvers, in the latter case as *mala fide* improvers. A lessee or tenant, however, is not a possessor in the strict sense of that word, but his position is equiparated to that of a *bona fide* or *mala fide* improver according as he has improved his holding with or without the consent of the lessor or landlord, subject to this very important qualification namely that in no case has he the *jus retentionis*. In view of this, the order of the Judge giving a *jus retentionis* cannot stand for a moment.

In regard to his real rights as a tenant who had effected improvements without the landlord's consent and was entitled to compensation for necessary improvements, the question arises whether he can enforce those rights against the plaintiffs. In my opinion, it is quite clear that he cannot maintain such a claim against them on the law as it is established in this Island. Roman-Dutch Law text books raise a keen controversy on the point whether an improving lessee or tenant is entitled to claim compensation from any party seeking to recover possession from him or only from the lessor or landlord. But it is not necessary to enter into that controversy, for we have two Divisional Bench cases, *Lebbe vs Christie* (18 N.L.R. 353) and *Soysa vs Mohideen* (7 N.L.R. 279) which decide the point that arises in this case. The plaintiffs are entitled to the property in question by right of inheritance from their father, a Kandyan. The property was acquired property, and the plaintiffs' mother was entitled to enjoy the income from it in order to maintain herself during her life-time. The evidence shows that the plaintiffs did not dispute that right. It was during the currency of that right that the defendant entered into possession of this house. Whatever improvements he effected, were effected without the consent of the plaintiffs' mother and the view taken in South Africa in regard to the defendant's legal position is that he is in the position of *negotiorum gestor* compensated *quasi ex contractu*. But between the plaintiffs and the defendant there is no contract whatever, express, implied, or constructive. The plaintiffs get their title quite independently of their mother and the defendant cannot claim compensation even on the principle enunciated in *Mudiyanse vs Sellandyar* (10 N.L.R. 209).

As I have said before *Lebbe vs Christie* (*supra*) is decisive of this point.

I, therefore, allow the cross appeal and direct that decree be entered in favour of the 1st, 3rd and 5th plaintiffs declaring them entitled to the house and ground described in the schedule; ejecting the defendant therefrom and placing the said plaintiffs in quiet possession thereof; and ordering the defendant to pay the said plaintiffs damages at the rate of Rs. 15/- per mensem as from the 1st of February, 1936, till these plaintiffs are placed in possession. I make no additional order for costs of the cross appeal.

DE KRETSER, J.

I agree.

Appeal allowed.

Proctors :—

V. M. Gurusamy, for defendant-appellant.

Liesching & Lee, for plaintiffs-respondents.

Present: SOERTSZ, A.C.J.

DHANAPALA vs MOHAMED IBRAHIM

S. C. No. 208—*M. M. C. Colombo No.* 72529.
Argued & Decided on 20th June, 1939.

Motor Car Ordinance (*Chapter* 156)—*Charges under section* 57 (3) (*Revised Edition section* 63), *section* 37 (1) (*Revised Edition section* 39 (1)) *and section* 10 (1) (*Revised Edition section* 11 (1))—*Is a person who drives a motor car while a licensed driver is seated by his side guilty of the charges.*

The accused who drove a motor car while a person licensed to drive it was seated by his side was charged :

(i) with having driven a motor car negligently.

(ii) with driving a motor car without a certificate of competence.

(iii) with driving a motor car with defective brakes.

The Magistrate acquitted the accused stating that it was the licensed driver who was liable for the offences under (i) and (iii) and that the accused was not guilty under (ii). The Solicitor-General appealed against the acquittal.

Held : (i) That it was the actual driver who was liable for the offences (i) and (iii) being offences under section 57 (3) (Revised Edition section 63) and section 10 (1) (Revised Edition section 11 (i) and not the licensed driver.

(ii) That the accused was rightly acquitted of the charge under section 37 (i) (Revised Edition section 39 (1)) in view of the proviso to that section.

D. Jansze, Crown Counsel, for the complainant-appellant.

No appearance for the accused-respondent.

SOERTSZ, A.C.J.

The accused in this case was charged with certain offences under the Motor Car Ordinance No. 20 of 1927. He was charged with having driven a motor car negligently, punishable under section 57 (3), new section 63 of the Ordinance, secondly, with driving a motor car without a certificate of competence, punishable under section 37 (1), new section 39 (1) of the said Ordinance, and thirdly, with driving a motor car with defective brakes, punishable under section 10 (1), new section 11 (1) of this Ordinance.

It would appear that the accused was driving this motor car while a person licensed to drive it was seated by his side. Notwithstanding the support, moral and other, that this proximity of a duly licensed driver might be assumed to have given this driver who had no licence, he succeeded in a short space of time to go on the wrong side of the road, knock down a man called Ramakutty, who was an employee of a hotel and was standing within a foot of the kerb, and then showing that he was no respector of persons, knocked down a beggar. I am informed that the driver contributed to this part of the achievement by interfering with the driving wheel himself,

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and then eventually either one or other or both of them succeeded in knocking over a bicycle, and quite pleased with their performance they brought the car to a stand still. In these circumstances the charges I have mentioned were laid against the accused. But the learned Magistrate, to whom an extract from some Australian case which is reported in some digest was cited, made up his mind that that case applied and enabled him to acquit the accused, on the ground that, while he was on this frolic of his, there was seated by him a duly licensed driver.

Now it is perfectly clear that, if this is good law, that the consequences must be startling. One has only to take the precaution of having a licensed driver by one's side in order to be able to knock down every second man one came across and plead that one was not liable because there was a licensed driver by one's side. The section itself, 57 (3), which is the new section, 63, says that anyone who drives a car negligently is liable to be dealt with under that section regardless of how that person was situated at the time he was driving, whether he was driving in splendid isolation or whether he had a licensed driver seated by him at the time. The matter is however different in regard to the charge preferred against the accused that he drove without a certificate of competence. In that case the proviso to section 37 (1) new section 39 (1), enables a person to drive without a certificate of competence provided a licensed driver is by his side, so that the accused was rightly acquitted of that charge. In regard to the other charge of driving with defective brakes, it does not make any difference whatever that at the time the car which the person charged with driving is found with its brakes defective, the licensed driver is also present in the car. In regard to that offence the person actually driving is liable as the driver under that section for that offence.

I, therefore, affirm the acquittal entered by the Magistrate in regard to the charge of driving without a certificate of competence. I set aside the order of acquittal in regard to the other two charges and send the case back for the Magistrate to impose such sentences as he thinks fit after addressing himself to the matter.

Order of acquittal affirmed in part and set aside in part.

Proctors :—

Complainant-appellant in person.

Merrill W. Pereira, for accused-respondent.

Present : SOERTSZ, A.C.J., DE KRETSER, J. & WIJEYEWARDENE, J.

USOOF JOONOOS vs ABDUL KUDNOOS

S. C. No. 159 (*Inty.*)—*D. C. Colombo No.* 47499.
Argued on 19th & 20th June, 1939.
Decided on 3rd July, 1939.

Civil Procedure Code (*Chapter* 86) *section* 474—*Liability of executor or administrator personally to pay costs in action instituted by him on behalf of the estate of the testator or intestate.*

Held : (i) That an executor or an administrator who brings an action in right of his testator or intestate is personally liable, under section 474 of the Civil Procedure Code (Chapter 86), to pay costs to the defendant in case of judgment being entered for the defendant unless the court shall otherwise order.

(ii) That where an executor or administrator has become personally liable to pay costs in an action brought in right of his testator or intestate the property of the estate of the deceased cannot be seized in execution of the decree for costs.

Cases referred to :—

Nonnohamy vs Podisingho 23 N.L.R. 319.
Nugara vs Palaniappa Chetty 14 N.L.R. 327.
Nanayakkara vs Juan Appu 21 N.L.R. 510.
Fernando vs Fernando 3 C.W.R. 328.

Approved :—

Edirishamy vs de Silva 2 N.L.R. 242.

C. Thiyagalingam with *E. B. Wickremanayake* and *S. Mahadeva*, for defendant-appellant.

S. J. V. Chelvanayagam with *A. Muttucumaru*, for 2nd plaintiff-respondent.

SOERTSZ, A.C.J.

The short point referred to us for decision is whether the property of an intestate is liable to be sold on an order for costs made in favour of a defendant against a plaintiff acting in right of the intestate in the capacity of an administrator.

My brother Moseley and I referred this question to a Divisional Bench not because we ourselves had any doubt in regard to it, but because in view of the conflict between earlier decisions on it, an authoritative ruling seemed desirable.

In *Nonnohamy vs Podisingho* (23 N.L.R. 319) Ennis, J. and Porter, J. held that section 474 of the Civil Procedure Code only provides an *additional remedy* against the executor or administrator personally, and that it is open to the defendant to seize the property of the testator or intestate in execution

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of his decree for costs. Ennis, J. sought to distinguish the case before him from the case of *Edirishamy vs de Silva* (2 N.L.R. 242), but so far as I understand, the earlier case is a direct authority on the point that arose in the case before Ennis, J. and Porter, J., and that arises now in this case. In that case, Bonser, C.J. and Lawrie, J. held that on an order for costs made against an executrix, she was personally liable and the "Fiscal therefore could not sell or the petitioner buy more than the personal interest of the executrix." He also said " the English Law does not allow a defendant to recover his costs from the estate of the deceased.....and in my opinion that law should govern this case." The case before Bonser, C.J. was one in which the sale occurred prior to the passing of the Civil Procedure Code, and commenting on that fact, the learned Chief Justice said that " since the passing of the Civil Procedure Code, it was clearly the law that an administrator was personally liable for costs, for section 474 expressly provides in the case of an action brought by an executor or administrator in right of his testator or intestate, the plaintiff is to be liable as though he were suing in his own right upon a cause of action accruing to himself and the costs are to be recovered accordingly." We respectfully agree with that view which, in our opinion, is the correct interpretation of section 474 of the Civil Procedure Code.

Counsel for the appellant was at great pains to emphasise that under the Roman-Dutch Law the estate of a deceased person was liable *qua* estate for costs resulting from litigation undertaken by an executor or administrator. That, however, is a proposition we were always willing to concede, subject to the qualification that the litigation was undertaken *bona fide*. But we are unable to follow him when he deduces from the liability the further proposition that whenever an order for costs is made against an administrator or executor, the judgment-creditor is entitled *ipso facto* to take out writ and sell property belonging to the intestate. In our view section 474 enables a court to exempt an executor or administrator from personal liability for costs and to make an order that costs shall be paid out of the estate, but that, of course, is a power which a court will exercise in appropriate cases where all the parties interested in the estate are before it. But where a court does no more than say that a plaintiff-executor or administrator shall pay the defendant's costs, the estate of the deceased is not automatically involved in that order. In such a case the administrator or executor is personally liable to pay the costs. He may later in proper proceedings seek to be reimbursed out of the estate. In the sixth edition of Daniell's Chancery Practice, Vol. II part 1 at page 1175, it is stated on the strength of a number of judicial decisions that " the general rule which gives the costs of the suit to the victorious party, and throws them on the unsuccessful party, applies equally to cases in which the parties are suing or defending in *autre droit*, and to those in which they are *sui juris*."

In the case of *Nugara vs Palaniappa Chetty* (14 N.L.R. 327), Lascelles, C.J. and Middleton, J. held that an executor or administrator who is on the

record as plaintiff or defendant is liable personally for costs in the same way as any other person, and " that the question whether he is entitled ultimately to recover the amount of the costs which he is ordered " to pay from the estate is a totally different matter." In *Nanayakkara vs Juan Appu* (21 N.L.R. 510), Bertram, C.J. and de Sampayo, J. followed the ruling in *Nugara vs Palaniappa Chetty* (*supra*) and added " the fact that a judgment-debtor has a right of indemnity against a third party does not entitle a judgment-creditor to sell the property of that third party under a judgment against his debtor. An order of court is clearly always necessary where it is sought to make the assets of such a third party available." In an earlier case, *Fernando vs Fernando* (3 C.W.R. 328), Wood Renton, C.J. and de Sampayo, J. had taken a similar view adopting the rule laid down in *Nugara vs Palaniappa Chetty* (*supra*). Wood Renton, C.J. said " the point is clearly covered both by Statute Law and by judicial decisions. Section 474 of the Civil Procedure Code provides that even when an executor brings an action in right of his testator, he is himself personally liable to pay the costs of the defendant should the action be dismissed, unless the court makes an order to the contrary, and that in all other cases the executor is liable for the defendant's costs if the action fails just as if he was suing upon a cause of action accruing to him personally."

We agree with counsel for the appellant that there is an *in terrorem* element in section 474, but what he fails to appreciate is that that element will disappear if his contention is sound, for in that case it will be open to an executor or administrator to fritter away the estate by wasteful or dishonest and collusive litigation.

We, therefore, hold that on the order for costs made in this case, the land sold by the Fiscal was not liable to be sold. In this view, the appeal fails and must be dismissed with costs.

DE KRETSER, J.

I agree.

WIJEYEWARDENE, J.

I agree.

Appeal dismissed.

Proctors :—

N. M. Zaheed, for defendant-appellant.

T. Canagarayar, for 2nd plaintiff-respondent.

Present : SOERTSZ, A.C.J.

BABY vs TIKIRI DURAYA AND ANOTHER

S. C. No. 76—C. R. Gampola No. 3678

Argued & Decided on 27th June, 1939.

Preliminary objection—Appeal—Failure to indicate that a party was made a respondent in his personal capacity as well as in his capacity of guardian-ad-litem.

The plaintiff brought an action for declaration of title, for damages, and ejectment against four defendants. The 2nd defendant who was sued in his personal capacity and in the capacity of *guardian-ad-litem* of the two added-defendants who were minors, gave two separate proxies. Plaintiff's action having been dismissed he appealed. In the petition of appeal he made the 1st and 2nd defendants-respondents, but there was nothing to indicate that the 2nd defendant was made a respondent in his capacity of guardian of the two minors as well.

Held : (i) That the appeal was not properly constituted.

(ii) That in the circumstances it was not open to the Supreme Court to grant relief.

E. B. Wickremanayake with *S. Mahadeva*, for the plaintiff-appellant.

G. P. J. Kurukulasooriya, for the defendants-respondents.

SOERTSZ, A.C.J.

A preliminary objection has been taken to this appeal on the ground that parties who are likely to be prejudically affected in the event of this appeal succeeding have not been named respondents to this appeal. The parties who it is alleged are necessary for the purpose of constituting this appeal properly are two minors, the children of the 2nd defendant. The 2nd defendant had been appointed guardian of these two minor children, but when this appeal was preferred the plaintiff-appellant in making the 2nd defendant a party along with the 1st defendant did not even try to make it clear that the 2nd defendant was being made a respondent in his personal capacity as well as in his capacity of guardian of these two minor children. In the circumstances it is obvious that two necessary parties have not been named respondents. It is obvious that they should have been named respondents.

I do not, therefore, think that this is a case in which it is open to grant relief.

I uphold the objection taken on behalf of the respondents and dismiss the appeal with costs.

Appeal dismissed.

Proctors :—

A. M. I. Gunaratne, for plaintiff-appellant.

M. W. R. de Silva, for defendants-respondents.

Present : SOERTSZ, A.C.J., DE KRETSER, J. & WIJEYEWARDENE, J.

MISSO (Revenue Inspector) vs PERERA

S. C. No. 16—*M. C. Colombo No.* 17047.

Argued on 19th June, 1939.

Decided on 10th July, 1939.

Motor Car Ordinance (*Chapter* 156) *sections* 2 *and* 31 (1)—*When is a registered owner of a motor car liable to be convicted of a breach of section* 31 (1) *of the Ordinance.*

Held : That in a prosecution for a breach of section 31 (1) of the Motor Car Ordinance (Chapter 156) the prosecution must prove not only that the registered owner possessed the motor car at some time during the material period, but also, that at some time during that period, it was used on a highway.

E. B. Wickremanayake with *J. A. T. Perera* and *S. de Zoysa*, for accused-appellant.

H. V. Perera, K.C., with *E. F. N. Gratiaen*, for complainant-respondent.

J. W. R. Illangakoon, K.C., Attorney-General, with *M. F. S. Pulle, Crown Counsel*, as amicus curiae.

SOERTSZ, A.C.J.

It is not with any desire to play upon words, but only to state a fact to which our Law Reports bear eloquent witness, that I permit myself the observation that the Motor Car Ordinance is not an enactment that those who run may read. On the very question that now arises for consideration there is a great variety of judicial opinion, and in view of its not infrequent recurrence in our courts, it seemed desirable to have a definite decision which would afford us "the sure anchorage of a dependable rule." Hence this Divisional Bench.

The question, stated briefly, is this : What is the liability imposed by section 31 (1) of the Ordinance when it requires that "no person shall possess or use a motor car for which a motor car license is not in force " ? That question arises in this case in these circumstances. The name of the accused appears on the register as that of the owner of motor car No. C 7576. In 1937, he took out a licence for it, but he omitted to obtain one for the year 1938, and in consequence, this prosecution was launched against him. The plea he sets up in defence is that in October, 1937 he sold the car to a purchaser who said he was going to dismantle it, and he knows nothing of the car thereafter. These facts the prosecutor is unable to contradict, and for the purpose of this case, they may be regarded as established. But, it is contended, that the accused is bound to provide himself with a licence, year after year, so long as his name continues on the Register.

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We have had the advantage of a full argument by Counsel appearing on the two sides, and also the assistance of the Attorney-General who appeared as *amicus curiae*, and I have come to a very clear view upon the question, although that view differs from those taken in earlier cases.

I will now refer to those cases in order to indicate how the law stood in regard to this point when I referred it to a Divisional Bench. In *Government Agent, Western Province vs Bilinda* (3 Cr. App. R. 38) Garvin, J. held that for the purpose of a conviction under this section it is not sufficient to prove that the accused man's name appears on the register as the owner of the car and that no licence has been taken out by him for the material period, but that " the prosecution must also prove that during that period the motor car was *in the possession* of the accused *or* that he *did use* it. He acquitted the accused, because his evidence to the effect that although he bought this car, it always lay in the garage in which it was at the time he purchased it was not opposed. The implication of this ruling is that if it had been shown that the accused was in *actual possession* of the car at any material time, he would be liable whether or not he used it.

In *Hodson vs Madugalle* (1935, 5 Ceylon Law Weekly 22) Koch, J. adopted this ruling and said " it is necessary for the prosecution to prove that the accused did *possess or use* the motor car in question during some period in 1935."

In *Government Agent, Northern Province vs Sepamalai* (1936, 1 Ceylon Law Journal 42), Dalton, J. too followed the ruling in Bilinda's case and acquitted the accused because although her name appeared as that of the registered owner, there was no evidence that " the accused *either possessed or used* the motor car at the time set out in the charge." Here again, the implication is that in order to sustain a charge under this section it is necessary to show that the registered owner *either possessed or used* the car.

In *Government Agent, Central Province vs Beeman* (1932, 33 N.L.R. 343),* Drieberg, J. took a different view. He held that where a registered owner of an omnibus on being prosecuted under this section, set up the plea that during the period in question the omnibus was in pieces at a garage, he was properly convicted because that plea does not amount to a statement that " he is not in possession of the bus." If the bus was left for repairs or storage at V's garage, it was still for the purposes of this section in the possession of the appellant. What the appellant says in effect is that he is not in possession of a car which is capable of being used, but if this is so, he should have satisfied the Registrar.....and had the registration of it cancelled. Drieberg, J. added that " if as has been proved, the appellant was in possession of the bus he was liable to take out a licence for it and *it does not matter whether he used it or not.*"

In *de Silva vs Rosen* (1932, 2 Ceylon Law Weekly 98) Macdonell, C.J. adopted this decision and stated that the effect of it was that " the accused, not having divested himself of the possession in law of this car in the manner provided by section 22 or section 24, is still in law in possession of this car,

* 1 C.L.W. 223 (Edd.)

and is liable for the licensing duty." The defence in that case was that the accused had no car for three years. The prosecution was unable to contradict that.

In *Misso vs de Zoysa* (1935, 4 Ceylon Law Weekly 81), I followed these rulings that "once a person has been registered owner of a car on his declaration that he is entitled to possession of it, he must be regarded as the person in possession of it unless there has been a transfer of possession in the manner provided by the Ordinance or unless by the cancellation of the registration it ceases to be a car which can be the subject of possession for the purposes of this Ordinance."

In *Government Agent, Province of Sabaragamuwa vs Peries* (1934, 36 N.L.R. 291), Drieberg, J. held that in a charge laid under this section *no proof is necessary of its user* during the period when there is no licence in force.

Finally, in *Hodson vs Cassim* (1938, 40 N.L.R. 83),* Keuneman, J. followed *Government Agent, Western Province vs Bilinda* and *Government Agent, Northern Province vs Sepamalai* and held that "the mere production of the register and proof that the accused's name appears there as the registered owner is not sufficient to prove that the accused possessed or used the vehicle in question. But where it has been proved that application has been made for registration.....in the name of the accused by the accused himself or at his instance.....it is possible in such circumstances to presume *prima facie* that the accused possessed the vehicle thereafter." Keuneman, J. added that he did not agree with the rulings in *Government Agent, Central Province vs Beeman, de Silva vs Rosen* and *Misso vs de Zoysa*, and that he thought that "the presumption of possession might be rebutted by the accused *in any way he wishes.*"

After a very careful examination of all these cases and of the Ordinance itself, I have, as I said, come to a very definite and clear conclusion that the correct view is that for the purpose of section 31, the prosecutor must prove not only that the registered owner possessed the motor car at some time during the material period, but also, that at some time during that period, it was used on a highway. Once those elements have been established, it is not open to the accused to rebut possession "in any way he wishes," but only by bringing himself within the exemption expressly given by the Ordinance.

To this view I have been led by a careful examination of section 2 of the Ordinance. In the course of the argument before us, that section was severely commented upon. I believe, I joined in the attack. Mr. H. V. Perera went the length of saying that if the draftsman responsible for the Ordinance knew what he was doing when he framed that section, he would, or at least, ought to have hidden it away in some obscure corner. But the compiler of the new edition of the legislative enactments had raised that provision from the humble dependence of a sub-section to the splendid isolation of a section all by itself. By a strange irony, however, it is this very section

* 12 C.L.W. 37 (Edd.)

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that, I think, provides the clue to what appeared to be an inextricable maze. It is the " open sesame " to the Ordinance.

Section 2 runs as follows: "Unless otherwise provided, this Ordinance applies to a motor car *only when on a highway*." Drieberg, J. in *Government Agent, Province of Sabaragamuwa vs Peries* (36 N.L.R. 291), interpreted this section " in its reference to highways as dealing with so much of the Ordinance as regulates the *use* of cars." Obviously, this is a considerable restriction of the meaning of the words of the section. It can be justified only if upon any other hypothesis, other provisions in the Ordinance are rendered nugatory. It is a cardinal rule of legal interpretation that every declaration in an enactment must be assumed to mean all that it says, and that every word must be given effect to if it is possible to do so. If the legislature intended to limit the operation of section 2 to that part of the Ordinance that relates to the *use* of a motor car, and not to make it applicable to "*matters unconnected with the use of a car*," it could have made that intention manifest by the employment of an additional word or two. But, as it stands, section 2 is an invariable condition precedent, and to be assumed unless otherwise provided. Drieberg, J. remarked that " it is not well worded." Perhaps, there is some justification for the remark, and perhaps, the idea meant to be conveyed by the use of the phrase "only when on a highway" might have been expressed better in other words. But the words used seem sufficient for the end in view.

The scheme of the legislature appears to be to regulate the construction and equipment of motor cars that are to appear on our highways ; to provide for the mode and condition of their use on highways consistently with the safety of traffic and with the preservation of the road ; and to enable the authorities to collect licensing and other fees by way of reimbursing themselves for the expenditure incurred on account of the repair and maintenance of highways. In such a scheme, the legislature is not at all concerned with motor cars that do not come on highways at any time, or that do not come on highways during some relevant period. The purpose of section 2 is to make that fact and to declare that when any question of compliance or non-compliance with the requirements of the Ordinance, or of offence or no offence under it arises, that that question must be determined with reference to the prerequisite, whether or not at any material point of time or during any material period the motor car in question was on a highway. I cannot accept the dicta of Drieberg, J. that " there can be no relevancy to the offence of non-observance of this provision where the car happens to be, whether on the road or in the garage," and that " it is an offence for a person to possess a car for which no licence is in force and this is *not affected by the question of place of user or whether it is used at all.*" Now it is clear that in the absence of section 2, the use anywhere in Colombo or outside Colombo whether on highways, *or on private lands,* of cars of certain dimensions, would constitute an offence. But, obviously the legislature could not have

so intended. So far as it is concerned, there is no purely ethical or moral *desideratum* in regard to the dimensions of cars, but their size assumes a primary importance when the question is whether they may, or may not be permitted on a highway consistently with other interests. Similarly, the legislature is not concerned with the dimensions and relative position of trailers (section 5), or with the construction and equipment of cars (sections 10 (1), 11, 12, 13, 14, 15, 16, 17) when they are not on a highway. To my mind, it is an essential ingredient of the offence that the car was on a highway at some material point of time.

A scrutiny of the different chapters of the Ordinance makes this view inevitable. Chapter II deals with the construction and equipment of cars. Section 4 provides for the dimensions of cars for use in Colombo and outside Colombo. Chapters IV, VI, VII, VIII and IX deal with 'identification plates,' 'certificates of competence,' 'driving rules,' 'restriction of use on highways and speed limits,' and 'hiring cars and lorries' respectively and as the very titles suggest, are intended to apply to 'motor cars when on a highway.' Likewise the supplementary Chapter X contemplates 'motor cars when on a highway.'

But it may be said that the Chapters, I have referred to, relate to the *use* of a car and are within the scope of the interpretation given by Drieberg, J. I will therefore, examine the two Chapters I have so far omitted, namely Chapters III and V which deal with *possession* of cars and in Drieberg, J.'s phrase "with matters unconnected with the use of cars." These are the the important chapters so far as this case is concerned. Chapter III deals with the registration of Motor Cars. Section 19 (1) read with section 2 would have made possession and/or use of a motor car even for a limited purpose and by anyone at all an offence, if it was shown that it had been on a highway at some material time unless there was a registered owner of that car. That would have resulted in manufacturers and dealers of cars being involved in great hardship, and section 15 (2) is designed to free them from that hardship. It provides for possession and/or use by dealers of cars on a highway although there are no registered owners in respect of those cars. Section 19 lays down the first condition for the possession or use of a motor car on a highway so far as persons other than those indicated in its sub-section 2 are concerned. That condition is that there should be a registered owner. Section 31 in Chapter V supplements section 19 and provides the other condition namely that there should be a licence in force to cover both possession and use, at every point of time at which a motor car is used on a highway, and here again the dealer is exempted altogether from this requirement, and the owner of a motor car who has notified the licensing authority that the car will not be used for a stated period is exempted during that period from liability to conviction "*by reason only of* a person's possession of the motor car." Emphasis is laid on the fact that possession alone will not inculpate him during that period. If, despite the notification there is user during the period notified, the person using it will, of course, be liable under section 31 (1),

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and the notifying owner's possession during that period will also become culpable, for the condition for exemption from a licence will have been violated, namely the condition of non-user. In that event, the owner as the registered owner becomes liable under 31 (3) to a fine for the offence as well as to a fine to cover the amount payable for the licence; and the party who used the car during that period, if he is other than the owner, will himself be liable to punishment. Now, it is obvious that it is an easy matter to fix liability in the case of an offending "user" of the car. He is the person detected using it. But if the blameable owner is to be the owner as the common law understands him, it will be necessary to pursue a changing and even elusive person. That of course would be a most unsatisfactory state of things from the point of view of the legislature, and to obviate it, section 26 provides that "for the purposes of any proceeding under this Ordinance, the registered owner shall be deemed to be the owner." The only exceptions to this rule are (*a*) where the absolute owner registered under section 19 (3) is shown to be in possession and (*b*) where the person who would have figured as "absolute owner" if he had complied with section 19 (3), seizes the car under section 23 (6) and the registered owner complied with the requirements of section 23 (6) (*a*) and (*b*). Any other change of possession does not result in the exemption of the registered owner from liability unless section 23 is obeyed. Upon such a change of possession, however, the person entitled to possession by virtue of that change is allowed to use the car for seven days although he has not yet conformed with section 19 (1), but during that period the liability of the registered owner continues despite the change of possession till the new owner is put upon the register and licensed. The result is thus attained that there is no interval during which a car "on the highway" exists without an imputable registered owner.

An examination of Chapter III and Chapter V of the Ordinance in this manner leads to the conclusion that it is a motor car on the highway that is in their contemplation as is clearly the case in the other chapters. In a word section 2 is the corner stone of the Ordinance.

It follows that the accused in this case is not liable to conviction under section 31 (1) because the uncontradicted evidence in the case is that this motor car was not on a highway in the year 1938 during which it is charged by the prosecution and admitted by the accused that there was no licence in force. There was no obligation imposed on him to obtain a licence in 1938 for a motor car that was not on a highway during the year. If, however, there was evidence to show that at any time during 1938, this car was on a highway, then, in my opinion, it would not have availed the accused to prove that although he appeared as the registered owner, he was not the true owner because he had sold the car in October, 1937. I cannot agree with the view taken by Keuneman, J. in *Hodson vs Cassim* (40 N.L.R. 83),* that it is open to a registered owner to rebut "the presumption of possession *in any way he wishes.*" It is not, I submit, correct to speak of "a presumption of possession arising from registered ownership. It is much more than

* 12 C.L.W. 37 (Edd.)

a presumption that arises. A statutory possession comes into being and overrides *de facto* possession and possession as it is understood in common law. This possession imputed to the registered owner by the Ordinance, can, in the view I take, be displaced only in the manner expressly provided by the Ordinance.

For these reasons, I set aside the conviction and acquit the accused.

SOERTSZ, A.C.J.

In view of the observation made by my brother de Kretser on the question of the burden of proof in a case of this kind, I think I ought to add a few words to state as clearly as possible that my view on the point is that it is incumbent on the prosecutor to lead evidence, to show that at some time during the material period, the car was on a highway, and that it is only in that event, that occasion arises for the accused to enter upon a defence. In this case, I find the accused not guilty, because the prosecutor stated that he was not able to establish that essential fact. It is true that the accused was able to prove and did prove that he had not used the car during the year in question. He apparently attempted and accomplished that task because the prevailing view was that a *prima facie* case against an accused was established once it was shown that he continued to be the registered owner of an unlicensed motor car and that it was in his possession. But my brothers agree with me that "no charge can be maintained under section 31 in respect of an unlicensed motor car *which has not been used on a highway* at some time during the material period." To my mind, the inescapable result of that finding is, that in order to establish a case against an accused, it is necessary for the prosecutor to show not only that he is the registered owner of an unlicensed motor car, *but also that the motor car was on a highway* at some time during the material period, for the Ordinance applies only to motor cars on a highway. Till such evidence has been adduced, there is no case for the accused to meet. He is entitled to maintain "a sullen silence" and to claim an acquittal. I am quite unable to subscribe to the propositions of my brother de Kretser that "in the first result the prosecutor will have to meet a defence of non-user," and that "in case of doubt.....the doubt should tell against the owner of the car." If I may say so, with respect, those propositions appear to me to be topsy-turvy. They are subversive of the fundamental principles of criminal law that the accused must prove the guilt of the accused, not the accused his innocence and that the accused is always entitled to the benefit of the doubt.

I am aware that there are a few exceptional criminal cases in which the legislature has imposed upon the prisoner the burden of proving that he is not guilty, but this is not such a case.

DE KRETSER, J.

I agree, and wish to add that I reserve my opinion regarding the onus of proof, a matter which was not argued before us nor discussed later.

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In the final result the prosecutor will have to be in a position to meet a defence of non-user, but in a case of doubt the question of non-user will be a matter of importance, and as at present advised, I incline to the view that the doubt should tell against the owner of the car.

WIJEYEWARDENE, J.

I have had the advantage of reading the judgment of my Lord the Acting Chief Justice, and I agree that no charge can be maintained under section 31 of the Motor Car Ordinance (vide—Legislative Enactments Volume 4, Chapter 156), in respect of an unlicensed motor car which had not been used on a highway at some time during the material period.

In this case there is clear evidence that the car in question was not used on a highway during the year 1938. I would, therefore, set aside the conviction and acquit the accused.

Conviction set aside.

Proctors :—

Vivian Jansz, for accused-appellant.

Wilson and *Kadiragamar*, for complainant-respondent.

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

LITTLE'S ORIENTAL BALM & PHARMACEUTICALS LTD. vs USSEN SAIBO

S. C. No. 111 (*Inty.*)—*D. C. Colombo No.* 6217.

Argued on 20th & 21st June, 1939.

Decided on 30th June, 1939.

Trade marks—Colourable imitation—Intent to pass off defendant's goods as plaintiff's.

The facts shortly are as follows :—

The plaintiff had registered a trade mark in respect of a remedy called "Little's Oriental Balm." His labels and cartons had been got up in a particular style. The defendant put into the market a remedy called "Pain Killer's Electric Balm." The labels and cartons of this remedy was also got up in the same style as the plaintiff's. The plaintiff's remedy was the older. The plaintiff alleged that the imitation was such, as was likely to deceive a purchaser, and brought this action to restrain the defendant from passing off his goods as plaintiff's. The District Judge held in favour of the plaintiff. The defendant appealed and the appeal was dismissed.

Held : That although the plaintiff may have no monopoly for the use of the individual features of his trade mark, if they are so combined by the defendant as to pass off the defendant's goods as the plaintiff's, then the plaintiff is entitled to an injunction to restrain the defendant from passing off his goods as of the plaintiff's.

N. E. Weerasooriya, K.C., with *M. M. I. Kariapper* and *A. E. R. Corea*, for defendant-appellant.

H. V. Perera, K.C., with *C. X. Martyn*, for plaintiff-respondent.

This is an appeal from a judgment of the District Judge of Colombo in favour of the plaintiff, in an action for infringing the plaintiff's trade marks and for passing off goods not of the plaintiff's manufacture as and for the goods of the plaintiff.

The plaintiff claims to be the owner of the following registered marks :

i. The trade mark No. 3139 (vide P2) registered on October 9th, 1924, consisting of the device of a circular label and a narrow strip of paper, the circular label containing a monogram composed of the letters L.O.B. and the words "Little's Oriental Balm, Established 1885"

ii. The trade mark No. 4601 (vide P1) registered on December 16th, 1930, and consisting of the device of a packet bearing :

a. a rectangular label with the letterpress

Little's Oriental Balm
A certain remedy for
Rheumatism, Neuralgia, Sore Throat, Nervous-
Headaches, Chest Colds, Sprains, Bruises, etc.

Sole Manufacturers
Little's Oriental Balm & Pharmaceuticals Ltd., Madras.
Successors to A. C. Berryman, Chemist.

b. a circular label similar to the label constituting the trade mark No. 3139.

The defendant registered on December, 19th, 1930, the trade mark No. 5246 (vide D1) consisting of the device of a rectangular label with the letterpress :

Pain Killer's Electric Balm
A sure remedy for
Headaches, Chest Colds, Sprains, Bruises, Backache,
Rheumatism, Neuralgia, Sore Throat, Swelling, etc.

Sole Manufacturers
Electric Balm & Pharmaceutical Works
Electric Balm Depots
Kandy & Colombo.

The evidence led by the plaintiff shews that for at least twenty years the plaintiff has been selling his balm in Ceylon, in bottles packed in red cartons as depicted in trade mark No. 4601. The carton carries the circular label on the top surface and the rectangular label on a side. A narrow strip of paper attached to the circular label passes round four sides of the carton. The rectangular label has a red border and the words " Oriental Balm " in red letters while the rest of the letterpress is in dark blue. There is a wrapper round the bottle, which is placed inside the carton and contains an advertisement of the plaintiff's balm. The plaintiff appears to be doing an extensive business in his Oriental Balm in Ceylon, the balm being used by literate as well as illiterate people.

The respondent sells his Electric Balm in bottles packed in orange-coloured cartons. The carton bears on the top surface a circular label containing the figure of a man and the words " Pain Killer's Electric Balm "

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and on a side the rectangular label constituting the trade mark No. 5246. A narrow strip of paper attached to the circular label passes round four sides of the carton. The rectangular label has a red border and the words " Electric Balm " in red letters while the rest of the letterpress is in dark type. The defendant too uses a wrapper round the bottle, advertising his balm. The defendant does not appear to have done any business in his balm prior to 1934.

The oral evidence led in the case is somewhat scanty but this evidence taken with the exhibits serves to show that there has been an infringement by colourable imitation. The defendant has used on his wrappers (marked P14) a device similar to the device on P1 which is the certificate of registration in respect of plaintiff's trade mark No. 4601. The defendant's advertisement (marked P7) and cash memo (marked P10) bear similar devices. These clearly constitute an infringement. The law on the subject is set out in Kerly on Trade Marks (5th Edition page 464) as follows :—

> " It is not necessary that the spurious mark should be actually applied to the goods, provided it is so used in connection with them as to be calculated to cause them to be taken for the plaintiff's goods. Use on the wrapper in which they are sold, or upon a slip placed in the package with them.....or in circulars or advertisements offering them for sale is sufficient."

It is also not unlikely that ignorant people who purchase balm would be misled by the circular label which the defendant has chosen to use on his packets in exactly the same position as the plaintiff places his trade mark No. 3139 on his packets, though, of course, these two circular labels when placed side by side show marked differences—the plaintiff's label containing a monogram and the defendant's label, the figure of a man.

The general get-up of the defendant's goods affords clear proof of a colourable imitation with intent to pass off the defendant's goods as the plaintiff's goods. The form and size of the labels, the borders round the labels, the letterpress on the rectangular label, the printing of the words " Electric Balm " in red type, the running of the strip of paper round the cartons, the design on these strips of paper, the arrangement of the printed matter on the cartons, all these facts betray a deliberate attempt at passing off. In this connection it has to be borne in mind that the cartons of the rival traders will not be seen side by side and " the proper test is whether the get-up of the defendant's goods would be likely to deceive a purchaser who is acquainted with the plaintiff's get-up, but trusts to his memory " (vide Halsbury's Laws of England, Volume 27 paragraph 1350). It is true that the plaintiff cannot claim to have the exclusive right in any one of these individual matters taken separately, but in the absence of evidence that the leading features of the get-up are common to the trade in question, it is reasonable to infer that the defendant has made an " intentional imitation with colourable differences calculated to cause deception." In the case of *Lever vs Goodwin* (1887) 36 *Chancery Division* 1, the plaintiffs sold their soap in packets wrapped in parchment paper, the wrapper bearing the words " Sunlight Self-Washer " printed in spaced type. The defendants used similar packets

and paper with the words " Goodwin's Self-Washing Soap " printed on the wrapper in similar type. In the course of his judgment Cotton, L.J. said— " Looking at the two tablets one cannot but see that there is a strong general resemblance between them and especially in the eyes of people who cannot read. But the defendant's contention was this : there is no trade mark in Self-washer or Self-washing ; there is no monopoly in this parchment papers ; there is no monopoly in the spaced printing ; then why should we be restrained, in carrying on business, from using these as to which the plaintiffs cannot claim any monopoly ? That is an obvious fallacy. There may be no monopoly in the individual things, but if they are so combined by the defendants as to pass off the defendant's goods as the plaintiff's, then the defendants have brought themselves within the old common law doctrine in respect of which equity will give to the aggrieved party an injunction to restrain the defendants from passing off their goods as those of the plaintiffs."

On a consideration of the whole case I am unable to state that the learned District Judge has come to a wrong conclusion. I would, therefore, dismiss the appeal with costs.

DE KRETSER, J.

I agree.

Appeal dismissed.

Proctors :—

A. M. Markar, for defendant-appellant.

W. Sathasivam, for plaintiff-respondent.

Present : NIHILL, J.

REWATA THERO vs HORATALA

S. C. No. 61 *of* 1939—*C. R. Kandy No.* 24456.

Argued on 15th June, 1939.

Decided on 29th June, 1939.

Civil Trial—When may a Judge call evidence not produced by either party—Courts Ordinance (*Chapter* 6) *section* 36.

Held : That a Civil Court has a discretion at any period in a case to allow further evidence to be called for its own satisfaction.

Per NIHILL, J. " It is no part of a Judge's duty in a civil action to fill in the deficiencies in the case of one of the disputants by calling evidence on his own."

Editorial Note : " Section 134 of the Civil Procedure Code provides that if the court at any time thinks it necessary to examine any person other than a party to the action, and not named as a witness by a party to the action, the court may, of its own motion, cause such person to be summoned as a witness to give evidence or, to produce any document in his possession, on a day to be appointed, and may examine him as a witness, or require him to produce such document."

For a discussion of this provision see *Kiramen vs Lebbe Marikar*, (1908) 2 Weer 47 ; 2 Leader 93, and *Canapathipillai vs Adanappa Chetty*, 21 N.L.R. 217 ; 6 C.W.R. 217.

D. S. L. P. Abeyesekere, for defendant-appellant.

Cyril E. S. Perera, for plaintiff-respondent.

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vs
Horatala

NIHILL, J.

This is a somewhat remarkable and unusual case. In an action for ejectment in the Kandy Court of Requests the plaintiff-respondent alleged in his plaint that the defendant-appellant was an overholding lessee of the land in dispute. The defendant denied this and the plaintiff to prove the lease called the notary before whom it was executed. This witness was however unable to swear that the defendant was the man who had signed the lease, but he had taken the precaution of taking the lessee's thumb impression on the protocol and this he produced. The defendant in evidence denied that the thumb impression on the protocol was his and further stated that he was willing to have his thumb impression taken in court and forwarded along with the protocol to an expert for examination and report. At the close of the case and after counsel on both sides had addressed the court the learned Commissioner purporting to act under section 73 of the Evidence Ordinance, took the defendant's thumb impression in open court. This was sent to the Registrar of Finger Prints for comparison with the thumb impression on the protocol. Subsequently evidence was taken to the effect that the impressions were the thumb impressions of one and the same person.

Counsel for the appellant has urged that this action on the part of the learned Commissioner was wholly irregular, that after the close of the plaintiff's case, the plaintiff having failed to prove that the defendant had been a lessee of the land, the defendant was entitled to succeed on the first issue, namely, as to whether the defendant had or had not held the land as a lessee. As a general proposition there is force in this contention; it is no part of a Judge's duty in a civil action to fill in the deficiencies in the case of one of the disputants by calling evidence on his own. But in the present case it is clear that the learned Commissioner called the further evidence for his own satisfaction and that he was urged to do so by the defendant's evidence. In the *Alim Will Case*, (20 N.L.R. p. 481), it was held that the court has a discretion at any period in a case to allow further evidence to be called for its own satisfaction, even though it is doubtful whether it is admissible on the request of the party desiring it as of right. In this instance no formal request appears to have been made by the plaintiff, but the defendant himself had suggested the procedure subsequently adopted. In the light of what transpired this was a brazen suggestion to say the least of it, but at the time when the learned Commissioner took action under section 73 of the Evidence Ordinance there was nothing to indicate whether the comparison of the thumb prints would enure to the plaintiff's or the defendant's interest. Indeed on the defendant's evidence it must have seemed more probable that the defendant would succeed. However, whether or no the learned Commissioner's action was an irregularity, and I do not propose to decide the point, for in my view this is a case which, if an irregularity did occur, I should be right to ignore it under the provisions of section 36 of the Courts Ordinance. He who seeks equity should come with clean hands and in this case the hands of the defendant-appellant are very dirty indeed. On the other issues which dealt, *inter alia*, with the identity of the land the learned Commissioner found in the plaintiff's favour and there is no reason for me to question the correctness of his decision. The appeal is dismissed with costs.

Proctors :— *Appeal dismissed.*

Silva and *Karunaratne*, for defendant-appellant.

P. B. Ranaraja, for plaintiff-respondent.

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

THE COMMISSIONER OF STAMPS vs PARSONS AND OTHERS

S. C. No. 107 (*Inty.*)

Argued on 30th June and 3rd July, 1939.

Decided on 11th July, 1939.

Stamp Ordinance (*Chapter* 189) *section* 22—*Factors to be taken into account in deciding the proper duty to be paid on a conveyance of immovable property—Appeal under section* 31.

The following instrument was submitted under section 29 of the Stamp Ordinance (Chapter 189) to the Commissioner of Stamps for his opinion.

TO ALL TO WHOM THESE PRESENTS SHALL COME GERALD ERNEST DE ALWIS of Colombo in the Island of Ceylon, Secretary of the District Court of Colombo aforesaid.

SENDS GREETINGS:

WHEREAS Robert William Lindsay-White of Sorana Valley Panwila in the said Island of Ceylon was seized and possessed of or otherwise well and sufficiently entitled to (1) All that one undivided half part or share of and in all that and those the estate plantations and premises called and known as "Soranawallie" alias "Panwilawatta" in the First Schedule hereto particularly described and (2) All that one undivided fourth part or share of and in all that and those the estate plantations and premises called and known as "Madulla" in the Second Schedule hereto particularly described.

AND WHEREAS by Mortgage Bond *No.* 1358 *dated the Twenty third day of July,* 1927 and attested by Nigel I. Lee of Kandy, Notary Public, the said Robert William Lindsay-White mortgaged and hypothecated to and with Wilton Bartleet, Percy John Parsons, Arthur Boys, and Edward Henry Frederick Layard, carrying on business in partnership at Colombo aforesaid under the name style and firm of Bartleet and Company (hereinafter referred to as "the Purchasers" which term shall where the context so requires or admits mean and include the said Wilton Bartleet, Percy John Parsons, Arthur Boys, and Edward Henry Frederick Layard, and their successors and the survivors and survivor of them and the heirs executors and administrators of the last survivor of them their and his assigns) (1) *as a Secondary Mortgage (subject to the Primary Mortgage thereon created by Bond No.* 1258 *dated the Fourteenth day of May,* 1926 *and attested by the said Nigel I. Lee*) the said one undivided half part or share of and in the said Soranawallie Estate and premises in the First Part of the Schedule thereto and in the First Schedule hereto particularly described together with a like share of the buildings, bungalows, machinery, fixtures, furniture, tools, implements, cattle and other the dead and live stock crops produce and appurtenances whatsoever to the said Soranawallie Estate and premises belonging or in anywise appertaining or held to belong or be appurtenant thereto and all the estate right title interest property claim and demand whatsoever of the said Robert William Lindsay-White of in to upon or out of the said Soranawallie Estate and premises and (2) as a Primary Mortgage the said one undivided fourth part or share of and in the said Madulla Estate and premises in the Second Part of the Schedule thereto and in the Second Schedule hereto particularly described together with a like share of the buildings bungalows machinery fixtures furniture tools implements cattle and other the dead and live stock crops produce and appurtenances whatsoever to the said Madulla Estate and premises belonging or in anywise appertaining or held to belong or be appurtenant thereto and all the estate right title interest property claim and demand whatsoever of the said Robert

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William Lindsay-White of in to upon or out of the said Madulla Estate and premises, for securing all sums of money then lent and advanced and thereafter to be lent and advanced to him by the Purchasers the aggregate amount whereof shall not exceed the sum of Rupees Fifty Thousand (Rs. 50,000/–) together with interest thereon at and after the rate of eight per cent per annum.

AND WHEREAS R. W. Hood Wright care of Messrs. Liesching and Lee, Proctors, Kandy, was a subsequent Mortgagee upon Bond No. 1677 of the Twenty ninth day of August 1931 attested by the said Nigel I. Lee of the said one undivided half part or share of and in the said Soranawallie Estate and premises.

AND WHEREAS the *Purchasers instituted an Action, inter alia*, in respect of the afore in part recited Mortgage Bond No. 1358 in *Proceedings No. 52344 of the District Court of Colombo* on the First day of April, 1933 against the said Robert William Lindsay-White and R. W. Hood Wright and obtained a Decree therein on the Twenty eighth day of July 1933 against the said Robert William Lindsay-White, *inter alia*, for the sum of Rupees seventy nine thousand and seventy eight and cents thirty eight (Rs. 79,078/38) with interest thereon at the rate of nine per cent per annum from the date of the Decree till payment in full and the costs of action to be paid within thirty days from the date of the said Decree.

AND WHEREAS by the said Decree it was, *inter alia*, ordered and decreed as against the said Robert William Lindsay-White and the said R. W. Hood Wright that the said one undivided half part or share of and in the said Soranawallie Estate and premises (*subject to the afore in part recited Mortgage Bond No.* 1258) and as against the said Robert William Lindsay-White the said one undivided fourth part or share of and in the said Madulla Estate and premises be and the same were thereby declared specially bound and executable upon the footing of the said Bond No. 1538 for the payment of the said sum in the said Decree mentioned with interest and costs and it was further ordered and decreed that *in default of the payment of the said sum within the said period the said one undivided half part or share of and in the said Soranawallie Estate and premises* (*subject as aforesaid*) and one undivided fourth part or share of and in the said Madulla Estate and premises together with like respective shares of the buildings bungalows machinery fixtures furniture tools implements cattle and other the dead and live stock crops produce and appurtenances whatsoever to the said Soranawallie Estate and premises and the said Madulla Estate and premises belonging and all the estate right title interest property claim and demand whatsoever of the said Robert William Lindsay-White of in to upon or out of the said Estates and premises should be sold by Public Auction by Robert John Macdonald Meaden, Auctioneer of Colombo, or some other Auctioneer appointed by the said Court, in accordance with the conditions of Sale attached to the said Decree and the proceeds be applied in and towards the payment of the said sum in the said Decree mentioned, and it was further ordered and decreed that the Purchasers the Plaintiffs in the said Action or any duly authorised Agent on their behalf be permitted to bid for and purchase the said mortgaged properties and premises or any portion or portions thereof and that in the event of the Purchasers the Plaintiff in the said Action becoming the purchasers thereof they should be allowed credit to the extent of their claim interest and costs and that the Secretary of the said Court was thereby directed to execute any and all conveyance or conveyances in due form of law in favour of the purchaser or purchasers at such sale on his or their complying with the said Conditions of Sale.

AND WHEREAS the said Court by its Order dated the Twenty second day of November, 1933 appointed Justin Gerhard Vandersmagt, Auctioneer of Colombo aforesaid, to conduct the sale under the said Decree instead of the said Robert John Macdonald Meaden.

AND WHEREAS the said Robert William Lindsay-White the first defendant in the said action having made default in the payment of the amount due under the said Decree, the said Court issued a Commission to the said Justin Gerhard Vandersmagt on the Twenty second day of November 1933 to carry out the sale of the said mortgaged

properties and premises in terms of the said Decree upon Conditions of Sale approved by the said Court and to allow the Purchasers the Plaintiffs in the said action credit at such sale to the extent of their claim and costs in the event of their becoming the Purchasers at such sale on their producing an Order of Court authorising him to do so.

AND WHEREAS the said Justin Gerhard Vandersmagt the said Auctioneer after due advertisement caused the said mortgaged properties and premises to be put up for sale at his Office, at Baillie Street, Fort, Colombo, on the Twenty eighth day of April, 1934 upon Conditions of Sale approved by the said Court.

AND WHEREAS at such sale the said Edward Henry Frederick Layard for and on behalf of the Purchasers the Plaintiffs in the said action having made the highest bid to wit Rupees One Thousand (Rs. 1,000/–) for the said one undivided half part or share of and in the said Soranawallie Estate and premises and Rupees seven thousand five hundred (Rs. 7,500/–) for the one undivided fourth part or share of and in the said Madulla Estate and premises, was declared the Purchaser thereof for and on behalf of the Purchasers and was allowed credit for the said purchase price as will appear from the report to the said Court of the said Justin Gerhard Vandersmagt as well as from the Conditions of Sale Nos. 35 and 36 both dated the Twenty eighth day of April, 1934 attested by F. C. Rowan of Colombo, Notary Public.

AND WHEREAS by its Order dated the Twenty first day of May, 1934 (*a copy whereof is annexed to the Original of these presents*) the said District Court confirmed and sanctioned the credit so allowed by the said Auctioneer and authorised the Secretary of the said Court to execute the necessary Conveyance in favour of the Purchasers.

NOW KNOW YE AND THESE PRESENTS WITNESS that the said Gerald Ernest de Alwis, Secretary of the District Court of Colombo aforesaid, in pursuance of the said authority and in consideration of the said sum of Rupees one thousand (Rs. 1,000/–) credited as aforesaid, doth hereby grant convey assign transfer set over and assure unto the Purchasers All that one undivided half part or share of and in all that and those the Estate plantations and premises called and known as "Soranawallie" in the First Schedule hereto particularly described with a like share of all the buildings bungalows machinery fixtures furniture tools implements cattle and other the dead and live stock crops produce and appurtenances whatsoever to the said Soranawallie Estate and premises belonging or in anywise appertaining or held to belong or be appurtenant thereto or used or enjoyed therewith and all the estate right title interest property claim and demand whatsoever of the said Robert William Lindsay-White of in to upon or out of the said Soranawallie Estate and premises.

TO HOLD the said one undivided half part or share of and in the said Soranawallie Estate and premises together with all and singular the appurtenances thereto belonging unto the Purchasers absolutely for ever.

AND THESE PRESENTS FURTHER WITNESS that the said Gerald Ernest de Alwis, Secretary of the District Court of Colombo aforesaid, in pursuance of the said authority and in consideration of the said sum of Rupees seven thousand five hundred (Rs. 7,500/–) credited as aforesaid doth hereby grant convey assign transfer set over and assure unto the Purchasers All that one undivided fourth part or share of and in all that and those the Estate plantations and premises called and known as "Madulla" in the Second Schedule hereto particularly described together with a like share of all the buildings bungalows machinery fixtures furniture tools implements cattle and other the dead and live stock crops produce and appurtenances whatsoever to the said Madulla Estate and premises belonging or in anywise appertaining or held to belong or be appurtenant thereto or used or enjoyed therewith and all the estate right title interest property claim and demand whatsoever of the said Robert William Lindsay-White of into or out of the said Madulla Estate and premises.

TO HOLD the said one undivided fourth part or share of and in the said Madulla Estate and premises together with all and singular the appurtenances thereto belonging unto the Purchasers absolutely for ever.

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AND the said Gerald Ernest de Alwis doth hereby for himself as such Secretary as aforesaid and his successors in office as such Secretary as aforesaid covenant with the Purchasers that he shall and will at the request and cost of the Purchasers do and execute or cause to be done and executed all such further and other acts deeds assurances matters and things whatsoever for further and more perfectly assuring the said one undivided half part or share of and in the said Soranawallie Estate and premises and the said one undivided fourth part or share of and in the said Madulla Estate and premises or either of them to the Purchasers as shall or may be reasonably required.

The deed had been stamped on a conveyance for Rs. 1,000/- but the Commissioner expressed the opinion that it was liable to duty as a conveyance of land valued at Rs. 42,500/-.

From this decision the appellants appealed.

It was pointed out in appeal that although the land had been sold subject to the primary mortgage it had in fact been discharged at the time of sale, though the discharge had not been registerd. The plaintiff in the mortgage action brought this fact to the notice of the judge when he applied for confirmation of sale and offered to give credit in a sum of Rs. 42,500/- being the appraised value of the share to be conveyed under the mortgage sale.

Held : That the deed was liable to duty as a conveyance of land for a consideration of Rs. 42,500/-.

N. Nadarajah with *Van Geyzel*, for appellants.

M. T. de S. Amarasekera, Acting Solicitor-General with *Schokman, Crown Counsel*, for *Commissioner of Stamps.*

KEUNEMAN, J.

This is an appeal under section 31 of the Stamp Ordinance from an order of the Commissioner of Stamps under section 30 determining that the duty payable in respect of deed No. 170, dated 12th June, 1934, and attested by D. J. Boniface Gomes, Notary Public, is Rs. 801/-.

The deed in question is a transfer executed by the secretary of the District Court of Colombo in favour of the appellants of (*a*) an undivided half share of the estate known as " Soranawallie " and (*b*) an undivided one-fourth of the estate known as " Madulla." The only matter in dispute in this appeal is the duty payable in respect of the half share of " Soranawallie." No question arises about the quarter share of " Madulla."

The facts are as follows : The appellants in D. C. Colombo No. 52344 obtained a decree for Rs. 148,714/82 ; this sum included Rs. 79,078/38 due upon a secondary mortgage bond hypothecating the half share of " Soranawallie," No. 1358, dated 23rd July, 1927. The primary mortgage bond in respect of the same estate was No. 1258 of 14th May, 1926 for the sum of Rs. 40,000/- and interest in favour of some other person. In D.C. Colombo No. 52344 on 19th April, 1934 the appellants applied for an order to bid and an order giving them credit in a sum not exceeding their claim and costs. This was allowed on 25th April, 1934 subject to the condition that they were allowed to purchase at any value, on agreeing to enter satisfaction of the decree for a sum of Rs. 5,000/-. The District Judge took into consideration the fact that the primary bond was for Rs. 40,000/-. Further, the half share of the said estate was valued at Rs. 42,500/- by the auctioneer appointed to conduct the sale (Mr. J. G. Vandersmagt).

Thereafter the premises in question was sold by the auctioneer on 28th April, 1934. At this sale the appellants made the highest bid, viz., Rs. 1,000/– and the premises was knocked down to them.

On 21st May, 1934 the plaintiffs applied to Court for an order confirming the sale. The journal entry of that date reads as follows :

> " The plaintiffs having purchased the mortgaged property sold in the case, viz., an undivided half part of Soranawallie *alias* Panwila Watte.....for the sum of Rs. 1,000/-.....the Proctor for plaintiffs move that the plaintiffs may be given credit in the said sum and that the sale be confirmed.
>
> They also move that the Secretary be directed to execute the necessary conveyance in favour of the Purchasers. Mr. Rowan for Plaintiffs states that the Plaintiff is willing to give credit for the amount of the appraised value of Soranawallie Estate, viz., Rs. 42,500/– as it has now been ascertained that the primary mortgage has been discharged, although the discharge has not been registered .....The sale will now be confirmed."

It is not in evidence when the primary mortgage was discharged, except that this happened before the application for confirmation of the sale. It is clear, however, that the conditions originally imposed by the Court as regards the order to bid and the order for credit had been based upon the supposed existence of the primary mortgage, and the orders were allowed upon that footing. Either the primary mortgage had no existence at all at that date, or had been extinguished thereafter. Under the circumstances, it may have been open to the Court to refuse to confirm the sale, and it is difficult to think that the Court was not materially influenced in confirming the sale by the offer of the plaintiff's proctor to give credit in the sum of Rs. 42 500/–.

Thereafter on 12th June the transfer now in question No. 170, was executed. In its recitals, all the facts which I have mentioned were set out. The recitals stated that the secondary bond No. 1358 was subject to the primary mortgage No. 1258, and that the decree in D. C. Colombo No. 52344, as far as the hypothecation of Soranawallie Estate was concerned, was subject to the said bond No. 1258. The order of the District Judge allowing order to bid and order for credit was set out. though not in full. It was also recited that the plaintiffs had made the highest bid at the auction, namely, Rs. 1,000/–, and that the Court had confirmed the sale. A copy of the District Judge's order of 21st May, 1934 was annexed to the deed.

The operative words in deed No. 170 are as follows : " Now know ye and these presents witness that the.....Secretary of the District Court, Colombo....., in pursuance of the said authority, and in consideration of the said sum of Rs. 1,000/– credited as aforesaid doth hereby grant.....".

In the attestation clause the notary makes no reference to the consideration. Stamp duty was paid upon the footing that the consideration for the purchase of the half share of " Soranawallie " was Rs. 1,000/–.

Thereafter on 17th February, 1938 the Commissioner for Stamps called upon the appellants to pay the sum of Rs. 664/–, being the deficiency in the duty paid, together with a penalty of Rs. 25/– later reduced to Rs. 5/–. After some correspondence the appellants applied to the Commissioner

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under chapter 3 of the Stamp Ordinance (section 29) for an adjudication as to the proper stamp. The present appeal is from the Commissioner's adjudication.

For the appellants it is contended that stamp duty should be calculated on the basis that the consideration on the deed in question was Rs. 1,000/–, and that this was " the purchase or consideration money " expressed in the deed (vide Schedule A Part I, item 23 (1) (*b*)), and that no further enquiry could be made by the Commissioner. The Acting Solicitor-General contends on the contrary that under section 29 (2) the Commissioner was entitled to call for affidavits or other evidence " necessary to prove all the facts and circumstances affecting the chargeability of the instrument with duty." He further argued that in any event the terms of the deed in question sufficiently showed that the consideration for the deed was the sum of Rs. 42,500/– for which credit was given, and the fact that this consideration appeared in the recitals and not in the operative words did not affect the question. He further urges that the consideration either wholly or in part was not a pecuniary consideration, and that accordingly the basis of assessment should be the value of the property, under the later words of item 23 (1) (*b*), and that the value of the property is Rs. 42,500/–.

In expanding his argument the Acting Solicitor-General stated that whether we took the original order for credit or the subsequent arrangement made at the confirmation of the sale as operative, the result would be the same. The original order for credit included an agreement to give credit in the sum of Rs. 5,000/–, and even if we regarded the bid of Rs. 1,000/– as pecuniary consideration, the credit to be given for the balance of the Rs. 5,000/– was not pecuniary consideration. A similar result would be arrived at if we took into account the arrangement to give credit in Rs. 42,500/–.

For the appellants it was contended that in any event the consideration was pecuniary, whether it consisted in the payment of money or the giving of credit. It was further argued that the giving of credit in Rs. 42,500/– was an act of voluntary generosity, and could not be regarded as forming part of the consideration.

As regards the question whether the Commissioner in arriving at his adjudication was entitled to consider matters not expressed in the deed, the Acting Solicitor-General has referred us to two authorities. *In Gunewardene vs Gunasekera* (1 Times L.R. 90), Bertram, C.J. has dealt very fully with this point, has considered our own as well as English authorities, and has held that it is competent for the Commissioner of Stamps to insist upon being satisfied that the property which has been the subject-matter of a deed has been correctly valued. He rejected the argument that " duly stamped " means " stamped in accordance with what appears on the face of the instrument." Although this is an *obiter dictum*, it is a valuable one. Again, in *Croos vs Attorney-General* (32 N.L.R. 78) this Court held that the Commissioner, if he was not satisfied with the consideration stated, was

entitled to call for affidavits, and to utilise the information so obtained for the purpose of making his adjudication.

In this particular case, however, I do not think it is necessary to resort to the affidavits, as in my opinion the recitals in the deed No. 170 sufficiently contain all the facts which are necessary for the determination of this question of consideration. I am of opinion that we are entitled to take into account not only the operative clause but also the recitals for this purpose. I do not think the affidavits add anything material to what is contained in the deed in question.

Now, it is of great importance that the District Judge's order of 21st May, 1934 confirming the sale has been annexed to the deed in question and forms part of that deed. That order shows that before the confirmation of the sale the proctor for the plaintiffs quite properly pointed out to Court that it had been discovered that the primary mortgage had been discharged, although the discharge had not been registered. The proctor went further and expressed his willingness to give credit for the appraised value of Soranawallie Estate, viz., Rs. 42,500/–. Can this be regarded as merely an act of voluntary generosity on the part of the plaintiffs ? I think not. As I said before, it was capable of influencing the District Judge in his decision either to confirm the sale or to refuse the confirmation, and I have no doubt that this offer had an important effect in inducing the District Judge to confirm the sale.

Can this offer be regarded as the consideration for the deed in question ? Now it has been held in *Waharaka Investment Co., Ltd. vs Commissioner of Stamps* (34 N.L.R. 266) that the word " consideration " in the Stamp Ordinance must be given the meaning it has in English Law, where it has been defined thus :— " a valuable consideration in the sense of the law may consist in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."

The " profit or benefit " accruing to the defendant in D.C. Colombo No. 52344 was that his debt was to be diminished to the extent of Rs. 42,500/–. The proctor's statement that the plaintiffs were " willing to give credit " to that amount has had, in my opinion, the important result of influencing the District Judge to confirm the sale, and I do not think it was open to the plaintiffs thereafter to resile from that position and to refuse to give credit to that amount. I think the position is equivalent to the plaintiffs having entered into an agreement with the defendant to give credit up to the amount of Rs. 42,500/–. This formed the real consideration for the deed No. 170.

I am of opinion that my finding on this point is in keeping with section 22 of the Stamp Ordinance. I hold that the property was transferred in consideration of the debt due to the plaintiffs to the extent of Rs. 42,500/–. I incline to the view that this is not a pecuniary consideration, but it is unnecessary, in view of this finding, to decide this point. If it is a pecuniary consideration, it must be taken as the basis of the assessment. If it is not

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a pecuniary consideration, the value of the land must be taken as the basis, and that value has been held to be Rs. 42,500/–.

Counsel for the appellant asked for an opportunity to lead evidence that the value of the half share of Soranawallie Estate was not Rs. 42,500/– but I think it is too late to grant his request. The valuation of Mr. Vandersmagt has not been challenged at any time before the Commissioner, and in fact it was accepted as "the appraised value" by the proctor for the plaintiffs on 21st May, 1934.

I am of opinion that the arrangement on 21st May, 1934 superseded the agreement to give credit to the extent of Rs. 5,000/–, which was the footing on which the order for credit was issued. It is unnecessary in this case to consider how the instrument in question had to be stamped, if that was the only arrangement in operation at the date of the deed. It is also unnecessary to consider the further argument addressed to us, namely, that it was necessary in any event for the purposes of the assessment to add to the price the amount of the primary mortgage bond, in view of the explanation to section 22 of the Stamp Ordinance. A number of Indian authorities were quoted to us, which were not all in accord. It is, however, clear that at the date of deed No. 170 the primary mortgage bond had been discharged and nothing was due in respect of it.

The appeal fails and is dismissed with costs.

DE KRETSER, J.

I agree.

Appeal dismissed.

Proctors :—

Julius & Creasy, for appellants.

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

DE MEL & OTHERS vs SUGUNASEKERA & OTHERS

S. C. No. 277—*D. C. Kalutara* 20599.

Argued on 23rd June, 1939.

Decided on 3rd July, 1939.

Trial of action—Application for postponement by counsel—Withdrawal of counsel after refusal of postponement—Is the appearance of counsel to be regarded as limited to the application for postponement only—Are proceedings in action thereafter exparte *or* inter partes.

On the date fixed for the trial of this action counsel for the defendant applied for a postponement of the trial. This application was refused. The counsel then withdrew from the case on the ground that he had been instructed only to apply for a postponement and that he had no further instructions. The trial proceeded after counsel had withdrawn. In appeal it was argued that the decision of the trial judge should be regarded as one made *exparte*.

Held : (i) That the appearance of counsel was sufficient appearance for the parties and that the trial should despite his withdrawal be regarded as a trial *inter partes*.

(ii) That the refusal to grant a postponement is not a ground on which a party or his proctor or counsel may withdraw from a trial.

(iii) That there is no such thing as a limited appearance of counsel.

Colvin R. de Silva and *Barr Kumarakulasingham*, for defendants-appellants.

N. M. de Silva, for 1–4 plaintiffs-respondents.

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This was an action for recovery of land. Certain of the defendants filed answer through a Proctor, and a date was fixed for trial. On that date one of them at least attended Court, and an advocate entered an appearance on behalf of all of them. He asked for a postponement on the ground that the defendants had been prevented by a Vidhane Aratchy from leaving their homes and so could not get ready for trial, and he called one of the defendants, after which the Court called the Vidhane Aratchy and thereafter refused a postponement. There is nothing on the record to show which of the parties appeared, and whether the respective proctors appeared or not, but the appeal has been argued on the assumption that only the defendant who was called appeared, and that their proctor did not appear.

It would seem that upon the postponement being refused the advocate withdrew, intimating that he had been instructed only to apply for a postponement and had no further instructions. Apparently the Court acquiesced in his withdrawing, but again there is nothing to shew that it approved of his doing so. The learned Judge thereupon remarked that the case was really proceeding *ex parte*, and after recording the evidence of one of the plaintiffs he entered judgment for the plaintiffs.

It is contended on appeal that there was no appearance on the part of the defaulting defendants, and that the Court should in fact have proceeded *ex parte* and have entered a decree *nisi* ; and that even before doing so it should have framed issues. I have only to add that the defendants claimed title by prescriptive possession, and that plaintiffs had a long chain of title and a decree obtained many years previously by a predecessor in title against, it was alleged, defendants' predecessors in title.

The main point argued was that the appearance of Counsel was not an appearance on behalf of the defendants-appellants, and that the decisions of this Court applied to a Proctor applying for a postponement and then withdrawing, and not to the circumstances of the present case. If Counsel's appearance amounted to an appearance by them, then the Judge was correct in proceeding as if the trial was *inter partes*.

It is conceded that if a defendant applied for a postponement and then withdrew, the trial would proceed *inter partes*. It is also conceded that if a proctor acted similarly the proceeding would be *inter partes*, but it is argued that Counsel having appeared for a limited purpose, his appearance

was for that purpose and no other ; *i.e.* a party may not limit his appearance, nor may a proctor, but they may both do so if they appear by an advocate. This seems a startling proposition, and its only foundation is that a Proctor holds a proxy from his client and therefore represents him, but a Counsel does not represent him ; yet it is conceded that if he did appear for a part of the trial and then withdrew, the trial would be considered one *inter partes*.

In the large majority of cases an application for postponement would be made by the Proctor, and so most of our decided cases deal with such applications by Proctors, and there being a tendency to give relief where the Proctor's appearance happened to be " casual". A Bench of Four Judges (33 N.L.R. 217)* decided that if a proctor happened to be present when the case was taken up for trial, he should be regarded as appearing for his clients unless he expressly stated that he did not. This case left untouched the decisions which held that when the Proctor did more and applied for a postponement, that was an appearance by his clients for all purposes.

It seems to me that, apart from authority to which I shall refer, the argument proceeds on a misconception. It is difficult to get any authority from the Indian Courts for the reason that in that country they use the term "pleader" and pleader includes an advocate, and that a pleader represents his client is made clear by his being expressly referred to in the section corresponding to section 24 of our Code.

In India, however, a pleader is appointed in writing and resembles a proctor in Ceylon rather than an advocate. In that country Barristers stand on a different footing.

In *Rampertab Mull & another vs Jakeeram Agurwallah & others* (I.L.R. 23 Cal. 991) the Court held that where Counsel applied for a postponement and on this being refused left the Court not having been further instructed, there was an appearance by the party and the proceedings were *inter partes*. Counsel in this case was not a ' pleader.'

In section 24 of our Code, a party is allowed to appear by his proctor, and the section goes on to say that " an advocate, instructed by a proctor for this purpose represents, the Proctor in Court." That does not limit his appearance nor do the words " instructed for this purpose " limit it. Those words only mean that a party is not to be bound by some act of an advocate appearing without instructions or appearing improperly with instructions obtained direct from the party. If then a proctor represents a party by virtue of his appointment, and especially where his appointment authorises him to retain an advocate—as it does in this case, the advocate represents the proctor. That means that his appearance is the appearance of the proctor and we are in exactly the same position as a proctor who attempts to limit the nature of his appearance.

The question must not be confused with the responsibility of the advocate, for it may be that his contract is with the proctor, and having fulfilled his contract he is under no further obligation. The question is

* 1 C.L.W. 178 (Edd)

whether there has been an appearance by the party, and I cannot doubt for a moment that there has been. The advocate's appearance for a limited purpose was the proctor's appearance for a limited purpose, and that again was the appearance of the party for a limited purpose.

Turning to Chapter 12 which deals with default of appearance, we first get section 84 which refers to the defendant appearing in person or by proctor. It cannot be denied that the proctor has a right to appear by an advocate. Section 85 deals with deafult on the part of the defendant; it will not be denied that here again he may appear by an advocate instructed by his proctor. There is no reference in either section to limited authority, and all that both sections deal with is *appearance* and *no appearance*. If a party appears, even to move for a postponement, he has appeared.

Section 72 has an explanatory note to the effect that "a party appears in Court when he is there present in person to conduct his case or is represented by a proctor or other duly authorised person." It will be noted that the proctor *represents* the party, and exactly the same word is used in section 24 in describing the position of an advocate; he "represents" the proctor. An advocate would also be a duly authorised person. It is a case where the maxim "*Qui facit per alium facit per se*" applies. If the argument is pressed to its logical conclusion, it would mean that if a trial took more than a day, Counsel may not appear on the second day on the ground of not being obliged to do so, and if proctor and clients keep away the case will go partly *inter partes* and partly *ex parte*. That is a position which cannot be tolerated, nor would it be conceivable where a proper sense of responsibility exists.

To look at it from another point of view, on a trial proceeding *ex parte* a decree *nisi* is entered and the defendants have an opportunity of curing their default by showing that they had reasonable grounds for not appearing. Now, when a postponement is applied for on specified grounds and is refused, what other reasonable grounds would such a defendant have? His only ground would have to be that the Court should have granted his application and that would be inviting the Court, perhaps presided over by another Judge, to reconsider its previous order, and this a Court cannot do. And this position is the same whether the application is made by a party or by a proctor or by an advocate. There is, therefore, no reason why any distinction should be drawn between an appearance by a proctor and one by an advocate. The truth is that there is no such thing as a limited appearance. There are two local cases dealing with similar applications by advocates. In *Woutersz vs Caruppen Chetty* (3 Bal. 197) counsel applied for a postponement on the ground of his client's illness and "left the matter in the hands of the Court." On the application being refused he withdrew. This Court held that counsel had no right to withdrew without the consent of the Judge, but that it was his duty as an advocate to go on with the case as far as he could. The Court had given judgment for the defendant and this Court refused to interfere. It does not seem to have been contended that his obligation was limited or that a decree *nisi* should have been entered.

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In Volume 23 page 397 of Halsbury's Laws of England will be found this statement :

> " If Counsel is instructed, he ought to have control over the case and conduct it throughout. His authority may be limited by the client, but only to a certain extent ; and it is not becoming for him to accept a brief limiting the ordinary authority of counsel in this respect ; or to take a subordinate position in the conduct of a case, or to share it with the client even if the litigant is himself a barrister ; the litigant must elect either to conduct the case entirely in person or to intrust the case entirely to his counsel. If a litigant instructs counsel, the litigant cannot himself be heard, unless he revokes his counsel's authority and himself assumes the conduct of the case and when a case is fairly before the Court and counsel is seized of it his authority cannot be revoked."

In the case of *The Public Trustee vs Karunaratne* (9 Ceylon Law Weekly 72) the application was made by an advocate, and perhaps this appeared in the record, but the judgment of this Court which treated the decree as one entered *inter partes* makes no specific mention of this fact.

There remains the question whether the Judge should have framed issues. It is not clear whether the first defendant followed his advocate out of court or remained. The Judge's note rather suggests he left, for the Judge's note means that though in law the case was proceeding *inter partes* it was in fact *ex parte*. The issues in the case were simple and apparent and could not but have been present to the Judge's mind and I do not think the omission to frame issues affects the case. In any event section 36 of the Courts Ordinance prevents us from interfering on a point like this where substantial justice has been done, and I think it has in this case.

I dismiss the appeal with costs.

WIJEYEWARDENE, J.

I agree.

Appeal dismissed.

Proctors :—

D. R. de Silva, for defendants-appellants.

Fernando and *Fernando*, for plaintiffs-respondents.