The Ceylon Law Weekly

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

DIGEST

VOLUME XXXI

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Of forgery—Is sanction of Attorney-General necessary to enable private party to prosecute.

See Criminal Procedure Code 77

Action

Possessory action by lessee—Value of action—Test of jurisdiction.

Held : (i.) (*by Divisional Bench*)—That the test of jurisdiction in a possessory action is the value of the land.

(ii.) That it is immaterial whether such an action is brought by a plaintiff *suo nomine* or as lessee.

Per SOERTSZ, A.C.J.: "In order, therefore, to ascertain whether an action is within or beyond the pecuniary jurisdiction of a court, the nature and extent of the subject-matter in dispute has to be ascertained, and for that purpose, it would be necessary, to examine not only the plaintiff's claim but also the defendant's answer to it."

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Action—Dismissal owing to plaintiff's failure to to appear—Plaintiff given permission by Commissioner of Requests to institute fresh action upon paying costs of previous action—Must costs be paid before institution of fresh action—Civil Procedure Code section 823.

An action in the Court of Requests was dismissed for non-appearance of the plaintiff. The Court later granted the plaintiff permission to institute a fresh action "upon the plaintiff paying the costs of the previous action." The fresh action, which was duly instituted, was dismissed on the ground that the condition precedent to its institution had not been complied with.

Held : (i.) That the only authority for permitting the institution of a fresh action was section 823 (5) of the Civil Procedure Code.

(ii.) That under that section payment into Court is a condition precedent to the institution of the action.

(iii.) That where the order was not in the terms of the section, the wording of the former should if possible, be reconciled with the wording of the latter.

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Action rei vindicatio—*Burden of proving plaintiff's title—Misdirection.*

Held : (i.) That in an action for declaration of title it is for the plaintiff to establish his title to the land he claims and not for the defendant to show that the plaintiff has no title to it.

(ii.) That it is a serious misdirection on the part of a Judge to overlook this rule.

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Appeal

Preliminary objection—One petition of appeal by several defendants who had given separate proxies to the same proctor and who acted jointly—Should the appeal be regarded as one for purposes of stamping—Civil Procedure Code, sections 754, 755.

Appellants Nos. 1-11 were defendants in a suit for ejectment and were represented by one proctor who duly filed his proxy. From the answer filed it appeared that appellant No. 12 was interested in the property and was duly added as a defendant. He elected to be represented by the same proctor (who filed proxy) and to abide by the answer of the defendants already filed.

Judgment was entered for plaintiff and all defendants appealed. The same proctor acting for all the defendants filed one petition of appeal which bore a stamp sufficient to cover only one appeal.

In the Supreme Court a preliminary objection to the hearing of the appeal was taken on the ground that the petition was improperly stamped inasmuch as the stamp affixed was sufficient to cover only one appeal although, in fact, there were two appeals before the Court. This objection was upheld and the defendants appealed to the Privy Council.

Held : (i.) That in the circumstances there was only one appeal before the Court.

(ii.) That as soon as the added-defendant gave his proxy to the proctor who was acting for the other defendants and threw in his lot with them by adopting their defence, he became a joint defendant with them for all purposes.

Per LORD GODDARD: "As this is enough to dispose of this appeal their Lordships to not propose to express any opinion as to whether it is open to the Supreme Court, once the petition has been accepted by the Court of first instance, to take or give effect to an objection as to the sufficiency of the stamp, nor as to whether by the combined effect of section 756 and 839 it may not be possible for a *bona fide* mistake as to the stamp required to be remedied and thus perhaps avoid a miscarriage of justice. They say no more than that both points appear susceptible for considerable argument and that it would be an unfortunate and probably unintended result of the Stamp Ordinance if a litigant should be debarred from an appeal on a ground which is from a practical point of view capable of easy remedy without injustice to anyone.

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Held : (i) That the service of notice of tendering security for costs of appeal on the respondent's proctor is a sufficient compliance with the requirements of section 756 of the Civil Procedure Code.

(ii.) That where an order of abatement of appeal is made for failure to serve such notice on the respondent personally the remedy is by way of appeal, inasmuch as it is an error of law committed by the District Judge.

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Bail

Bail—Accused convicted and sentenced to imprisonment—Special leave to appeal against conviction and sentence granted by Privy Council—Power of High Court in India to grant bail—Indian Criminal Procedure Code, sections 426, 496, 497, 498 *and* 561*A*.

Held : (i.) That the Indian Criminal Procedure Code confers no powers on a High Court to grant bail in the case of the convicted person and the fact that he has obtained leave from His Majesty in Council to appeal from his conviction or sentence makes no difference in this regard.

(ii.) That chapter 39 of that Code together with section 426 is, and was intended to contain a complete and exhaustive statement of the powers of the High Court in India to grant bail, and excludes the existence of any additional inherent power in a High Court relating to the subject of bail.

(iii.) That if the local Court has no power to grant bail, no suggestion or direction of the Privy Council can confer that power.

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Failure to raise issue at trial—Right to raise in appeal—Estoppel.

Held : (i.) That where in the Court below a party fails to raise issues on matters which he could have put in issue, he ought not to be allowed to rely on such matters in the Appeal Court. Such default creates an estoppel by election against such party.

(ii.) That if at the original dedication no provision was made for regulating the mode of succession to the incumbency, then the general rule of *Sisyanu Sisya Paramparawa* applies and the persons who dedicated the temple and the grantors cease to have any rights over the incumbency.

(iii.) That where a property dedicated to the Sangha had been possessed by the grantee and his pupils *ut dominus* for over ten years, they can claim a right by prescription against the " dayakayas " who made the dedication and their heirs.

PEMA & OTHERS VS. JINALANKARA TISSA THERO 43

Right of Buddhist Priest to maintenance from tutor's temple.

Held : That a Buddhist Priest is entitled to receive a reasonable sum for his maintenance out of the income received by the temple of his tutor priest.

Per KEUNEMAN, J. : " One of these judgments said that it was necessary before you claimed past maintenance to show expenditure from your own pocket or the incurring of liability to pay others. Now, undoubtedly this applies to past maintenance in the sense I have indicated, but in the present case what is claimed is not past maintenance but what Schneider, J. called future maintenance, namely, maintenance after the date of the plaint. It may or may not be a matter of importance that Schneider, J. himself dealt with this question of future maintenance but did not apply the arguments which he had adduced in the case of past maintenance. On the other hand, the question may well be considered as to whether future maintenance in the sense of maintenance after the date of the plaint is to be placed upon the same footing as past maintenance, namely, maintenance before the date of the plaint."

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Section 247—Action under, by unsuccessful claimant—Burden of proof.

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Application with respect to maintenance of minor children after decree absolute for divorce—Leading of evidence in summary proceedings.

Held : (i.) That section 622 of the Civil Procedure Code enables a party to petition the Court from time to time for all such orders and provisions as come within the purview of the section.

(ii.) That the leading of evidence in summary proceedings is governed by section 384 of the Civil Procedure Code.

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Commission to Examine Witness

Application for a commission to examine witnesses —Reasons for refusal—When should objection be taken.

Held : That before an application for a commission to examine witnesses is refused, on the ground that the applicant has shown a want of due diligence in pursuing the matter, it must be shown that the granting of such application involves an appreciable postponement of the trial date. An objection to such application does not lie after the case has been taken off the trial roll with the consent of the objector.

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Contract

Contract—Sale of goods—Express warranty—Implied condition that goods are fit for purpose intended —Sale of Goods Ordinance (Chapter 70) section 15 (1) —Meaning of the word " description."

The defendant company, who were agents for an instrument known as the " Ediphone " sold to the plaintiff an instrument called a " Telediphone " for the purpose of recording and reproducing the charges of Judges of the Supreme Court to juries in the course of their criminal jurisdiction. The instrument was not fit for the purpose for which it was purchased.

The questions that arose in the case were :

(*a*) Whether the transaction was a contract of sale or merely an order on the defendant company to import a specified article ;

(*b*) Whether there had been an express warranty that the instrument was reasonably fit for the purpose intended ;

(*c*) Whether there was an implied condition under section 15 (1) of the Sale of Goods Ordinance.

The learned District Judge held :

(i.) That though the transaction began with an order by plaintiff to the defendant to import the instrument, there was a subsequent sale by the defendant to the plaintiff;

(ii.) That there was no express warranty by the defendant ;

(iii.) That the transaction was not merely a sale of a specified article under its trade name and that the proviso to section 15 (1) did not apply ;

(iv.) That the defendant knew the purpose which the instrument was intended to serve, that the plaintiff relied on the defendant's skill and judgment in the matter, but that, for the purpose of section 15 (1) the Telediphone was not an instrument of a description which it was in the course of the business of the defendant to supply.

He accordingly dismissed plaintiff's action. It was established that the Ediphone and the Telediphone were instruments of the same class or kind although the process for recording was different in the two cases.

Held : (i.) (In appeal)—That the Ediphone and the Telediphone were goods of the same description and that the Telediphone was an instrument of a description which it was in the course of the business of the defendant to supply.

(ii.) That for the purposes of section 15 (1) of the sale of Goods Ordinance the words " of a description " may be treated as including the meaning " of a class or kind."

JAYASENA VS. COLOMBO ELECTRIC TRAMWAYS & LIGHTING CO., LTD. 40

Contract—Purchase and sale of rubber coupons—Request to broker to purchase coupons—Purchase by broker from undisclosed principal—Usage of market—Broker liable to deliver coupons to buyer whether received from seller or not—Buyer liable to pay contract price to broker direct—Right of each party to look to broker for performance of contract—Buyer wrongfully refusing to accept delivery—Can broker sue to recover damages—Is broker in the position of surety for due performance of contract—Wagering contract.

Where according to the agreed usage of the market where business in the purchase and sale of rubber coupons is transacted—

(*a*) the broker's bought note or the sold note never discloses the name of the other party to the contract ;

(*b*) the broker was liable to deliver to the buyer the coupons sold, whether or not he had received them from the seller, and the buyer was liable to pay the contract price direct to the broker if delivery is accepted ;

(c) the buyer and seller have no dealings with each other direct in regard to the performance of the contract, and each party is entitled to look to the broker for performance of the contract ;

Held : (i.) That in the event of the buyer accepting delivery and refusing payment, or if the buyer wrongfully refuses to accept delivery, the broker is the person to recover damages for breach of contract;

(ii.) That, if the buyer is entitled to delivery of the coupons purchased by the broker, the contract is not a wagering one.

(iii.) That the broker's position is not one involving suretyship as there is nothing in the contract to suggest that the buyer must first claim delivery of the coupons from the seller before having recourse to the broker.

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Plaintiff, on dismissal of action, given power to institute fresh action upon paying costs of previous action. Must costs be pre-paid.
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Court of Criminal Appeal

Court of Criminal Appeal—Prosecution witness—Presumption of innocence—Onus of proof on prosecution—Absence of adequate direction on common intention and knowledge—Misdirection on what constitutes culpable homicide—Effect of.

Five persons were jointly charged with the murder of a man by shooting. The evidence showed that four empty cartridges found at the scene of the shooting had been fired from a gun found in the house of the second accused. The defence suggested that these cartridges might have been substituted by the police. After trial, the first accused was acquitted and the remaining four were convicted of culpable homicide not amounting to murder.

Held : (i.) That there is no such presumption of innocence in favour of a prosecution witness, against whom a suggestion of improper conduct is made, as there is in favour of an accused person.

(ii.) That the obligation on the Crown is not to prove a *prima facie* case but to prove the guilt of the accused beyond all reasonable doubt irrespective of whether the accused have given evidence or not.

(iii.) That where the defence does not rely on one of the exceptions (*e.g.* self-defence or sudden fight) a reference in the course of the charge to the onus on the accused being less than the onus on the Crown is irrelevant and misleading.

(iv.) (By a majority of the Court). That as it was a reasonable inference from the evidence that only one person—the second accused—fired the gun, the absence of adequate direction to the jury on common intention and knowledge, with reference to the facts of the case, and a palpable misdirection as to what constitutes culpable homicide not amounting to murder, rendered the verdict of the jury untenable as against the third, fourth and fifth accused.

Per Rose, J. : " It seems to us that there is great ofrce in Mr. H. V. Perera's contention that where in a summing-up there are substantial misdirections as to the law (as distinct from mistakes as to the facts which may or may not be vital) it is not safe to adopt the line of reasoning that because in other parts of the summing-up the Judge has adequately, although only in general terms, directed the jury, the misdirections should be disregarded."

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Court of Criminal Appeal—Common intention—Misdirection—Reference by Crown in opening case to evidence not subsequently proved—Curable irregularity.

Held : (i.) That when several accused are jointly charged with murder in that they acted with a common intention, the " common intention " that must be proved against each accused, in order to establish the charge of murder against him, is a murderous intention and not merely a criminal intention, and that a failure to make this clear to the Jury renders a verdict of guilty of murder insupportable.

(2) That when, in opening the case to the Jury, the Crown refers to evidence which is not subsequently led, the irregularity is cured by the Judge warning the Jury that they must disregard such reference entirely and decide the case only on the evidence led at the trial.

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Power of District Court to discharge, without trial, an accused person indicted by Attorney-General.
See District Court 68

Is sanction of Attorney-General necessary to enable private party to prosecute for abetment of forgery.
See Criminal Procedure Code 77

Trial by District Court upon Indictment—Absence of prosecuting Crown Counsel—Refusal of application for postponement—Discharge of accused without calling upon him to plead—Nullity of trial.

On the date fixed for a criminal trial in the District Court the prosecuting Crown Counsel was absent, being held up in another case. A postponement was applied for, but was refused by the District Judge, who thereafter discharged the accused as there was no prosecutor.

Held : (1) That the District Judge had no power to discharge the accused without trial in a case where they were tried upon indictment.

(2) That the discharge of the accused without calling upon them to plead to the indictment rendered the trial a nullity.

(3) That the District Judge might have granted an adjournment on the costs of accused being paid by the Crown.

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Sections 152 (3), 297 *and* 425*—Assumption of jurisdiction by Magistrate as District Judge—Reading over at the trial of evidence recorded before assuming jurisdiction—Illegality.*

Where in a case of theft, the Magistrate having examined a witness in the presence of the accused, thereafter assumed jurisdiction as District Judge under section 152 (3) of the Criminal Procedure Code, and read over to the accused the evidence of the witness recorded before the assumption of jurisdiction and proceeded to convict the accused.

Held : (i.) That section 297 of the Criminal Procedure Code did not sanction such a procedure and that the failure to record such evidence *de novo* vitiated a conviction.

(ii.) That the omission to record such evidence *de novo* was not a mere irregularity, but an illegality, which could not be cured under section 425 of the Criminal Procedure Code.

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Section 425*—Exercise of discretion by Appeal Court—Charges under Poisons, Opium and Dangerous Drugs Ordinance, sections* 26 *and* 28*—No evidence to prove charges as framed.*

Held : That the Supreme Court will not exercise its discretion under section 425 of the Criminal Appeal Code, to uphold a conviction on the ground that no miscarriage of justice has occurred, in a case where the prosecution has failed to take due care to see that the charges were properly framed in accordance with the evidence which it was proposed to adduce.

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Section 147*—Abetment of forgery—Abetment of fabrication of evidence for the purpose of being used in or in relation to a judicial proceeding—Is the sanction of the Attorney-General necessary to enable a private party to prosecute—Penal Code sections* 109, 190 *and* 454.

Held : That the abetment of an offence is an offence in itself and that the sanction of the Attorney-General is not necessary to enable a private party to prosecute an alleged offender for the offence of abetment of forgery or abetment of fabrication of evidence for the purpose of being used in or in relation to a judicial proceeding.

VANDER POORTEN vs. VANDER POORTEN & ANOTHER 77

Section 440*—Summary Punishment for giving false evidence—Conflict between evidence of two witnesses—Do provisions of the section apply.*

A was charged with an offence under the Excise Ordinance and was convicted on the evidence of the Excise Inspector. The village headman who was also a witness gave evidence conflicting with that of the Excise Inspector on a material point. At the conclusion of the trial the Magistrate called upon the headman to show cause why he should not be dealt with under section 440, of the Criminal Procedure Code for giving false evidence. The headman stated " I have made a mistake, I beg the Court's pardon." The Magistrate treated this statement as an unqualified admission of guilt and fined the headman Rs. 50.

Held : (i.) That the statement of the headman could not be treated as an unqualified admission of guilt.

(ii.) That the provisions of section 440 of the Criminal Procedure Code are not intended to apply to a case where a conflict arises between the testimony of two witnesses.

DASANAYAKE vs. JIRASINGHE, EXCISE INSPECTOR 82

Section 413 (1)*—Disposal of property brought to Court—Absence of trial or inquiry regarding any offence—To whom should such property be handed over.*

Held : (i.) That a Magistrate has no power under Section 413 (1) of the Criminal Procedure Code to make order regarding disposal of property brought to Court unless an inquiry or trial had taken place regarding an offence committed in respect of it or regarding an offence in the commission of which it has been used.

(ii.) That where no such inquiry or trial is held the property should be returned to the person from whose possession it was taken or to his legal representative.

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Decoy

Evidence of decoys—Natural caution to be exercised by Court—Explanation given by accused raising doubt as to his guilt.

Accused was charged with selling a pound loaf of bread for 11 cents more than the control price. He stated that in charging 11 cents extra he was recovering a debt of that sum owed to him by the decoy. The decoy admitted having an account with the accused, debts of a few cents at a time being occasionally outstanding, but stated that on the day in question the deduction of such a sum was not discussed.

Held : That, " having regard to the natural caution which a Court must always adopt in cases in which decoy witnesses are produced by the prosecution," the Magistrate should have in the circumstances felt some doubt as to the guilt of the accused and acquitted him.

GUNADASA vs. WIJESEKERA 64

Decree

Decree—Whether terms of settlement should be embodied in—Requisites of a decree—Civil Procedure Code section 188.

The plaintiff (wife) sued her husband for a divorce *a vinculo matrimonii* on the ground of malicious desertion. The defendant (husband) counterclaimed a divorce and prayed for the custody of the children and for an order settling certain property on himself and his children. When the case came up for trial on 7th March 1925, both parties, who were represented by counsel, intimated to Court that parties were agreed as to the custody of children and the disposal of the property and the terms of the agreement were recorded by the judge at the request of the parties.

On the evidence led for the plaintiff on the issue of malicious desertion, the judge directed decree *nisi* to be entered returnable on 9th June, 1925. On 9th June, 1925, when a draft decree was submitted the judge made the following entry : " I do not think the terms of the agreement need be embodied in the decree. Usual form of decree should be followed and in addition the custody of the children, etc., to be as in the terms of the agreement embodied in the record."

In view of this order the final decree settled and signed by the judge did not embody any of the terms of the agreement.

The defendant moved that the decree be amended embodying the terms of the agreement. The learned District Judge refused and the defendant appealed.

Held : (i.) That when the parties asked that the terms of the agreement be entered on the record, their purpose was that there should be evidence of the agreement and not that the Court should pass a decree in conformity with the agreement in the event of a divorce being granted.

(ii.) That the purpose of a decree is not to embody and enshrine the terms of a settlement, but when an action or part of an action is determined by a settlement, to give effect to that settlement by orders capable of being executed.

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Deed

Interpretation—Deed of gift subject to fidei commissum—*Sale of interests of some* fidei commissaries *together with life interest of* fiduciarius—*Recital containing words " granted unto W.....the premises fully described in the schedule hereunder written together with life interest of the said T "—Schedule describing as two-thirds share or part of property—Did T* (fiduciarius) *convey entirety of life-interest or only two-thirds.*

G by deed of gift No. 2505 of 1886 donated the property in question to T subject to a *fidei commissum* in favour of T's children. T married C who died leaving his widow T and three children. T and two of her children conveyed their interests to plaintiff by deed P 8 the relevant part of which reads as follows :

" We Dolly.....and.....George wife and husband ..... Elsie ..... and.....Theresia..... (hereinafter, sometimes referred to as the vendor) in consideration of the sum of..... paid by.....William have granted.....unto William.....the premises fully described in the schedule hereunder written together with the life interest of the said.....Theresia.....mentioned in deed No. 2505.....and together with all and singular the rights, ways, easements, advantages, servitudes and appurtenances whatsoever to the said premises belonging or in anywise appertaining.....and together with all the estate right, title, interest.....of the said vendor into upon or out of the said premises....."

The schedule mentioned above refers to the interest sold as two-thirds parts or shares of the property.

The plaintiff brought this action for sale of the property under Ordinance 10 of 1863 and the question that arose for determination was whether on the said deed P 8 T conveyed her life interest in the entire property or only a two-third share of it.

Held : That the deed P 8 did not convey to the plaintiff the entirety of the life interest of T, but only a two-third part of it.

WILLIAM PERERA vs. THERESIA PERERA ... 45

Conveyance of land—Vendor entitled to 3/16 *purporting to convey* 1/2 *of land—Title recited in deed only as to* 2/16—*Conveyance by vendor of all his right, title and interest in the land—Does conveyance pass* 2/16 *or* 3/16 *of the land.*

A vendor, who was entitled to 3/16 of a land, purported to convey 1/2 the land. In the conveyance the title recited pointed to a deed whereby only 2/16 of the land was acquired by the vendor. The question was whether the conveyance passed 3/16 or only 2/16 of the land. In the conveyance, the vendor conveyed to the vendee " all the estate, right, title, interest, claim and demand whatsoever of the said vendor in to or upon the said premises and every part thereof." For over a third of a century the vendor did not make any claim to the land.

Held : That 3/16 of the land passed under the conveyance.

FERNANDO vs. SILVA & OTHERS 73

Deed of gift—Recital in deed that it is irrevocable—Gross ingratitude of donee—Revocability of deed—Roman-Dutch Law.

Held : (i.) That under the Roman-Dutch Law a deed of gift can be revoked on the ground of ingratitude even though the donor may have expressly agreed not to revoke it.

(ii.) That such an agreement not to revoke is null and void as being *contra bonos mores*.

NAKANTHAR vs. SINNAMMAH 78

Defamation

Defamation—Roman-Dutch Law and English Law —Publication of an extract from the report of the Bribery Commissioner concerning plaintiff—Pleas of justification, fair comment, privileged occasion— Burden of proof—Is the Bribery Commission a Judicial Tribunal—Is his report a matter in which the public is interested, and is its publication for the public benefit—Right of Appeal Court to decide whether what was published was a matter of public interest—Commissions of Inquiry Ordinance (Chap. 276)—Special Commission (Auxiliary Provisions) Ordinance, No. 25 of 1942—Sections 5, 6 and 9.

The plaintiff sued the defendants—the publisher and the owner of the " Ceylon Daily News "—for the recovery of Rs. 50,000, being alleged damages sustained in consequence of the publication in the issue of the " Ceylon Daily News " of 25-5-43 of the following words which are an extract from Appendix C. attached to the report of the Commissioner appointed by the Governor to inquire into charges of bribery and corruption made against the members of the State Council :—

> Appendix C.—" Dr. M. G. Perera (the plaintiff) who gave evidence was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did."

The plaintiff alleged that these words imputed dishonesty to him and implied that he gave false evidence before the Bribery Commission, which evidence was taken in camera and that they are defamatory of him.

The defendants answered that they published the statement complained of concerning the plaintiff, but denied that the words were defamatory or that the plaintiff suffered any damages. Further answering they stated *inter alia* :

(*a*) that they published an accurate report of Appendix C. which is a part of the finding of the Commissioner which was a Judicial Tribunal and, therefore, the publication was privileged ;

(*b*) that the said report was issued by the Government of Ceylon as a Sessional Paper and was available for purchase at the Government Record Office, and, therefore, privileged ;

(*c*) that the said extract consists of comment on a matter of public interest and that the words complained of were true in substance and in fact ;

(*d*) that they are *bona fide* comments on matters of public interest and were published *bona fide* for the benefit of the public without malice ;

To supplement the provisions of the Commissions of Inquiry Ordinance a special Ordinance, No. 25 of 1942 was enacted.

The material provisions of which are as follows :—

Section 5 : " The Commissioner may, in his discretion, hear the evidence or any part of the evidence or any witness in camera and may for that purpose exclude the public and the press from the inquiry or any part thereof.

Section 6 (1) : " Where the evidence of any witness is heard in *camera* the name and the evidence or any part of the evidence of that witness shall not be published by any person save with the authority of the Commissioner.

(2) : " A disclosure, made *bona fide*, for the purposes of the inquiry, of the name or of the evidence or part of the evidence of any witness who gives evidence in *camera* shall not be deemed to constitute publication of such name or evidence within the meaning of sub-section (1)."

Evidence was led to show (*a*) that the Commissioner in his report to the Governor requested that certain Appendices (among which Appendix C. was not included) be not published.

(*b*) That the Government Printer was requested by the Acting Secretary to the Governor to print the report as a Sessional Paper.

(*c*) That 472 copies of the report were printed of which some were circulated and others were sold.

(*d*) That of the circulated copies one was sent to the defendants by the Government Printer free of charge.

(*e*) That the events leading up to the appointment of the Commission was a matter of considerable public interest and the report was eagerly awaited by the public.

(*f*) That the extracts selected for publication quoted the Commissioner *verbatim*.

(*g*) That the plaintiff was a stranger to the 1st defendant who authorised the publication.

There was no evidence that the defendants in publishing the report were actuated by express malice.

Held : (i.) That the words complained of are defamatory of plaintiff.

(ii.) That since the words are defamatory, whether they are true or not, the law presumes that they were used with an *animus injuriandi* or with malice.

(iii.) That the presumption of malice is rebutted by proof that the words used were in substance and in fact true and that the publication was for the public benefit.

(iv.) That the defendants had led sufficient evidence to negative the *animus injuriandi*.

(v.) That the evidence on which the Commissioner has founded his report is a matter in which the public is interested and that its publication was for the public benefit.

(vi.) That the Appellate Court was in as good a position as the original Court to decide the question whether what was published was a matter of public interest.

(viii.) That the publication of the report of the Bribery Commissioner is a matter of considerable public interest on which the newspapers could fairly be expected to report in due course and as express malice had been negatived, the publication was privileged.

(viii.) That the proceedings before the Bribery Commissioner could not be regarded as those before a Judicial Tribunal.

(ix.) That the Commissioner must be taken to have authorised the publication of Appendix C. inasmuch as it was not included in the Appendices that were not to be published.

(x.) That sub-section (1) of section 6 of Ordinance No. 25 of 1942 does not prohibit the publication of the name, but " the name and the evidence or any part of the evidence."

PERERA vs. PEIRIS & ANOTHER 97

Default

See Action 74

Defence Regulations

Defence (Control of Textiles) Regulations, 1945—Possession of sarongs 50 inches wide without a permit—No ration points allocated to such sarongs—Legality of possession.

The accused was convicted of having had in his possession, without a permit from the Controller of Textiles, a quantity of sarongs, 50 inches in width, in excess of that which he as a consumer could purchase from a dealer surrendering all coupons issued to him. Sarongs were " regulated textiles " within the meaning of the Defence (Control of Textiles) Regulations, 1942, but no ration points had been allocated for sarongs 50 inches in width.

Held : That the conviction was bad.

VANNIASINGHAM vs. JAYASUNDERA ... 15

Defence (Control of Textiles) Regulations, 1945—Prosecutions to be instituted only with the sanction of the Controller of Textiles—Powers of Controller exercisable by Deputy Controller—Validity of prosecution sanctioned by Deputy Controller.

Prosecutions under the Defence (Control of Textiles) Regulations, 1945, have, under regulation 57, to be sanctioned by the Controller of Textiles. By regulation 53 any Deputy Controller of Textiles was empowered to exercise, subject to the general direction of the Controller, any power or function conferred upon or assigned to the Controller by the regulations. A Deputy Controller sanctioned a prosecution under the regulations.

Held : That the Deputy's sanction was valid.

BUYZER (SUB-INSPECTOR OF POLICE) vs. SUMANAPALA 31

Defence (Restriction of Meals) (No. 3) Regulations, 1944, Regulation 2 (1)—Serving of chicken and milk at restaurant—Essential question—Was restaurant in existence on September 1st, 1939.

Accused, the proprietors of Shanghai Restaurant, were charged with having on 30th November, 1944, served chicken and milk to a customer in contravention of Regulation 2 (1) of the Defence (Restriction of Meals) (No. 3) Regulations, 1944, which prohibited the serving of chicken and milk in any catering establishment, which was not in existence on September 1st, 1939, and were convicted by the Magistrate. The prosecution admitted that on that date there was an eating-house at the said premises which was run by one Iyer. The accused had not purchased that business and could not therefore be said to be their successor. It was contended in behalf of the accused that as meals were sold by Iyer at the said premises on September 1st, 1939, the premises were excluded from the application of Regulation 2 (1).

Held : That " catering establishment " in the Regulation did not mean merely the building in which business was carried on, but meant the business itself and that the accused were rightly convicted.

Per JAYATILAKE, J. : " The Regulation is in a group of regulations which deal with restrictions of meals, and in my opinion, it shall be so interpreted, if it presents any ambiguity, as to promote the restriction of meals."

CHOW & TWO OTHERS vs. DE ALWIS, PRICE CONTROL INSPECTOR 84

Discretion

Exercise of by Appeal Court.

See Criminal Procedure Code 63

District Court

Indictment charging accused under section 317, Penal Code—Discharge of accused without proceeding to trial on ground that injury did not constitute grievous hurt and consequently committal was a nullity—Legality of order.

Held : That once an accused is committed for trial before the District Court after a preliminary inquiry, on an indictment forwarded by the Attorney-General, it is not open to the District Judge to " embark upon an inquiry as to whether the proceedings were irregular. In fact the only remaining step was for the District Judge to try the case."

KING vs. DAYARATNE & ANOTHER ... 68

Indictment—Crown Counsel absent at trial—postponement refused—Has Court power to discharge accused.

See Criminal Procedure 83

Document

Notice to produce.

See Evidence Ordinance 62

Donation

Subject to fidei commissum Interpretation.

See Deed 45

Recital in deed that it is irrevocable

See Deed 78

Ejectment

See Rent Restriction Ordinance 110

Elections

State Council Election—Action by common informer—Action for recovery of penalty from State Councillor for having sat and voted in the Council knowing or having reasonable grounds for knowing that he was disqualified—Evidence necessary to prove that the defendant sat or voted as aforesaid—Application of Prescription Ordinance to actions under Article 11 of the Ceylon State Council (Elections) Order in Council—Prescription Ordinance section 10—Evidence Ordinance sections 74, 76, 77, 78 and 80—Ceylon (State Council) Order in Council, 1931, Articles 8, 9, 10, 11 and 15.

This was an action by a common informer under Article 11 of the Ceylon (State Council) Order in Council, 1931, for the recovery of a penalty of Rs. 12,500 from the defendant for sitting and voting in the State Council knowing or having reasonable grounds for knowing that he was disqualified.

The defendant was elected as the member of the State Council for Colombo South at the election held on February 22, 1936. On an election petition his election was declared on July 16, 1936 to be null and void on the ground that, at the time of his election he was disqualified as he was a paid visiting lecturer at the Ceylon University College. He continued to deliver these lectures up to February 29, 1936.

On July 17, 1936, plaintiff's proctors filed (*a*) a stamped paper in the form of a plaint stating that the defendant became liable to pay a penalty of Rs. 12,500 but restricting the claim to Rs. 1,000, and (*b*) a motion asking for leave to prosecute the action in terms of Article 11 (2) of the Order in Council.

On July 20, 1936 the District Judge ordered the application for leave to be supported and on the same date the proctors filed another motion for raising the claim from Rs. 1,000 to Rs. 12,500. On July 29, 1936, the District Judge, allowed both applications. The original " plaint " did not bear the stamps required for a plaint in a claim of Rs. 12,500. This deficiency of stamp duty was made good only on June 3, 1943, and an amended plaint was filed on June 16, 1943. The Court then issued summons on the defendant on June 28, 1943.

The only evidence placed by the plaintiff at the trial was :

(*a*) A copy of the evidence given by the defendant at the Election Petition Inquiry in 1936.

(*b*) A copy of the judgment in that Inquiry, and

(*c*) A copy of the " Hansard " from March 17, 1936 to August 25, 1936.

The defendant called no evidence. The District Judge entered judgment for the plaintiff for Rs. 9,500 as he found that the defendant had sat or voted in the Council only on nineteen days. The defendant appealed.

The main questions argued in appeal were :

1. Has the plaintiff proved that the defendant sat or voted on the nineteen days or any of them in respect of which he has been awarded a penalty of Rs. 500 per day ?

2. Was the defendant disqualified within the meaning of Article 11 or was the seat vacant on anyone of these days ?

3. If the defendant sat or voted on those days did he do so knowing or having reasonable grounds to know that he was disqualified or the seat was vacant ?

4. If plaintiff's claim prescribed ?

Held : (i.) That the mere production of a copy of " Hansard " from March 17, 1936, to August 25, 1936, was insufficient to prove that the defendant had sat or voted in the Council during the relevant period, and as no other evidence was led on the point, that the plaintiff had failed to prove that the defendant had sat or voted in the Council during that period.

(ii.) That the disqualification referred to in Article 9 of the Order in Council refers only to persons who sit or vote—

(*a*) without taking the oath as required by Article 10, or

(*b*) while holding or enjoying a contract, or

(*c*) while disqualified in any other way under the Order.

(iii.) That even if the defendant sat or voted in the Council on any one of the nineteen days referred to, he would not be a person who sat or voted while " disqualified by this Order for so sitting or voting " as he ceased to be a visiting lecturer at the University College some days before the formal opening of the State Council.

(iv.) That the defendant did not sit or vote in the Council after his seat became vacant ; and

(v.) That the plaint was filed only when the amended plaint was filed on June 16, 1943, that the cause of action accrued in 1936, that section 10 of the Prescription Ordinance applied to penal actions filed under Article 11 of the Order in Council, and that therefore the action was prescribed.

Per WIJEYEWARDENE, J. : " I come now to the third question argued before us. The defendant knew that he was a Visiting Lecturer at the University College up to February 29, 1936. If that fact disqualified him for sitting or voting as a member or rendered his seat vacant within the meaning of Article 11 could it not be said that he had the knowledge contemplated by that Article, though, in fact, the defendant might have held the view that his holding the post of Lecturer did not disqualify him from being elected as member ? My brother and I hold somewhat conflicting views on this question, and I do not, therefore, propose to deal with this matter, as the appeal could be decided on the points on which we agree."

DE ZOYSA vs. WIJESINGHE 5

Village Committee—Election of Chairman—Allegations of undue influence and violation of secrecy of ballot.

See Quo Warranto 52

Estoppel

By election.

See Buddhist Law 43

Evidence

Onus of proof on prosecution.

See Court of Criminal Appeal 36

Onus of proof in transaction falling within section 6 of Money Lending Ordinance.

see Money Lending Ordinance 49

Onus of proof—in action under section 247 of Civil Procedure Code by unsuccessful claimant.

See Civil Procedure Code 50

Reference by Crown, in opening case to jury, to evidence which is not subsequently led.

See Court of Criminal Appeal 60

Secondary evidence.

See Evidence Ordinance 62

Evidence of Decoy.

See Decoy 64

Evidence in Summary proceedings.

See Civil Procedure Code 80

Onus of proof in charge under section 3 (1) (*c*) of Vagrants Ordinance. 85

Onus of proof in *rei vindicatio* action.

See Action 91

Onus of proof in action for defamation.

See Defamation 97

Evidence Ordinance

Sections 74, 76, 77, 78 and 80.

See Elections 5

Section 112.

See Maintenance 111

Sections 65 and 66—Nature of the notice under—Procedure in Criminal Proceedings—Summons on accused to produce document in his possession—Failure to produce—Acquittal of accused—Complainant's right to lead secondary evidence—Criminal Procedure Code section 66.

Held : (i.) That the notice to produce referred to in sections 65 and 66 of the Evidence Ordinance is a notice issued by process of Court under the Civil or the Criminal Procedure Code.

(ii.) That the principle on which notice to produce a document is required is merely to give sufficient opportunity to the other side to produce it.

(iii.) That, where in criminal proceedings, an accused person, who was summoned to produce a document in his possession failed to do so, the complainant is entitled to lead secondary evidence of the contents of such document.

SARANADASA, INSPECTOR OF LABOUR vs. CHARLES APPUHAMY 62

False Evidence

Summary punishment for giving.
See Criminal Procedure Code 82

Fidei Commissum

Deed of gift subject to *fidei commissum*—Interpretation.
See Deed 45

Forgery

See 77

Fraud

Land transferred a second time in fraud of prior transferee.
See Registration of Documents 106

Income Tax

Rules made under section 90 of the Income Tax Ordinance—Scope of expression "bank" in Rule I. (1) and I. (2).

Held : (i.) That for the purposes of Rule I. (1) and (2) a banker means a company or persons carrying on as its or his principal business the acceptance of deposits of money on current account or otherwise subject to withdrawal by cheque, draft or order.

(ii.) That it is for the person claiming relief to establish affirmatively that he is a "bank" within the meaning of the rule.

Per ROSE, J. : "I consider nevertheless that the question as to whether by the evidence adduced before the Board the Chettinad Bank and its Branch can reasonably be held to have satisfied the test to which I have referred is a matter of law, or at least of mixed fact and law, to which it is proper that this Court should apply its mind."

COMMISSIONER OF INCOME TAX vs. BANK OF CHETTINAD, LTD. 65

Indian Criminal Procedure Code

Sections 426, 496, 497, 498 and 561A.
See Bail 1

Indictment

Power of District Court to discharge, without trial an accused person indicted by Attorney-General.
See District Court 68

Power of District Court to discharge when Crown Counsel absent and postponement refused.
See Criminal Procedure 83

Interpretation

Of Statute—Reference to speeches in State Council as aids to interpretation of Ordinance.
See Rent Restriction Ordinance 12

Of Deed where vendor entitled to 3/16 of land purported to convey 1/2.
See Deed 73

When order not in terms of the Section
See Action 71

Of deed where fiduciaries sells life-interest with fidei commissaries.
See Deed 45

Judge

Failure of trial Judge to consider all the evidence or to appreciate evidence correctly or to give adequate reasons for his conclusions.
See Will 86

Misdirection as to onus of proof in action *rei vindicatio.*
See Action 91

Judicial Tribunal

Bribery Commission is not.
See Defamation 97

Jurisdiction

Possessory action by lessee.
See Action 83

Court of Requests—Action for return of jewellery valued at over Rs. 300 on payment of sum less than Rs. 300—Demand together with interest claimed exceeding Rs. 300—Jurisdiction of Court—Courts Ordinance section 75.

The plaintiff claimed the return of certain articles of jewellery on payment of a sum of Rs. 231, or in the alternative, judgment for the sum of Rs. 269, (being the value of the articles, which for the purposes of the alternative claim were assessed at Rs. 500, less Rs. 231) together with legal interest from date of plaint till payment. The plaintiff admitted that the value of the jewellery was Rs. 735. The legal interest brought the demand to a sum exceeding Rs. 300.

Held : (i.) That the claim for the return of articles valued at Rs. 735 on payment of Rs. 231 was outside the jurisdiction of the Court of Requests.

(ii.) That the interest claimed in the alternative claim brought the demand to a sum exceeding Rs. 300 and that the claim was therefore outside the jurisdiction of the Court of Requests.

HAMID vs. BADURDEEN 75

Justa Causa

See Money Lending Ordinance 49

Landlord and Tenant

See under Rent Restriction Ordinance.

Lease

Of undivided share by co-owner. Right to institute partition action.
See Partition 81

Lessee

Possessory action by—Value of action
See Action 33

Lotteries

Keeping place for the purposes of a lottery—What constitutes "keeping"—Penal Code section 288.

Held : That to constitute keeping a place for the purposes of a lottery there must be evidence of some habitual use of the place for the purposes alleged.

PERERA vs. PERERA 16

Maintenance

Maintenance—Children born during the subsistence of marriage—Presumption—Evidence Ordinance—Meaning of the word "access" in section 112.

Held : That the word "access" in section 112 of the Evidence Ordinance means no more than opportunity of intercourse.

RANASINGHE vs. SIRIMANNE 111

Maintenance of minor children after decree absolute for divorce.
See Civil Procedure Code 80

Maintenance for Buddhist Priest
See Buddhist law 55

Market

Keeping unlicensed private market.
See Urban Councils Ordinance 27

Misdirection

As to what constitutes culpable homicide.
See Court of Criminal Appal 36

As to common intention where several accused jointly charged with murder.
See Court of Criminal Appeal 60

Misdirection in rei vindicatio action.
See Action 91

Money Lending Ordinance

Written promise to pay money—Enforceability—Consideration—Undue influence—Money Lending Ordinance, sections 2 and 6.

The plaintiff sued the defendant on a written promise to pay Rs. 2,800 in certain circumstances. The promise was made deliberately and was not "irrational or motiveless." Although an issue was raised no evidence of undue influence on the part of the plaintiff was led by the defendant.

Held : (i.) That there was *justa causa* for the promise and that it was, therefore, enforceable ;

(ii.) That the agreement sued upon was within the provision of section 2 of the Money Lending Ordinance.

(iii.) That the transaction fell within section 6 of that Ordinance and that the burden was on the plaintiff to prove that the promise was not induced by undue influence.

The Supreme Court accordingly re-opened the transaction and granted the defendant relief.

EDWARD vs. DE SILVA 49

Notice

To produce document.
See Evidence Ordinance 62

Of tendering security for costs of appeal. Service on respondent's proctor instead of on respondent.
See Appeal 72

Omnibus Service Licensing Ordinance, No. 47 of 1942

Omnibus Service Licensing Ordinance, No. 47 of 1942—Construction of section 7.

The licence of the Commissioner of Motor Transport was sought for providing an omnibus service on a section of a highway which formed part of the routes over which two companies operated services.

Held : That under section 7 of the Omnibus Service Licensing Ordinance, the Commissioner had no power to issue a licence for the proposed route either to the existing companies or to any other applicant.

THE COMMISSIONER OF MOTOR TRANSPORT vs. THE HIGH LEVEL ROAD 'BUS CO. ... 51

Partition

Partition action—Defendants' answers disclosing fact that owners of certain shares not made parties—Plaintiffs proving claim as against certain defendants—Procedure.

In this case the plaintiffs and 1st to 9th defendants claimed a half share of a certain field and stated that 10th to 13th defendants were entitled to the other half. The 10th to 13th defendants claimed the entire field but their answer disclosed that the owners of certain shares in the field were not parties to the action. At the trial, plaintiffs and 1st to 9th defendants proved their claim as against 10th to 13th defendants.

Held : (i.) That further proceedings should be taken after all the persons who had not parted with their interests in the field had been made parties to the action.

(ii.) That at those proceedings 10th to 13th defendants should not be permitted to dispute the rights of the plaintiffs and 1st to 9th defendants to the shares claimed by them in the plaint.

ISMAIL & ANOTHER vs. MOHAMMADU & OTHERS 47

Partition—Lease of undivided share by co-owner—Can such co-owner bring partition action pending lease—Partition Ordinance, section 2.

Held : That a co-owner who leases his undivided share can institute an action to partition the land pending such lease.

GUNAWARDENE vs. BABY NONA & ANOTHER ... 81

Partition—Conveyance pending partition action of interests to which vendor may be declared entitled to in the final decree—Is it obnoxious to section 17 of the Partition Ordinance—Nature of the right so conveyed.

A conveyance executed after the institution of a partition action and before the entering of the final decree purported to "sell, assign, transfer and set over" to the vendee the interest to which the said vendor may be declared entitled to in the final decree to be entered in the said case from and out of all that land (*i.e.*, the subject-matter of the partition suit).

Held : (i.) That the conveyance was not obnoxious to section 17 of the Partition Ordinance.

(ii.) That the right of title conveyed thereunder comes into existence only upon the entering of the final decree in virtue of the *jam tunc* principle of the Roman-Dutch Law or the equitable principle of the English Law that "when the property comes into existence the assignment fastens to it."

MANCHANAYAKE vs. PERERA & OTHERS ... 104

Adoption of Commissioner's Report as regards allocation of allotments and valuation.

Held : Partition action—That questions of valuation (in the absence of an attack in the basis of valuation) and allocation of allotments in proceedings under the Partition Ordinance are not proper subjects for appeal to the Privy Council.

NARAYANAN CHETTIAR & OTHERS vs. KALIAPPA CHETTIAR & OTHERS 109

Penal Code

Section 323.
See Police Officer 14

Section 288.
See Lotteries 16

Section 394.
See Prevention of Crimes Ordinance 32

Sections 109 190 and 454.
See Criminal Procedure Code 77

Penalty

For sitting and voting in State Council
See Elections 5

Petition of Appeal

One petition by several defendants who had given separate proxies to same proctor and who acted jointly—How should petition be stamped.
See Appeal 70

Poisons, Opium and Dangerous Drugs Ordinance

Poisons Opium and Dangerous Drugs Ordinance—Cap. 172 sections 25, 26 and 76 (5) (a)—Possession of seeds, leaves and stems of the hemp plant (ganja)—Does ganja come within the definition of hemp plant.

Where the accused was charged with possessing seeds, leaves and stems of a hemp plant (ganja) in contravention of section 26 of the Poisons, Opium and Dangerous Drugs Ordinance, and it was contended that there were two varieties of the hemp plant, namely, Canabis Sativa and Canabis Indica and that the Ordinance penalised only the possession of Canabis Sativa.

Held : That Canabis Indica is a species of Canabis Sativa and that ganja comes within the definition of hemp plant in the Ordinance.

WILSON vs. KOTHALAWALA, EXCISE INSPECTOR... 81

Sections 26 and 28.
See Criminal Procedure Code 63

Police Officer

Complaint made to police officer—Right of police officer to demand from person against whom the complaint was made his name and address—Magistrate reading to accused the particulars of the offence from the plaint and not from the summons—Criminal Procedure Code sections 33 and 187—Police Ordinance section 56—Penal Code section 323.

Held : (i.) That a police officer to whom a complaint is made against a person has the right to demand from that person his name and address.

(ii.) That the reading of the particulars of the offence from the plaint instead of from the summons did not, in the circumstances of this case, vitiate the conviction.

SILVA (INSPECTOR OF POLICE) vs. ABEYASEKERA 14

Police Ordinance

Section 57.
See Police Officer 14

Possessory Action

See Action 33

Preliminary Objection—

See Appeal 70

Prescription Ordinance

Section 10.
See Elections 5

Presumption

Of Innocence. Prosecution witness.
See Court of Criminal Appeal 36

Prevention of Crimes Ordinance

Charge under section 394 of the Penal Code—Conviction of accused—Sentence of two years' rigorous imprisonment and two years' police supervision passed by magistrate—Validity of sentence—Prevention of Crimes Ordinance sections 5 and 6.

Held : (i.) That it is a condition precedent to the imposition of the enhanced punishment provided by section 6 of the Prevention of Crimes Ordinance that the Magistrate should pass a sentence other than imprisonment in respect of the offence charged.

(ii.) That the punitive powers given by sections 5 and 6 of the Prevention of Crimes Ordinance can be combined.

PIKAI *alias* PERIYAM vs. SIRISENA (P S 1744) ... 32

Privy Council

Appeal to on questions of valuation and allocation of allotments under Partition Ordinance.
See Partition 109

Proctor—

See Appeal 71

Proof

Onus of—
See under Evidence.

Quo Warranto

Village Committee—Election of Chairman—Allegations of undue influence and violation of secrecy of ballot at election—Validity of election. Sections 16 and 27 (1) of the Village Communities Ordinance (Chapter 198). Meaning of "ballot" and "secret ballot."

The Ratemahatmaya of the district was at the place where the members of the Village Committee were voting for the election of their Chairman. There was no evidence that the Ratemahatmaya intimidated the voters or that he saw what the members wrote on their ballot papers or otherwise abused the influence he had over the villagers.

Held : (i.) That the election was valid.

(ii.) That the meaning of the term " ballot " in section 27 (1) of the Village Communities Ordinance is hardly different from the meaning of the words " secret ballot " in section 16 (2) of the Ordinance.

DE SILVA VS. MANINGOMUWA 52

Registration of Documents

Roman-Dutch Law—Exceptio doli—*Land transferred a second time in fraud of prior transferee—Action by subsequent transferee claiming property—Can prior transferee who is in possession raise defence of fraud without making transferor a party to the action—Is priority of deed in favour of subsequent transferee defeated by fraud—Section 7 (2) Registration of Documents Ordinance (Cap. 101).*

Where X sold a land to the defendant (who entered into possession) prior to the publication of a settlement order declaring her (X) entitled to the land, and later, after the settlement order, re-sold the same land to the plaintiff, who was aware of the earlier conveyance :—

Held : (1) That the defendant could successfully raise the plea of *exceptio doli* (fraud) against the plaintiff.

(2) That it was not necessary to make X a party to the action if it could be shown that the plaintiff had acted fraudulently.

(3) That as the transaction between X and the plaintiff was a sham the priority obtained by the registration of the deed in the plaintiff's favour was defeated.

AMARASEKERA APPUHAMY VS. MARY NONA ... 106

Rei Vindicatio

See Action 74

Rent Restriction Ordinance, No. 60 of 1942

Writ of Certiorari—*Courts Ordinance section 42—Rent Restriction Ordinance No. 60 of 1942, section 6 (b)—Powers and jurisdiction of Assessment Board—Interpretation of Statutes—Can reference be made to speeches made in the State Council.*

Held : (i.) That section 6 (*b*) of the Rent Restriction Ordinance states in the clearest possible language that a landlord is entitled to raise the rents according to a certain formula whenever there is an increase in the amount paid by the landlord as rates, and there is nothing in that section or even in the whole Ordinance to indicate that the Legislature contemplated only an increase of the rates occasioned by an enhancement of the annual value and not by raising of the rate percentage.

(ii.) That the Assessment Board has no jurisdiction to interfere with an enhancement of rent under section 6 (*b*) of the Rent Restriction Ordinance No. 60 of 1942.

(iii.) That the plain meaning of section 6 (*b*) should be given to it and it should not be interpreted in a different way in view of certain speeches made in the State Council.

DE PINTO VS. THE RENT ASSESSMENT BOARD ... 12

Landlord and Tenant—Action for ejectment—Premises reasonably required for plaintiff's occupation—Hardship to defendant—Rent Restriction Ordinance No. 60 of 1942.

Plaintiff, a widow with three boys and two girls living with her at Ganewatte, sued the defendant, a tenant under her lessee to whom she had leased the premises in question for eight years. The plaintiff wanted the premises, to reside in Colombo for the purpose of educating her children, and she obtained a surrender of the remaining period of the lease from her lessee on payment to him of a sum of Rs. 255.

The defendant contested the case on the ground that he has a large family and has not been able to secure other accommodation for himself.

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Revision

Does not lie where order of abatement of appeal made for failure to serve on respondent personally notice of tendering security for costs.

See Appeal 71

Revocation

Of Gift—*See Deed* 78

Roman-Dutch Law

Revocability of deed for gross ingratitude of donee.

See Deed 78

Action for Defamation.

See Defamation 97

Exceptio doli.

See Registration of Documents 106

Sale of Goods Ordinance (Cap. 70)

Section 15 (1).

See Contract 40

Security

For costs of appeal. Notice tendering served on respondents' proctor. Is it sufficient compliance with section 756 of Civil Procedure Code.

See Appeal 72

Shops Ordinance, No. 66 of 1938

Closing Order under the Shops Ordinance—Charge of keeping shop open in contravention of closing order—Proper person to be charged for such contravention—Shops Ordinance, No. 66 of 1938—Sections 18, 23 and 31.

The accused, who was the Secretary of the Co-operative Stores Society, Ltd. was convicted of having kept a shop belonging to the Society open in contravention of a closing order made under the Shops Ordinance. The person liable for the offence was the " occupier " as defined in section 31. There was no evidence to show that the accused was the " occupier."

Held : That the conviction must be set aside.

KUMARAVELU VS. WIJEYARATNE (INSPECTOR OF LABOUR) 48

Special Commission (Auxiliary Provisions) Ordinance, No. 25 of 1942

Sections 5, 6 and 9.

See Defamation 97

Stamps

One Petition of appeal by several defendants who had given separate proxies to same proctor and who acted jointly.
See Appeal 70

Summary Procedure

Evidence under—
See Civil Procedure Code 80

Textiles

Possession of without permit.
See Defence Regulations 15

Validity of prosecution sanctioned by Deputy Controller of Textiles.
See Defence Regulations 31

Trust

Trusts Ordinance, section 102—*Religious Trust—Petition to Government Agent by* 79 *persons claiming to be interested in—Grant of certificate by Government Agent after inquiry—Action instituted by eight of the petitioners and four others—Can action be maintained —Nature of the inquiry by the Government Agent regarding interestedness of plaintiffs—Is the Government Agent's finding final—Matter of semi-public interest—Desirability of remitting case to enable plaintiffs to regularise plaint.*

Seventy-nine persons claiming to be interested in the matters relating to a religious trust which are set forth in the plaint, presented a petition to the Government Agent, Northern Province, in compliance with the requirements of section 102 of the Trusts Ordinance (Chap. 72) praying for a certificate in terms of paragraphs (*a*) and (*b*) of sub-section (3) of section 102. Having obtained this certificate of the 79 petitioners and four strangers to the petition instituted this action.

On a preliminary issue raised as to whether the plaintiffs had complied with section 102 (3) of the Trusts Ordinance before filing action the learned District Judge dismissed the action as Counsel for the plaintiff stated that he was not applying to strike out the names of any of the plaintiffs.

Held : (i.) That the trial Judge was right in dismissing the action as the plaintiffs refused to ask that the names of the non-petitioner-plaintiffs be struck out.

(ii.) That the finding of the Government Agent or the Assistant Government Agent regarding the interestedness of persons within the meaning of section 102 (2) is not final, and it would be open to a Court to consider that question independently should it arise before it.

Per Soertsz, A.C.J. : "As I have already observed, the trial Judge had no alternative but to make the order he made. It was not for him, even if he had the power, to strike out those who had not been petitioners. I should have, therefore, dismissed this appeal but that the questions involved are of semi-public interest, and for that reason I would accede to the application of appellant's counsel, make order that the case be remitted to enable the parties to apply to the Court for such of them as had not joined in the petition to withdraw from the action, and for the action to proceed thereafter. The *locus standi* of the eight others was not questioned.

Thambipillai vs. Kurukkal & Others ... 92

Undue Influence

See Money Lending Ordinance 49

Election of Chairman of Village Committee.
See Quo Warranto 52

Urban Councils Ordinance, No. 61 of 1939

Unlicensed private market—Market owner's default in obtaining licence due to delay of local authority in arriving at a decision—Plaint filed within time—Amended plaint filed out of time—Is prosecution barred—Power to impose continuing fine—Propriety of instituting prosecution—Urban Council's Ordinance, No. 61 *of* 1939, *sections* 151, 164 *and* 230.

The accused was charged with having kept an unlicensed private market during 1944. The default in obtaining a licence was due to the delay on the part of the Chairman of the Urban Council in giving a decision on an application made by the accused. The original plaint charged him with having contravened section 150 of the Ordinance. An "amended plaint" filed after three months of the date of the commission of the offence charged him with having contravened section 151 of the Ordinance. The Magistrate convicted the accused and sentenced him to pay a fine as well as a continuing fine in respect of each of four days.

Held : (i.) That a continuing fine could not have been imposed as the accused had not carried on the market in disregard of a notice suspending his licence.

(ii.) That as the accused's default in obtaining a licence was due to delay on the part of the Chairman, the prosecution should not have been launched until the accused's application for a licence had been disposed of.

(iii.) That the "amended" plaint was a new charge and was out of time.

Rev. Fr. Colleree vs. Benedict ... 27

Vagrants Ordinance

Vagrants' Ordinance (*Cap.* 26), *section* 3 (1) (*c*)—*Person found wandering abroad and not having any visible means of subsistence and not giving a good account of himself—Ingredients of offence—Burden of proof.*

Appellant was found by two policemen on a street in the early hours of the morning with a naval man and a boy. When the police came the boy ran away but was arrested. The appellant too was arrested and charged under section 3 (1) (*c*) of the Vagrants' Ordinance and was convicted by the Magistrate on the ground that the accused and her witnesses did not appear to be speaking the truth.

Held : That it was incumbent upon the prosecution to prove the ingredients of the offence and that the appellant could not be convicted in the absence of evidence from the prosecution to prove that the appellant was a person without any means of subsistence.

Cecily Hamy vs. P.C. 78 Zoysa 85

Village Communities Ordinance (Cap. 198)

Sections 16 and 27 (1).
See Quo Warranto 52

Wagering Contract

See Contract 94

Waste Lands

Waste Lands Ordinance, No. 1 of 1897, sections 2, 3 and 4—Notice under section 1—Claims by several claimants before special officer—Agreement with claimants admitting claim to part—Remainder declared property of Crown—Orders published in Gazette under section 4 (1) and (2)—Effect of such order—Meaning of the words final and conclusive in section 4 (2).

In pursuance of a notice duly published under section 1 of the Waste Lands Ordinance No. 1 of 1897 in respect of a tract of land 207 acres in extent, seven claimants appeared before the Special Officer, who after due inquiry, entered into an agreement with the claimants admitting their claim to an extent of 133 acres out of the land involved in the notice and the remainder was declared the property of the Crown. This agreement was embodied in orders dated 12th October, 1900, and were published in the "Government Gazette" as required by section 4 (1) and (2) of the Ordinance.

In 1933, the plaintiff brought this action to partition the said extent of 133 acres on the basis that those who claimed under the seven claimants who appeared before the Special Officer only were entitled to rights in the said land. The principal contesting defendants claimed that not only the seven claimants but also others who had been co-owners with them prior to the said agreement were entitled to the land in question, although they did not appear before the Special Officer.

In the District Court the contesting defendants succeeded and the plaintiff appealed.

The appeal came up before their Lordships Soertsz, J. and Jayetileke, J. who in view of the decisions in *Kiri Menika vs. Appuhamy* (19 N.L.R. 298) and *Dingiri Banda vs. Podi Bandara* (29 N.L.R. 257) sent the case to his Lordship the Chief Justice for an order under section 51 of the Courts Ordinance. The case was accordingly referred to a Bench of Five Judges.

Held (WIJEYEWARDENE, J., *dissentiente*) :

(i.) That the rights of co-owners who did not appear before the Special Officer in response to the notice were wiped out by the publication of the orders embodying the agreement with the claimants in the "Government Gazette," as required by section 4 (1) and (2) of the Waste Lands Ordinance.

(ii.) That proceedings under the Waste Lands Ordinance No. 1 of 1897 are proceedings *in rem*.

(iii) That the Special Officer in acting under section 4 of the Ordinance does so in a judicial capacity

(iv.) The words "final and conclusive" in section 4 (2) means binding everyone who is subject to the law, whether parties to the proceedings or not.

HARAMANIS APPUHAMY VS. MARTIN & OTHERS... 17

Will

Will—Disputed—Exclusion of blood relatives of testator from specific devises of acquired property—Inherited property to be dealt with as on intestacy—Is will unreasonable or unnatural—When should Appeal Court interfere with findings of lower Court on questions of fact—Misdirection—Failure on the part of trial judge to consider all the evidence, or to appreciate evidence correctly or to give adequate reasons for his conclusions.

Where a testator made specific devises of his acquired property to certain beneficiaries, who were not his relatives, excluding from the operation of his will his inherited property, which would devolve as on intestacy on the "admitted relatives."

Held : (1) That the will was not unreasonable or unnatural.

(2) That the actual feelings of the testator towards his relatives should be considered in deciding whether a will is reasonable and natural or not.

(3) That where a trial Judge has come to a conclusion without weighing or deciding the facts on which he could base his inference and where such conclusion has also coloured the attitude of the Judge to the other features of the case, his judgment is vitiated, as it amounts to a serious misdirection.

Per KEUNEMAN, J.—It has been strongly urged on us that we should not interfere with findings of by the trial Judge, and a long series of cases upon this matter decided both in Ceylon and in England have been cited to us. I may say that in this case, as I have shewn earlier, we are not dealing with a finding as to the truth of the oral evidence based upon observation of the manner and demeanour of witnesses, although even in such a case we are not entirely absolved from the obligation of rehearing the case : see *Yuill vs. Yuill* (29 C.L.W. 97). In this case the Judge has decided upon the "probabilities" of the case, and a Court of Appeal is in as good a position to weigh the probabilities as the trial Judge.

KARTHELIS APPUHAMY VS. SIRIMARDENA ... 86

Witness

Commission to Examine—application for—reasons for refusing.

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Words and Phrases

"Keeping a lottery"
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"Description"—Section 15 of Sale of Goods Ordinance
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"Ballot"
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"Secret Ballot"
See Quo Warranto 52

"Bank"
See Income Tax 65

"Ganja"
See Poisons Opium & Dangerous Drugs Ordinance 81

"Hemp Plant"
See Poisons Opium & Dangerous Drugs Ordinance 81

"Catering Establishment"
See Defence Regulations 84

"Access"
"Access" in section 112 of Evidence Ordinance
See Maintenance 111

Present: LORD RUSSELL OF KILLOWEN, LORD WRIGHT, LORD GODDARD, SIR MADHAVAN NAIR & SIR JOHN BEAUMONT

LALA JAIRAM DAS & OTHERS (APPELLANTS) vs EMPEROR

Privy Council Appeal No. 87 of 1944.
Decided on 5th February, 1945.

Bail—Accused convicted and sentenced to imprisonment—Special leave to appeal against conviction and sentence granted by Privy Council—Power of High Court in India to grant bail—Indian Criminal Procedure Code sections 426, 496, 497, 498 *and* 561*A.*

Held : (i) That the Indian Criminal Procedure Code confers no powers on a High Court to grant bail in the case of the convicted person and the fact that he has obtained leave from His Majesty in Council to appeal from his conviction or sentence makes no difference in this regard.

(ii) That chapter 39 of that Code together with section 426 is, and was intended to contain a complete and exhaustive statement of the powers of the High Court in India to grant bail, and excludes the existence of any additional inherent power in a High Court relating to the subject of bail.

(iii) That if the local court has no power to grant bail, no suggestion or direction of the Privy Council can confer that power.

(**Edd. C.L.W.**— See *The King vs Loku Nona & Two Others* (11 N.L.R. 119) in which the Supreme Court held that, it has no power to release a prisoner on bail pending the decision of his appeal to the Privy Council, unless directed to do so by the Privy Council. In the present case the Privy Council has held that it has no power to order bail in a case in which the court from which the appeal has been taken has itself no power to grant bail. In discussing the question of the absence of any right to direct the local court to admit to bail their Lordships state : Their Lordships are unable to recognize any proceeding or conduct on their part in the past which can be properly described as a " direction to a High Court to entertain an application for bail." When any suggestion of bail has been mooted on behalf of a successful petitioner for special leave to appeal against his conviction, their Lordships have always refused to consider the matter, and have no doubt at times said that the question of bail could only be properly and satisfactorily dealt with in India. But they have never given any formal direction to a High Court on the matter, nor has any reference to bail been made in Orders in Council granting leave to appeal. Moreover, their Lordships find it impossible to appreciate how any suggestion or direction by them in regard to an application for bail to the High Court, made or given when they decide to advise His Majesty that special leave to appeal from a sentence or conviction should be granted, can in any way determine or affect the question under consideration on this appeal. The High Court either does possess power to grant bail in the given circumstances or it does not. If it possesses the power it possesses it independently of any suggestion or direction made or given by their Lordships. If it does not possess it, no suggestion on direction made or given by their Lordships could confer such a power. So far as any decision in India is based upon the fact that such a suggestion was made or direction given, or that no such suggestion was made or direction given, it cannot be supported on that ground alone.)

D. N. Pritt, K.C., with *S. P. Khambatta*, for the appellants.
B. J. Mc Knenna, for the Crown.

LORD RUSSELL OF KILLOWEN

This appeal raises an important question *viz.* whether a High Court in India has power to grant bail to a person who has been convicted and sentenced to imprisonment, and to whom His Majesty in Council has given special leave to appeal against his conviction or sentence. The questions which arise for consideration in such a case are of such a nature that they can only, their Lordships think, be properly dealt with by some authority in India possessing either knowledge of the relevant facts, or the means of acquiring that knowledge ; but whether a High Court in India has power to grant bail in the circumstances indicated is a matter upon which divers views have been expressed in the courts in India, and which comes before the Board for the first time, in the following circumstances: The appellants were convicted under section 120 B read with section 420, Penal Code, and sentenced to terms of rigorous imprisonment. On appeal, the High Court of Lahore upheld the convictions but altered the sentences. The appellants having obtained special leave from His Majesty in Council to appeal from the judgments of the High Court, applies to the High Court of Lahore to be released on bail. Their application was dismissed. From that dismissal they now appeal by special leave to His Majesty in Council. The application was dismissed upon the ground that the Judicial Committee had given no direction that an application for bail should be made to the High Court. It will be convenient at the outset to review briefly the decisions in India. In the year 1900, the High Court of Madras held (in a case in which special leave to appeal had been granted) that it had

power to make an order for release on bail pending the decision of the appeal : see 24 Mad. 161 (1). On the petition for special leave, an application for bail had also been made, when the Judicial Committee stated that any such application must be dealt with by the High Court. The case was argued before the High Court on the footing that the High Court could act under section 498,* Criminal Procedure Code. (herein referred to as the Code). The judgment simply states :

" In our opinion this court has jurisdiction to make an order in this case releasing the accused on bail pending the decision of the Privy Council." In the year 1908 in 15 B.R. Cr. 1908 at p. 50 (2) the Chief Court, which had previously dismissed an appeal from their convictions by the accused persons, dismissed an application by them to be released on bail pending the hearing of a petition by them to His Majesty in Council for special leave to appeal.

The application seems to have been based on section 498* of the Code; but it was held that section 498 does not refer to a case where the court is *functus officio*, but refers to cases where the court has still some power left as regards the sentence of the accused, and that the court has no power to release the accused on bail. In February, 1923, the case in 50 Cal. 585 (3) came before the High Court of Calcutta. A convicted person applied under section 498 of the Code for a stay of execution of the sentence pending the hearing of a proposed application to His Majesty in Council for special leave to appeal. It was decided that the High Court had no jurisdiction under section 498. The Chief Justice indicated that the High Court might have had jurisdiction by reason of clause (41) of the court's Letters Patent if the case had come within that clause, which it did not. Richardson, J. distinguished the Madras case on the ground that in that case special leave to appeal had already been obtained. He was of opinion that the court had no jurisdiction under section 498 to grant bail pending an application for special leave to appeal. The court was *functus officio*, and had no seisin of the case. Nor had the court any inherent jurisdiction. He pointed out, however, that it was open to the Local Government to suspend the sentence under section 401 of the Code. On 2nd April, 1923, the Code of Criminal Procedure (Amendment) Act, 1923, came into force by which there was added to the Code section 561 A† which runs thus :

" 561 A.† Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice."

In 1926, in 49 All. 247 (4) the High Court of Allahabad held that " a High Court has certainly inherent jurisdiction to stay execution of its own order when the ends of justice require it." It refused to grant bail at that stage because special leave to appeal had not yet been obtained ; a petition had been lodged but had not been heard by the Judicial Committee. The applicant, however, was told to apply again when leave to appeal had been granted. In 1936 another case came before the High Court of Calcutta, *viz.* I.L.R (1937) 1 Cal. 464 (5) in which it was held that after disposal of a criminal appeal the High Court is *functus officio* and has no seisin of the case, and cannot grant bail to a convicted person before leave to appeal has been granted by His Majesty in Council. The decisions in 24 Mad. 161 *(supra)* and 49 All. 247 *(supra)* were distinguished on the ground that they were decisions given on the footing that leave to appeal had been or would be obtained. The application for bail had been refused by the High Court of Calcutta, who gave their reasons at a later date. Cunliff, J. in his judgment mentions the fact that in the interval a suspension order had been made by the Local Government under section 401. Henderson, J. (differing from the view expressed in the Allahabad case) was of opinion that section 561 A had no reference to bail, which was a matter specifically provided for by the Code itself. It appears (from the judgment of Blacker, J. in a later case) that, special leave to appeal having been subsequently obtained, a Single Bench Judge did in fact grant bail to Babu Lal Chokhani. In the same year the matter came under the consideration of the High Court of Nagpur in I.L.R. (1937) Nag. 236 (6). The High Court on an appeal from an acquittal, had convicted a person charged with an offence under section 420, Penal Code. He applied for bail pending an application to His Majesty in Council for leave to appeal. It was held that after signing judgment convicting the accused the High Court was *functus officio*, and had thereafter no power to release him on bail unless special leave to appeal was granted. The application was therefore refused " for the present" because no directions had been received from their Lordships of the Privy Council. Bose, J. who delivered the judgment of the court, repudiated the idea of the High Court possessing any inherent jurisdiction to grant bail. The question of bail had been expressly dealt with by the Code,

* The corresponding provision in the Ceylon Code is section 396 — *Edd.*
† There is no similar provision in the Ceylon Code—*Edd.*
(1) *Queen-Empress vs Subrahmania Ayyar* (2) *Diwan Chand vs King-Emperor* (3) *Tulsi Telini vs Emperor*
(4) *Emperor vs Ram Sarup* (5) *Babu Lal Chokhani vs Emperor* (6) *Bashiruddin vs Emperor*

"and although the matter of bail pending appeal to the Judicial Committee is not there, its provisions on the subject must be regarded as exhaustive." Finally, in 1937 an application for bail was made to the High Court of Lahore by a convicted person who had obtained special leave to appeal from His Majesty in Council; but no direction had been given as to applying for bail to the High Court. It was decided that once the High Court has passed orders in a criminal appeal it was *functus officio* and had no seisin of the case, but that the seisin might be revived when the Judicial Committee gave leave to appeal and directed the High Court. Blacker, J. in delivering judgment said that he had no power to grant bail because in granting leave to appeal the Judicial Committee had given no direction to apply to the High Court for bail. He dismissed the application but stated:

"It can in my opinion be revived if the petitioner obtains and produces any direction from their Lordships of the Privy Council in the matter which would authorize this court to go into the question of bail."

In the present case, the appellants' application to be released on bail pending the decision of their appeal to His Majesty in Council was dismissed by the High Court of Lahore (following the last mentioned case) on the ground that their Lordships had given no "direction to the High Court to entertain an application for bail."

From this review of the authorities in India, it would appear that the various views which have prevailed may be summarized thus: (1) If leave to appeal has been obtained from His Majesty in Council, and the Judicial Committee has said that an application for bail must be dealt with by the High Court the High Court will have power under section 498 of the Code to release a convicted person on bail pending the hearing of the appeal. (2) The High Court has an inherent power to do so if special leave to appeal has been obtained from His Majesty in Council. (3) The High Court possesses no inherent power as regards bail. (4) After disposal of a criminal appeal by the High Court it is *functus officio*, has no longer any seisin of the case, and cannot grant bail to a convicted person unless special leave to appeal has been obtained from His Majesty in Council. (5) In addition there must also be a direction received from "their Lordships of the Privy Council." (6) The High Court's seisin of a criminal case, and its power to grant bail under section 498 of the Code is revived when the Judicial Committee gives leave to appeal and directs the High Court. Their Lordships are unable to recognize any proceeding or conduct on their part in the past which can be properly described as a "direction to a High Court to entertain an application for bail." When any suggestion of bail has been mooted on behalf of a successful petitioner for special leave to appeal against his conviction, their Lordships have always refused to consider the matter, and have no doubt at times said that the question of bail could only be properly and satisfactorily dealt with in India. But they have never given any formal direction to a High Court on the matter, nor has any reference to bail been made in Orders-in-Council granting leave to appeal. Moreover, their Lordships find it impossible to appreciate how any suggestion or direction by them in regard to an application for bail to the High Court, made or given when they decide to advise His Majesty that special leave to appeal from a sentence or conviction should be granted, can in any way determine or affect the question under consideration on this appeal. The High Court either does possess power to grant bail in the given circumstances or it does not. If it possesses the power it possesses it independently of any suggestion or direction made or given by their Lordships. If it does not possess it, no suggestion or direction made or given by their Lordships could confer such a power. So far as any decision in India is based upon the fact that such a suggestion was made or direction given, or that no such suggestion was made or direction given, it cannot be supported on that ground alone.

There remains for consideration the question whether the alleged existence of a power in a High Court to grant bail in the stated circumstances can be established on other grounds. If it exists, it must be either because it was conferred on the High Courts by the Code, or because it is one of those inherent powers which are referred to in section 561 A of the Code. So far as the provisions of the Code are concerned, their Lordships can discover nothing therein to justify the view that any such power is thereby conferred on a High Court. The question of bail is dealt with in Part 9 of the Code ("Supplementary Provisions") under Chapter 39 which is entitled "Of Bail." The only granting of bail which is referred to in that chapter (which consists of sections 496 to 502 inclusive) is the granting of bail to accused persons. There is no reference therein to the granting of bail to persons who have been tried and convicted. It is true that in the Indian decisions, section 498 seems to have been treated as though it included cases in which persons already convicted were concerned; but any such view seems to their Lordships to be a

misapprehension based upon a mistaken reading of a few words which occur in that section. The section runs thus :

" 498. The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive ; and the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police officer or magistrate be reduced."

Two things must be observed in relation to this section. The only bonds " executed under this chapter " are executed by persons who are accused (not convicted) persons ; and the words " whether there be an appeal on conviction or not " merely qualify or relate to the words " in any case," and only mean that all accused persons are within the section whether their case is appealable on conviction or not. In truth the scheme of Chapter 39 is that sections 496 and 497 provide for the granting of bail to accused persons before trial, and the other sections of the chapter deal with matters ancilliary or subsidiary to that provision. The only provision in the Code which refers to the grant of bail to a convicted person is to be found in section 426. Section 426 forms part of Chapter 31 of the Code which is entitled " Of Appeals " and is included in Part 7 of the Code (" of Appeal, Reference and Revision "). The section is in these terms :

426. (1) Pending any appeal by a convicted person, the appellate court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended, and, also, if he is in confinement, that he be released on bail or on his own bond.

(2) The power conferred by this section on an appellate court may be exercised also by the High Court in the case of any appeal by a convicted person to a court subordinate thereto.

(3) When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

A consideration of section 426 reinforces the view that section 498 has no reference to convicted persons, for if they were covered by section 498, it would confer upon the court of session a power to grant bail to a convicted person appealing to the High Court, a power which under section 426 is confined to the High Court. Their Lordships feel no doubt that the Code confers no power on a High Court to grant bail in the case of a convicted person, and the fact that he has obtained leave from His Majesty in Council to appeal from his conviction or sentence makes no difference in this regard.

If such a power exists in a High Court it can only be as a power inherent in a High Court, because it is a power which is necessary to secure the ends of justice. It must be observed that, as decided by Hallett, J., after a careful and exhaustive review of the authorities, that no such inherent power exists in the High Court of Justice in this country : (1944) 1 K.B. 532 (7). In a case (reported only in the " Weekly Notes ") Branson, J. appears to have made an order granting bail to a prisoner (in this country) who had been sentenced to six months' imprisonment in Cyprus but had been given leave by His Majesty in Council to appeal : (1932) W.N. 272. (8) The order, however, seems to have been made with the consent of the Secretaries of State for Home Affairs and for the Colonies and cannot be relied upon as any authority for the view that a judge of the High Court has any inherent power to grant bail in the circumstances indicated. When such power exists it is statutory. It is perhaps conceivable that such an inherent power might exist in the High Court in India, but historically it would seem unlikely in view of the provision found in the early Charters, which confer powers on the judges in India by reference to the powers of the justices of the King's Bench in England in terms such as the following:

" .....and to have such jurisdiction and authority as Our Justices of Our Court of King's Bench have and may lawfully exercise within that part of Great Britain called England, as far as circumstances will admit."

Section 561 A of the Code confers no powers. It merely safeguards all existing inherent powers possessed by a High Court necessary (among other purposes) to secure the ends of justice. But other difficulties exist in the way of establishing that any such inherent power exists in a High Court. A power to grant bail to convicted persons would, if exercised, interrupt the serving of the sentence ; the period of bail might even cover the whole of its term. A power to grant bail would not include a power to exclude the period of bail from the term of the sentence : that this is so is shown by the fact that it was necessary to enact the special provision which is contained in sub-section (3) of section 426 of the Code. Under these conditions the exercise of a power to grant bail would, in the event of the appeal being unsuccessful, result in defeating the ends of justice. Moreover, in the same event it would result in an alteration by the High Court of its judgment, which is prohibited by section

(7) *Ex Parte Blyth* (8) *Sutton vs Reg.*

369 of the Code. Finally, their Lordships take the view that Chapter 39 of the Code together with section 426 is, and was intended to contain a complete and exhaustive statement of the powers of a High Court in India to grant bail, and exclude the existence of any additional inherent power in a High Court relating to the subject of bail. They find themselves in agreement with the views expressed by Richardson, J., Henderson, J. and Bose, J. in the three cases referred to earlier in this judgment.

It may well be that the case of an appeal from a High Court to His Majesty in Council was not within the contemplation of the framers of the Code. It may well be that a power to grant bail in such a case would be a proper and useful power to vest in a High Court. Their Lordships fully appreciate the propriety and utility of such a power, exercisable by judges acquainted with the relevant facts of each case, and (if exercised) with power to order that the bail period be excluded from the term of any sentence. But in their Lordships' opinion this desirable object can only be achieved by legislation. In the meantime there is a section of the Code to which, pending legislation, recourse may be had, and by means of which the ends of justice may be secured, *viz.* section 401 which enables the Provincial Government to "suspend" the execution of a sentence. As hereinbefore appears recourse has been had to this section on previous occasions. For the reasons indicated, their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed. In view of the general importance of the question which has been raised and decided their Lordships make no order as to the costs of appeal.

Appeal dismissed.

Present: Wijeyewardene, J. & Cannon, J.

DE ZOYSA (appellant) vs WIJESINGHE

S. C. No. 230/1944—*D. C.* (*Final*) *Colombo No.* 5588/*Money.*
Argued on 14th, 20th, 25th, 26th & 27th September, 1945.
Decided on 12th October, 1945.

State Council Election—Action by common informer—Action for recovery of penalty from State Councillor for having sat and voted in the Council knowing or having reasonable grounds for knowing that he was disqualified—Evidence necessary to prove that the defendant sat or voted as aforesaid—Application of Prescription Ordinance to actions under Article 11 of the Ceylon State Council (Elections) Order in Council—Prescription Ordinance section 10—Evidence Ordinance sections 74, 76, 77, 78 and 80—Ceylon (State Council) Order in Council, 1931, Articles 8, 9, 10, 11 and 15.

This was an action by a common informer under Article 11 of the Ceylon (State Council) Order in Council, 1931, for the recovery of a penalty of Rs. 12,500 from the defendant for sitting and voting in the State Council knowing or having reasonable grounds for knowing that he was disqualified.

The defendant was elected as the member of the State Council for Colombo South at the election held on February 22, 1936. On an election petition his election was declared on July 16, 1936 to be null and void on the ground that, at the time of his election he was disqualified as he was a paid visiting lecturer at the Ceylon University College. He continued to deliver these lectures up to February 29, 1936.

On July 17, 1936 plaintiff's proctors filed (*a*) a stamped paper in the form of a plaint stating that the defendant became liable to pay a penalty of Rs. 12,500 but restricting the claim to Rs. 1,000 and (*b*) a motion asking for leave to prosecute the action in terms of Article 11 (2) of the Order in Council.

On July 20, 1936 the District Judge ordered the application for leave to be supported and on the same date the proctors filed another motion for raising the claim from Rs. 1,000 to Rs. 12,500. On July 29, 1936, the District Judge allowed both applications. The original "plaint" did not bear the stamps required for a plaint in a claim of Rs. 12,500. This deficiency of stamp duty was made good only on June 3, 1943 and an amended plaint was filed on June 16, 1943. The court then issued summons on the defendant on June 28, 1943.

The only evidence placed by the plaintiff at the trial was :

(*a*) A copy of the evidence given by the defendant at the Election Petition Inquiry in 1936.
(*b*) A copy of the judgment in that Inquiry, and
(*c*) A copy of the "Hansard" from March 17, 1936, to August 25, 1936.

The defendant called no evidence. The District Judge entered judgment for the plaintiff for Rs. 9,500 as he found that the defendant had sat or voted in the Council only on nineteen days. The defendant appealed.

The main questions argued in appeal were :

1. Has the plaintiff proved that the defendant sat or voted on the nineteen days or any of them in respect of which he has been awarded a penalty of Rs. 500 per day ?
2. Was the defendant disqualified within the meaning of Article 11 or was the seat vacant on anyone of these days ?
3. If the defendant sat or voted on those days did he do so knowing or having reasonable grounds to know that he was disqualified or the seat was vacant ?
4. Is plaintiff's claim prescribed ?

Held : (i) That the mere production of a copy of " Hansard " from March 17, 1936, to August 25, 1936, was insufficient to prove that the defendant had sat or voted in the Council during the relevant period, and as no other evidence was led on the point, that the plaintiff had failed to prove that the defendant had sat or voted in the Council during that period.

(ii) That the disqualification referred to in Article 9 of the Order in Council refers only to persons who sit or vote—

(*a*) without taking the oath as required by Article 10, or
(*b*) while holding or enjoying a contract, or
(*c*) while disqualified in any other way under the Order.

(iii) That even if the defendant sat or voted in the Council on any one of the nineteen days referred to, he would not be a person who sat or voted while " disqualified by this Order for so sitting or voting " as he ceased to be a visiting lecturer at the University College some days before the formal opening of the State Council.

(iv) That the defendant did not sit or vote in the Council after his seat became vacant ; and

(v) That the plaint was filed only when the amended plaint was filed on June 16, 1943, that the cause of action accrued in 1936, that section 10 of the Prescription Ordinance applied to penal actions filed under Article 11 of the Order in Council, and that therefore the action was prescribed.

Per WIJEYEWARDENE, J. : " I come now to the third question argued before us. The defendant knew that he was a Visiting Lecturer at the University College up to February 29, 1936. If that fact disqualified him for sitting or voting as a member or rendered his seat vacant within the meaning of Article 11 could it not be said that he had the knowledge contemplated by that Article, though, in fact, the defendant might have held the view that his holding the post of Lecturer did not disqualify him from being elected as member ? My brother and I hold somewhat conflicting views on this question, and I do not, therefore, propose to deal with this matter, as the appeal could be decided on the points on which we agree."

Cases referred to : *Tranton vs Astor* (1917 – 33 Times L.R. 363)
Queen-Empress vs Durga Sonar (1885 Ind. Dec. (New Series) 11 Cal. 580)
The King vs Sirimana (1925 – 7 C.L.R. 7)
"The Englishman," Ltd. vs Lajpat Rai (1910 I.L.R. 37 Cal. 760)
Dickenson vs Fletcher (1873 L.R. 9 (Common Pleas) 1)
Remmington vs Larchin (1921 – 3 K.B. 404)
Narendra Lalkhan vs Jogi Hari (1905 I.L.R. 32 Cal. 1107)
Forbes vs Samuel (1913 – 3 K.B. 706)
Bradlaugh vs Clarke (1883 – 6 App. Cases 354)
Wegh Raj et al vs Allah Rakhia et al (1942 – 29 A.I.R. (Federal Court) 27).

H. V. Perera, K.C., with *L. A. Rajapakse, K.C.*, and *Ian de Zoysa*, for the defendant-appellant.

N. Nadarajah, K.C., with *C. Renganathan* and *V. K. Kandasamy*, for the plaintiff-respondent.

WIJEYEWARDENE, J.

This is an action filed under Article 11 of the Ceylon (State Council) Order in Council, 1931, for the recovery of Rs. 12,500 as penalty due from the defendant.

The defendant is a Barrister-at-Law and a Doctor of Philosophy of the London University. In 1934 the defendant agreed to lecture two hours every week as a Visiting Lecturer at the University College, Colombo, and was paid a fee of Rs. 10 per hour. He continued to deliver those lectures up to February 29th 1936.

The defendant and a medical man, Dr. Coorey, stood as candidates for the Colombo South seat at the State Council Election held on February 22nd 1936. He polled about 2000 votes more than Dr. Coorey and was declared to be duly elected. Dr. Coorey, thereupon, filed a petition under the Ceylon (State Council Elections) Order in Council, 1931, to have the election of the defendant declared null and void on the ground that he was a visiting lecturer at the University College at the time of his election and was thus disqualified for election as a member. By his judgment dated July 16th 1936, (*vide* (1936) 43 New Law Reports 121) the Election Judge — Mr. Justice Akbar — " determined " the defendant's election to be null and void and certified that "determination" to the Governor under Article 75 of the Ceylon (State Council Elections) Order in Council, 1931.

On July, 17th 1936, the plaintiff's proctors filed in the District Court of Colombo, a stamped paper XX in the form of a plaint (*a*) stating that the defendant sat and voted in the State

Council knowing and having reasonable grounds for knowing that he was disqualified and thereby became liable to pay a penalty of Rs. 12,500 but (*b*) restricting his claim to Rs. 1000.

Seven years later, the plaintiff filed what is referred to in the proceedings of the District Court as an "amended plaint" claiming the entire penalty of Rs. 12,500.

At the trial the plaintiff proposed, among others, the following issue :

> "Did the defendant between 22/2/36 and 17/7/36 sit and or vote in the State Council knowing or having reasonable grounds for knowing that he is disqualified by the State Council Order-in-Council for so sitting or voting or that his seat has become vacant ?"

The defendant's counsel stated that the words "or his seat had become vacant" should be deleted, as the plaintiff did not claim the penalty either in the "plaint" or "the amended plaint" on the ground that the plaintiff sat or voted when he knew or had reasonable grounds to know that his seat had become vacant. The District Judge, however, accepted the issue as proposed by the plaintiff.

The only evidence placed by the plaintiff before the court was :

> (*a*) A copy of the evidence given by the defendant at the Election Petition Inquiry (marked P1) ;
> (*b*) A copy of the judgment in the Election Petition Inquiry (marked P2) ;
> (*c*) A copy of the "Hansard" from March 17, 1936, to August 25, 1936 (marked P3).

The defendant's counsel called no evidence.

The District Judge entered judgment for plaintiff for Rs. 9,500 as according to P3 the defendant had sat or voted only on nineteen days, *viz.* four days in March, eight days in May and seven days in June. The present appeal is preferred against that judgment.

The main questions argued at the hearing of the appeal were :

> 1. Has the plaintiff proved that the defendant sat or voted on the nineteen days or any of them in respect of which he has been awarded a penalty of Rs. 500 per day ?
> 2. Was the defendant disqualified within the meaning of Article 11 or was the seat vacant on anyone of those days ?
> 3. If the defendant sat or voted on those days did he do so knowing or having reasonable grounds to know that he was disqualified or the seat was vacant ?
> 4. Is plaintiff's claim prescribed ?

P3 was the only evidence submitted by the plaintiff in proof of the fact that the defendant sat or voted on nineteen days between March 17th 1936 and June 26th 1936. P3 is a bound volume of 1226 printed pages. This has obviously been bound by some private individual. On the cover of the bound volume appears the legend "Ceylon Hansard 1, 1936." It does not even show that it has been printed by the Government Printer. It was not produced by any official of the State Council, but was tendered by the plaintiff's counsel. Now, section 78 of the Evidence Ordinance reads :

> "The following public documents may be proved as follows :—
> (2) The proceedings of the Legislature :
> (i) by the minutes of that body, or
> (ii) by published Ordinances or abstracts, or
> (iii) by copies purporting to be printed by order of Government."

Clearly P3 does not come under section 78 (2) (i) or section 78 (2) (ii). It cannot come under section 78 (2) (iii), as there is nothing to shew that it is a copy "purporting to be printed by order of Government." Even if P3 is regarded as falling under section 78 (2) (iii) of the Evidence Ordinance, it will be only evidence of the proceedings of the Legislature. Such a copy cannot by itself prove that the defendant sat or voted in the State Council on the days in question. That should have been proved by the evidence of a witness, for instance, an official stenographer, to the effect that he saw the defendant who was known to him sitting or voting in the State Council (*vide Tranton vs Astor* (1917) 33 Times Law Reports 363 at 365.) I would in this connection refer to sections 74, 76, 77 and 80 of the Evidence Ordinance. Section 74 (*a*) (iii) declares records of courts to be public documents and sections 76 and 77 provide for certified copies being produced in proof of the contents of a record. Section 80 then proceeds to enact :

> "Whenever any document is produced before any court purporting to be a record or memorandum of the evidence.....given by a witness in a judicial proceeding.....in accordance with law and purporting to be signed.....the court shall presume :
> (i) that the document is genuine ;
> (ii) that any statements, as to the circumstances under which it was taken, purporting to be made by the persons signing it, are true ; and
> (iii) that such evidence,.....was duly taken."

It has been held both here and in India that where it is sought to prove that a person gave certain evidence in an earlier judicial proceeding it is not sufficient to produce the record of that case but there should be some independent evidence to show that the person who gave such evidence is the person against whom it is sought to be proved (*vide Queen-Empress vs Durga Sonar* (1885 Ind. Dec. (New Series) 11 Cal. 580) and *The King vs Sirimana* (1925 – 7 C.L.R. 7)). A comparative study of these sections of the Evidence Ordinance can leave no doubt that if such evidence is necessary in the case of judicial records it becomes doubly necessary in the case of copies mentioned in section 78 (2) (iii). The

decision in "*The Englishman*," *Ltd. vs. Lajpat Rai* (1910 – I.L.R. 37 Cal. 760) which was cited by the plaintiff's counsel does not militate against the views I have expressed. In that case the question arose whether by producing a volume of Hansard's Reports of Parliamentary Debates the defendant could prove that a certain statement made in the "Englishman" with regard to the alleged seditious activities of Mr. Lajpat Rai was merely a repetition of what had been said in the British Parliament. Harington, J. thought it could only be proved by calling the reporter or obtaining his evidence on commission. Woodroffe, J. thought the deportation of Mr. Lajpat Rai was a matter of public history within the meaning of section 57 of the Indian Evidence Act and the Hansard might be used as an appropriate book of reference. I am unable to invest the commonplace fact of the defendant sitting in the State Council with the importance of "a matter of public history." I hold that the plaintiff has failed to prove that the defendant sat or voted on anyone of the nineteen days referred to by plaintiff's counsel.

The second question requires a careful consideration of Articles 8, 9, 10, 11 and 15 of the Ceylon (State Council) Order in Council.

Article 8 says that every person not disqualified under Article 9 shall be qualified for election if he is qualified to be registered as a voter and is actually so registered or, if he is not so registered, his non-registration as a qualified voter is due to some unavoidable circumstances. The relevant parts of Article 9 may be written as follows:

> *A.* No person shall be capable of being elected .....as a member.....who.....holds or enjoys.....any contract.....made..... with.....any person for or on account of the public service.
>
> *B.* No person shall be capable of.....sitting or voting in the Council as an elected..... member.....who.....holds or enjoys..... any contract.....made.....with.....any person for or on account of the public service.

Clearly A does not refer to a person who enters into a contract after his election. It is equally clear that A does not make a person who held a contract before the election and ceased to hold it before the election incapable of being elected as a member. In other words A refers only to a person who is elected during the time he holds a contract. Consequently I hold that the only interpretation that could be placed consistently on B is that it makes a person incapable of sitting or voting as a member during the time he holds a contract. This interpretation of Article 9 brings it into harmony with section 1 of 22 George III chapter 45 which reads:

> "Any person who shall.....hold or enjoy .....any contract.....made.....with .....the Commissioners of His Majesty's Treasury.... or with any other person.....for or on account of the public service.....shall be incapable of being elected, or of sitting or voting as a member .....during the time that he shall.....hold or enjoy any such contract....."

No doubt, Article 9 of our Order does not contain the words "during the time that he shall .....hold or enjoy any such contract" found in the English section. Those words had to be inserted in the English section, as that section refers at the beginning to a person "who *shall*.....hold or enjoy.....any contract," as otherwise that section may have invalidated even the election of a person who had a contract which terminated months before the election. I think Article 9 conveys the same meaning as the English section by substituting the words "who.....*holds* or *enjoys*" for "who shall.....hold or enjoy" followed by "during the time he shall.....hold or enjoy....."

Article 10 enacts that "except for the purpose of electing the Speaker.....no member.....shall sit or vote..... until he shall have taken and subscribed..... the oath of allegiance.....or.....an affirmation....."

For the reasons given by me I hold that when Article 9 speaks of persons "disqualified by this Order for sitting or voting," it refers only to persons who sit or vote —

> (*a*) without taking the oath as required by Article 10, or
>
> (*b*) while holding or enjoying a contract, or
>
> (*c*) while disqualified in any other way under the Order.

Even if the defendant sat or voted on any one of the nineteen days referred to above, he would not be a person who sat or voted while "disqualified by this Order for so sitting or voting," as he ceased to be a visiting lecturer at the University College some days before the formal opening of the State Council. I may add that this view derives some support from two decisions in the King's Bench Division.

In *Forbes vs Samuel* (1913–3 *King's Bench* 706) Scrutton, J. said:

> "The ground of this (the plaintiff's) objection was that, as the defendant's election was declared void as soon as he became interested in the first contract, he was voting when not a member. My attention however was not called to any statute under which he was liable to a penalty for voting when not a member if he did not hold a public contract at the time of voting; and in my opinion the statute (22 George III chapter 45) on which the action is based does not impose such a liability."

In *Tranton vs Astor* (*supra*) Low, J. said:

> "The mere fact that he might have vacated his seat was not enough to entitle the plaintiff to recover as the penalties do not attach for sitting or voting

while disqualified but for sitting or voting while executing, holding or enjoying a contract."

There remains the connected part of the question to be considered — whether the defendant sat or voted after the seat became vacant.

Article 15 refers to the vacation of seats in the Council and the relevant portion of that Article reads as follows :

> " The seat in the Council of an elected..... member shall become vacant —
> (*a*) upon his death ; or
> (*b*) if.....he shall resign ; or
> (*c*) if he shall become incapable of sitting or voting as a member by reason of any of the provisions of Article 9 ; or
> (*d*) ..... ; or
> (*e*) if his election shall be vacated or made void by reason of the commission of any corrupt or illegal practice or by reason of the declaration certificate or report of an Election Judge ; or
> (*f*) ..... ; or
> (*g*) ..... ; or
> (*h*) .....

The circumstances causing a vacancy under Article 15 (*e*) are those contemplated by Articles 73, 74, 78 and 79 of the Ceylon (State Council) Order in Council. There is no doubt that the defendant's seat became vacant under Article 15 (*e*) when the Election Judge certified his "determination" to the Governor on July 16, 1936.

Did the defendant's seat become vacant on an earlier date under any other paragraph of Article 15 ? The only other paragraph that may have to be considered is paragraph (*c*). I do not think that paragraph applies to the defendant. That paragraph, like all other paragraphs, refers to something happening after the election. That paragraph requires that " he *shall* become incapable " and that the incapacity should be " by reason of any of the provisions of Article 9." Now, as I explained earlier in the judgment, the fact that the defendant functioned as a visiting lecturer on February 29, 1936, did not make him incapable of sitting or voting in the State Council which was opened some days afterwards. I would, therefore, hold that the defendant did not sit or vote after his seat became vacant.

I am aware that the interpretation of the Articles mentioned above is not free from doubt, but I think the interpretation I have given is in conformity with the principle adopted in *Dickenson vs Fletcher* (1873 L.R. 9 Common Pleas 1) and *Remmington vs Larchin* (1921 – 3 King's Bench 404). In the former case Brett, J said :

> " Those who contend that the penalty may be inflicted, must show what the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail, if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty."

I come now to the third question argued before us. The defendant knew that he was a visiting lecturer at the University College up to February 29, 1936. If that fact disqualified him for sitting or voting as a member or rendered his seat vacant within the meaning of Article 11 could it not be said that he had the knowledge contemplated by that Article, though, in fact, the defendant might have held the view that his holding the post of Lecturer did not disqualify him from being elected as member ? My brother and I hold somewhat conflicting views on this question, and I do not, therefore, propose to deal with this matter, as the appeal could be decided on the points on which we agree.

For a decision of the issue of prescription it is necessary to determine —

> (*a*) when the plaint was filed ;
> (*b*) when the cause of action accrued to the plaintiff ; and
> (*c*) whether there is any legal enactment fixing the period of limitation for actions under Article 11.

On July 17, 1936, the plaintiff's proctors filed two documents (i) a stamped paper marked XX in the form of a plaint for a claim of Rs. 1,000 against the defendant, and (ii) a motion asking for leave " to prosecute " the action " in terms of section 11 (2) of the Order in Council." Where a person has to obtain leave of court for the institution of an action, that person has to submit to court a statement giving full particulars of the claim so as to enable the court to decide whether leave should be granted. It is usual in such and similar cases for practitioners in our courts to file a draft plaint as such a draft plaint would set out concisely all the information required by the judge. I would, therefore, regard XX as such a document and I find additional reason for this view in the facts (*a*) that the motion filed on that day did not contain any allegation with regard to the filing of a plaint on that day, and (*b*) that the first clause in the prayer of XX asked for leave in terms of Article 11 (2) and such a clause should not find a place in the plaint.

On the papers being submitted to him on July 20, 1936, Mr. Crossette-Thambiah who was then Acting District Judge made an order to the effect that the application for leave should be supported. On the same day the proctors filed another motion for raising the claim from Rs. 1,000 to Rs. 12,500. Mr. Crossette-Thambiah made an endorsement on that motion referring to the order he had already made on the previous motion. On July 29, 1936, he allowed both the applications after hearing counsel. It is, therefore, clear that no plaint could have been filed before July 29, 1936. Dr. Dias Bandaranaike,

the District Judge who heard the case, held, however, that certain entries appearing in the record proved that Mr. Crossette-Thambiah accepted document XX as a plaint on July, 29 1936, soon after he allowed the two applications. Dr. Dias Bandaranaike reached this decision for the following reasons :

(*a*) The initials of Mr. Crossette-Thambiah appear against the amendment of clause 2 of the prayer in XX raising the claim from Rs. 1,000 to Rs. 12,500.

(*b*) The initials of Mr. Crossette-Thambiah appear just below the typescript, " Plaint accepted. Summons to issue on....." appearing on XX.

Neither (*a*) nor (*b*) has been dated and it is not therefore possible to say when Mr. Crossette-Thambiah initialled the document in these places. It is not unlikely that he would have initialled the amendment referred to in (*a*) above shortly after he allowed the amendment in order to identify the claim which he permitted the plaintiff to sue for. That this initialling and correction were not intended as an amendment of an accepted plaint is borne out by the following facts :

(*a*) He did not strike out the words in paragraph 7 of XX, " but the plaintiff restricts his claim to Rs. 1,000."

(*b*) He did not alter the figures in paragraph 8 which alleges that " there is now due and owing from the defendant to the plaintiff the said sum of Rs. 1,000."

(*c*) He did not delete clause 1 of the prayer asking for leave to sue the defendant which would have no place in the plaint which had to be filed after obtaining leave of court.

It appears to me most unlikely that Mr. Crossette-Thambiah would have accepted XX as a plaint on July 29, 1936. He knew that on that day itself he had authorized the increase of the claim from Rs. 1,000 to Rs. 12,500 and made with his own hand an amendment probably on that day itself in clause 2 of the prayer in XX. He would have known, therefore, that XX did not bear the stamps required for a plaint in a claim of Rs. 12,500. It is difficult to believe that he would have in those circumstances accepted an understamped paper as a plaint. Moreover, if he did, in fact, accept XX as a plaint there is no explanation for his failure to give a returnable date for the summons. It will be remembered that the type-script he initialled read : " Plaint accepted. Summons to issue returnable on ....." Though the judge initialled it, no date was mentioned as the summons returnable date. I am inclined to think that this initialling was probably done on July 20, 1936, for identifying XX when it was submitted to him with the first motion for obtaining his leave to file an action and he therefore refrained rightly from giving on that occasion a returnable date for the summons. This is supported by the first entry made on the journal sheet and initialled by the judge on July 20, 1936. That entry could not have been signed by the judge before he initialled XX just below the type-script.

The deficiency of stamp duty was made good only on June 3, 1934. What has been referred to in the proceedings of the District Court as an amended plaint was filed on June 16, 1943, and the court issued summons on the defendant for the first time on June 28, 1943.

I am unable to infer from the above facts that a plaint in the action was filed or accepted by Mr. Crossette-Thambiah on July 29, 1936. The trial judge has thought it possible to hold that XX was accepted as a plaint in July 1936 by the aid of the presumption permissible under section 114 of the Evidence Ordinance " that official acts have been regularly performed." I do not think that the plaintiff could invoke the aid of such a presumption in the circumstances of this case (*vide Narendra Lal Khan vs Jogi Hari* (1905 - I. L. R. 32 Cal. 1107)). It appears to me further that the decision of the trial judge on the matter could be reached only by holding that there was some laxity on the part of Mr. Crossette-Thambiah. It is the duty of every officer who receives a stamped document liable to stamp duty to examine the document to see if it is properly stamped (*vide* sections 32 and 33 of the Stamp Ordinance). Moreover, section 46 (2) (*h*) of the Civil Procedure Code enacts that " when the plaint is written upon paper insufficiently stamped and the plaintiff on being required by the court to supply the requisite stamps within a time to be fixed by the court fails to do so.....the plaint shall be rejected." To hold that Mr. Crossette-Thambiah accepted XX as a plaint would necessarily mean that he failed to fix a date for the plaintiff to supply the requisite stamps, though, apart from the examination required by the Stamp Ordinance, he was well aware that the paper was under-stamped. The burden, therefore, rested on the plaintiff and not on the defendant, as held by the trial judge, to prove the date of filing the plaint in this case. He led no evidence whatever and I hold that a plaint was filed only when the " amended plaint " was filed on June 16, 1943.

When did the cause of action accrue to the plaintiff ? It is argued on his behalf that the cause of action in respect of a penal action accrues to a party only at the time when that party files a plaint and the plaintiff's counsel relied on *Forbes vs Samuel (supra)* and earlier cases referred to in that decision.

The penalty is created by sub-paragraph 1 of Article 11 which states merely the liability to pay a penalty. If there was only that sub-paragraph, the Crown alone could recover that penalty, as it is well settled law that "no man can sue for that in which he has no interest and a common informer can have no interest in a penalty of this nature unless it is expressly or by some sufficient implication given to him by statute" (*vide Bradlaugh vs Clarke* (1883 – 8 Appeal Cases 354)). We have, then, sub-paragraph 2 of Article 11 which enacts:

> "The penalty imposed by this Article shall be recoverable in the District Court of Colombo by any person who shall sue for the same; provided that no person shall bring an action for the recovery of any such penalty without first obtaining leave from the District Judge of the court....."

I interpret that sub-paragraph as giving a common informer an interest in the penalty and then setting up a special court and a special procedure for the recovery of the penalty. He has the right given to him by the Article and he is told where he should file his action and what procedure he should follow. I am unable to read that sub-paragraph as stating that the interest in the penalty is given to a common informer if and when he files his plaint in the District Court of Colombo. If that contention is sound, it will not be possible for a common informer to file a plaint disclosing a cause of action and the plaint will have to be rejected under section 46 of the Civil Procedure Code. I do not think the authorities relied on by the plaintiff's counsel establish the proposition put forward by him. In those cases the courts were concerned with the question which of the two common informers who had sued for a penalty was entitled to priority over the other. It was held that the common informer who had obtained the previous writ did not lose his priority, even though the subsequent claimant obtained judgment earlier, "by the accidents of legal procedure." It is true that in some of those cases the language used is such that when read apart from the context it conveys the idea that the right to the penalty becomes vested in the common informer only when he same to court. This, however, was not the meaning intended to be conveyed. I find that in the very case *Forbes vs Samuel* (*supra*) Scrutton, J. paraphrases the sentence, in an earlier case, — "on filing an information the informer has a right to the penalty vested in him" — to mean that on filing the information the informer "secures his position against a later informant."

Even if one interprets the principle in those English cases — that the party first coming to court "attaches" the right of action to himself — to mean that the cause of action accrues only when the party comes to court, then the cause of action in this case accrued to the plaintiff in July, 1936 when he filed papers in the District Court and asked for leave to sue the respondent.

In any event then the plaint has been filed in this case nearly seven years after the accrual of the cause of action.

The Ceylon (State Council) Order in Council does not fix a period of limitation for an action under Article 11, but section 10 of the Prescription Ordinance enacts:

> "No action shall be maintainable in respect of any cause of action not hereinbefore expressly provided for, or expressly exempted from the operation of this Ordinance, unless the same shall be commenced within three years from the time when such cause of action shall have accrued."

It is true that the Prescription Ordinance does not define "action" and "cause of action." These terms are, however, defined in the Civil Procedure Code and an action filed by a common informer is regulated by the provisions of the Code except where special provision is made by Article 11. It would not therefore be inappropriate to adopt those definitions in the present case. Moreover, "action" even in the restricted sense in which it is generally used would denote a civil action brought by a subject and commenced by writ of plaint (*vide* Halsbury's Laws of England, Vol. 1, para. 1). I would, therefore, hold that section 10 of the Prescription Ordinance applies to penal actions filed under Article 11. I may add that I do not see any incongruity in making a provision of a local Ordinance like the Prescription Ordinance applicable to an action permitted by an Order in Council.

The Prescription Ordinance was enacted in 1871 by the Governor of Ceylon with the advice and consent of the Legislative Council in the exercise of the powers vested in him under the Royal Instructions. An Ordinance so passed derives its authority from the Sovereign just as much as an Order in Council and where the Order in Council does not contain a conflicting provision with regard to limitation I do not see any reason why the Prescription Ordinance should not apply (*vide Wegh Raj et al vs Allah Rakhia et al* (1942 – 29 A.I.R. (Federal Court) 27)). Where a local Ordinance is not to be made applicable to an Order in Council it is stated so in express terms as in section 2 (*v*) of the Interpretation Ordinance. It is, however, interesting to note that in view of that provision, the Ceylon (State Council) Order in Council provided in

express terms in Article 4 (3) that the Interpretation Ordinance should apply to that Order in Council.

For the reasons given by me I allow the appeal and dismiss the plaintiff's action with costs here and in the court below.

CANNON, J.

I agree.

Appeal allowed.

Present: WIJEYEWARDENE, J.

DE PINTO vs THE RENT ASSESSMENT BOARD, DEHIWALA—MT. LAVINIA

In the matter of an application for a Writ of Certiorari for quashing certain proceedings before the Rent Assessment Board constituted for the Dehiwala-Mount Lavinia Urban Council Area under the Rent Restriction Ordinance No. 60 of 1942.

Argued on 28th September, 1945.

Decided on 5th October, 1945.

Writ of Certiorari—*Courts Ordinance section* 42—*Rent Restriction Ordinance No.* 60 *of* 1942 *section* 6 (*b*)—*Powers and jurisdiction of Assessment Board—Interpretation of Statutes—Can reference be made to speeches made in the State Council.*

Held : (i) That section 6 (*b*) of the Rent Restriction Ordinance states in the clearest possible language that a landlord is entitled to raise the rents according to a certain formula whenever there is an increase in the amount paid by the landlord as rates, and there is nothing in that section or even in the whole Ordinance to indicate that the Legislature contemplated only an increase of the rates occasioned by an enhancement of the annual value and not by raising of the rate percentage.

(ii) That the Assessment Board has no jurisdiction to interfere with an enhancement of rent under section 6 (*b*) of the Rent Restriction Ordinance No. 60 of 1942.

(iii) That the plain meaning of section 6 (*b*) should be given to it and it should not be interpreted in a different way in view of certain speeches made in the State Council.

Cases referred to : *The Attorney-General vs Sillem* (1863 - 2 H. & C. 508).

H. V. Perera, K.C., with *H. W. Jayawardene*, for the petitioner.

N. Nadarajah, K.C., with *C. Renganathan*, for the 1st to 4th respondents.

No appearance for the 5th respondent.

WIJEYEWARDENE, J.

This is an application for a Writ of Certiorari for quashing certain proceedings before the Rent Assessment Board constituted for the Dehiwala-Mount Lavinia Urban Council area under the Rent Restriction Ordinance No. 60 of 1942.

The petitioner let a house in Dehiwala on a monthly rent of Rs. 30 to the 5th respondent and undertook to pay the assessment rates. At the commencement of the tenancy, the annual value of the property was Rs. 330, the standard rent in terms of section 5 (1) (*b*) of the Ordinance was Rs. 30 per month and the yearly amount payable as rates was Rs. 29/72 which was the amount fixed for 1941 "the year which included the date by reference to which the standard rent was determined." In January 1945 the Urban Council reduced the annual value from Rs. 330 to Rs. 321 but raised the percentage at which rates should be levied from 9 per cent. to 12 per cent. of the annual value. This resulted in the rates payable by the petitioner being raised from Rs. 29/72 to Rs. 38/52 per annum.

Now, section 6 (*b*) of the Ordinance enacts :

> "Where the rates levied under any written law in respect of any premises are, under the terms of the tenancy, payable by the landlord, and the actual amount for the time being payable per annum by way of such rates exceeds the amount so paid for the year which included the date by reference to which the standard rent of the premises is determined for the purposes of this Ordinance, the standard rent per annum may be increased by an amount which bears to such rent the same proportion as the excess amount payable per annum by way of such rates bears to the amount so paid for the year which included the aforesaid date."

If that sub-section governs the present case, the petitioner could claim a monthly rent of nearly Rs. 39 from January, 1945.

The petitioner wrote to the 5th respondent on February 15, 1945, referring to section 6 (*b*) of the Ordinance and claiming rent at Rs. 39 per

month. Thereupon, the 5th respondent made an application to the Board setting out the material facts mentioned above and asked the Board to restrain the petitioner from claiming an increased rent.

Overruling an objection raised by Mr. Advocate H. W. Jayawardene who appeared before them as counsel for the petitioner, the Board held that they had jurisdiction to adjudicate on the application of the 5th respondent and decided that the petitioner was not entitled to claim more than Rs. 30 a month.

The Board misdirected themselves when they overruled the preliminary objection taken by Mr. Jayawardene. Section 6 (*b*) of the Ordinance empowers the petitioner to "increase" the standard rent as "the actual amount payable by way of rates" in 1945 exceeds the "amount paid" from 1941. A comparison of sub-sections (*a*) and (*c*) with sub-section (*b*) of section 6 shows also that the Legislature did not give any authority to the Board to interfere with an enhancement of rent under section 6 *(b)*.

The Board thought that they were vested with wide powers under section II of the Ordinance, and that, therefore, they had jurisdiction to hear and determine any application against an increase of rents except where such increase had been made under section 6 (*b*). Then they proceeded to assume jurisdiction to adjudicate in the present case by holding that section 6 (*b*) applied *only* to cases where the rent has been raised on the ground that there has been an increase in the amount paid as rates owing to an enhancement of the annual value of the property. It is not necessary for the purpose of this application to express an opinion with regard to the extent of the powers conferred by section II, as I hold that the view of the Board with regard to the scope of section 6 (*b*) is erroneous. Section 6 (*b*) states in the clearest possible language that a landlord is entitled to raise the rents according to a certain formula, whenever there is an increase in the amount paid by the landlord as rates, and there is nothing in that section or even in the whole Ordinance to indicate that the Legislature contemplated only an increase of the rates occasioned by the enhancement of the annual value and not by the raising of the rate percentage.

The Board gave a restrictive interpretation to section 6 (*b*), as they permitted themselves to be guided by a speech alleged to have been made in the State Council and by their own view that it would be "monstrous to allow a landlord to increase the rent by Rs. 120/– per annum to meet an increase in the tax of Rs. 8/80." But there are certain recognized canons of interpretation which must be followed in construing an Ordinance. Where the words of the Ordinance "are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver." (*Vide* Craies on Statute Law, 3rd Edn. page 66). In view of the reliance placed by the Board on the speeches in the State Council as aids to the interpretation of an Ordinance it is not inapposite to refer to the opinion of Pollock, C.B. in *The Attorney-General vs Sillem* (1863–2 H. & C. 508) that where the terms of a statute "are reasonably plain and clear" there is no need for "the assistance which may be derived from what eminent statesmen have said." Moreover, it is not competent for the Board to modify the clear language of the section in order to bring it in accordance with their own views as to what is right or reasonable and thus give relief to the 5th respondent. (*Vide* Craies on Statute Law, 3rd Edn. page 85).

There has been a clear usurpage of jurisdiction in this case. By acting in excess of their jurisdiction the Board placed themselves in a position to make an order which under section 12 (12) would be final and conclusive. If that order is allowed to stand it would prejudice the petitioner when he seeks to take action against the 5th respondent as his tenant.

I quash the finding of the Board and order the 1st, 2nd, 3rd and 4th respondents to pay the costs of the petitioner on this application.

Application allowed.

Present: JAYETILEKE, J.

SILVA (Inspector of Police) vs ABEYASEKERA

S. C. No. 605—*M. C. Colombo No.* 774.
Argued on 29th August, 1945.
Decided on 5th September, 1945.

Complaint made to police officer—Right of police officer to demand from person against whom the complaint was made his name and address—Magistrate reading to accused the particulars of the offence from the plaint and not from the summons—Criminal Procedure Code sections 33 *and* 187*—Police Ordinance section* 57*—Penal Code section* 323.

Held : (i) That a police officer to whom a complaint is made against a person has the right to demand from that person his name and address.

(ii) That the reading of the particulars of the offence from the plaint instead of from the summons did not, in the circumstances of this case, vitiate the conviction.

L. A. Rajapakse, K.C., with *K. C. Nadarajah*, and *S. W. Walpita*, for the accused-appellant.

G. P. A. Silva, Crown Counsel, for the Crown.

JAYETILEKE, J.

The accused in this case was charged in the Magistrate's Court of Colombo with having caused hurt to Police Constable Ranasinghe in the execution of his duty as a public servant, an offence punishable under section 323 of the Penal Code. He was convicted and sentenced to pay a fine of Rs. 50.

The facts were that on December 21, 1944, at about 4-30 p.m. the complainant was on duty at Armour Street junction. One Wijesinghe complained to him that a tram car inspector had abused him and his wife in filthy language when they were travelling in the tramcar. He noted the complaint in his note book, went up to the tram car which was halted there, informed the accused that a complaint had been made against him, and asked him his name and address. The accused said, "You bloody constable, I am not going to give my address to you," and pushed him by the neck. Two points were raised by Mr. Rajapakse at the argument before me. His first contention was that the complainant had no right to demand from the accused his name and address. The answer to this contention is to be found in the language of section 33 of the Criminal Procedure Code. The section provides that when any person in the presence of a peace officer is accused of committing a non-cognizable offence and refuses on demand of such peace officer to give his name and residence he may be arrested by such peace officer. The section presupposes that a peace officer has a right to demand from a person who is accused of committing a non-cognizable offence in his presence, his name and address. One of the duties of a Police Officer under section 57 of the Police Ordinance is to detect and bring offenders to justice. This duty a Police Officer will not be able to perform unless he is given the right to demand from an offender his name and address. The complainant was, in my opinion, well within his rights in demanding from the accused his name and address.

Mr. Rajapakse's next argument was that the Magistrate had failed to comply with the provisions of section 187 of the Criminal Procedure Code and, therefore, the conviction cannot stand. He urged that as the accused appeared on summons it was the duty of the Magistrate to read to the accused a statement of the particulars of the offence contained in the summons. The Magistrate had, instead, read to the accused the particulars contained in the plaint. The question is whether this mistake vitiates the proceedings in this case. The identical question seems to have been raised in the case of *Boulton vs Sanmugam* (3 Bal. Notes of Cases 46). In the course of his judgment Wood Renton, C.J. said :

> "The record, however, shows that the accused appeared in the Police Court in answer to a summons, and, therefore, under section 187 (2) of the Criminal Procedure Code, it was competent to the Police Magistrate to explain the nature of the charge to him from the summons itself. This the Police Magistrate did not do. He explained the charge from the plaint, and so an irregularity has been committed. But the plaint and the summons are equally precise as to the particulars of the alleged offence, and in the absence of any authority constraining me to do so, I am not prepared to hold that this irregularity is fatal to the conviction. It is clear from the evidence that the accused, who was defended by a

proctor, was fully aware of what the charge against him was, and there is nothing to show that he has suffered any prejudice from the fact that it was explained to him from the plaint instead of from the summons."

These observations seem to me to apply to this case. I would, accordingly, dismiss the appeal.

Appeal dismissed.

Present: JAYETILEKE, J.

VANNIASINGHAM vs JAYASUNDERA

S. C. No. 879—*M. C. Colombo No.* 4552.
Argued on 28th August, 1945.
Decided on 3rd September, 1945.

Control of textiles—Possession of sarongs 50 *inches wide without a permit—No ration points allocated to such sarongs—Legality of possession—Defence (Control of Textiles) Regulations*, 1945.

The accused was convicted of having had in his possession, without a permit from the Controller of Textiles, a quantity of sarongs, 50 inches in width, in excess of that which he as a consumer could purchase from a dealer surrendering all coupons issued to him. Sarongs were "regulated textiles" within the meaning of the Defence (Control of Textiles) Regulations, 1942, but no ration points had been allocated for sarongs 50 inches in width.

Held : That the conviction was bad.

G. E. Chitty, for the accused-appellant.
T. K. Curtis, Crown Counsel, for the Crown.

JAYETILEKE, J.

In this case the accused was charged with having in his possession, without a permit from the Controller of Textiles, 24 Palayakat Sarongs, a quantity of regulated textiles, in excess of that which he, as a consumer, could purchase from a dealer surrendering all the coupons issued to him for a year. The sarongs in question are about 4 yards in length and 50 inches in width. The expression "regulated textiles is defined" in Regulation 2 of Part I of the Defence (Control of Textiles) Regulations, 1945. It reads :

"Regulated Textiles means any unused textiles for the time being specified in Part I of the schedule...."

In Part I of the schedule sarongs are included in the list of regulated textiles. Mr. Chitty points out that though sarongs are included in the list of regulated textiles, ration points have not been allocated to any sarong other than those that are 42 inches in width in Part III of the schedule*. He contends that regulation 14 (1)† cannot apply to sarongs other than those that are 42 inches in width as there is no provision in the regulations for calculating their point value. Mr. Curtis relies on paragraphs 4 and 3 of Part III of the schedule where provision is made for ascertaining the point value of rationed textiles not sold by the yard and not specified in the schedule. There is a difficulty in applying paragraph 3 to this case because there is no evidence that sarongs of the kind which form the subject-matter of this prosecution are in webs. Paragraph 3 is headed "Rationed Textiles in Webs." I think the appeal is entitled to succeed. I would set aside the conviction and sentence, and acquit the accused.

Appeal allowed.

* By an amendment of Part III of the Schedule, ration points have now been allocated to sarongs exceeding 42 inches in width — Gazette No. 9430 of July 11, 1945 — **Edd.**

† Regulation 14(1) is as follows :

"No person other than a dealer shall, except under the authority of a permit granted by the Controller, transport or have in his possession or under his control at any one time, whether for his own use or for any other purpose whatsoever, any quantity of regulated textiles in excess of that which a consumer can purchase from a dealer by surrendering all the coupons issued to the consumer for a year. Provided however that the preceding provisions of this paragraph shall not apply in any case where a person employed by any dealer transports any regulated textiles to a registered store of that dealer."—**Edd.**

Present: CANNON, J.

PERERA vs PERERA

S. C. No. 1324—*M. C. Negombo No.* 41504.
Argued & Decided on 19th July, 1945.

Keeping place for the purposes of a lottery—What constitutes "keeping"—Penal Code section 288.

Held : That to constitute keeping a place for the purposes of a lottery there must be evidence of some habitual use of the place for the purposes alleged.

Cases referred to : *Martin vs Benjamin* (1907–1 K.B.D. 64)
Perera vs Silva (1889–1 C.L.R. 57)
Ludovici vs Zoysa (1 A.C.R. 142)
Attygalle vs Perera (1 A.C.R. 143)

H. W. Jayawardene, for the accused-appellant.
A. C. Ameer, Crown Counsel, for the Attorney-General.

CANNON, J.

On the evidence in this case it is possible that the accused committed an offence, but the question for consideration is whether that offence was the one charged. He was charged with keeping a place, to wit, a house situated at Kimbulapitiya, for the purpose of drawing a lottery contrary to section 288* of the Penal Code. The Magistrate convicted him and sentenced him to six months' rigorous imprisonment. Evidence was given that he had had printed in Colombo over 100,000 lottery tickets and that in his house were found some books of lottery tickets some of which were complete while others had only the counterfoils on which were the names and addresses of the purchasers of the tickets. One purchaser said that the prisoner told him that the drawing was to take place at his dwelling house on 17th October, and there was further evidence that the prisoner had postponed the drawing to the 12th of December on which date some 200 people assembled at his house, when he told them that the drawing was further postponed.

Mr. Jayawardene for the appellant contends that this evidence does not justify the Magistrate in holding that the accused was " keeping " the house for the purpose of a lottery inasmuch as it is well established that to constitute "keeping" there must be evidence of some habitual use of the premises for the purpose alleged. This so appears in a number of decided cases, both in England and Ceylon, particularly *Martin vs Benjamin* (1907 – 1 K.B.D. 64); *Perera vs Silva* (1889 – 1 C.L.R. 57) and in the cases of *Ludovici vs Zoysa* and *Attygalle vs Perera* which are reported in 1 Appeal Court Reports at pages 142 and 143.

Mr. Ameer in support of the conviction urged that a " keeping " requires no more than using premises over a period of time for a lottery. I agree ; but it will be seen from the evidence that the facts testified to do not amount to such continuous user.

It has been pointed out by Mr. Jayawardene that the accused might have been properly charged with cheating under section 403 of the Penal Code, or with publication of a proposal for a lottery under the second paragraph of section 288 of the Penal Code, or with selling tickets for a lottery under the Lotteries Ordinance, section 4. The prosecution, however, seems to have selected the charge most difficult to prove. In my view the evidence submitted, though accepted by the Magistrate, does not amount to proof of " keeping " the premises for the purpose alleged. There are no merits in this appeal on the facts, but accused is entitled to succeed on the legal point which has been raised, and the conviction is quashed.

Appeal allowed.

* Section 288 of the Penal Code has now been repealed by section 10 of the Lotteries (Amendment) Ordinance, No. 6 of 1944—Edd.

DIVISIONAL BENCH

Present: SOERTSZ, A.C.J., WIJEYEWARDENE, J., CANNON, J., ROSE, J. & CANEKERATNE, J.

HARAMANIS APPUHAMY vs MARTIN & OTHERS

S. C. No. 251-*L*—*D. C.* (*F*) *Matara No.* 8950.
Argued on 16th & 17th October, 1945.
Decided on 6th November, 1945.

Waste Lands Ordinance, No. 1 *of* 1897, *sections* 2, 3 *and* 4—*Notice under section* 1—*Claims by several claimants before special officer—Agreement with claimants admitting claim to part—Remainder declared property of Crown—Orders published in Gazette under section* 4 (1) *and* (2)—*Effect of such order—Meaning of the words final and conclusive in section* 4 (2).

In pursuance of a notice duly published under section 1 of the Waste Lands Ordinance No. 1 of 1897 in respect of a tract of land 207 acres in extent, seven claimants appeared before the Special Officer, who after due inquiry, entered into an agreement with the claimants admitting their claim to an extent of 133 acres out of the land involved in the notice and the remainder was declared the property of the Crown. This agreement was embodied in orders dated 12th October, 1900 and were published in the Government Gazette as required by section 4 (1) and (2) of the Ordinance.

In 1933, the plaintiff brought this action to partition the said extent of 133 acres on the basis that those who claimed under the seven claimants who appeared before the Special Officer only were entitled to rights in the said land. The principal contesting defendants claimed that not only the seven claimants but also all others who had been co-owners with them prior to the said agreement were entitled to the land in question, although they did not appear before the Special Officer.

In the District Court the contesting defendants succeeded and the plaintiff appealed.

The appeal came up before their Lordships Soertsz, J. and Jayetileke, J. who in view of the decisions in *Kiri Menika vs Appuhamy* (19 N.L.R. 298) and *Dingiri Banda vs Podi Bandara* (29 N.L.R. 257) sent the case to his Lordship the Chief Justice for an order under section 51 of the Courts Ordinance. The case was accordingly referred to a Bench of Five Judges.

Held (WIJEYEWARDENE, J. *dissentiente*):

(i) That the rights of co-owners who did not appear before the Special Officer in response to the notice were wiped out by the publication of the orders embodying the agreement with the claimants in the Government Gazette as required by section 4 (1) and (2) of the Waste Lands Ordinance.

(ii) That proceedings under the Waste Lands Ordinance No. 1 of 1897 are proceedings *in rem*.

(iii) That the Special Officer in acting under section 4 of the Ordinance does so in a judicial capacity.

(iv) The words "final and conclusive" in section 4 (2) means binding everyone who is subject to the law, whether parties to the proceedings or not.

Cases referred to : *Kiri Menika vs Appuhamy* (1916–19 N.L.R. 298)
Dingiri Banda vs Podi Bandara (1927–29 N.L.R. 357)
Jacobs vs Batavia Trust Ltd. (1924–2 Ch. 329)
De Soysa vs Attorney-General (19 N.L.R. 493)
Gunasekara vs Silva et al (1917–4 C.W.R. 226)
Fernando vs Hendrick et al (1920–22 N.L.R. 370)

H. V. Perera, K.C., with *S. R. Wijayatilake*, for the plaintiff-appellant.

N. E. Weerasooriya, K.C., with *S. W. Jayasuriya*, for the defendant marked as 1A, substituted in place of 1st defendant who died.

L. A. Rajapakse, K.C., with *G. P. J. Kurukulasuriya*, for the 4th defendant and 24th defendant and 42nd to 46th defendants-respondents.

N. Nadarajah, K.C., with *N. M. de Silva*, for the 11th defendant-respondent.

SOERTSZ, A.C.J.

Although the order of the Chief Justice dated the 12th of September, 1944, is that this case (that is the whole case) "shall be heard by five judges of the Supreme Court," the main question for decision is whether the interpretation given of the provisions of the Waste Lands Ordinance 1 of 1897, particularly of sections 2, 3 and 4, in the case of *Kiri Menika vs Appuhamy* (19 N.L.R. 298), is correct and should be followed, for, in this case as in that, the question is in regard to the meaning of the words "final and conclusive" in the opening sentence of section

4 (2) — "Every such order shall be published in the Government Gazette and shall be final and conclusive."

Briefly stated, the relevant facts on which that question arises here, are as follows: A tract of land 207 acres and 1 rood in extent, was the subject of a notice under section 1 of the Waste Lands Ordinance 1 of 1897. The Special Officer took all the steps section 1 of that Ordinance required him to take, and in response to the notice duly published by him, seven claimants came forward and preferred a claim to the lands involved in the notice. He, thereupon, held the inquiry prescribed by sections 3 and 4 (1) of the Ordinance, and under section 4, he concluded the inquiry by entering into an agreement with the claimants by which he admitted their claim to an extent of 133 acres, and the remainder was declared to be the property of the Crown. This agreement was embodied in Orders P3 and P4 of the 12th of October, 1900, and the Orders were published in the Government Gazette in compliance with the requirements of section 4 (1) and (2) of the Ordinance. In 1933, the plaintiff instituted this suit for the partition of the 133 acre extent in respect of which the claim of the seven claimants was admitted by the Special Officer and the basis upon which his case proceeded is, that only those parties who claim under the seven are entitled to share in the land, whereas the principal respondents to this appeal maintain that not only the seven claimants but also all the others, who had been co-owners with them prior to the admission of the claim of the seven claimants, are to be regarded as entitled to this land although they themselves did not appear before the Special Officer. This latter contention is advanced on an interpretation of the words "every such order shall be published in the Government Gazette and shall be final and conclusive" as meaning nothing more than that the order, on publication, shall be binding upon the actual parties to the agreement, and not as affecting the title of those others who claim to be shareholders of the land although they themselves preferred no claims to the Special Officer. In dealing with a similar contention advanced in *Kiri Menika vs Appuhamy, (supra)* de Sampayo, J. said: "In my opinion, the order embodying the agreement with the claimant is, subject to such relief as the above (*i.e.* the relief afforded by sections 20 and 26 of the Ordinance), final and conclusive, as section 4 (2) itself declares, even where the person with whom the agreement has been entered upon has claimed only an undivided share..... I do not think that the minority (*i.e.* in age) of persons, who ought to have claimed but did not, takes away the conclusive effect of the Ordinance." In other words, de Sampayo, J. with whom Wood Renton, C.J. concurred, construed the words "final and conclusive" as binding everyone who is subject to the law, whether parties to the proceedings or not. The question then, really, is whether proceedings under the Waste Lands Ordinance are proceedings *in rem*. After a careful consideration of the purpose and provisions of the Ordinance, of the earlier cases bearing on this question, and of the submissions made to us in the course of the argument, I find myself compelled to the conclusion that they are proceedings *in rem*. The meticulously elaborate precautions taken by the Legislature to secure the widest possible publicity for proceedings intended to be taken under the Ordinance, "for the speedy *adjudication* of claims" to lands of the description within the purview of the Ordinance, the requirement that all declarations and all orders made under sections 2 and 4 of the Ordinance shall be published in the Government Gazette, the powers conferred on the Special Officer to extend the period within which claims could be made when he is satisfied that there is occasion for such an extension, the provision for the intervention of the court in a certain event, and for granting relief in appropriate cases within a period of one year (section 20), the further provision for the granting of compensation by the Governor, in certain cases, to persons adversely affected by any order (section 26), seem to me to proclaim that fact in no uncertain voice. Indeed nothing less than proceedings *in rem* would have served the purpose of the Legislature. As de Sampayo, J. observed, "The primary object of the Ordinance is to settle once for all as between the Crown and private persons the title to lands of the description mentioned in the Ordinance, and if the rights of shareholders who did not come forward to claim are to remain notwithstanding the proceedings taken under the Ordinance, that object will not be attained. Consequently it seems to me that the Ordinance when it provided for an agreement with the claimant meant that a complete settlement of the title might thereby be arrived at, whether there might or might not be possible claims on the part of other persons who have not chosen to come forward." The method of interpretation implied in that observation is well established. It is popularly known as the "mischief rule," which was laid down in a case dating back to the year 1584 — Haydon's case — in which the Barons of the Exchequer ruled that "for the true interpretation of all statutes in general — be they penal or beneficial,

restrictive or enlarging the common law—four rules are to be discerned and considered:

(1) What was the law before the passing of the Act;

(2) What the *mischief* and defect for which the law did not provide;

(3) What remedy the Parliament hath resolved and appointed for the cure of the disease;

(4) The true reason for the remedy."

And then the Barons go on to say: "The office of the judges is always to make such construction as shall suppress the mischief and advance the remedy and to suppress subtle inventions and evasions for the continuance of the mischief *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*." It is abundantly clear that in the Waste Lands Ordinance the Legislature was concerned to eliminate as far as possible the mischief that must attend upon title to waste lands so long as it rested merely upon the presumption in favour of the Crown in respect of such lands. The Legislature contemplated by means of this Ordinance, the attainment of certainty in regard to the title to them by ascertaining what valid claims, unknown to the Crown owing to the absence of the usual *indicia* of private ownership, third parties might have to them. But it is contended that an investigation aimed at ascertaining merely what lands belonged to the Crown on the one hand, and what was private property, on the other, was sufficient for the purpose of the Crown and that that was all the Ordinance provided for and not for "probing any further into the title of such lands as appeared to be private." I must confess that, at a certain stage of the discussion, this contention proved attractive for there were many instances in which the Special Officer proceeding under the Waste Lands Ordinance was content with the simple admission that lands to which claims were made were *private*. But on further consideration, I am satisfied that, in a good many cases, it would not be sufficient for the Special Officer to be content with such a finding for it is clear that the Legislature contemplates his entering into agreements for the "admission, rejection of the whole or a portion of the claim or for the purchase of the whole or any portion of the land which is the subject of such claim." In order to do that with desirable assurance and safety it is essential that he should be satisfied that the parties with whom he enters into such agreements are the parties with the ultimate right to act in that behalf with conclusive effect. If it were otherwise, if it were competent for third parties to reopen these agreements, the mischief the Legislature set out to cure would endure, for *ex hypothesi*, not only the title of the claimants but also that of the Crown acquired by agreement would be liable to attack. The main arguments addressed to us in attempted refutation of the view taken in *Kiri Menika vs Appuhamy (supra)* were:

(*a*) That the ruling in *Kiri Menika vs Appuhamy* is undermined by the view taken in two later cases by de Sampayo, J. who wrote the judgment in the cases just mentioned, namely in the cases of *Gunasekara vs Silva* (1917–4 C.W.R. 226), and *Fernando vs Hendrick* (1920–22 N.L.R. 370), and by the judgment of Fisher, C.J. and Drieberg, J. in *Dingiri Banda vs Podi Bandara* (1927–29 N.L.R. 357) and that we should follow the ruling in the last named case.

(*b*) That the Special Officer in acting under section 4 of the Ordinance was acting in an administrative or executive and not in a judicial capacity and that, for that reason, the Legislature could not have intended to give the Orders made by him so far-reaching an effect as contended for on behalf of the seven claimants;

(*c*) That whereas section 2 (2) provides that every Order made in the event of no claim being preferred, shall, on publication in the Government Gazette be "conclusive proof that the land or lands mentioned in the Order was or were, at the date of such Order, the property of the Crown," section 4 (2) only says that the Order made under section 4 (1) "shall be final and conclusive";

(*d*) That section 16 provides that, on a dispute being referred to a Commissioner or to a Court for adjudication, the tribunal shall proceed to try the question *as between the claimant and the Crown* and shall adjudicate as between them;

(*e*) That if it had been intended by the Legislature to bind the world at large by proceedings under this Ordinance, it would have enacted in terms similar to the terms of section 8 of the Land Settlement Ordinance which, admittedly gives a conclusive effect to the Order, similar to the Order made under section 4 (2) of the Waste Lands Ordinance, made under it.

I will deal with these in the order in which I have set them forth.

In regard to (*a*), this case falls exactly within the principle laid down in *Kiri Menika vs Appuhamy (supra)* for here too we are dealing with proceedings that ended in an agreement between the Crown and the claimants, and an order based thereon. In *Gunasekara vs Silva (supra)*, de Sampayo, J. while affirming that principle in the case of agreements, introduced a modification of it, when he said that "the *admission* of the claim by the Settlement Officer does not conclude the other owners of the land for the case of *Kiri Menika vs Appuhamy (supra)* to which I have been referred does not apply. That was a case of an agreement on the footing of mutual concession between the claimant and the Crown." To speak with all the deference due to so learned a judge, it seems to me that the effect of an admission cannot, logically, be any less than that of an

agreement. Section 4 provides, for the embodying of such "*admission* or *agreement* in an order" and makes "every such order final and conclusive" it seems to follow inevitably from these words that whatever the finality or conclusiveness contemplated by the Legislature, it applied in the same degree, to both admission and agreement. The second case of *Fernando vs Hendrick (supra)* has, really, no direct application to the present question. It dealt with a decree of court based upon an agreement and the decree only directed that a part of the property be declared that of the Crown, and that the remainder be *private* property. There was no direction admitting the claim of the claimants in respect of that remainder. The third case *Dingiri Banda vs Podi Bandara (supra)* raised substantially the same question as arose in *Kiri Menika vs Appuhamy (supra)* and as arises here, but Drieberg, J. relying upon the modification of the rule introduced by *Gunasekara vs Silva (supra)* held that as the order made on the 18th of January, 1918, contained only an admission of the claim of the claimant to the land in dispute in the case before him, and as it was only the order made on the 8th of February, 1918, that "set out the agreements with the several claimants including the respondent," the two orders had to be considered and construed separately and that it was not possible to "import into the simple admission of claim in the earlier order the fact of the agreement" referred to in the later order. He said that for that reason *Kiri Menika vs Appuhamy (supra)* did not apply. If I may presume to say so, to my mind this reasoning is far from satisfactory. I have always understood that when there is a question as to what the real agreement between parties is, and when, in fact, the complete agreement is in more than one document, all the documents must be read together (*see Jacobs vs Batavia Trust Ltd.* (1924–2 Ch. 329) and the local case of *de Soysa vs Attorney-General* (19 N.L.R. 493)). I would, therefore, hold that *Kiri Menika vs Appuhamy (supra)* states the law correctly, that the modification made by *Gunasekara vs Silva (supra)* is unsound, and that *Dingiri Banda vs Podi Bandara (supra)* was not correctly decided on this point.

In regard to (*b*), the proposition that the Special Officer is acting in an administrative or executive and not in a judicial capacity is hardly tenable. It is refuted by the very words of the preamble itself: "Whereas it is expedient to make special provision for the speedy *adjudication* of claims to forest, chena, waste and unoccupied lands." The terms of sections 2, 3 and 4 of the Ordinance clinch the point. The proceedings before the Special Officer may not be as elaborate as proceedings in courts of law generally are, but it must be borne in mind that the Legislature was expressly concerned to have *speedy adjudication*, and was, therefore, content to entrust the investigation into all claims, up to a certain point to the judgment of the Special Officer. The words used in section 3 make it clear, as already observed, that the matter entrusted to the Special Officer was not merely to consider and determine the broad question whether the lands involved in the notice were the property of the Crown or of private persons but also to investigate the validity of the actual claims made. If "final and conclusive" in section 4 (2) meant nothing more than that the order bound the immediate parties to it, if that was what the Legislature intended, it was, surely, not so artless as not to be able to say so. It could hardly be, as was darkly suggested, that the Legislature was attracted by the euphony of the well-known words "final and conclusive" and so preferred them when all they meant to say was that, the order was binding on the parties. Besides, it was only a matter of binding the parties to the agreement they were bound by the very force of the agreement itself, and there was no occasion for proclaiming that fact, nor was there occasion for proclaiming from the house tops, as it were, an agreement that could hardly concern even an insatiate public.

(*c*). Stress was next laid on the difference in phraseology between sections 2 (2) and 4 (2). Section 2 (1) says that where there is no claim, an order shall be made declaring the land or lands the property of the Crown, and section 2 (2) provides that such order, on publication, shall be final and conclusive and "the Gazette containing .....shall be conclusive proof *that the land or lands mentioned in the order was or were at the date of such order the property of the Crown*" whereas section 4 (2) does not contain the concluding words. It provides that "every such order, on publication, shall be final and conclusive.....proof of the admission or agreement entered into under sub-section (1)." This difference in phraseology appears to me to be quite appropriate to each of the contingencies contemplated in the two sections. When no claim has been made, the simple result is that the lands which were *deemed* in section 1 (1) to be the property of the Crown, become so in fact, and notice is given to the world by an order published in the Gazette declaring that those lands are, from the date of the order, the property of the Crown, and that declaration is final and conclusive to that effect. But the scope of an agreement is wide and variable. There is no such thing as an inevitable agreement, and the logical method of dealing with the contingency

of the agreement is to say that the order which embodies it is final and to make provision for the agreement being admitted in evidence for the ascertainment of the area of conclusiveness and finality.

In regard to point (*d*) as I understood it, the argument was that section 16 indicates that the investigation held under that section relates to a question in dispute between the Crown and the claimant, and that, therefore, the finding binds only those parties, and upon the submission it is asked whether the adjudication by the Special Officer could be more far-reaching. But the fallacy of the argument is surely that of begging the question by assuming that because only a claimant or some claimants are before the court on the one side and the Crown on the other, the proceedings are necessarily *inter partes*. But, as I have already ventured to observe for the reasons I have given, there can be no doubt that the proceedings are proceedings *in rem* and so they must remain to the end. Their nature cannot change with a change of the tribunal.

Finally, there is point (*e*), and to that the short answer is, I think, as submitted by Mr. H. V. Perera, that in the light of the experience gathered in the interval of a third of a century, the Legislature thought it prudent to make explicit what was implicitly contained in the earlier Ordinance. It is hardly probable that, as was contended, the Land Settlement Ordinance resulted from a complete change of policy in regard to the effect to be given to orders made in proceedings for the settlement of titles to forest, chena, waste or unoccupied lands. It is a small circumstance but still worthy of some notice that on page 335 *et seq* of Balasingham's Laws of Ceylon Vol. 1 is published the Report by the Land Settlement Officers to which Canekeratne, J. referred in the course of the argument, and it is worthy of notice that it is therein stated, in paragraph 3 (1) (pp. 339-40), "He (the Special Officer) may forthwith order that a lot be admitted as private property .....The admission as private property is in favour of no particular party, and in such cases, no inquiry is made into claims....." And on page 342 (*c*), "He (the Special Officer) may compromise the claim by settling the whole part of the land claimed upon the claimant at a certain rate of payment per acre, or in some cases free of any payment. Such compromise is embodied in a written agreement signed by the claimant and the Special Officer. In such cases a Final Order and Title Plan are issued which confer absolute title upon the claimants, and prevent dispute *inter se*." That certainly has been the view consistently taken by this court in many decisions which lay down that a Grant from the Crown under the Waste Lands Ordinance confers an indefeasible title. This too does not conclude the question but it is a matter which may properly be taken into account in interpreting a statute.

These are some of the reasons which lead me to the conclusion that the land in suit must be partitioned on the footing that the seven claimants alone were entitled to the land in consequence of Orders P3 and P4.

As I observed at the commencement of this judgment the whole case is before us, and for that reason, and also because this case has been before the courts since 1933, I think, now that we are in full possession of all the facts in the case, we ought to give as complete a judgment as possible.

The questions that remain to be considered are two. It is said that the trial judge has found that the seven claimants claimed on behalf of their co-owners as well and that, therefore, this case is within the principle enunciated by Fisher, C.J. in *Dingiri Banda vs Podi Bandara (supra)*. Fisher, C.J. said: "There is nothing in the Waste Lands Ordinance to make it unlawful or improper for one of several co-owners to make a claim on behalf of himself and his co-owners, and when he does so I think the co-owners must be regarded as persons making claim under the Ordinance." But the question is whether the co-owners' claims even if regarded as made in that way, continue notwithstanding the fact that the Special Officer's order and the agreement take no notice of them. It seems to me that the most that can be said is that in such circumstances a trust results. But it is not necessary to go into that question here, for in view of the length of time that has elapsed and the number of persons through whose hands shares of this land have passed, there is no material upon which we can, satisfactorily, consider that question. The only other matter is that in regard to the acquisition of prescriptive titles in the long interval that has elapsed since 1900. The learned trial judge found in effect that the 4th defendant had acquired a prescriptive title to lots 1, 5, 6 and 7. That finding is strongly supported by the evidence and I would direct that those lots be excluded from the partition. Similarly, in the case of the 11th defendant, he has made out a prescriptive title to lots 26 and 27 and those lots must also be excluded. The remainder of the land will be partitioned on the basis that the seven claimants were entitled to the land. Let the case go back for that to be done.

In regard to the costs of appeal, the 4th and 11th defendants succeed on the question of

prescriptive title but fail on the question of original ownership, on which the plaintiff succeeds. Those parties will, therefore, bear their own costs *inter se*. Those who failed on the question of original ownership will pay the plaintiff's costs of appeal in respect of that contest. The costs of the trial court will be considered by the trial judge when he makes his final order on the lines indicated. It would be very convenient if the same trial judge could hear the rest of this case.

CANNON, J.

I agree.

ROSE, J.

I agree.

CANEKERATNE, J.

I agree.

WIJEYEWARDENE, J.

This is an action for the partition of lot U $1\frac{1}{4}$ in sheets $\frac{0.\ 15}{3,4,11,13}$ and $\frac{10.}{52,\ 60}$

That lot U $1\frac{1}{4}$ and lot U $1\frac{1}{2}$ shown also in the sheets mentioned above were included in a notice duly published under section 1 (1) of Ordinance No. 1 of 1897 as amended by Ordinance No. 1 of 1899 and Ordinance No. 5 of 1900. In response to that notice seven persons made a claim to the two lots under section 3 (1) of the Ordinance. In terms of section 4 (1) of the Ordinance the claimants withdrew their claim to U $1\frac{1}{2}$ and agreed to "take" U $1\frac{1}{4}$. Thereafter, the Special Officer appointed under section 28 of the Ordinance made two orders under section 4 (1) — the order P3 embodying the "admission" of the claim of the seven claimants to U $1\frac{1}{4}$ and the order P4 declaring U $1\frac{1}{2}$ to be the property of the Crown. The former order P3 shows that the Governor consented to its publication in the Government Gazette and it was duly published.

In the present action the plaintiff and some of the defendants take up the position that only those deriving title from the seven claimants referred to in P3 are entitled to shares in lot U $1\frac{1}{4}$. The contesting defendants urge, on the other hand, that all claiming title from one Gamage Dingi Hamy are entitled to shares in this lot, as the seven claimants preferred their claim in the proceedings before the Special Officer on the footing that they were entitled to the two lots U $1\frac{1}{2}$ and U $1\frac{1}{4}$ as the heirs of Gamage Dingi Hamy.

On the evidence led before him the District Judge held that the seven claimants who were descendants of Gamage Dingi Hamy made their claim before the Special Officer "on behalf of themselves and the members of their families." He held further that all those tracing title from Gamage Dingi Hamy would be entitled to shares in lot U $1\frac{1}{4}$, on the ground that the present case was governed by *Dingiri Banda vs Podi Bandara* (1927–29 N.L.R. 357), as the order P3 was a simple admission of the claim and did not contain any reference to an agreement. It may be stated here that *Dingiri Banda vs Podi Bandara* (*supra*) adopted the view of de Sampayo, J. in *Kiri Menika vs Appuhamy* (1916–19 New Law Reports 298) as explained by him in his later judgment in *Gunasekara vs Silva* (1917–4 Ceylon Weekly Reporter 226).

The present appeal preferred by the plaintiff against the judgment of the District Judge came at first before a Bench of two judges. At the hearing of the appeal before that Bench the counsel for the respondents appear to have thought it necessary to question the correctness of the view of de Sampayo, J. in *Kiri Menika vs Appuhamy* (*supra*) as explained in *Gunasekara vs Silva* (*supra*) to the effect "that when an agreement is reached under section 4 on the footing of mutual concession between the claimant and the Crown and such agreement is embodied in an order and published in the Government Gazette, the order is conclusive of the title not only of the Crown but also of the claimants." That question was referred to this Bench under section 51 of the Courts Ordinance. In spite of the terms of this reference the point of law argued by the appellant's counsel before us was the wider question whether an order embodying an agreement or admission and falling under section 4 (2) gives to the claimants mentioned in the order a title good against all others including the claimants who failed to appear before the Special Officer.

Section 4 empowers the Special Officer to make an order embodying an admission or agreement mentioned in that section and then enacted :

> "Every such order shall be published in the Gazette and shall be final and conclusive and the Government Gazette containing such order shall be received in all courts.....as conclusive proof of the admission or agreement....."

Does that provision justify the view that such an order gives to claimants named in that order a title good against the whole world ? It will be noted that the words "final and conclusive" mentioned above are followed immediately afterwards by the words "and the

Government Gazette containing such order shall be received in all courts.....as conclusive proof of the admission or agreement .....". Do not those last mentioned words show that the words "final and conclusive" in the earlier part of the sub-section are used to indicate merely that the agreement or admission cannot be canvassed again by the Crown or the private individual? If it was intended to give an indefeasible title to the claimants, would not the Legislature have adopted the language used in section 2 when referring to an order declaring the land to be the property of the Crown? Section 2 of the Ordinance stated that where no claim was made within a certain time the Special Officer should make an order declaring the land to be the property of the Crown and proceeded then to say that:

> "Every such order shall be published in the Gazette and shall be final and conclusive..... and the Government Gazette containing such order shall be.....received in all courts..... as conclusive proof that the land.....was..... at the date of such order the property of the Crown."

The different phraseology used in the two sections appears to me to militate against the appellant's argument.

In the course of the argument reference was made to section 9 of the Partition Ordinance, section 146 of the Municipal Ordinance and section 8 of the Land Settlement Ordinance, 1931. Section 9 of the Partition Ordinance says that "the decree.....shall be good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the said property.....and shall be good and sufficient evidence of the title of the parties.....". Section 146 of the Municipal Councils Ordinance says the certificates "shall vest the property sold absolutely in the Council free from all encumbrances" while section 8 of the Land Settlement Ordinance says the settlement order "shall be conclusive proof.....that such person is entitled to such land.....and that such land vests absolutely.....in such person to the exclusion of all unspecified interests of whatsoever nature.....". It will thus be seen that where the Legislature intended in other Ordinances to give a person absolute title in a property, it used language which expressed that intention in clear and unmistakable terms.

The view contended for by the appellant is sought to be supported by the argument that this Ordinance was passed in order to settle the dispute of private individuals *inter se*. I am unable to entertain that argument. This Ordinance was enacted to make special provision for the speedy adjudication of the claims of the Crown to forest, chena, waste and unoccupied lands where such claims were disputed by private individuals. The Legislature was not concerned with disputes between private individuals. The Legislature wished to bring to a speedy conclusion the disputes raised by private individuals to lands regarded as, or presumed to be, the property of the Crown. The Crown has, no doubt, a right to institute an action in a court to recover lands which it claims. This right is referred to and reserved under section 29. But the Legislature proceeded under this Ordinance to provide a speedier method of giving an indefeasible title to the Crown. A study of a few sections of this Ordinance shows this clearly. Section 1 of the Ordinance empowered the Special Officer to issue a notice with regard to lands which appeared to him to be forest, chena, waste or unoccupied land and the effect of that notice was that the failure of any claimant to make a claim within three months enabled the Special Officer to make a declaration that the land was the property of the Crown. Section 2 (2) made such an order when published in the Gazette conclusive proof of the title of the Crown to the land. Section 3 dealt with the case where a claimant appeared before the Special Officer and made a claim. That section provided the machinery for the Special Officer to ascertain the soundness of the claim of the private individual in order to reach a decision whether it would be advisable for him to come to an agreement with the claimant with regard to the whole or part of his claim or he could confidently compel the claimant to prove his claim against the Crown in a court of law. Sub-section 2 of section 3 was necessary as without such a provision the Special Officer would not have had the necessary material to decide which course of action he should follow. It enabled the Crown to examine the title of the claimant before taking proceedings in court. Section 12 shows that when the Special Officer referred the matter to a court of law because he was unable to reach an agreement with the claimants, the Crown was placed in the advantageous position of a defendant and the claimants were required to prove their claim as plaintiffs against the Crown. Section 14 provided that generally cases under this Ordinance should be given precedence over other cases. These and other provisions of the Ordinance make it abundantly clear that the object of the Ordinance was merely the speedy settlement of the Crown title to lands.

It was also argued for the appellant that we should take into consideration the provisions

of section 8 of the Land Settlement Ordinance, 1931 which repealed Ordinance 1 of 1897. That section enacts that a settlement order made under that Ordinance affords conclusive proof of the absolute ownership of the claimant. That was an Ordinance which amended and consolidated the law relating to settlement of land unlike the Ordinance 1 of 1897 which aimed at making "*special provision* for the *speedy adjudication* of claim to forest, chena, waste and unoccupied lands." The scheme of one Ordinance differs largely from the scheme of the other and the two Ordinances show that the land policy of the Government had undergone a great change during the intervening period of 1897 to 1931. I do not think that we could say that section 4 (2) of Ordinance No. 1 of 1897 gave an absolute title to a claimant because the Legislature gave an absolute title to claimants in proceedings under the Land Settlement Ordinance of 1931 (*vide* Craies on Statute Law, Third Edition, pages 134 and 135).

It was then sought to support the appellant's contention by an argument which was put more or less as follows: If there were two claimants A and B to a land and they did not appear before the Special Officer, they lost all rights in the land. If B alone appeared and got a portion of the land, why should A be allowed to claim a share in that portion? To concede such a right to A, it is said, would be to give him an advantage which he would not have had, if B also failed to appear before the Commissioner. There is a short answer to this. The fact of B appearing before the Special Officer and leading some evidence before him operated to prevent the Crown from adopting the summary procedure of having the land declared Crown property under an order made under section 2 (2). Once the land was removed from the operation of such an order that land remained the property of the various persons who had an interest in the property before the proceedings were taken under the Ordinance. The position is made clear by section 6 which required the Special Officer to mention in his reference to court not only the claimants who appeared before him but also "any other person whom he has reason to think interested in such land." The Legislature would not have required the Special Officer to mention as parties the claimants who did not appear before him but were in his opinion interested in the land, if their non-appearance before the Special Officer had the effect contended for by the appellant?

It was finally argued that the proceedings before the Special Officer under section 34 were "proceedings *in rem*" before a person who acted in a judicial or quasi-judicial capacity. I do not think that is a correct view of the proceedings. As stated earlier by me, the object of section 3 was to enable the Special Officer to find out the strength of the disputing claimant's case and to decide whether he should come to an agreement with the claimant or allow the dispute to be adjudicated in a court of law.

Section 4 (1) contemplated a number of contingencies. If the claimant appeared but produced *no* evidence whatever, then in spite of his mere physical appearance before the Special Officer he was in no better position than a claimant who did not appear, and an order could be made against him declaring the land to be the property of the Crown. Such an order could also be made if he withdrew the claim even after leading some evidence. But the position was different where he led some evidence however scanty and did not withdraw his claim. The Special Officer who was acting on behalf of the Crown could not act in a judicial or semi-judicial capacity and give a decision on that evidence in a dispute between the private individual and the Crown, his employer, on whose behalf he issued the notice under section 1. In such a case the Legislature gave him authority to enter into an agreement on behalf of the Crown. Acting on behalf of the Crown he could admit the claim or enter into an agreement for the admission or rejection of the whole or part of the claim or for the purchase of the whole or part of the land. He had no right then to make an order unless the claimant agreed to it. This shows clearly that the Special Officer did not act in a judicial capacity. Moreover, the requirement under section 4 (2) that the Governor's consent should be obtained for the validity of an order embodying such an agreement or admission in the case of lands of more than ten acres emphasizes the fact that the Special Officer was not acting in a judicial capacity under section 4 but as an administrative officer of Government. If the Special Officer was unable to reach an agreement under section 4, he had to bring the matter before a court. The "speedy adjudication" mentioned in the preamble was achieved by the Special Officer bringing the disputing claimants to court without waiting until the claimants brought an action and by the special provisions made for the expeditious hearing of such cases in a court of law. The administrative proceedings before the Special Officer were merely a preparation for the "speedy adjudication" in a court of law, if the claimants and the Crown were unable to agree.

It was suggested during the course of the argument that the Ordinance required the order to be published in the Gazette because the order was binding on the whole world and the Legislature thought it, therefore, necessary to give a general notice of the order. I think that the correct explanation, if an explanation is needed for this provision, lies in the fact that we are dealing here with an order made by a Government Servant disposing of land presumed to be the property of the Crown. Such an order cannot be put on the same footing as any other administrative act of the Government Servant. The right to sell Crown land is one of the few important matters dealt with in the Letters Patent constituting the office of Governor. Article VI of the Letters Patent reads :

> " The Governor, in Our name and on Our behalf, may make and execute under the Public Seal of the Island, grants and dispositions of any lands which may lawfully be granted or disposed of by Us within the Island : Provided that every such grant or disposition be made in conformity either with some law in force in the Island or with some Instructions addressed to the Governor under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State, or with some regulation in force in the Island."

We find an indication of the importance attached to acts of administrative officials in regard to disposal of Crown lands in this very section when it required that an order in respect of lands in excess of ten acres should receive the assent of the Governor for its validity. The orders were required to be published in the Gazette, because it was thought necessary that the fact of a Government Servant disposing of lands presumed to be the property of the Crown should be a matter of public knowledge and not because it was thought necessary that the title of a private individual should be made public.

I may add that the enactment of sections 20 and 21 show also by implication the difference between the scope of an order under section 2 (2) and that of an order under section 4 (2).

The Ordinance provided for the making of an order giving to the Crown good title against all persons :

> (1) Where no claimant appeared before the Special Officer.
> (2) Where the claimant appeared but placed no evidence.
> (3) Where the claimant appeared and withdrew his claim.

The Legislature then proceeded to give relief in case (1) by giving him the right under sections 20 and 21 to claim the land or compensation if he showed good reason for his failure to prefer his claim. That right was given to him because otherwise owing to the conclusive nature of the order he would have no relief. But no such right was reserved to the absent claimant where the Special Officer made an order under section 4 (2). I think that fact too tends to shew that the absent claimant did not lose his right to the land referred to in that order and it was for that reason that the Legislature did not give him a right to any relief in those circumstances even if he showed good and sufficient reason for his absence.

On an examination of the provisions of the Ordinance I have formed the opinion that the order referred to in section 4 (2) did not give an indefeasible title to the claimants named in the order.

I shall now consider the previous decisions of this court.

In *Kiri Menika vs Appuhamy* (*supra*) the Special Officer entered into an agreement with the claimant that the claimant should be declared the owner of one lot A and should be allowed to purchase another lot B and that the claimant should withdraw his claim to other lots. Two orders were published — one order with respect to lot A and reciting the agreement to purchase and the other order with respect to lot B without any reference to the agreement. De Sampayo, J. (Wood Renton, C.J. agreeing) held that the claimant got title to both the lots. He stated the reason for his decision as follows :

> " The primary object of the Ordinance is to settle once for all, as between the Crown and private persons, the title to the lands of the description mentioned in the Ordinance, and if the rights of shareholders who did not come forward to claim are to remain intact, notwithstanding the proceedings taken under the Ordinance, that object will not be attained."

I fail to see how that fact that the shareholders who do not come forward may claim a share of a land mentioned in an order under section 4 (2) could possibly affect the rights of the Crown to lands declared to be the property of the Crown by the conclusive order referred to in 2 (2). In the subsequent judgment *Gunasekara vs Silva* (*supra*) de Sampayo, J. held that an order embodying an admission did not give indefeasible title and distinguished it from the order considered in the earlier case which he said was an order embodying "an agreement on the footing of mutual concession between the claimant and the Crown."

In *Fernando vs Hendrick* (1920–22 N.L.R. 370) the Government Agent had made a reference to court under section 5. In the course

of the proceedings a settlement was arrived at between the claimants and the Government Agent, the terms being that certain lots should be declared the property of the Crown and the rest of the land, private property. A decree was accordingly entered by the District Judge under section 16 of the Ordinance. De Sampayo, J. (Schneider, A.J. agreeing) said in the case :

> " The real effect of the decree was to declare the Crown entitled to certain portions, and that the balance of the land belonged to private parties. The title of the private parties *inter se* must be determined by other considerations and upon evidence heard with regard to it. In reality the decree in favour of the claimants in the waste lands case must be held to enure to the benefit of those to whom they transferred their rights previously."

If the proceedings before the Special Officer were in the nature of proceedings *in rem* it is difficult to say that the proceedings altered their nature when they were transferred to the District Court or that the Legislature intended such a change. It is difficult to understand how a consent decree can be entered in the District Court with regard to title to land in proceedings *in rem*. It would be just as wrong as to enter a consent decree in a partition action. These considerations shew that the view taken in *Fernando vs Hendrick* (*supra*) is inconsistent with the decision in *Kiri Menika vs Appuhamy* (*supra*).

In *Dingiri Banda vs Podi Bandara* (*supra*) Drieberg, J. (Fisher, C.J. agreeing) found it possible to consider the Order 6D5 in that case as an order embodying a simple admission and then held that the order did not give an indefeasible title to the claimants. Referring to the question as to the correctness of the decision in *Kiri Menika vs Appuhamy* (*supra*) he said :

> " It is not necessary to go into that question, for assuming the correctness of the principle in that case as explained in the later case of *Gunasekere vs Silva et al* viz : that it applied only to where the admission of a claim proceeds upon an agreement of mutual concession between claimant and Crown, the admission in 6D5 cannot be treated as one of that nature."

I am unable to appreciate how the distinction drawn in *Gunasekara vs Silva* (*supra*) and *Dingiri Banda vs Podi Bandara* (*supra*) between the two orders falling under section 4 (2) could lead to different results when both the orders come under section 4 (2) and are "final and conclusive" within the meaning of that section.

I think the decision in *Kiri Menika vs Appuhamy* (*supra*) is erroneous and the efforts made subsequently to distinguish that case from the later cases serve only to show the unsoundness of that judgment.

It has been suggested that, even if we are of opinion that the view expressed in *Kiri Menika vs Appuhamy* (*supra*) is incorrect, we should not overrule it as the present case should be regarded as " one of those cases in which inveterate error is left undisturbed because titles and transactions have been founded on it which it would be unjust to disturb " (*vide Pate vs Pate* (1915–18 N.L.R. 289 at 293)). Now the judgment in *Kiri Menika vs Appuhamy* (*supra*) was delivered on November 15th, 1916, and within nine months the same judge delivered his judgment in *Gunasekara vs Silva* (*supra*) on August 10th 1917. It is difficult to believe that any prudent person would have purchased any lands after the later judgment relying on the decision in the earlier case because the unreality of the distinction sought to be drawn by the learned judge between these two cases should have been a sufficient warning to anyone as to the correctness of the view expressed in the earlier case. The later judgments referred to by me involved in serious doubt the correctness of that decision. I am, therefore, unable to agree that there is any reason for not overruling that decision though it was given twenty-eight (28) years ago. (*Vide* Craies on Statute Law, Third Edition, page 143).

I may add that it is not necessary for the purpose of this appeal to overrule the decision in *Kiri Menika vs Appuhamy* (*supra*). It is sufficient to adopt the view taken of that judgment in the subsequent cases. Adopting the line of reasoning of Drieberg, J. in *Dingiri Banda vs Podi Bandara* (*supra*) the District Judge has construed the Order P3 as an admission of claim. On that finding of fact the present appeal must fail unless we reject the explanation given by de Sampayo, J. in *Gunasekara vs Silva* (*supra*) of his earlier judgment in *Kiri Menika vs Appuhamy* (*supra*).

I answer in the negative the question argued by appellant's counsel before this Bench.

Present: SOERTSZ, A.C.J.

REV. FR. COLLEREE vs BENEDICT

S. C. No. 871—*M. C. Negombo No.* 44686.
Argued on 12th October, 1945.
Decided on 15th October, 1945.

Unlicensed private market—Market owner's default in obtaining licence due to delay of local authority in arriving at a decision—Plaint filed within time—Amended plaint filed out of time—Is prosecution barred—Power to impose continuing fine—Propriety of instituting prosecution—Urban Councils Ordinance, No. 61 *of* 1939, *sections* 151, 164 *and* 230.

The accused was charged with having kept an unlicensed private market during 1944. The default in obtaining a licence was due to the delay on the part of the Chairman of the Urban Council in giving a decision on an application made by the accused. The original plaint charged him with having contravened section 150 of the Ordinance. An "amended plaint" filed after three months of the date of the commission of the offence charged him with having contravened section 151 of the Ordinance. The Magistrate convicted the accused and sentenced him to pay a fine as well as a continuing fine in respect of each of four days.

Held : (i) That a continuing fine could not have been imposed as the accused had not carried on the market in disregard of a notice suspending his licence.

(ii) That as the accused's default in obtaining a licence was due to delay on the part of the Chairman, the prosecution should not have been launched until the accused's application for a licence had been disposed of.

(iii) That the "amended" plaint was a new charge and was out of time.

Cases referred to : *Radcliffe vs Bartholomew* (1892–1 Q.B. 161)
South Staffordshire Tramway Co. vs Sickness & Accident Assurance Association (1891–1 Q.B. 402)
Mabro vs Eagle, Star & British Dominions Insurance Co., Ltd. (56 L.J.Q.B. 30)

L. A. Rajapakse, K.C., with *H. W. Jayawardene*, for the accused-appellant.
Mackenzie Pereira, for the complainant-respondent.

SOERTSZ, A.C.J.

At the end of March 1945, either on the 28th or 29th or 30th of that month — the magistrate's figures at the top of the plaint are so illegible that it is impossible to say what the exact date is — a Sanitary Inspector of the Negombo Urban Council filed a plaint charging the appellant with an offence committed on the 28th of December, 1944, in breach of section 150 punishable under section 164 of Ordinance No. 61 of 1939. Summons was ordered, upon this plaint, for the 14th of April, 1945. On that date, the appellant appeared and pleaded not guilty and the trial was fixed for the 5th of May, 1945. On that date, what purported to be an amended plaint, according to the magistrate's description of it, was filed charging the appellant with an offence on the 28th December, 1944, in breach of section 151 of that Ordinance, itself punishable under section 164. The appellant was now charged in respect of this plaint, and he pleaded not guilty and the trial was fixed for the 19th of May, 1945. At the end of the trial, the magistrate convicted the appellant and sentenced him to pay a fine of Rs. 100 and a "continuing fine" of Rs. 50 for each of the dates 28th, 29th, 30th and 31st December, 1944. The appeal is from that conviction and sentence. The contentions on behalf of the appellant were :

(*a*) That, in that event, the "continuing fine" could not have been imposed on the facts proved in the case ;

(*b*) That this prosecution should not have been launched in the peculiar circumstances of this case ;

(*c*) That the prosecution was barred by section 230 of the Ordinance, the complaint not having been made within three months next after the commission of the offence.

In regard to point (*a*), the imposition of the continuing fine is palpably erroneous and reveals a surprising misinterpretation of the simple and clear words of section 164. The "continuing fine" is leviable only in cases in which in disregard of a notice of suspension of a licence, the party noticed carries on a market. There is no question here, at all, of the appellant's licence having been suspended. That part of the sentence cannot, therefore, stand in any event.

In regard to point (*b*), the offence alleged in the plaint in respect of which the appellant was ultimately charged and of which he has been convicted, is that he continued to maintain a private market in the year 1944 without the requisite licence issued by the Chairman of the Council, and that he was found to be so maintaining it on the 28th of December, 1944. It is clear from the provisions of section 152, particularly from the terms of sub-section 2 read with Form B that a licence, in the case of a market other than a new market, should be applied for and obtained in respect of each ensuing year before the end of the preceding year. By-law No. 5 published in the Government Gazette No. 7995 of the 4th of August, 1933, entitled a party who "wishes to pay the licensing fees calculated on the percentage basis..... to produce proof of the annual profits..... to the satisfaction of the Chairman at least a month before the date on which he desires the licence to issue." In accordance with this requirement, the appellant made application on the 23rd November, 1943, to be allowed to pay the 1944 licensing fees on a percentage basis. His application was well within the time prescribed by the by-law for such an application. But he heard nothing about it till the 16th of March, 1945 (see P3), and it seems monstrous that he should now be charged with having failed to pay the 1944 licensing fee and with having carried on his market on the 28th December, 1944, although it was the shocking delay on the part of the Chairman in giving his decision upon the appellant's application that involved him in his default. Moreover, P3 says in reference to the accounts submitted by the appellant in support of his application for assessment on a profit percentage basis "I have to inform you that the accounts are not in conformity with the requirements of the by-laws of this Council." It is not stated in what respect they fail to conform. Ten days later the appellant was sent letter D1 threatening him with prosecution unless he paid Rs. 250 before 10 a.m. on the 28th of March, 1945. D1 bears date 26th March, 1945, and appears to have reached him on the 29th March. By a stroke of the pen, the appellant is deprived of the right of appeal to the Executive Committee given him by section 152 (5) of the Ordinance. The view to which one is driven by these facts is far from flattering to a responsible public body such as an Urban Council must be supposed to be. Obviously the Council's officers had been grossly dilatory and were now trying to make the appellant the scapegoat. I hold that this prosecution ought not to have been launched till the appellant's application had been properly disposed of.

The next question (*c*) is whether this prosecution is barred by section 230. That section provides that "no person shall be liable to any fine or penalty under this Ordinance .....for any offence triable by a magistrate unless the complaint respecting such offence shall have been made within three months next after the commission of such offence." The first complaint appears to have been made as I have already observed either on the 28th, 29th or 30th of March, 1945. Let us assume that it was on the 28th of March, 1945, and therefore within the three month period according to the rule laid down in *Radcliffe vs Bartholomew* (1892-1 Q.B. 161); *South Staffordshire Tramway Co. vs Sickness & Accident Assurance Association* (1891) (1 Q.B. 402) and other cases. But that complaint was in respect of an offence in breach section 150, an offence for which, on the facts, the appellant was admittedly not liable. The charge under section 151 of which the appellant has been found guilty was not made till the 5th of May, 1945, long after the expiry of the three month period. It is impossible for the complainant to attempt to surmount that difficulty by pretending that the new charge was no more than an amendment of the first complaint. That would be to delude oneself with words. In *Mabro vs Eagle, Star & British Dominions Insurance Co., Ltd.* (56 L.J. — Q.B. 30) Scrutton, L.J. said: "The court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the statute of limitations would be defeated. The court has never treated it as just to deprive a defendant of a legal defence. If the facts show that.....the new cause of action sought to be added is barred. I am unable to understand how it is possible for the court to disregard that statute." That principle applies with even greater force to a criminal prosecution.

I, therefore, hold that the appellant was not liable to be prosecuted for the alleged breach of section 151 on the 28th of December, 1944, on a plaint filed on the 5th of May, 1945. I set aside the conviction.

Appeal allowed.

Present: GARVIN, J. & MAARTENSZ, J.

DASSENAYAKE vs DASSENAYAKE

S. C. Nos. 138-138*A*—*D. C. Ratnapura No.* 3884.
Argued on 30th October, 1925.
Decided on 5th November, 1925.

Decree—Whether terms of settlement should be embodied in—Requisites of a decree—Civil Procedure Code section 188.

The plaintiff (wife) sued her husband for a divorce *a vinculo matrimonii* on the ground of malicious desertion. The defendant (husband) counter-claimed a divorce and prayed for the custody of the children and for an order settling certain property on himself and his children. When the case came up for trial on 7th March 1925 both parties, who were represented by counsel, intimated to court that parties were agreed as to the custody of children and the disposal of the property and the terms of the agreement were recorded by the judge at the request of the parties.

On the evidence led for the plaintiff on the issue of malicious desertion, the judge directed decree *nisi* to be entered returnable on 9th June, 1925. On 9th June, 1925 when a draft decree was submitted the judge made the following entry: "I do not think the terms of the agreement need be embodied in the decree. Usual form of decree should be followed and in addition the custody of the children etc. to be as in the terms of the agreement embodied in the record."

In view of this order the final decree settled and signed by the judge did not embody any of the terms of the agreement.

The defendant moved that the decree be amended embodying the terms of the agreement. The learned District Judge refused and the defendant appealed.

Held: (i) That when the parties asked that the terms of the agreement be entered on the record, their purpose was that there should be evidence of the agreement and not that the court should pass a decree in conformity with the agreement in the event of a divorce being granted.

(ii) That the purpose of a decree is not to embody and enshrine the terms of a settlement, but when an action or part of an action is determined by a settlement, to give effect to that settlement by orders capable of being executed.

Allan Drieberg, K.C., with *H. H. Bartholemeusz* and *E. Navaratnam*, for the defendant-appellant.

H. V. Perera, for the plaintiff-respondent.

GARVIN, J.

The facts out of which this appeal arises are of a somewhat unusual character. The action is one for a divorce *a vinculo matrimonii* by the wife against her husband on the ground of malicious desertion. The husband admitted living apart from his wife for various grave reasons alleged by him which he made the basis of a prayer for divorce in his favour. He also prayed for the custody of the children and for an order of the court ordering a settlement of property on himself and his children. The case came up for trial on the 7th of March last. Both parties were represented by counsel and proctors and before entering upon the trial an intimation was made to the court that the parties were agreed as to the custody of the children and the disposal of the property. This intimation is recorded under date the 7th March, 1925. There is then a note by the judge in the following terms: "Evidence is needed on the issue, was there malicious desertion?". The plaintiff was then called and examined in chief. There was no cross-examination, but immediately thereafter there appears the following entry: "At this stage I am informed that the parties have arrived at the following agreement which they desire me to record. The terms of the agreement are: (then follow the clauses of agreement which were twelve in number)." Counsel for the defendant then intimated to the court that in view of the agreement so recorded he had decided not to lead evidence on behalf of the defendant. The District Judge then delivered judgment upon the evidence recorded which satisfied him that there had been malicious desertion and directed decree to be entered returnable on the 9th of June 1925. This judgment and order was delivered on the 7th of March, 1925. It would seem, however, that for some reason, which is not evident to us, the formal decree was not drawn up until the 5th of June, 1925, when a draft decree was submitted for approval. Thereupon the District Judge made the following entry: "I do not think the terms of the agreement need be embodied in the decree. Usual form of decree should be followed and in addition the custody of the children etc. to be as in the terms of the agreement embodied in the record." On the 9th of June, 1925, the learned District Judge signed the decree *nisi*

and made it absolute. The decree as finally settled and signed by the judge does not embody any of the terms of the agreement. The defendant who was present in court on that day moved that the decree *nisi* be varied on the ground that it was not in accordance with the order of the court and tendered an amended decree in which the agreement earlier referred to was embodied. The learned District Judge refused this application giving as his reasons that the terms of the agreement are matters to be enforced otherwise than under the divorce. The purpose of the present appeal, which was taken by the defendant, is to have the decree amended by incorporating in it the agreement entered of record. Certain terms of this agreement related to immovable property, and it is feared that unless they are embodied in the decree the defendant may meet with opposition when he attempts to procure specific performance. The agreement relates to the custody of the children, provides for the settlement of allotments of land upon them and contains certain other covenants the object of which is to settle the property rights of the parties.

There can be little doubt that it was the intention of the parties by this agreement to provide for and settle all matters which would naturally call for settlement in the event of a dissolution of their marriage. They intimated that such a settlement had been arrived at, invited the court to place the terms of the agreement on record and submitted for the adjudication of the court the one question whether the defendant had maliciously deserted his wife. That question has been decided by the court and decree in conformity with that decision entered.

For the appellant it is said that it was the intention of the parties that their agreement was to be given effect to by the decree to be passed in this action. The respondent does not admit this. But on the contrary strongly resists the attempt of the appellant to obtain the decree he seeks.

It is possible that parties to an action may settle some of their disputes and invite the court to enter a decree to give effect to such a settlement while submitting the rest of the matters in dispute to the adjudication of the court. So also they may intimate that they have settled certain matters and withdraw those matters completely from the recognizance of the court while inviting the intervention of the court only in regard to the remainder of the matters in dispute.

There is no record that the parties invited the court to pass a decree in conformity with the agreement in the event of a divorce being granted.

The judge apparently thought that the parties were satisfied with the settlement as recorded and that all questions relating to the custody of the children and the property rights of the parties had been withdrawn from his recognizance.

It is for the appellant to satisfy this court that the parties intended a decree to be passed in conformity with the settlement. There does not appear to be anything to support his bare assertion. Indeed there is much that militates against it. Some of the terms of the agreement cannot possibly be made the subject of a decree. The agreement as a whole is so drawn that it is difficult to believe that the parties could possibly have imagined that it could be enforced by the decree to be passed in the action.

By way of illustration it is sufficient to instance clause 4 of the settlement which runs as follows :

> " Defendant do undertake to settle all claims and costs in respect of promissory notes, mortgage bonds or other obligations incurred by plaintiff and defendant jointly or in respect of which the plaintiff has joined or been joined with the defendant as wife of defendant out of the monies lying in deposit in court in cases Nos. 3539 and 3379 of the District Court of Ratnapura. If there is any deficiency in respect of the above claims and costs after such payment out of the monies aforesaid deposited in court the defendant shall make good such deficiency out of his own monies provided however that if the monies lying in deposit in the said cases cannot be used for the aforesaid purpose either wholly or in part then to the extent to which such monies cannot be so used the defendant shall remain liable only for half."

Such a covenant is incapable of being given effect to in any decree which might have been made in this action. Clauses 5 and 7 are other instances. A decree must specify " in precise words the order which is made by the judgment in regard to the relief granted or other determination of the action " — *vide* section 188 of " The Civil Procedure Code." Since a decree is to be followed by execution of the decree the order made by the decree must be capable of execution. The purpose of a decree is not to embody and enshrine the terms of a settlement but where an action or part of an action is determined by a settlement to give effect to that settlement by orders capable of being executed.

It is difficult to see how it is possible to pass a decree to give effect to this settlement or how the parties could have intended such a decree to be passed.

When the parties asked that the terms of the agreement should be entered on the record of these proceedings their purpose was that there

should be evidence of the agreement. That purpose has been achieved. The defendant anticipates a technical objection to the proof of the agreement in the event of an action to enforce its terms — hence this application to have it embodied in the decree.

I am not satisfied that this was intended or contemplated. I would, therefore, dismiss this appeal with costs.

There is a second appeal from an order of the District Judge directing the defendant to deposit a sum for the respondent's costs of appeal. As the substantial appeal has been heard and determined there is no purpose in pursuing the matter further. That appeal will also stand dismissed but without costs.

MAARTENSZ, J.

I agree.

Appeal dismissed.

Present: CANNON, J.

BUYZER (Sub-Inspector of Police) vs SUMANAPALA

S. C. No. 1036—*M. C. Ratnapura No.* 44249.
Argued on 8th October, 1945.
Decided on 10th October, 1945.

Defence (Control of Textiles) Regulations, 1945—Prosecutions to be instituted only with the sanction of the Controller of Textiles—Powers of Controller exercisable by Deputy Controller —Validity of prosecution sanctioned by Deputy Controller.

Prosecutions under the Defence (Control of Textiles) Regulations, 1945, have, under regulation 57, to be sanctioned by the Controller of Textiles. By regulation 53 any Deputy Controller of Textiles was empowered to exercise, subject to the general direction of the Controller, any power or function conferred upon or assigned to the Controller by the regulations. A Deputy Controller sanctioned a prosecution under the regulations.

Held : That the Deputy's sanction was valid.

T. K. Curtis, Crown Counsel, for the complainant-appellant.
K. C. Nadarajah, for the accused-respondent.

CANNON, J.

Charges under regulations 4 and 14 of the Defence (Control of Textiles) Regulations, 1945, were preferred against the respondent, and the magistrate discharged him at the close of the case for the prosecution on the ground that the prosecution had not been sanctioned by the Controller of Textiles, as required by regulation 57. This regulation reads as follows :

"No person shall be prosecuted for contravening any of these regulations except by, or with the written sanction of, the Controller.

The prosecution had in fact been sanctioned by the Deputy Controller, whose endorsement of the proceedings reads, " Prosecution sanctioned. (Signed) Percy A. Senaratne, Deputy Controller of Textiles. 1/5/45." The complainant, with the sanction of the Attorney-General, appeals against the magistrate's decision on the ground that the sanction given by the Deputy Controller is deemed to be a sanction given by the Controller by virtue of the powers conferred on the Deputy Controller by regulation 53, which reads :

"Subject to the general direction of the Controller—

(*a*) Any power or function conferred upon or assigned to the Controller by any of the provisions of these regulations may be exercised or discharged by any Deputy Controller of Textiles, and

(*b*) Any such power or function other than power or function under regulation 57 or regulation 58, may be exercised or discharged by any Assistant Controller of Textiles or by any other officer authorized in writing in that behalf by the Controller."

For the respondent it is contended that the words " subject to the general direction of the Controller " mean that the Deputy Controller had no such powers unless the Controller gave them to him, and that, therefore, his sanction of the prosecution should have included some express indication that he had been ordered or authorized by the Controller to give the sanction; that without such an indication as, *e.g.*, " By order of the Controller " the court would have no cognisance that the proceedings had in fact been authorized by the Controller.

The distinction between (*a*) and (*b*) in the Regulation appears to be that (*a*) gives the powers to the Deputy Controller, and (*b*) empowers the Controller to give certain of the powers to officers subordinate to the Deputy Controller. The performance of such duties by the Deputy Controller on the one hand and by his subordi-

nates on the other is to be under the control of the Controller. I am, therefore, of opinion that in the case under appeal the prosecution was validly sanctioned by the Deputy Controller by virtue of the provisions in regulation 53.

The order of the magistrate is set aside and the case remitted to him for further trial according to law.

Order set aside and case sent back.

Present: SOERTSZ, A.C.J.

PILLAI *alias* PERIYAM vs SIRISENA (P.S. 1744)

S. C. No. 1125—*M. C. Chilaw No.* 26955.
Argued & Decided on 19th October, 1945.

Charge under section 394 of the Penal Code—Conviction of accused—Sentence of two years' rigorous imprisonment and two years' police supervision passed by magistrate—Validity of sentence—Prevention of Crimes Ordinance sections 5 and 6.

Held : (i) That it is a condition precedent to the imposition of the enhanced punishment provided by section 6 of the Prevention of Crimes Ordinance that the Magistrate should pass a sentence other than imprisonment in respect of the offence charged.

(ii) That the punitive powers given by sections 5 and 6 of the Prevention of Crimes Ordinance can be combined.

Accused-appellant in person.

E. L. W. de Zoysa, Crown Counsel, for the Attorney-General.

SOERTSZ, A.C.J.

The accused-appellant was charged in the Magistrate's Court of Chilaw with dishonestly retaining a single-barrel breach-loading gun, No. A 329852, valued at Rs. 75, property belonging to Mr. E. S. L. Perera of Kaluarippuwa, knowing or having reason to believe that the same was stolen property and with having thereby committed an offence punishable under section 394 of Chapter 15 of the Legislative Enactments. After trial the magistrate convicted the accused of the offence charged and, it having been brought to his notice that the accused admitted five previous convictions, sentenced the accused to 2 years' rigorous imprisonment and 2 years' police supervision. Although the magistrate does not state in his order the provisions of law under which he purported to act in passing that sentence, it seems clear that he was acting under section 6 and section 5 of the Prevention of Crimes Ordinance, Chapter 18. But he appears to have overlooked the fact that section 6 makes it a condition precedent to the imposition of the enhanced punishment provided for by that section that the magistrate should pass a sentence other than imprisonment in respect of the offence charged. So that in order to regularize the sentence passed by the magistrate under section 6 it is necessary that it should be revised to the end that some punishment other than imprisonment be imposed in respect of the offence itself. Accordingly I sentence the accused to pay a fine of Rs. 10 in respect of the offence and I leave intact the punishment which the magistrate inflicted under section 6 of the Prevention of Crimes Ordinance as that was a matter which the Legislature had left in his discretion.

The next question that arises is whether the sentence passed by the magistrate under section 5 of the Ordinance directing the accused to submit to 2 years' police supervision may legally be passed. There is nothing positive in the various sections of this enactment to make it possible for the magistrate to pass both a sentence of police supervision, if that may be described as a sentence, as well as the enhanced punishment to which a man renders himself liable under section 6 in certain circumstances. But having regard to the fact that the proviso appended to section 5 expressly states that the provisions of section 5 shall not apply in the case of any person sentenced to preventive detention under section 7 of the Ordinance, it seems to follow by necessary implication that there is nothing to prevent a magistrate from combining the punitive powers given to him by the two sections, 5 and 6.

I would, therefore, dismiss the appeal, subject to the alteration I have made under section 6 of the Prevention of Crimes Ordinance for the purpose of regularizing the sentence passed by the magistrate.

Appeal dismissed.

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

APPUHAMY & ANOTHER vs APPUHAMY & ANOTHER

S. C. No. 97—C. R. Gampaha No. 2463.
Argued on 31st October, 1945.
Decided on 14th November, 1945.

Court of Requests—Possessory action by lessee—Value of action—Test of jurisdiction.

Held : (i) (*by Divisional Bench*) That the test of jurisdiction in a possessory action is the value of the land.

(ii) That it is immaterial whether such an action is brought by a plaintiff *suo nomine* or as lessee.

Per SOERTSZ, A.C.J. : " In order, therefore, to ascertain whether an action is within or beyond the pecuniary jurisdiction of a court, the nature and extent of the subject-matter in dispute has to be ascertained, and for that purpose, it would be necessary, to examine not only the plaintiff's claim but also the defendant's answer to it."

Approved : *Laidohamy vs Goonetileke* (5 Bal. N.C. 14)
Lebbe vs Banda (20 N.L.R. 343)

Disapproved : *John Singho vs Julis Appu* (1906–10 N.L.R. 351)
Siyadoris de Silva vs Punchirala (1908–1 S.C.D. 32)
Appuhamy vs Agidahamy (1921–23 N.L.R. 473)

H. W. Jayawardene, with *G. T. Samarawickrema*, for the plaintiff-appellant.
N. Nadarajah, K.C., with *Kingsley Herat*, for the defendant-respondents.

SOERTSZ, A.C.J.

The plaintiffs, relying upon a deed of lease executed in their favour on the 1st of November, 1943, in respect of a land called Millagahawatte, about 7 acres in extent, for a period of 3 years at a total rental of Rs. 90, brought this action on the 4th of July, 1944, alleging that the defendants had entered upon the land 'forcibly and unlawfully' on the 29th of May, 1944, and ousted them from the possession which their lessor had given them. They asked that the defendants be ejected from the land, that they themselves be restored to possession, and that the defendants be condemned to pay them 25 rupees on account of the damages sustained up to the date of action, and thereafter at Rs. 10 a month till they should be restored to possession. The defendants denied that the plaintiffs or their lessors ever had possession of this land or that they had ousted the plaintiffs, and asserted that they were on the land which they described in somewhat different terms, as the tenants of one Albert Perera who, they declared was the rightful owner, not the plaintiffs' lessors. From the dates mentioned above, it is clear that although the action was brought within a year of the alleged dispossession as required by section 4 of Ordinance 22 of 1871, the plaintiffs themselves had had only about seven months' possession at the date of this ouster, and could, consequently, make out the year and a day's possession the Roman-Dutch law required only if they were entitled to fall back on their lessors' possession to supplement theirs, or if they could not do that, they had to establish a dispossession *vi et armis* to justify the possessory remedy they sought. There was another difficulty they had created for themselves. By joining to the claim for possessory relief a claim for compensation in damages, they gave the defendants an opportunity to plead their or their principal's ownership and this the defendants did.

It was in this hybrid of pleadings that the case came up for trial, and as was to be expected the issues framed were very confused. There were issues framed and adopted indicating that title would be investigated (see issues 5 and 8); there were others that suggested that the action was regarded as a possessory action, for instance issue 4 which raised the question of a year and a day's possession.

It is of course obvious that if the title to this land was going to be investigated, the court had no jurisdiction for the land is, admittedly, over three hundred rupees in value. But the order under appeal shows that the learned Commissioner was going to try the case on the footing that it involved a possessory action and, even in that view of it, he found that the value of the subject-matter, that is to say, as he appears to have thought, the value of the land was above 300 rupees. He said : " The test of jurisdiction in a possessory action is the value

of the land and not the value of the remaining period of a lease." No issue had been proposed to suggest that, in this instance, the value of the subject-matter of the action, namely the right to the possession of the land, uncomplicated by the lease, was less than the value of the land itself. We must, therefore, assume that the parties were agreed that the two values coincided as, in many instances, they would.

When the appeal came before our brother Wijeyewardene, J. Counsel for the appellant contended that the subject-matter of the action was the remainder of the plaintiffs' lease and that that was the relevant value for determining jurisdiction. This contention reopened an old sore, and because of the opposite views taken by the single judges on this question, he referred it to a Bench of two judges under section 48 of the Courts Ordinance (Chapter 6).

The more important cases dealing with this question are, on the one side, the case of *John Singho vs Julis Appu* (1906; 10 N.L.R. 351); *Siyadoris de Silva vs Punchirala* (1908; 1 S.C.D. 32); and *Appuhamy vs Agidahamy* (1921; 23 N.L.R. 473); and on the other side, *Laidohamy vs Goonetilleke* (5 Bal. N.C. 14); and *Lebbe vs Banda* (20 N.L.R. 343).

The view taken in the former group of cases is stated thus by Wendt, J. *Siyadoris de Silva vs Punchirala.* "Assuming that the land is worth over Rs. 300, I cannot accede to the argument that that value is involved in this action; in other words, that this action by a lessee for two years must be valued at the same sum as if the claim was made by the owner of the land seeking a declaration of title to the whole dominium. I think that the proposition has only to be stated to be rejected. It is plaintiff's claim that has to be valued, not defendant's rights or claims by which he seeks to resist plaintiff. Plaintiff has only a leasehold interest, and that is all that can be really in issue in the action, although the defendant may allege and prove that the dominium is his and not plaintiff's lessors. I adhere to what I said in the case of *John Singho vs Julis Appu.*" For the moment, I would only say that the observation that in a possessory action "the defendant may allege and prove that the dominium is his and not the plaintiff's lessor's," can hardly be supported. The Roman-Dutch jurists, the text writers and case law are opposed to that view. See *Voet* 43.16.3. I *Nathan* 405; 3 *Bal.* 299; 4 *N.L.R.* 144; 11 *N.L.R.* 105. Title is not relevant unless of course, the plaintiff claims compensation in damages (*see* Maasdorp Book II p. 28 1907 Ed.) But, in that event, the question of title being introduced, jurisdiction would depend on the value of the land.

In the latter group of cases, de Sampayo, J. taking a contrary view, said (see *Lebbe vs Banda*) "Reference has been made to my judgment in *Laidohamy vs Goonetilleke* where I remark that a possessory suit should be valued according to the value of the subject-matter of the suit, that is to say of the property of which possession is claimed. I venture to think that is a correct view. In such a suit neither title to the land nor the extent of the plaintiff's interest therein is involved. The suit is based solely on the fact of possession, and whether it be brought by the owner himself or by a lessee, the subject-matter is the land. Consequently, in the case of a lease, the jurisdiction of the court cannot be determined merely by the value of the unexpired term of his lease."

After as careful a consideration as I could bring to bear on these opposite views taken by two very eminent judges of this court, I would venture respectfully to express my agreement with the view taken in the second group of cases. The other view, if I may say so with great deference, appears to me to result from the assumptions (*a*) that what is involved in an action of this kind is the plaintiff's claim, and (*b*) that that claim is for a leasehold interest and that it had to be valued on that basis. Neither assumption is warranted. Section 75 of the Courts Ordinance provides a special test. This section reproduces *verbatim* section 77 of Ordinance 1 of 1889 which was the section in force at the time the cases I have referred to were decided, enacts that Courts of Requests shall have jurisdiction to hear and determine "all actions in which the title to, interest in, or right to possession of any land shall be in dispute .....provided that the value of the land, or the particular share, right, or interest in dispute .....shall not exceed three hundred rupees" .....These are plain, unambiguous words and do not, as far as I can see afford justification for saying that "it is the plaintiff's claim that has to be valued." What they do say is that the land in dispute, or the share of it in dispute, or the interest in dispute, or the right to possession in dispute that must be valued. In that view of it the dictum of de Sampayo, J. that in a possessory suit "whether it be brought by the owner himself or by the lessor, the subject-matter is the land" is not strictly correct for, although in many cases the value of the land and the value of the right of possession of it would be found to coincide, there may be cases in which the value of the two things would not be commen-

surate. In order, therefore, to ascertain whether an action is within or beyond the pecuniary jurisdiction of a court, the nature and extent of the subject-matter in dispute has to be ascertained, and for that purpose, it would be necessary, to examine not only the plaintiff's claim but also the defendant's answer to it. Examined in that way, an action brought by a plaintiff not as lessee but *suo nomine* to recover possession from a trespasser himself claiming *suo nomine* the right in dispute would be the whole right to possession of the particular land, and in such a case it has been held that "the value of the subject-matter.....is the value of *the right claimed* and that" so far as the action before that Bench was concerned, "is *the right of perpetual possession of the land as against the defendant*. It is difficult to assess such a right as it is to assess the value of a right to an annuity in an individual case, but it is none the less necessary to assess it. The course usually adopted is to regard the right as being equal in value to the actual value of the land, and in the case of the *O.B.C. Estates Co. vs Brook Co.* (1 S.C.R. 1), the Supreme Court found no fault with the plaintiffs for following that course." Per Pereira, J. & Ennis J. in *Wickremesinghe vs Jayasinghe* (18 N.L.R. 84). In a possessory action of that kind, therefore, it is the whole, unlimited right of possession that has to be valued and there is, so far as I am aware not a single case in which that proposition has been challenged. Similarly, in an action by a lessee to recover possession he prays to be restored to possession of the whole land and without limitation in point of time, so that even on the assumption that his claim determines the question of jurisdiction, on the face of it, it cannot be distinguished from a case like that of *Wickremesinghe vs Jayasinghe*. But if an examination of the plaintiff's claim and the defendant's answer to it is made, it becomes as clear that so far as the court is concerned, it is called upon to adjudicate in regard to the right to possession of the whole land at the date of adjudication.

In a possessory action whether brought by a plaintiff in assertion of his own right or by a lessee as has been already observed, title is an irrelevant question. Section 4 of Ordinance 22 of 1871 enacts that "the plaintiff in such action shall be entitled to a decree against the defendant for the restoration of such possession without proof of title." The defendant cannot oppose such a claim with an assertion that he has a good title to the land for possessory actions are given in enforcement of the principle that "*spoliatus ante omnia est restituendus.*" If then title is irrelevant, if possession is all that matters, a limited title such as that of a lessee is equally irrelevant. A court may well refuse to hear a word about a lease for any purpose whatever except, perhaps where it is relied upon as an item of evidence to show that the plaintiff has the requisite kind of possession to enable him to maintain a possessory action if that matter comes into question. For all other purposes, the lease is immaterial. The court adjudicates between parties with reference to rights and obligations existing at the date of the action and with reference to the value of the subject-matter of the action at that date. It is not concerned with what is going to befall a plaintiff whom it has restored to possession, whether he would have to surrender his possession to a lessor in a year or two or whether, on the very next day, he would be evicted by the defendant by means of an action for declaration of title, any more than it is concerned with the future value of the subject-matter of the action. I am quite unable to discover any satisfactory principle upon which to discriminate between the value of what, after all, is the same subject-matter, that is to say the right to possess the whole land, whether a plaintiff sues in a possessory suit *suo nomine* or as lessee. If the 'remainder of the lease' test is sound, then it should be possible for a lessee to bring a possessory suit asking that he be restored to possession for the remaining term of the lease. I have never known such an action but I can well imagine the Gilbertian situations that would arise from an action of that kind. But, it is said that this view would result in great hardship to a party who is only seeking for possession for the period of his lease. We must, however, be warned by the experience gathered from our Law Reports to steal our hearts against this *ad misericordiam plea*. Nor do I, in fact, see any hardship at all. A plaintiff, like the plaintiffs in this case, recovers possession, if he succeeds, immediately for himself but ultimately for his lessor, and he should be in a position to arrange with his lessor for the launching and the conducting of the suit or, he can have recourse to his lessor to ask him to take all necessary action. But, if he chooses to turn himself into a catspaw for pulling his lessor's chestnuts out of the fire, he must not complain that he has burned his little toes.

I would dismiss the appeal with costs.

Canekeratne, J.

I agree.

Appeal dismissed.

(IN THE COURT OF CRIMINAL APPEAL)

Present: WIJEYEWARDENE, J. (President), CANNON, J. & ROSE, J.

REX vs SUBRAMANIAM & THREE OTHERS

Appeals Nos. 38-41 *of* 1945, *with Applications Nos.* 89-92 *of* 1945.
S. C. No. 100—*M. C. Jaffna No.* 6291.
Argued on 1st, 2nd, 3rd, & 4th October, 1945.
Decided on 13th October, 1945.

Court of Criminal Appeal—Prosecution witness—Presumption of innocence—Onus of proof on prosecution—Absence of adequate direction on common intention and knowledge—Misdirection on what constitutes culpable homicide—Effect of.

Five persons were jointly charged with the murder of a man by shooting. The evidence showed that four empty cartridges found at the scene of the shooting had been fired from a gun found in the house of the second accused. The defence suggested that these cartridges might have been substituted by the police. After trial, the first accused was acquitted and the remaining four were convicted of culpable homicide not amounting to murder.

Held : (i) That there is no such presumption of innocence in favour of a prosecution witness, against whom a suggestion of improper conduct is made, as there is in favour of an accused person.

(ii) That the obligation on the Crown is not to prove a *prima facie* case but to prove the guilt of the accused beyond all reasonable doubt irrespective of whether the accused have given evidence or not.

(iii) That where the defence does not rely on one of the exceptions (*e.g.* self-defence or sudden fight) a reference in the course of the charge to the onus on the accused being less than the onus on the Crown is irrelevant and misleading.

(iv) (By a majority of the Court.) That as it was a reasonable inference from the evidence that only one person—the second accused—fired the gun, the absence of adequate direction to the jury on common intention and knowledge, with reference to the facts of the case, and a palpable misdirection as to what constitutes culpable homicide not amounting to murder, rendered the verdict of the jury untenable as against the third, fourth and fifth accused.

Per ROSE, J. : " It seems to us that there is great force in Mr. H. V. Perera's contention that where in a summing-up there are substantial misdirections as to the law (as distinct from mistakes as to the facts which may or may not be vital) it is not safe to adopt the line of reasoning that because in other parts of the summing-up the judge has adequately, although only in general terms, directed the jury, the misdirections should be disregarded."

R. L. Pereira, K.C., with *H. V. Perera, K.C., H. W. Thambiah, S. N. Rajaratnam, M. M. Kumarakulasingham*, for the 1st, 2nd & 3rd appellants.

G. E. Chitty with *H. Wanigatunga* and *Sivagurunathan*, for the 4th appellant.

H. H. Basnayake, Solicitor-General, with *H. W. R. Weerasooriya, Crown Counsel*, for the respondent.

ROSE, J.

In this case five persons were charged with the murder of one Sinnathamby on the 26th September, 1944. After a long trial the first accused was acquitted and the remaining four were convicted of culpable homicide not amounting to murder.

For the sake of convenience we propose to refer to the various appellants by the numbers which they bore during the trial as accused persons. Although the case lasted for some 14 days and the learned judge's charge to the jury occupied no less than 107 type-written pages we feel that so far as this court is concerned the matter is susceptible of comparatively brief treatment. It appears that on the night in question a number of persons among whom was the deceased were engaged in cremating the body of a member of the Nalavar caste in a Vellala crematorium at Villundi, Jaffna. The pyre was apparently lit in daylight on the 26th September and it was soon after nightfall, before the completion of the funeral ceremony, that the incident occurred which resulted in the death of the deceased. The case for the prosecution, which by their verdict the jury must be assumed, as far as the facts relating to the 2nd, 3rd, 4th and 5th accused were concerned, to have accepted, was in short as follows: The 2nd, 3rd, 4th and 5th accused were seen conferring sometime during the afternoon of the day in question; after dark, by the light of the moon, they were observed entering a field adjoining the cemetery; the 2nd and 5th accused were carrying shot guns. It is uncertain whether the 3rd accused was also carrying a

gun, although one witness stated that he was; the 4th accused was not carrying a gun or indeed any weapon; the 4th accused was seen to make a sign with his hand to the party which suggested to the eye witnesses that he was directing them to be silent; from this fact and because the 4th accused was walking in front of the party the eye witnesses appear to have assumed that he was their leader. All four persons disappeared from sight in the direction of the cemetery; a short time afterwards three or four shots were heard and shortly thereafter the 2nd, 3rd, 4th and 5th accused returned the way they had come and went away "walking quickly;" as a result of this shooting, the deceased who, as we have already said, was one of the mourners at the cremation ceremony, fell dead, a pellet having penetrated his brain and two other mourners received minor gun shot injuries. On the following day the police found four empty cartridge cases at a distance of over 80 yards from the spot where the deceased fell and two days after that they obtained information from the two principal eye witnesses for the Crown to the effect that the 2nd, 3rd, 4th and 5th accused had been seen in the vicinity in the circumstances described above. The 2nd accused was arrested on the 30th of September at his house where the police found a single choke-barrelled 12-bore breech-loading gun fitted with an automatic ejector. Tests were subsequently carried out, and after examination of the empty cartridges and experiments with this gun the expert witness called by the Crown stated that in his opinion the empty cartridges were fired from that gun which (with the particular kind of cartridges employed) had an effective range considerably in excess of the 40 yards or so which the witness from his general experience of shot guns would have expected.

The suggestion on the part of the Crown was that the 2nd, 3rd, 4th and 5th accused were incensed by the cremation of a Nalavar in a Vellala crematorium and went to the scene actuated by a common purpose to fire at the mourners with a murderous intention. By their verdict the jury negatives the murderous intention but found that all four accused had the knowledge that by the shooting death was likely to result.

The second accused gave evidence on his own behalf in which he denied his presence at the scene. It was not disputed by the defence that these empty cartridges were similar to the cartridges which the second accused kept in his own house but it was suggested that in all probability the police had effected a substitution of the cartridges in question. The 3rd, 4th and 5th accused gave no evidence themselves and called none on their behalf.

On the question of the alleged substitution of the cartridges, counsel for the 2nd accused contends that there was a serious misdirection. In a passage towards the end of his charge the learned judge says:

> "I told you gentlemen that there was a presumption of innocence in favour of an accused. The burden is upon the Crown of proving their guilt beyond any reasonable doubt. That presumption is part of a larger presumption, namely that there is always a presumption of innocence whenever an allegation of criminality is made against anybody, and when the defence suggests circumstances such as this against those police officers a presumption of innocence also arises in their favour which makes it necessary for them to prove at least to raise some substitution of thought in their minds that the allegations they make are justified. Gentlemen, in this connection I wish to draw your attention to a ruling of the Court of Criminal Appeal. In that case this very point which I am now dealing with was referred to and in another connection and I will give it to you in the very words of the Court of Criminal Appeal (41 N.L.R. page 438). In this case gentlemen the learned judge who was trying a criminal case told the jury that they should not pay the slightest attention to any suggestion put to the witnesses when cross-examined unless those suggestions were supported by proof. We need say no more than that in our view that is a proper direction.
>
> Therefore, gentlemen, fortified by the ruling of the Court of Criminal Appeal that you should not pay any attention to suggestions unless they are supported by some proof, what are these allegations against these police officers? Are they supported by any proof? Are they or are they not merely suggestions made by the defence? What proof is there that cartridges were substituted at the spot? What proof is there that empty cartridges were fired through the gun? What evidence is there that the productions which were put into the box were taken out and new ones substituted? What evidence is there? These are suggestions, and there is a presumption of innocence just as much as is present in favour of the accused arising in favour of the police officers when any allegation is made against them, to say nothing of the language of the Court of Criminal Appeal which says that where suggestions are made of this kind they should not be accepted unless there is some proof in support of that."

Further the learned judge adverts to the matter again a little later in his summing-up when he invites the jury, if they so wish, to bring in a rider that the allegations against the police have not been substantiated. In the event the jury declined this invitation; but had they accepted it their rider would have lacked that spontaneity in which its value lies. Quite apart from this invitation to the jury, which in the circumstances seems to us to be unfortunate, we consider that the passage in question is open to objection. There is, of course no such presumption of innocence in favour of a witness for the prosecution, whether he be a police officer or

not, and the authority of the Court of Criminal Appeal which was cited to the jury seems to us to have no application to the present case where the defence of the 2nd accused was in effect, "I was not present at the scene. I admit that these four empty cartridges are similar to the cartridges which I myself possess and may very well be mine. As I was not present myself at the scene I can only explain their being found there on the basis that some substitution had been effected by the police."

It is to be borne in mind that according to the evidence which was adduced at the trial not more than four shots were fired. If that evidence is to be accepted and also the evidence of the police as to the finding of the four empty cartridges then those four cartridges would seem fully to account for all the shots that were fired. As they were all fired from the same gun it is, in the absence of evidence to the contrary, a reasonable inference that only one man fired. Having regard to the jury's verdict it is important to see whether they were adequately directed not only as to common intention but also as to the matters which they should consider before they could properly return a verdict that the three persons who did not fire had a knowledge that the shooting by the fourth was done in such circumstances as was likely to cause death. It would seem to be a fundamental matter in this case for the jury to make up their minds as to what it was that the three accused persons who did not fire intended to be done. Was it their intention that the fourth man, whoever he was, should aim at the party of mourners and (to quote a phrase from the learned judge's charge) "send a hail of pellets among them?" or was it merely that he should make a demonstration by letting off his gun with the object, no doubt, of frightening away the mourners from the crematorium? To this important aspect of the case it is disconcerting to find that in so long a summing-up there are such slight references. In one passage, dealing, be it noted, not with this aspect of the case at all but with the question as to the rapidity with which the four shots could have been fired from a single gun, the learned judge says:

> "May it or may it not be the case that the Vellalas who wanted to teach the Nallavars a lesson fired at the people without taking aim and even without taking a gun to the shoulders? That would have a bearing on the question of intention and knowledge. If the intention was not so much to kill or wound the people who had the temerity to use this crematorium could not the gun have been loaded, ejected and fired quickly?"

In another passage which would seem to be intended as a summary of what had gone before the learned judge says:

> "In my opinion there are three verdicts open to you according to the knowledge or intention, assuming of course that these accused or anyone of them took part in the transaction. Murder, if they had the intention or those essential forms of knowledge in the third definition of murder which I gave. Culpable homicide if you think they did not intend to kill but merely in order to intimidate or frighten the Nallavars or not guilty. I do not think there is a possibility of a fourth verdict of grievous hurt."

In the immediately succeeding sentence the learned Judge says:

> "I am sorry I have taken so much of your time in defining these forms but it is a matter of vital importance and it is my duty to detail them to you."

We agree as to the importance of the matter and it is therefore unfortunate that the learned judge's summary contains a palpable misdirection on the question of culpable homicide not amounting to murder. The only other reference which can be said to have any bearing upon the point which we are now considering is contained almost at the conclusion of the charge and reads as follows:

> "If a *prima facie* case has been made out against the accused then the burden of proof would be shifted. For instance in the case of the 2nd accused if you are satisfied that the case for the prosecution is established *prima facie*, then the onus shifts to the 2nd accused, and it is my duty to tell you that the burden of proving an exception to criminal liability or some circumstance which exempts him from criminal liability is on the accused, but it is the practice of learned judges to tell you that the burden of proof which lies on the defence is not so strong as the burden which rests on the prosecution. It is sufficient for an accused by a preponderance of probability or on a balance of evidence to raise reasonable doubts in your minds with regard to the case for the prosecution."

With great respect to the learned judge this seems to us to be a most confused and misleading passage. As far as the jury is concerned there is, of course, no question of considering at any stage of the trial whether a *prima facie* case has been established. That is solely a matter for the consideration of the trial judge at the close of the case for the Crown. The fact that the 3rd, 4th and 5th accused did not give evidence on their own behalf is, of course, an element which the jury are entitled to take into consideration in regard to the case as a whole but the obligation on the Crown is not to prove a *prima facie* case but to prove the guilt of the accused beyond all reasonable doubt, irrespective of whether the accused have given evidence. Further, the learned judge seems to have formed an impression that this was a case in which an exception (such as sudden fight, self-defence or grave and sudden provocation) was being raised by the defence. That is not the position with regard to any of the accused persons and his reference therefore to the onus on the defence being less than the onus on the

Crown has no relevance and in our opinion can only have served to confuse the jury.

At no stage in this lengthy charge is there any passage which brings to the attention of the jury the fact that they must consider carefully whether having regard to the actual circumstances of the shooting the only reasonable inference is that, in the absence of explanation by the accused themselves, the three accused who did not fire must have known that the act of firing by the other accused was likely to cause death. Having regard to the fact that the four shots were fired (and according to the evidence, only four shots were fired) in quick succession and at a range which normally would be far beyond the effective or dangerous range of a shot gun it seems to the majority of the court that it is at least a possible and not unreasonable inference that the other three men merely intended that a demonstration should be made either by firing in the air or at random, and not in the direction of the mourners. It is true that there is no evidence that any protest was made against the direction in which the man who fired was pointing his gun, but as the incident took place at night time and there is no evidence as to how close the other three men were to the man who fired at the actual moment of firing, it is in the opinion of the majority of the court impossible for us to hold that the jury, if properly directed, would inevitably have come to the conclusion that the three men who did not fire had the knowledge that the firing was likely to cause death.

There is no doubt that at various stages in this very lengthy charge the learned judge has in general terms correctly stated the provisions of the law which arise for consideration in this case. But it seems to us that there is great force in Mr. H. V. Perera's contention that where in a summing-up there are substantial misdirections as to the law (as distinct from mistakes as to the facts which may or may not be vital) it is not safe to adopt the line of reasoning that because in other parts of the summing up the judge has adequately, although only in general terms, directed the jury, the misdirections should be disregarded. The matter is, of course, one of degree but in the present case, at least as regards the 3rd, 4th and 5th accused it seems to the majority of the court that the directions, where they are not actually misleading, are so inadequate as to make it impossible for the verdict to stand.

It would seem to follow from what we have said that if the jury were in doubt as to which of the four accused fired then the appeals of all four should be allowed.

As regards the second accused, however, we are of opinion that on the facts presented by the Crown and which as we have already stated must be presumed to have been accepted by the jury there is an irresistible inference that it was the 2nd accused who fired the four shots. He was seen in the vicinity both immediately before and immediately after the shooting; he was carrying a shot gun; when he was arrested a shot gun was found in his house which it is not disputed was in fact his gun; four empty cartridges which were proved to have been fired from his gun were found at the scene of the crime; not more than four shots were fired and they were fired in rapid succession. From those facts it seems to us that the jury must reasonably have come to the conclusion that it was the 2nd accused who actually fired those four shots, one of which proved fatal to the deceased. In his case it seems to us that the deficient direction as to knowledge is not fatal because, as he himself was in control of the shot gun at the time of the firing, as the event proved was pointing the shot gun in the direction of the party of mourners; and must presumably have known the effective range of his own gun, he must reasonably be presumed to have known that such firing was dangerous and likely to cause death. In his case, therefore, we have to consider whether the misdirections in the passages relating to the presumption of innocence of the police witnesses and the shifting of the onus of proof are in themselves sufficiently serious to vitiate the verdict of the jury. After the most anxious consideration we are of opinion that even in the absence of these misdirections the jury would have come to the same conclusion in his case. We are not, therefore, disposed to regard these misdirections, unfortunate as they are, as fatal to the conviction. No argument was adduced to us on the question of sentence with which we see no reason to interfere.

As regards the second accused, therefore, his application for leave to appeal is refused and his conviction and sentence are confirmed. As regards the 3rd, 4th and 5th accused, the majority of the court is of opinion that their appeals must be allowed. They are, therefore, acquitted.

Conviction and sentence of 2nd accused affirmed.

3rd, 4th, 5th accused acquitted.

Present: KEUNEMAN, S.P.J. & JAYETILEKE, J.

JAYASENA vs COLOMBO ELECTRIC TRAMWAYS & LIGHTING CO., LTD.

S. C. No. 277—D. C. Colombo No. 13898.
Argued on 5th & 6th September, 1945.
Decided on 19th September, 1945.

Contract—Sale of goods—Express warranty—Implied condition that goods are fit for purpose intended—Sale of Goods Ordinance (Chapter 70) section 15 (1)—Meaning of the word "description."

The defendant company, who were agents for an instrument known as the "Ediphone" sold to the plaintiff an instrument called a "Telediphone" for the purpose of recording and reproducing the charges of judges of the Supreme Court to juries in the course of their criminal jurisdiction. The instrument was not fit for the purpose for which it was purchased.

The questions that arose in the case were :

(*a*) Whether the transaction was a contract of sale or merely an order on the defendant company to import a specified article ;

(*b*) Whether there had been an express warranty that the instrument was reasonably fit for the purpose intended ;

(*c*) Whether there was an implied condition under section 15 (1) of the Sale of Goods Ordinance.

The learned District Judge held :

(i) That though the transaction began with an order by plaintiff to the defendant to import the instrument, there was a subsequent sale by the defendant to the plaintiff ;

(ii) That there was no express warranty by the defendant ;

(iii) That the transaction was not merely a sale of a specified article under its trade name and that the proviso to section 15 (1) did not apply ;

(iv) That the defendant knew the purpose which the instrument was intended to serve, that the plaintiff relied on the defendant's skill and judgment in the matter, but that, for the purpose of section 15 (1) the Telediphone was not an instrument of a description which it was in the course of the business of the defendant to supply.

He accordingly dismissed plaintiff's action. It was established that the Ediphone and the Telediphone were instruments of the same class or kind although the process for recording was different in the two cases.

Held : (i) (In appeal) That the Ediphone and the Telediphone were goods of the same description and that the Telediphone was an instrument of a description which it was in the course of the business of the defendant to supply.

(ii) That for the purposes of section 15 (1) of the sale of Goods Ordinance the words "of a description" may be treated as including the meaning "of a class or kind."

Cases referred to : *Baldry vs Marshall* (1925–1 K.B. 260)
Gutta Percha & India Rubber Co. of Toronto's Application (L.R. 1909, 2 Ch. Div. 10)

H. V. Perera, K.C., with *M. M. Kumarakulasingham*, for the plaintiff-appellant.
N. Nadarajah, K.C., with *G. Thomas*, for the defendant-respondent.

KEUNEMAN, J.

In his plaint the plaintiff alleged that the defendant company sold to him, as a result of negotiations on his behalf by Segarajasingham, an instrument for recording and reproducing the spoken word known as a Telediphone with its necessary equipment and adjuncts. Plaintiff alleged that to the knowledge of the defendant company, this instrument was purchased for the purpose of recording and reproducing the charges of the Judges of the Supreme Court to juries in the course of their criminal jurisdiction. The plaintiff maintained that the sale was subject to an express warranty on the part of the defendant company and was further subject to an implied warranty that the instrument was reasonably fit for the purpose mentioned. The instrument was found on experiment to be defective and unsuited for the purpose mentioned, due to faulty workmanship and/or materials or to the unsuitability of the same to local conditions. Plaintiff claimed judgment for Rs. 4,670 with interest and costs.

The defendant company in their answer averred that they undertook to import for the plaintiff from the makers, *viz.* Thomas A. Edison Inc., a specified article, to wit a Model 24 Telediphone. They admitted that they were aware of the purpose for which the instrument was being purchased but denied that the sale was subject to any express or implied warranty by the defendant company.

It appeared in the evidence that the defendant company who were agents for an instrument called the Ediphone approached the Chief Justice with a view to securing a contract for the installation of that instrument in the Courts,

The Ediphone was however considered unsuitable for the purpose because it could not record a long charge to the jury without constant changes of cylinders and the consequent interruptions to the summing up by the judge. Thereafter the defendant company wrote P1 dated the 3rd November, 1937, to the Chief Justice, stating that they had heard from their suppliers that this shortcoming "could readily be taken care of by the Telediphone equipment which records electrically through an amplifier and can be used with a microphone." The defendant company referred to Model 24 "which is provided with two cylinders making it possible to provide continuous recording" with the result that one cylinder can be changed while the other is recording. The defendant company added that "the apparatus gives clear reproduction and this reproduction is secured through the medium of the Standard Secretarial Model Ediphone, the same type that is used for correspondence work."

This letter was known to Segarajasingham, who was Chief Stenographer to the Supreme Court, and thereafter plaintiff became interested in the purchase of this instrument, and throughout the negotiations Segarajasingham acted as agent for the plaintiff. Eventually it was agreed between the plaintiff and the defendant company that the plaintiff should purchase the instrument subject to a satisfactory trial demonstration and a fortnight's free trial. The first demonstration proved a success, but later the instrument was found to be deficient as regards reproductions. It was thought however that this defect could be remedied and the purchase was completed on the 2nd August, 1938. In fact the defect was never remedied, and it has been proved that the instrument is even now not fit for the purpose for which it was purchased. Apparently the cause of the defect was faulty manufacture of the crystals used. The bakelite varnish used on the crystals should not have "cold flowed" but in fact, owing to the effect of the tropical temperature or to some other cause, the varnish did in fact "cold flow" and became a "glutinous mess" which interfered either with the recording or with the reproduction.

The first point which arose in this case was whether this transaction was a contract of sale or merely an order on the defendant company to import a specified article. The District Judge held that, though the transaction began with an order by the plaintiff to the defendant company to import the machine, the facts also showed that there was a subsequent sale by the defendant company to the plaintiff. This finding has been disputed by counsel for the defendant company but the finding of the District Judge is supported by the evidence and I think must be upheld.

The next question was whether there had been an express warranty that the instrument was reasonably fit for the purpose intended. The District Judge decided the point against the plaintiff-appellant who disputed that finding in appeal. The evidence however, as accepted by the District Judge, supports that finding. Undoubtedly the letter P1 contains the phrase "The apparatus gives clear reproduction" and this may be taken to be a warranty or a condition. But P1 was addressed by the defendant company to the Chief Justice and it cannot be regarded as a representation to plaintiff. In P3, written to plaintiff's agent Segarajasingham, the only phrase applicable is "The makers of the machine guarantee the mechanism against faulty workmanship." This relates to a guarantee by the makers of the machine and cannot be regarded as a warranty or condition undertaken by the defendant company.

The real question in the case was whether there was an implied condition under section 15 (1) of the Sale of Goods Ordinance, Chapter 70, which runs as follows:

> "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be resonably fit for such purpose;
>
> Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

With regard to this matter the District Judge held that the defendant company knew fully well why the Telediphone was needed and the purpose it was intended to serve. In fact this was admitted by the defendant company. He further held that it was clear that the buyer (plaintiff) relied on the seller's (defendant company's) skill and judgment in this matter. This finding was disputed by the defendant company but in my opinion the evidence clearly supports the finding. The District Judge however held that the Telediphone was not an instrument of a description which it was in the course of the business of the defendant company to supply. On this point the District Judge dismissed the plaintiff's action. The attack by plaintiff's counsel was mainly directed against this finding, and it is necessary to consider the argument more fully later on. The District Judge also held that in any event this transaction was not merely a sale of a specified article under

its trade name, and that the proviso to section 15 (1) did not apply. This again was disputed by the defendant company but on examination of the evidence I am satisfied that the District Judge was right on this point. As Bankes, L.J. put it in *Baldry vs Marshall* (1925,—1 K.B. 260):

> " In my opinion the test of an article having been sold under its trade name within the meaning of the proviso is : Did the buyer specify it under its trade name in such a way as to indicate that he is satisfied, rightly or wrongly, that it will answer his purpose, and he is not relying on the skill or judgment of the seller, however great that skill or judgment may be ? ".

I now return to the question whether the Telediphone was an instrument of a description which it was in the course of the defendant company's business to supply. The chief point taken by the plaintiff was that the defendant company were agents for the Ediphone and supplied it in the ordinary course of their business, and that the Telediphone was an instrument of the same "description."

Defendant company's witness Swain made the point that the firm had considerable experience of the Ediphone but had no previous experience of the Telediphone. The difference between the two is described as follows :

> " The Ediphone is a mechanical device for recording by sound waves. ....The telediphone is an electrical apparatus. The Ediphone records mechanically. The Telediphone is an electrical recording. The two work on entirely different principles. The Ediphone works close and the Telediphone is for recording at a distance. The Telediphone records at a distance because the recording in electrical, 2 ft. 6 inches is the utmost distance you can record on an Ediphone."

Later in cross-examination he said :

> " The reproducing is done on an Ediphone machine. The thing is reproduced on the Ediphone machine. The spoken word is recorded on a cylinder. In the case of the Ediphone the recording is mechanical. In the case of the Telediphone it is electrical. That is at that stage. But when you come to the stage of reproducing it for the purpose of typing, the reproduction is on the same principles both in the case of the Ediphone and Telediphone. The same cylinder is used on both cases. To adjust and control is the same when the typist wants to type with headphones. It is reproduced in the same way. The recording in one case is purely electrical. Soon as the Judge speaks, the microphone conveys it to the machine. The recording is automatic."

The main points of difference are (1) that the Telediphone records electrically while the Ediphone records mechanically ; (2) that the Telediphone records at a distance while the Ediphone records only within the distance of 2 ft. 6 inches. (2) follows upon (1) As against this there are points of resemblance between the two machines. They are both instruments for recording and reproducing the human voice. In both cases the record is made on a cylinder as a result of sound waves. The process by which the recording is done is different but the reproduction is secured in the same way in both cases. In fact the Ediphone apparatus is used for the reproduction in the case of the Telediphone also. (see P1). In my opinion the resemblances far outweigh the differences between the two instruments and relate to points of greater substance.

What is meant by the word "description" in section 15 (1)? In his comment on the corresponding English section 14 (1) *Benjamin on Sale* says : " The seller must also deal with the *class* of goods sold." (I quote from the 6th Edition p. 716). I think that for the purposes of section 15 (1) we may treat the words "of a description" as including the meaning "of a class or kind." On the evidence I think it has been established that the two instruments are of the same class or kind although the process for recording is different in the two cases. I think that the Telediphone may be regarded as an improvement upon the Ediphone and that it does not fall into an entirely different class.

It is indeed possible in certain cases that the word " description" may have either a broader or a narrower meaning than the word "class ": see *In re Gutta Percha & India Rubber Co. of Toronto's Application* (L.R. 1909 ; 2 Ch. Div. 10). This case related to an application under the Trade Mark Act : a distinctive trade mark, a Maltese Cross, had been taken out by the opponents who manufactured all sorts of rubber goods, except boots and shoes. The applicants applied to register trade mark with the same distinctive trade mark for boots and shoes. It was held that the opponent's trade mark was for the same "description of goods."

In this connection Cozens Hardy M.R. said :

> " It has also been decided that the words 'description of goods' are not to read solely with reference to the class in which the registration is effected. 'Description of goods' may be narrower than the whole class, it may also be wider, in this sense, that it may include articles in a different class. The matter must be looked at from a business and commercial point of view."

I may mention that the word 'class' here refers to the special classes of goods mentioned in the Trade Marks Ordinance in respect of which registration could be made. A trade mark had to be registered as belonging to particular goods or classes of goods, and refusal to register may be extended to goods of the same description.

I am not sure that this comment is applicable to the Sale of Goods Ordinance, but in

any case I am of opinion that even looked at from a narrow or broad point of view the Ediphone and the Telediphone should be regarded as goods of the same 'description.' The difference in the process of recording appears to me a detail and not a fundamental change in the character of the instrument so as to constitute two different 'description' of goods. At any rate the evidence in the case leads me to the conclusion that the Telediphone is to be regarded from a business or commercial point of view as the Ediphone writ large.

In my opinion the District Judge has come to a wrong conclusion on this point. His judgment is set aside and judgment entered for the plaintiff as prayed for with costs in both courts.

JAYETILEKE, J.

I agree.

Appeal allowed.

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

PEMA & OTHERS vs JINALANKARA TISSA THERO

S. C. No. 319—*D. C. (F) Avissawella No.* 3472.
Argued on 31st October & 1st November, 1945.
Decided on 21st November, 1945.

Buddhist Law—Incumbency—Property dedicated to Sangha by original donors—Can the heirs of original donors claim rights to such property after forty years—Rights of succession to incumbency on the failure of pupils of last incumbency—Sisyanu Sisya Paramparawa.

Failure to raise issue at trial—Right to raise in appeal—Estoppel.

Held : (i) That where in the court below a party fails to raise issues on matters which he could have put in issue, he ought not be allowed to rely on such matters in the appeal court. Such default creates an estoppel by election against such party.

(ii) That if at the original dedication no provision was made for regulating the mode of succession to the incumbency, then the general rule of Sisyanu Sisya Paramparawa applies and the persons who dedicated the temple and the grantors cease to have any rights over the incumbency.

(iii) That where a property dedicated to the Sangha had been possessed by the grantee and his pupils *ut dominus* for over ten years, they can claim a right by prescription against the 'dayakayas' who made the dedication and their heirs.

Cases referred to : *Wickremesinghe et al vs Unnanse et al* (1921–22 N.L.R. 236)
Dhammajoti Unnanse vs Sarananda Unnanse (1881 5 S.C.C. 8)
Rathanapalla Unnanse vs Kewthagala Unnanse (1879–2 S.C.C. 26)
Saranankara Unnanse vs Indajoti Unnanse (1918–20 N.L.R. 385)

H. V. Perera, K.C., with *C. V. Ranawaka* and *D. D. Athulathmudali*, for the 4th, 8th and 10th defendants-appellants.

N. E. Weerasooriya, K.C., with *S. E. J. Fernando* and *T. B. Dissanayake*, for 9th defendant-respondent.

CANEKERATNE, J.

The plaintiff claimed the incumbency of Sri Perna Aramaya Vihare standing on the land called Gedellekele situate at Puwakpitiya. Plaintiff came to court on the 18th February, 1943, and averred that he was appointed incumbent by the High Priest of the Nikaya and that 1st to 8th defendants, dayakayas of the vihare, and 9th to 10th defendants who were priests prevented him from entering into possession of the vihare on 6th November, 1942. The 1st and 2nd defendants filed no answer. The position taken up by the 4th to 8th defendants who filed one answer was that they and the other dayakayas were entitled to appoint the incumbent of the vihare and that the 10th defendant was appointed by them. The 9th defendant claimed the incumbency himself on the ground that he was the co-pupil of the last incumbent.

The learned judge found as a fact that with the consent of the late Mudaliyar Sri Chandrasekera a temple was built on the land Gedellekele belonging to him in 1899 by Rev. Somananda Thero with the help of a number of inhabitants of the locality including one William Fernando a close relative of the Mudaliyar, that thereafter the dayakayas of the temple obtained subscriptions and erected a dagoba and a *pilmage* and in 1903 the dayakayas, one Peiris the manager of the Mudaliyar's properties in the district and one George the conductor of the Mudaliyar's estate at Puwakpitiya got down the Rev. Kottegoda Punnananda, the tutor of Somananda and formally dedicated the vihare to the Sangha. Punnananda was the first incumbent; he was succeeded by Somananda who continued to be

the incumbent for about 40 years and died without leaving any pupil. The learned judge held that the 9th defendant succeeded to the incumbency on the death of Somananda and made a declaration in his favour.

It was strongly urged that there is no justification for the learned judge making a declaration in favour of a defendant. The action came on for hearing on the 28th March 1944; after certain admissions had been made six issues were framed: issue 2 deals with the right of the High Priest of the Nikaya to appoint an incumbent. Issue 6 reads thus: is the 9th defendant entitled to the incumbency of this temple as a co-pupil of Rev. Somananda Thero? Five more issues were then suggested by counsel for the appellants. Counsel for the 9th defendant then raised an issue — issue 12. Even if issue 2 is answered in the affirmative does 9th defendant's right to the incumbency prevail over such appointment?

The right to succeed to the incumbency on the death of Somananda was asserted at the earliest opportunity by the 9th defendant and a claim for relief was expressly put forward in his answer. It became clear to the contesting defendants that a claim to the incumbency was made against them by two persons, the plaintiff and the 9th defendant. At the commencement of the hearing an issue was raised in respect of this right. It was clearly the duty of the contesting defendants at this stage, if they intended to rely on the irregularity now complained of, to ask that a direct issue on that point should be framed and tried. It is quite probable that had this course been adopted the 9th defendant would have taken appropriate steps immediately to make an independent claim to the incumbency against the 4th to 8th and 10th defendants. No such issue, however, was asked for and the case was disposed of on the merits. In this case counsel had elected to go on and take his chance with the judge on the case as it then stood and he failed; he ought not to be allowed to rely on a point which he could have taken in the court below, at this late stage. In these circumstances there is now an Estoppel by election against the appellants. They acquiesced in the irregularity they could have complained against, and they should not be allowed to raise the question now. (Spencer Bower on Estoppel, page 233 etc.)

It was also argued that there was no dedication. One reads how his devoted friend, King Seniya Bimbisara, four years younger than Buddha, his protector, gives him a park, perhaps the first donation of this sort, the origin of all the monastic foundations. The King Nagadtha Bimbisara thought "here is this bamboo forest Valuvana, my pleasure ground, which is neither too near the town nor too far from it.... what if I were to give it to the fraternity?..... and he gave a golden vessel of water and dedicated the garden to Buddha, saying 'I will give up the park to the fraternity with Buddha at the head.' And the Blessed One accepted the Park" (Mahawagga, 1.22). Then there is the gift of the Rajagaha treasurer. After he had entertained Buddha he spoke as follows: "Reverend Sir, how shall I act in the matter of these monastery cells? In that case, O householder, dedicate these sixty monastery cells to the Order, both present, and to come and throughout the world" (Cullavagga, VI. 1. 1., see 20 N.L.R. pages 394, 395).

The essentials of a gift seem to be the presence of the grantor and grantee before an assembly of four or more priests and the delivery of the subject of the gift in the presence of the assembly to the grantee; the grantor would use appropriate words so as to indicate sufficiently his intention to make a grant. The grant may be made by a writing or may be verbally. *Wickremasinghe et al vs Unnanse et al* (1921–22 N.L.R. 236). The offering and reception of gifts was always accompanied with water in Buddhistic circles. Once the gift is accepted the property becomes Sangika.

The effect of a donation is that the donor divests himself of all right in the thing delivered in favour of the donee: a man may in good faith give a thing which is not his own and the donee will get all the rights of the donor in the property. The only reliable evidence on the question of a grant is that given by William Fernando whose testimony has been accepted by the learned judge: it shows that there was a dedication ceremony at which ten priests were present and that the temple was formally dedicated: it must be assumed that all the necessary requisites for making the temple sangika were complied with. There was thus a formal act accompanied by a solemn ceremony in the presence of ten priests; this fact is admissible as a starting point for acquiring a title by prescription. Punnananda enterd into possession of the premises *ut dominus;* he and his successor had been in possession of the premises for a period of about forty years and they can claim a right by prescription against the dayakayas who made the dedication and their heirs. The fact that title to the land was in the Mudaliyar is not very material. He at least knew that strangers were beginning to build in his land and he either allowed them or left them to complete the building and to take possession of it; it is a question whether his successor in title can at this distance of time assert a title to the land.

A gift of property may be made by a royal donor or by a private person to a particular priest and his pupils : an example of such a gift by a King is the gift of the village of Dumbara in 1800 to D. Rakkita Unnanse, the persons to take the income were referred to as "Dharmarakkita Unnanse Sisyanu Sisya Paramparawa" (4 N.L.R. 167). Kings in ancient times used to dedicate temples. Similarly a vihare may be dedicated to a particular priest and his pupils in perpetual succession (20 N.L.R. pages 396, 402). Every vihare is presumed to be dedicated in pupillary succession unless the contrary is proved.

If at the original dedication no provision was made regulating the mode of succession to the incumbency then the general rule of Sisyanu Sisya Paramparawa applies and the persons who dedicated the temple or the grantors cease to have any right or control over the incumbency. *Dhammajoti Un. vs Sarananda Un.* (1881 5 S.C.C. 8.) *Rathanapalla Un. vs Kewthagala Un.* (1879 2 S.C.C. 26) ; *Saranankara Un. vs Indajoti Un.* (1918 20 N. L. R. 385). No such provision was made at the time of the dedication. Where an incumbent dies leaving no pupil, his sole fellow pupil succeeds provided he is in the line of pupillary succession to the vihare ; the 9th defendant was a pupil of Punnananda and is thus entitled to succeed.

The order as to costs should be varied slightly; the 4th to 8th and 10th defendants would be liable to pay only the costs of the hearing on the 28th March, the order against the plaintiff will remain.

The appeal is otherwise dismissed with costs.

CANEKERATNE, J.

I agree. *Appeal dismissed.*

Present: WIJEYEWARDENE, J. & CANNON, J.

WILLIAM PERERA vs THERESIA PERERA

S. C. No. 340—D. C. (F) Colombo 1872
Argued on 12th September, 1945.
Decided on 14th September, 1945.

Interpretation—Deed of gift subject to fidei commissum—Sale of interests of some fidei commissaries together with life interest of fiduciarius—Recital containing words "granted unto W.....the premises fully described in the schedule hereunder written together with life interest of the said T"—Schedule describing as two-thirds share or part of property—Did T (fiduciarius) convey entirety of life-interest or only two-thirds.

G. by deed of gift No. 2505 of 1886 donated the property in question to T subject to a fidei commissum in favour of T's children. T married C who died leaving his widow T and three children. T and two of her children conveyed their interests to plaintiff by deed P8 the relevant part of which reads as follows :

"We Dolly.....and.....George, wife and husband.....Elsie.....and..... Theresia.....(hereinafter, sometimes referred to as the vendor) in consideration of the sum of.....paid by.....William have granted.....unto William.....the premises fully described in the schedule hereunder written together with the life interest of the said.....Theresia..... mentioned in deed No. 2505.....and together with all and singular the rights, ways, easements, advantages, servitudes and appurtenances whatsoever to the said premises belonging or in anywise appertaining.....and together with all the estate right title interest,.....of the said vendor into upon or out of the said premises....."

The schedule mentioned above refers to the interest sold as two-thirds parts or shares of the property.

The plaintiff brought this action for sale of the property under Ordinance 10 of 1863 and the question that arose for determination was whether on the said deed P8 T conveyed her life interest in the entire property or only a two-third share of it.

Held : That the deed P8 did not convey to the plaintiff the entirety of the life-interest of T, but only a two-third part of it.

Cases referred to : *Kuda Etana vs Ran Etana et al* (1912–15 N.L.R. 154)

H. V. Perera, K.C., with *Ivor Misso*, for the plaintiff-appellant.
E. G. Wickramanayake, for the 3rd to 7th and 16th defendants-respondents.

WIJEYEWARDENE, J.

This is an action for the sale of a property under Ordinance No. 10 of 1863.

According to the plaintiff the original owner was one Gooneratne who gifted the property by deed P5 of 1886 to Theresia, the 1st defend-

ant, subject to a *fidei commissum* in favour of her children. Theresia was married to Clement Perera who died leaving him surviving his widow and three children, Dolly, Elsie and the 2nd defendant. The plaintiff claimed to be entitled to undivided two thirds shares of the property absolutely under a deed, P8 of 1939, executed by Dolly and her husband, Elsie and Theresia. He alleged that the 2nd defendant was the owner of the remaining 1/3rd share subject to a life interest in favour of Theresia, the 1st defendant.

The respondents denied that Gooneratne was the original owner of the land and claimed certain interest in the land, tracing title from a different source.

The respondents contended at the trial that, even if Gooneratne was the original owner, the plaintiff could not maintain this action, as the deed P8 purported to convey to the plaintiff the life interest of Theresia in respect of the entire property (vide *Kuda Etana vs Ran Etana et al.* (1912; 15 N.L.R. 154). The District Judge upheld that contention and dismissed the plaintiff's action with costs.

The relevant parts of the deed P8 which have to be considered on this appeal read as follows :

> "We Dolly.....and.....George, wife and husband.....Elsie....and.....Theresia..... .. (hereinafter, sometimes referred to as the vendor) in consideration of the sum of....paid by..... William have granted.....unto William.....the premises fully described in the schedule hereunder written together with the life-interest of the said .....Theresia.....mentioned in deed No. 2505 .....and together with all and singular the rights, ways, easements, advantages, servitudes and appurtenances whatsover to the said premises belonging or in any wise appertaining.....and together with all the estate right title interest,.....of the said vendor into upon or out of the said premises....."

William mentioned in the above clause is the plaintiff and the deed No. 2505 is the deed marked P5. The schedule referred to in that clause gives a description of "two-third parts or shares" of the property.

Now, if the contention of the respondent is correct, Dolly and Elsie conveyed their interest in two-third shares and Theresia conveyed her interest in the entire property. In that case the notary should have "annexed" to the deed another schedule giving a description of the entire property or "embodied" a description of the entire property in the deed itself (*vide* The Notaries Ordinance section 30 subsection 16 (*a*)). The omission of the notary to do so militates against the interpretation put forward by the respondents unless, of course, one is prepared to concede that the notary may have committed a breach of an important rule laid down in the Notaries Ordinance. It is not disputed and it cannot be disputed that Dolly and Elsie sold their interests in the two third shares described in the deed as "the premises fully described in the schedule hereunder written." These words are followed immediately afterwards by the words "together with the life interest of the said.....Theresia.....mentioned in deed 2505." Those words do not refer in express terms to the property the life interest in which is conveyed by Theresia. I think the natural and reasonable interpretation of that passage is that Theresia was dealing therein with her life interest in the property referred to immediately before, namely, "the premises fully described in the schedule hereinunder written." It is argued that the words "mentioned in deed 2505" indicate that what Theresia conveyed was the entire life interest to which she was entitled under P5. Such an interpretation cannot be accepted without ignoring some of the other passages in the deed. Now the deed conveys to the vendee "the rights, ways, easements..... to the said premises." What are the "premises" referred to in that passage ? Are they not "the premises fully described in the schedule hereunder written" referred to earlier, namely, the two-third shares ? If the contention of the respondents is accepted, the word "premises" in "the rights, ways, easements.....to the said premises".....have two meanings, namely, two-third shares of the property in connection with the transfer by dolly and Elsie and the entire property in connection with the transfer by Theresia. The same difficulty would arise in the next passage "together with all the right title interest.....of the said vendor into upon.....said premises." It will be remembered that "vendor" according to the deed refers to all the vendors. I cannot believe that the notary used the word "premises" on each occasion in two senses. The notary must have used it in one sense and, therefore, it must have been used to mean "the premises described in the schedule." I think the words "mentioned in deed 2505" have been used merely to indicate that the life interest conveyed is the life interest in the premises, namely, the two-third share, created by P5.

I hold, therefore, that P8 did not convey to the plaintiff the entirety of the life interest of Theresia.

I allow the appeal and send the case back for trial in due course. The plaintiff is entitled to the costs here and the costs in the District Court occasioned by the argument with regard to the interpretation of P8.

CANNON, J.

I agree.

Appeal allowed.

Present: WIJEYEWARDENE, J. & CANNON, J.

ISMAIL & ANOTHER vs MOHAMMADU & OTHERS

S. C. No. 171—*D. C.* (*F*) *Kegalla No.* 1080
Argued on 11th October, 1945.
Decided on 12th October, 1945.

Partition action—Defendants' answers disclosing fact that owners of certain shares not made parties—Plaintiffs proving claim as against certain defendants—Procedure.

In this case the plaintiffs and 1st to 9th defendants claimed a half share of a certain field and stated that 10th to 13th defendants were entitled to the other half. The 10th to 13th defendants claimed the entire field but their answer disclosed that the owners of certain shares in the field were not parties to the action. At the trial, plaintiffs and 1st to 9th defendants proved their claim as against 10th to 13th defendants.

Held : (i) That further proceedings should be taken after all the persons who had not parted with their interests in the field had been made parties to the action.

(ii) That at those proceedings 10th to 13th defendants should not be permitted to dispute the rights of the plaintiffs and 1st to 9th defendants to the shares claimed by them in the plaint.

E. A. P. Wijeratne, for the plaintiff-appellants.
No appearance for the defendants-respondents.

WIJEYEWARDENE, J.

The plaintiffs instituted this action in August 1942 for the partition of a field called Oliyaketuwe Cumbura.

They alleged :

(*a*) That the land belonged originally to Mudalihamy Aratchi and that on his death it devolved on his two children Menikhamy and Henduhamy.

(*b*) That Menikhamy sold her half share by P1 of 1902 to Ibura Lebbe and Assana Lebbe and that

(*c*) The rights of the vendees have devolved on the plaintiffs and the 1st to 9th defendants.

(*d*) That Henduhamy's half share was claimed by 10th, 11th, 12th and 13th defendants.

The 10th, 11th, 12th and 13th defendants filed their answers in August, 1943 :

(*a*) Admitting (*a*) above.

(*b*) Stating that Menikhamy and Henduhamy divided their ancestral lands amicably and that Henduhamy got the entirety of this field at that partition and possesed it exclusively.

(*c*) That Henduhamy sold his interests to Banda and that Banda's interests were purchased at a Fiscal's sale by Warusa Ibrahim.

(*d*) That they bought the shares of most of the heirs of Warusa Ibrahim.

The answer of these defendants disclosed the fact that some of the heirs of Warusa Ibrahim had not parted with their interests. Those heirs should have been made parties to the action. The District Judge, however, fixed the case for trial on February 18th, 1944, though no steps had been taken to make them parties.

On the pleadings I have referred to, the burden rested on the 10th to 13th defendants to prove the amicable partition and exclusive possession for the prescriptive period by Henduhamy and his successors in title subsequent to such partition.

A week before the trial date the plaintiff filed a list of documents on which they relied to rebut the plea of the 10th to 13th defendants about the amicable partition between Menikhamy and Henduhamy.

On the trial date counsel appearing for the 10th to 13th defendants wanted to amend the answer saying that their answer was "wrong in regard to pedigree."

They were permitted by the District Judge to file an amended answer in March, 1944.

The only way in which they "corrected" the pedigree was by denying the allegation (*a*) made by the plaintiff and admitted by them in their original answer and by stating that Banda was the original owner of the field "by right of deed which cannot be traced and by virtue of prescriptive possession."

The case came up for trial on October, 30th 1944, on the amended answer. The 1st plaintiff gave evidence and called as his witness one Illangakoon the owner of adjoining lands and the Village Headman. The evidence of the 1st plaintiff showed that the original owner was Mudalihamy and was also to the effect that he and the others deriving title from Menikhamy have been in possession of parts of the field from time to time. Certain deeds produced by Illangakoon in respect of his lands showed that the field in question formed a boundary of those lands and was described as a field of Ibura Lebbe and others — one of the vendees under

P1: The headman said with regard to possession: "There was nothing to possess. It was a fallow land. I knew the land for the last 15 or 20 years." For the defence the witnesses were the 10th defendant, a son of Warusa Ibrahim and a man called Syati Banda. The 1st witness was called to prove that the lessees under a lease executed by the predecessors in title of the contesting defendants possessed the entirety of the field. That witness, however, denied any such possession by the lessees. It is not necessary to examine the evidence any further. It is sufficient to say that the plaintiffs and the 1st to 9th defendants have proved their claim as against the 10th to the 13th defendants to the shares set out in paragraph 9 of the plaint.

I set aside the decree and remit the case to the District Judge for further proceedings to be held subject to the following directions:

(*a*) Steps should be taken to add as parties the heirs of Warusa Ibrahim who have not parted with their interests. If the necessary notices and summons cannot be served on them personally the District Judge will order substituted service to be effected.

(*b*) The 10th, 11th, 12th and 13th defendants shall not be permitted to dispute the rights of the plaintiff's and the 1st to the 9th defendants to the respective shares mentioned in paragraph 9 of the plaint.

The plaintiffs and the 1st to 9th defendants are entitled to the costs occasioned by the contest in the District Court. The plaintiffs are also entitled to the costs of appeal. The plaintiffs and 1st to 9th defendants may take out execution for these costs and recover the same even during the pendency of the proceedings directed to be held.

CANNON, J.

I agree. *Decree set aside and case sent back.*

Present: WIJEYEWARDENE, J.

KUMARAVELU vs WIJEYARATNE (Inspector of Labour)

S. C. No. 751—M. C. Colombo South No. 548.
Argued on 28th September, 1945.
Decided on 1st October, 1945.

Closing Order under the Shops Ordinance—Charge of keeping shop open in contravention of closing order—Proper person to be charged for such contravention—Shops Ordinance, No. 66 of 1938—Sections 18, 23 and 31.

The accused, who was the Secretary of the Co-operative Stores Society, Ltd. was convicted of having kept a shop belonging to the Society open in contravention of a closing order made under the Shops Ordinance. The person liable for the offence was the "occupier" as defined in section 31. There was no evidence to show that the accused was the "occupier."

Held: That the conviction must be set aside.

N. Nadarajah, K.C., with *N. Nadarasa*, for the accused-appellant.
G. P. A. Silva, Crown Counsel, for the Crown.

WIJEYEWARDENE, J.

The accused was charged with —

(a) having kept his shop open at 7.25 p.m. and

(b) having permitted a customer to enter the shop after 6 p.m., and thereby committed offences punishable under section 23 (1) read with section 18 of the Shops Ordinance, No. 66 of 1938.

Now, section 23 (1) of the Ordinance shows clearly that it is only "the occupier" of the shop who is guilty of an offence committed in breach of the provisions of section 18. "Occupier" is defined by section 31 to mean the owner of the business of the shop or any person having the charge or the general management and control of the shop.

The prosecuting Inspector himself stated that the accused was the Secretary of the Co-operative Stores Society, Limited, which ran the shop and that one Kumaraswamy was the Manager and further that Kumaraswamy was present when he entered the shop at about 7-25 p.m. The accused gave evidence and said that he was an Honorary Secretary working at the Stores after 6-30 p.m. and that Kumaraswamy, the Manager was in charge of the business. The accused was not cross-examined on that point.

I hold that the prosecution has not proved that the accused was "the occupier" of the shop and I acquit the accused.

Accused acquitted.

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

EDWARD vs. DE SILVA

S. C. No. 142—*D. C.* (*F*) *Matara No.* 15119.
Argued on : 10th October, 1945.
Delivered on : 14th November, 1945.

Written promise to pay money—Enforceability—Consideration—Undue influence—Money Lending Ordinance, sections 2 *and* 6.

The plaintiff sued the defendant on a written promise to pay Rs. 2,800 in certain circumstances. The promise was made deliberately and was not " irrational or motiveless ". Although an issue was raised no evidence of undue influence on the part of the plaintiff was led by the defendant.

Held : (i.) That there was *justa causa* for the promise and that it was, therefore, enforceable ;

(ii.) That the agreement sued upon was within the provision of section 2 of the Money Lending Ordinance.

(iii.) That the transaction fell within section 6 of that Ordinance and that the burden was on the plaintiff to prove that the promise was not induced by undue influence.

The Supreme Court accordingly re-opened the transaction and granted the defendant relief.

H. V. Perera, K.C., with *Vernon Wijetunge*, for the defendant-appellant.
N. E. Weerasooriya, K.C., with *H. W. Jayawardene*, for the plaintiff-respondent.

SOERTSZ, A.C.J.

The plaintiff sued the defendant to recover a sum of Rs. 2,800 which he said was due to him on a written promise given to him by the defendant on the 3rd February, 1938. That promise was in these terms, according to the translation adopted by the trial Judge :—

" Whereas D. C. Galle case No. 36083, in which Mr. K. H. Andris Silva of Talaramba has claimed a sum of Rs. 2,800 from the estate of my deceased father, is now gone up in appeal, I, Galappatti Guruge Charles Edward of Ahangama, having hereby promised to pay to the aforesaid plaintiff in the said case the said sum of Rs. 2,800 within four complete years from the date of the decision of the said appeal, in the event of the said appeal being decided against the said Mr. K. H. Andris Silva of Talaramba, have hereunto set my hand on a five-cent stamp at Talaramba on this 3rd day of February, 1938."

The circumstances in which this promise was made are briefly as follows :—The plaintiff and the defendant are brothers-in-law. The plaintiff alleging that he had given his father-in-law, that is the defendant's father, this sum of money to be invested in his name and on his account, sued his father-in-law's estate which the defendant was administering to recover that amount. The defendant did all he could to help the plaintiff in that case, but the action was held to be statute-barred and was dismissed. The plaintiff appealed and, it was, pending that appeal, that this promise was made. The defendant having failed to fulfil the promise, the plaintiff brought the action now before us.

The defendant denied liability. He said that, at about the time he gave this written promise, he was urgently in need of money, and asked the plaintiff to lend him a thousand rupees on a promissory note, and that the plaintiff " brought undue influence and pressure to bear on the defendant, and thus forced the defendant to execute the writing ". He also pleaded that there was no consideration for the promise and he asked that the plaintiff's action be dismissed. The case went to trial on nine issues but for the purpose of this appeal, the two issues that are material are : (*a*) was there valid consideration for the promise ? and (*b*) was there undue influence ? The trial Judge answered both these issues in favour of the plaintiff. In regard to the circumstances in which the promise was made, the trial Judge's finding was stated by him thus :—

" I do not think either party was telling the whole truth in this matter. What actually happened seems to be that the defendant, as he felt that his father had been benefited by the plaintiff's money and that most of it came to him, agreed to pay the amount due in case the plaintiff failed in his appeal, within four years of the decision of the appeal, but that the plaintiff took advantage of the fact that the defendant wanted money on a loan and he availed himself of the opportunity on which he lent money to the defendant to have the defend-

ant's promise put down in writing; although the defendant may have promised to return this money to the plaintiff, he may not have given the writing in question unless the plaintiff availed himself of the opportunity to get it on the occasion when he, the defendant, had to borrow some more money from the plaintiff. ..... The plaintiff, when he got the writing from the defendant, and at every later stage, always intended to use it to recover this money, which he could not recover from his father-in-law's estate, from the defendant."

On the issue of consideration, the trial Judge found that there was *just causa* for the promise and that it was, therefore, enforceable. On the question of undue influence, he said that the plaintiff had led no evidence.

Having regard to the doctrine of consideration in Roman-Dutch Law as enunciated in *Jayawickreme vs. Amarasuriya* (20 N. L. R. 289); and in the South African case of *Conradie vs. Rousseauw* (S. A. L. R. 1919 (A.D.) p. 279), I am of opinion that the trial Judge was right for all that appears to be required to support a promise and to make it enforceable is that " the agreement must be a deliberate, serious act, not one that is irrational or motiveless ". This promise was of that nature although it resulted from the web of circumstances in which the defendant found himself at the time. The only other question is that of undue influence. In regard to that too, the Judge was right on the pleadings and issues as they stood, but there was the Money Lending Ordinance too, which unfortunately, was not brought to his notice. The agreement sued on here is within the purview of section 2 of that Ordinance, and the transaction which appears to have led to the promise being made, also appears to be within the meaning of section 6 of that Ordinance, and therefore, properly regarded, the burden was upon the plaintiff to prove that the promise was not induced by undue influence. Illustrations (*b*) and (*c*) appended to section 6 are very apposite on the facts found by the trial Judge.

There remains the question whether we should ourselves re-open the transaction and grant relief or send the case back to the trial Judge for him to deal with it in that manner. The latter course would involve expenditure of both time and money and the case was brought very nearly three years ago. Moreover, I do not think that any further evidence is required for the purpose. All the material is already on the record.

It would appear that the defendant got the lion's share of his father's property and it is reasonable to suppose that he would have been willing to pay to the plaintiff his proportion of the plaintiff's money that had fallen into the estate. Documents P1 to P4 show that the other children were also willing to make their contributions. But now that they are dead, all but the plaintiff's wife, the plaintiff exercised the dominating power he had over the defendant's will at the time the defendant came to him in urgent need of a loan to compel him to undertake to pay not only his share of the debt but also those shares that the others would have had to pay.

I would, therefore, direct that decree be entered for the plaintiff for a thousand rupees. There will be no order for costs in either Court.

Decree varied.

CANEKERATNE, J.

I agree.

Present : WIJEYEWARDENE, J.

BALAMENIKA vs ABEYSENA

S. C. No. 85—*C. R. Galle No.* 24278.
Argued on : 21st August, 1945.
Decided on : 4th September, 1945.

Civil Procedure Code, section 247—*Action under, by unsuccessful claimant—Burden of proof.*

Held : That in action under section 247 of the Civil Procedure Code by an unsuccessful claimant the burden rests on him to prove that at the date of seizure he had the right which he claims.

H. W. Jayawardena, for the plaintiff-appellant.
S. W. Jayasuriya, for the defendant-respondent.

WIJEYEWARDENE, J.

This is an action under section 247 of the Civil Procedure Code brought by an unsuccessful claimant. The Commissioner of Requests dismissed the action.

The defendant obtained a money decree against one Bastian on December 19, 1939, and seized on January 20, 1942, an undivided 1/12th share of Paragahawatte. The plaintiff preferred a claim relying on deed P1 of July 22, 1941, by which

Bastian conveyed to him the property described as follows :—

" All those advantages such as costs compensation and the like payable to..... the vendor or disadvantages such as costs compensation and the like payable by..... the vendor in case No. 34891 D. C. Galle and also the interests to which I the said vendor may be declared entitled to by the final decree to be entered in the said case in lieu of and equivalent to the following :—An undivided 1/12th share of the soil and trees of the allotment of land called Paragahawatte.....which share is given as lots Nos. 8 and 8A in partition plan No. 362 dated 23rd and 26th June, 1941."

That claim was dismissed after investigation on March 1, 1943, and the present action was instituted three days later.

The entire land of Paragahawatte was the subject matter of the partition action No. 34891 in the District Court of Galle. The interlocutory decree in that action was entered on January 29, 1940, declaring Bastian entitled to an undivided 1/12th share. The Commissioner appointed under section 5 of the Partition Ordinance made his return to Court in June, 1941, suggesting that lots 8 and 8A in plan No. 362 be alloted to Bastian. The Court entered final decree on March 27, 1944, declaring Bastian entitled to those lots.

The order made in the claim inquiry will be conclusive against the plaintiff unless he is able " to establish the right which he claims," to the undivided 1/12th share. The burden rests on him to prove that he had that right at the date of seizure (*vide Silva vs Nona Hamine* (1909) 10 N. L. R. 44) and *Abubacker vs Tikiri Banda* (1926) 29 N. L. R. 132). In view of the pendency of the partition action, the deed P1 was inoperative to give him title to an undivided share. Moreover the deed could not have given him any title to lots 8 and 8A before the final decree was entered in the partition action in 1944, more than a year after the institution of this action.

I dismiss the appeal with costs.

Appeal dismissed.

Present : ROSE, J.

THE COMMISSIONER OF MOTOR TRANSPORT vs. THE HIGH LEVEL ROAD 'BUS CO.

Case stated for the opinion of the Supreme Court under Section 13 (8) of the Omnibus Service Licensing Ordinance, No. 47 of 1942.

Argued on : 7th November, 1945.

Decided on : 14th November, 1945.

Omnibus Service Licensing Ordinance, No. 47 of 1942—Construction of section 7.

The licence of the Commissioner of Motor Transport was sought for providing an omnibus service on a section of a highway which formed part of the routes over which two companies operated services.

Held : That under section 7 of the Omnibus Service Licensing Ordinance, the Commissioner had no power to issue a licence for the proposed route either to the existing companies or to any other applicant.

T. S. Fernando, Crown Counsel, for the appellant.

C. Thiagalingam, with *E. B. Wickremanayake*, for the respondent (High Level Road 'Bus Company).

U. A. Jayasundera, with *Vernon Wijetunga*, for the Party noticed (Gamini 'Bus Company).

ROSE, J.

This matter concerns the interpretation of section 7 (1) of the Omnibus Licensing Ordinance No. 47 of 1942. The point of law to be decided is a simple one and has already been considered by this Court. In the Galle Omnibus Company, Limited, and the Commissioner of Motor Transport and others, 45 New Law Reports, at page 67, Hearne, J. considered the precise point which is formulated in the present stated case, and accepted the view of the law contended for by the present appellant.

Section 7 (1) reads as follows :—

" The issue of road service licences under this Ordinance shall be so regulated by the Commissioner as to secure that different persons

are not authorised to provide regular omnibus services on the same section of any highway."

Provided, however, that the Commissioner may, where he considers it necessary so to do, having regard to the needs and conveniences of the public, issue licences to two or more persons authorising the provision of regular omnibus services involving the use of the same section of a highway, if, but only if—

(*a*) That section of the highway is common to the respective routes to be used for the purposes of the services to be provided under each of the licences, but does not constitute the whole or the major part of any such route ; and

(*b*) the principal purpose for which each such licence is being issued is to authorise the provision of a service substantially different from the services to be provided under the other licence or licences.

Counsel for the respondent contends that the words " different persons " should be interpreted to mean " strangers " or " outsiders " to the section of the highway in question and are not intended to refer to the various persons who are already operating over it. It seems to me, however, that the plain wording of the section supports the view taken by Hearne, J. and the effect of the section is to prevent more than one person from providing regular omnibus services on the same section of any highway unless the provisos to the sub-section are satisfied.

In the present case it appears that the two Omnibus Companies—which during the argument were for convenience sake designated the Red and Blue Lines respectively—operate services over routes which include in common the greater part of that section of the highway between the Eye Hospital, Cinnamon Gardens and the Kirillapone Bridge, which constitutes the Proposed New Route, for which the Commissioner's approval was sought. Having regard to the view of the law which I have accepted, it follows that in my opinion the Commissioner has no authority under the Ordinance to issue a road service license for this proposed route either to the Red or to the Blue Line or indeed to any other applicant who may come forward in the future. Counsel for the respondent urges that such a position is inconvenient to the public. If that is correct—and it may well be so—the matter can be remedied by a simple amendment of the Ordinance.

The respondent will pay to the appellant the costs of the proceedings in this Court and before the Tribunal of Appeal. The party-noticed will have no costs.

Appeal allowed.

Present : CANEKERATNE, J.

DE SILVA vs. MANINGOMUWA

Application for a writ of Quo Warranto on L. Maningomuwa. S. C. No. 546.

Argued on : 1st August, 1945 ; 12th and 15th October, 1945 ; 20th and 21st November, 1945.
Decided on : 29th November, 1945.

Village Committee—Election of Chairman—Allegations of undue influence and violation of secrecy of ballot at election—Validity of election. Sections 16 and 27 (1) of the Village Communities Ordinance (Chapter 198). Meaning of " ballot " and " secret ballot."—

The Ratemahatmaya of the district was at the place where the members of the Village Committee were voting for the election of their Chairman. There was no evidence that the Ratemahatmaya intimidated the voters or that he saw what the members wrote on their ballot papers or otherwise abused the influence he had over the villagers.

Held : (i) That the election was valid.

(ii) That the meaning of the term " ballot " in Section 27 (1) of the Village Communities Ordinance is hardly different from the meaning of the words " secret ballot " in Section 16 (2) of the Ordinance.

C. S. Barr Kumarakulasingham, with T. D. L. *Aponso and Vernon Wijetunge*, for the petitioner.
G. E. Chitty, with *S. R. Wijetileke*, for the respondent.
T. S. Fernando, Crown Counsel, Amicus Curiae, for the Attorney-General.

CANEKERATNE, J.

In this case a petition has been presented to obtain a mandate in the nature of a writ of *Quo Warranto* to oust the respondent who is the *de facto* Chairman of the Village Committee of Udasiya Pattuwa from that office on the ground that the freedom of election has been flagrantly violated.

The meeting for the election of the chairman was held on 27th July, 1940, at about 2 p.m.

The voting took place at the Village Tribunal building at Paldeniya : it consists of a hall with an open verandah in front and on the two sides, a dwarf wall separates the verandah from the hall : in the front wall there is a gate and at the back of the hall is a wall probably reaching the roof ; near this wall is the platform of the President of the Village Tribunal and in front of this platform the Presiding Officer sat during the election meeting ; in front of him was the ballot box. There are two rooms behind the hall, entrance to one, *i.e.* the room on the right, as one enters the hall, is gained through a door in the wall : there is a window on a side and another door at the back ; from the back door one would step on to an open verandah which leads to a block consisting of a small verandah, a store-room and a kitchen : the store-room being nearer the hall than the kitchen.

At the election the petitioner, H. W. S. de Silva, and the respondent, L. Maningomuwa, were the candidates. The evidence of the headmen called by the respondent shows that the Assistant Government Agent had fixed a meeting of the headmen of his division for the purpose of considering matters relating to the cultivation of fields, the internal purchase of paddy and certain other things for 3 p.m. Their presence in the hall at the time of the election meeting was not necessary ; however, led by curiosity or at the request of some person they took their seats in the hall. On an objection taken by the petitioner to the presence of the headmen and the Ratemahatmaya of the district, Kapuwatte, in the hall, the Presiding Officer requested them to leave the building. Most of them left by the front entrance ; the Ratemahatmaya who was seated near the Presiding Officer got up from his seat and departed from the back entrance : he apparently opened the door leading to the back verandah which would have been closed at the beginning of the election meeting and went out ; this door was thus left unbolted.

On a member applying for a ballot paper the Presiding Officer handed him a blank piece of paper and requested him to go to the room on the right where a table had been placed, write the name of the candidate of his choice, fold the paper, return to the hall and put it in the ballot box. The number of ballot papers given out by him was 22 ; 14 votes were cast in favour of the respondent and 8 in favour of the petitioner.

It was argued on behalf of the petitioner that the election was void because it had not been conducted in accordance with the provisions of the law inasmuch as it was not by secret ballot and as undue influence had been exercised. On behalf of the respondent it was urged that there was no mistake as regards the voting, that the law only required that the voting should be by ballot, that there was no contravention of the law and that the mistake, if any, had not affected the result of the election and there was an unreasonable delay in making this application by the petitioner.

R. A. Peter Perera was the first person to receive a ballot paper. He testified that when he went inside the room to write the name of the candidate whom he preferred he saw the back door open and the Ratemahatmaya standing near the open door.

The presence of the Ratemahatmaya at the entrance was spoken to by Mudiyanse who voted next. The petitioner was the 14th person to go to the room : he saw the Ratemahatmaya at the open door and immediately came and made a complaint to the Presiding Officer ; it was, as he testified, to the effect that the door was open and that the Ratemahatmaya was standing just by the door and trying to see what was being done by the voters ; that the Presiding Officer went to the place and closed the door with a bang. It was not disputed that the complaint was made about the door being open, that the Presiding Officer went to ascertain this, found the door open and closed it.

The Police Officer, Sergeant Fernando (now Sub-Inspector Fernando), corroborated the petitioner's statement that he complained that the Ratemahatmaya was by the door. It is probable that the petitioner saw Mr. Kapuwatte standing at this place and mentioned this fact to the Presiding Officer ; the fact that the petitioner was in a state of excitement when making the complaint seems to be a circumstance, although slight, in favour of this view.

Two of the headmen who were called by the respondent stated that they were with the Ratemahatmaya near the kitchen while voters were recording their votes : according to them the Ratemahatmaya did not leave that place till the election was over. One would not be impressed with the story they related in the witness-box and I have no doubt that their evidence is not true. The other witness was the Vel Vidane, the 12th person to record his vote : he did not remember whether the door was open at all but he said there was plenty of light in that room. The respondent is the brother-in-law of the Korale : he said he does not associate with the Ratemahatmaya, he does not know that he is a man of influence ; he started by saying he addressed the Ratemahatmaya as " R. M." Later

it transpired that he was the clerk to the gentleman who was the immediate predecessor of Mr. Kapuwatte and that he continued to be the clerk to Mr. Kapuwatte for one month and left his services thereafter. He gave different reasons for doing so : because his education was not sufficient, then the salary was not sufficient ; later he stated he wanted to look after the cultivation of his property. He was not a candid witness and his answers were lamentably lacking in frankness. It would not be safe to accept his evidence on any material point unless it is corroborated by the evidence of others.

It has long been held in England before the acts relating to elections were passed, that by the common Law of the land, *i.e.* Law not created by Enactments and Acts of Parliament, an election is void (1) if it is not a real election, as where there is bribery, undue influence and undue pressure ; (2) if the election were not conducted in accordance with the principles of the subsisting election laws. An election would be declared void if the Tribunal which is asked to avoid it is satisfied as a matter of fact that there was no real electing by the constituency at all, if it were proved to its satisfaction that the body of electors had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if the majority were proved to have been prevented from recording their votes effectively according to their own preference by general undue corruption or general intimidation. The same result should follow if by reason of any such or similar mishap, the Tribunal, without being able to say that a majority had been prevented should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate they preferred.* An election may also be avoided whenever intimidation by the improper exercise of spiritual influence has so extensively prevailed upon as to prevent the election being a free election : undue influence may be lay or ecclesiastical. (Galway, 2. O'M & H 56).

For the purpose of this case it is necessary to consider and determine the construction of the provisions of the Ordinance (Ch. 198 of Legislative Enactments). Section 27 (1) of the Ordinance enacts : " Election of the Chairman of a Village Committee shall be by ballot....." Then follows sub-section 2 which enacts : " The election of a Chairman and the ballot.....subject to the provisions of sub-section 1 shall be conducted in accordance with such procedure as may be prescribed by rules under section 59." The rules made under section 59 of the Ordinance are published in the 1941, Supplement of Subsidiary Legislation, Volume 3 (320) ; Part 111 contains the rules relating to the election of a Chairman. Rule 2 (A) states : " If there are two candidates.....the Presiding Officer shall proceed to the election of one of the candidates by ballot." Rule 5 states : " For the purpose of a ballot under Part 111.....the Presiding Officer shall give to each member present a ballot paper on which the member may write the name of the candidate for whom he wishes to vote. Ballot papers shall be folded so that the name written thereon shall not be seen. The Presiding Officer shall collect..... and count them in the presence of the members of the Committee present at the meeting. The Rule generally points out the mode or manner of doing what the section enacts shall be done. Words should be taken in their ordinary sense and it is, therefore, permissible to refer to a dictionary to ascertain the meaning of a word : the dictionary meaning of the word ballot is as follows : a small ball used for secret voting hence, a ticket, etc. so used ; the method of secret voting.

The provisions relating to the election of members are to be found in section 16 ; section 16 (2) enacts : " Every poll at a meeting of voters shall be held by secret ballot." The procedure is to be found in the rules made under the Ordinance (Part II of the Rules, page 321 of Volume 3 supra). These contain elaborate provisions for choosing a member. The intention of the legislature gathered from the words used appears to be to ensure absolute secrecy in voting when it comes to the election of a member. The election in one case is by ballot, in the other by " secret ballot." The suggestion of a change of language as importing a change of substance, though material, may easily be exaggerated. The election of the first Chairman has to be held under the presidency of an official : the particular provision he has to observe is stated in the statute Law—every person who is a member must be supplied with a ballot paper by him, the member has to write the name of a candidate, fold it in such a manner that what is written there cannot be seen by another and return it in the manner directed by the Presiding Officer. It is a kind of secret voting inasmuch as no one but the member who hands the paper would as a general rule, know for whom he has given his vote till perhaps the election is over.

The evidence does not warrant a finding that the door leading to the back verandah was half open. It was, however, open to some extent during the time that 13 of the electors were at the

* Woodward *vs.* Sarsons (1875), L. R. 10 C. P. 733.

table : on the evidence the door was a quarter open, or just a little more.

The Ratemahatmaya could not actually see what was written on a ballot paper unless he stepped inside the room or the elector went up to the door. If the Ratemahatmaya looked through the open door he would see an elector at the table, he would notice how long the man took to complete his task and he might make a shrewd guess as to what was inscribed on the paper but that would be far short of the evidence which ought to satisfy the Tribunal that the Ratemahatmaya had knowledge of how the 13 electors or some of them voted.

The evidence in this case does not show that there was any contravention of the statutory rules regulating the election of a Chairman.

Was the election not a real election ? By means of the civil authority with which a Ratemahatmaya is invested he is in a position to acquire an influence over the subordinate headmen and over the villagers living in his district. But that alone is not sufficient, there must be an abuse of the influence. In the cases referred to, some specific act was alleged to have been done by a priest or priests ; no definite act is alleged in this case.

It may be urged that the Ratemahatmaya was at the place for the purpose of letting voters see that he was keeping an eye upon them and in the hope that by so doing he might induce some of them who would not otherwise do so, to vote for the respondent or at least not to vote for the petitioner. As the voter did not pass the chief headman on his way to the room, is one justified in coming to the conclusion, without any direct evidence, that one or more voters observed him at the place and were intimidated by his presence to do what he or they would not otherwise have done ?

The respondent has been chosen by the majority of the persons having the right to elect : he is the better man according to their standards ; a committee gets the chairman it deserves. A Tribunal that has to consider the validity of an election impugned by the extraordinary writ of *Quo Warranto* ought to act with great caution in upsetting the considered view of the electors. It ought at least to have reasonable grounds for believing that one or more electors were prevented from electing the candidate they preferred. The presence of the Ratemahatmaya at the place was unfortunate but I do not think that there are reasonable grounds for coming to a conclusion that an elector or electors were intimidated.

I disallow the respondent the costs of the inquiry up to the 15th October : he is entitled to the costs thereafter.

Application refused.

Present : KEUNEMAN, S.P.J., & ROSE, J.

ATAPATTU & OTHERS vs. PREMANANDA

S. C. No. 358-359.—*D. C. (F) Tangalla No.* 4978.

Argued and Decided on : 29th November, 1945.

Buddhist Ecclesiastical Law—Right of Buddhist Priest to maintenance from tutor's temple.

Held : That a Buddhist Priest is entitled to receive a reasonable sum for his maintenance out of the income received by the temple of his tutor priest.

Per KEUNEMAN, J.—" One of these judgments said that it was necessary before you claimed past maintenance to show expenditure from your own pocket or the incurring of liability to pay others. Now, undoubtedly this applies to past maintenance in the sense I have indicated, but in the present case what is claimed is not past maintenance but what Schneider, J. called future maintenance, namely, maintenance after the date of the plaint. It may or may not be a matter of importance that Schneider, J. himself dealt with this question of future maintenance but did not apply the arguments which he had adduced in the case of past maintenance. On the other hand, the question may well be considered as to whether future maintenance in the sense of maintenance after the date of the plaint is to be placed upon the same footing as past maintenance, namely, maintenance before the date of the plaint."

H. V. Perera, K.C., with *C. V. Ranawaka*, for the 1st defendant-appellant in No. 358 and 1st defendant-respondent in No. 359.

E. B. Wickremanayake, for 2nd defendant-appellant in No. 359 and 2nd defendant-respondent in 358.

N. E Weerasooriya, K.C., with *S. R. Wijetileke*, for the plaintiff-respondent in both appeals.

KEUNEMAN, S.P.J.

In this case the plaintiff obtained a decree that he was entitled to reside in the Vihare in question and obtained a decree for maintenance from the date of the plaint up to the date of decree and a further declaration as regards his right to get maintenance. There are two appeals in the case, the first by the 1st defendant, the Incumbent and the 2nd by the 2nd defendant, the trustee. As regards the right of residence, the plaintiff's claim in the plaint was that he was entitled to a particular room in the Vihare and to a quarter share of the income of the Vihare on the footing that he was one of four pupils of his tutor priest who has been Incumbent of the Vihare, but at the trial this position was not maintained and Counsel for the plaintiff said that he was not claiming any particular room in the temple but merely a right of residence and also that he waived his claim to a quarter share of the income and merely claimed a reasonable sum as maintenance out of the income. Counsel for the 1st and 2nd defendants first took up the position that if the only question raised was the right of residence, then perhaps there was no need for the contest at all because all priests are entitled to residence. Later, however, in the course of the proceedings, counsel for the plaintiff suggested as issue 7 " Is plaintiff entitled to residence in the Wanawasa Kuda Vihare," and on this occasion counsel for the 1st and 2nd defendants said that he did not concede that the plaintiff had such a right as a pupil of Sinhala Ratanapala.

Now, it does appear that this question of residence was not one of the admitted, conceded points and evidence had to be led with regard to it and the issue had to be decided. In my opinion, the issue has been rightly decided and the principal point that arises, as far as the 1st defendant's appeal is concerned, is as to whether there should have been an order for costs made against him. On that point it has to be remembered that the plaintiff himself had considerably modified his position since the date of the plaint and I think that must be taken into account in deciding the question of costs. On the other hand, there appears to have been an issue still subsisting as to whether the plaintiff was entitled even to a right of residence. In all the circumstances I think that as regards that issue the more appropriate order was that there should be no costs awarded either to the plaintiff or to the 1st defendant in respect of this issue. In the circumstances, in appeal No. 358 I delete the order directing the 1st defendant to pay the costs of the plaintiff. There will, however, be no order for costs of appeal because the 1st defendant has raised many other points besides this question of costs in his appeal.

As regards the right of maintenance, Mr. Wickremanayake referred us to the case of *Gunaratana vs Punchibanda* (29 N.L.R. p. 249) and other cases and argued that " a claim for maintenance implies that the necessity for maintenance exists or has existed, because the person claiming it had no other means of maintenance, or has not been maintained by anyone other than the person from whom maintenance has been claimed." This is what was held by Schneider J in the 29 New Law Reports case, but Schneider J applied that argument to what he called past maintenance, meaning thereby maintenance due before the date of the plaint and he cited with approval certain judgments with regard to past maintenance.

One of these judgments said that it was necessary before you claimed past maintenance to show expenditure from your own pocket or the incurring of liability to pay others. Now, undoubtedly this applies to past maintenance in the sense I have indicated, but in the present case what is claimed is not past maintenance but what Schneider J. called future maintenance, namely maintenance after the date of the plaint. It may or may not be a matter of importance that Schneider J. himself dealt with this question of future maintenance but did not apply the arguments which he had adduced in the case of past maintenance. On the other hand, the question may well be considered as to whether future maintenance in the sense of maintenance after the date of the plaint is to be placed upon the same footing as past maintenance, namely maintenance before the date of the plaint.

I do not think, however, that it is necessary to decide this point, because, I think the basis of fact on which Mr. Wickremanayake could possibly succeed has not really been established in this case. In the circumstances appeal No. 359 is dismissed with costs.

Appeal No. 358— Decree varied.

Appeal No. 359 dismissed.

ROSE, J.

I agree.

Present : JAYETILEKE, J. & ROSE, J.

WILFRED vs. SOMASUNDRAM, INSPECTOR OF POLICE

S. C. No. 579—*M. C. Panadura No.* 35977.
Argued : December 6th and 7th, 1945.
Delivered : 19th December, 1945.

Criminal Procedure Code, sections 152 (3), 297 *and* 425—*Assumption of jurisdiction by Magistrate as District Judge—Reading over at the trial of evidence recorded before assuming jurisdiction—Illegality.*

Where in a case of theft, the Magistrate having examined a witness in the presence of the accused, thereafter assumed jurisdiction as District Judge under section 152 (3) of the Criminal Procedure Code, and read over to the accused the evidence of the witness recorded before the assumption of jurisdiction and proceeded to convict the accused,

Held : (i.) That section 297 of the Criminal Procedure Code did not sanction such a procedure and that the failure to record such evidence *de novo* vitiated a conviction.

(ii.) That the omission to record such evidence *de novo* was not a mere irregularity, but an illegality, which could not be cured under section 425 of the Criminal Procedure Code.

H. W. Jayawardene, with *G. T. Samarawickrema*, for the appellant.
J. A. P. Cherubim, Crown Counsel, for the Crown.

JAYETILEKE, J.

This appeal has been referred by Wijeyewardene, J. to a Bench of two Judges. The point submitted for our decision is whether evidence that is recorded by a Magistrate to enable him to decide whether he should exercise jurisdiction under section 152 (3) of the Criminal Procedure Code can be read over when he assumes jurisdiction and tries the case.

On February 7, 1945, Inspector Somasundram made a written report to the Magistrate under section 148 (1) (*b*) of the Criminal Procedure Code that the accused had committed theft of a gold watch and chain valued at Rs. 750 belonging to one Soysa, and produced the accused before him. Thereupon, the Magistrate examined Soysa in the presence of the accused and decided to try the accused summarily as Additional District Judge. He then framed a charge against the accused, recalled Soysa, and read over the evidence previously recorded.

Learned Counsel for the appellant contended that the proceedings involved a violation of the provisions of section 297 of the Criminal Procedure Code by reason of the fact that the Magistrate read over the evidence of Soysa instead of recording it *de novo*. He said that there is no law which sanctions a departure from the procedure indicated in section 297 of the Criminal Procedure Code and that the Magistrate was under an obligation to record the evidence of Soysa *de novo*.

Section 297 reads—

"*Except as otherwise expressly provided* all evidence taken at inquiries or trials under this Ordinance shall be taken in the presence of the accused or when his personal attendance has been dispensed with, in the presence of his pleader ;

"Provided that if the evidence of any witness shall have been taken in the absence of the accused whose attendance has not been dispensed with, such evidence shall be read over to the accused in the presence of such witness and the accused shall have a full opportunity allowed him of cross-examining such witness thereon."

The language of the section is imperative that the evidence shall be taken in the presence of the accused, or in certain circumstances, in the presence of his pleader. The proviso is an excepting or qualifying proviso and it excludes from the application of the preceding portion of the section the case where evidence has been recorded in the absence of the accused. To satisfy the requirements of the section it does not seem to be enough to read over the sworn statement of the witness recorded in the presence of the accused before the commencement of the inquiry or trial and treating it as examination-in-chief. The section requires that such examination-in-chief shall take place after the commencement of the inquiry or trial. Learned Counsel for the Crown contended that the proviso impliedly excludes from the operation of the section evidence that has been recorded in the presence of the accused. On a careful consideration of the terms of the section and of the effect of the proviso with reference to the substantive words of the section we are of opinion that there is no force whatsoever in this contention. One fundamental principle that governs the interpretation of Statutes is that an exception must be construed strictly. The effect of a proviso has been considered by the House of Lords

in the case of *West Derby Union vs. The Metropolitan Life Assurance Society* 1897 A.C. 647. In that case it was sought to import into the substantive section certain words which were not there but which were thought to be implied from the terms of the proviso.

Lord Herschell said—

"I decline to read into any enactment words which are not found there and which alter its operative effect because of provision to be found in any proviso."

Lord Watson said—

"I am perfectly clear that if the language of the enacting part of the Statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso."

The language of section 297 is clear and unambiguous and, according to the authority I have quoted, the construction that the proviso impliedly excludes evidence recorded in the presence of the accused from the operation of the section cannot be supported. We fully appreciate that it seems inconsistent that evidence recorded in the presence of the accused cannot be read over whilst evidence recorded in his absence can be read over. But we cannot be affected by it. All we can do is to construe the section. The matter may well be one for the attention of the Legislature to remedy the defect.

We agree with the view held by Hearne, J. in *Diyonis vs. Perera* 43 N.L.R. 336 that in the absence of a proviso covering such evidence it has to be recorded *de novo*. The question we are considering seems to have arisen incidentally in the case if *Abeysinghe vs. Menika* 43 N.L.R. 419 and, in the course of his judgment, Howard, C.J. has dealt with the inconsistency we have referred to. He has, however, not decided the question. For these reasons we are of the opinion that Mr. Jayawardene's contention must be upheld.

Learned Counsel for the Crown argued that in any event the conviction should be affirmed, as the failure to record evidence *de novo* is, at best, an irregularity which is cured by section 425 of the Criminal Procedure Code. This question has been considered under the corresponding section of the Indian Penal Code which reads—

Section 350 :

"Except as otherwise expressly provided, all evidence taken under Chapters XVIII., XX., XXI., XXII. and XXIII. shall be taken in the presence of the accused, or, when his personal attendance has been dispensed with, in the presence of his pleader."

There are a number of decisions referred to in Volume II. of Chitaley at page 1862, where it has been held that a contravention of the provisions of this section is not a mere error, omission, or irregularity and that it cannot be cured by section 537. In the case of *Allu vs. The Emperor* A.I.R. 1924 Lahore 104, which was followed in several cases, it has been held that section 537 of the Indian Code of Criminal Procedure, which corresponds with section 425 of our Code, does not apply to the infringement of a Statutory requirement. It only applies to errors, omissions and irregularities of a technical nature which may occur by accident or oversight in the course of proceedings conducted in the mode prescribed by Statute.

In the well-known case of *Subramania Aiyar vs. King Emperor* 1901 I.L.R. Madras 61 it was held by the Privy Council that a disregard of the provisions of section 233 of the Indian Code of Criminal Procedure, which is practically identical with section 178 of our Code, was not a mere irregularity which could be overlooked, if it had been productive of no substantive injustice. In delivering the judgment of the Privy Council Lord Halsbury said—

"The remedy of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that, when the Code positively enacts that such a trial as that which has taken place here shall not be permitted, this contravention of the Code comes within the description of error, omission or irregularity."

I may also refer to a judgment of a Divisional Bench of this Court in *Ebert vs. Perera* 23 N.L.R. 362 where De Sampayo, J. said—

"But the entire absence of a charge, when the Magistrate ought to have framed one, is not a mere irregularity which may be overlooked under section 425, but is a violation of the essential principle generally governing Criminal Procedure and vitiates a conviction."

We are of opinion that in this case there has been an infringement of the Statutory requirement that evidence shall be taken in the presence of the accused, and that it is not covered by the provisions of section 425 of the Criminal Procedure Code.

We would accordingly set aside the conviction and sentence and send the case back for a new trial, which, as the Magistrate has formed his own opinion with regard to the evidence, must take place before another Magistrate.

ROSE, J.

I agree, and have nothing to add.

Set aside and sent back.

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

ABNER & Co. vs. CEYLON OVERSEAS TEA TRADING Co.

S. C. No. 104—*D. C. Colombo No.* 15725.

Argued on : 12th December, 1945.

Delivered on : 19th December, 1945.

Application for a commission to examine witnesses—Reasons for refusal—When should objection be taken.

Held : That before an application for a commission to examine witnesses is refused, on the ground that the applicant has shown a want of due diligence in pursuing the matter, it must be shown that the granting of such application involves an appreciable postponement of the trial date. An objection to such application does not lie after the case has been taken off the trial roll with the consent of the objector.

Cases referred to :—L.R. 1877, 7 Ch. D. at p. 394.

H. V. Perera, K.C., with *D. W. Fernando* and *C. E. L. Wickremasinghe*, for plaintiff-appellant.

N. K. Choksy, with *Izadeen Ismail*, for defendant-respondent.

ROSE, J.

The plaintiff-appellant, who is a merchant residing in Cairo instituted an action for damages alleged to have been sustained by him in consequence of the failure of the respondent to fulfil certain contracts for the supply of tea and desiccated coconut oil. The appellant is desirous of having his evidence and that of certain of his witnesses taken on Commission. The learned Judge, however, refused his application principally on the ground that the appellant had shown a want of diligence in pursuing the matter. The present appeal is against that refusal.

The history of the matter appears to have been as follows : On the 7th of February, 1945, application was made on behalf of the plaintiff for a postponement of the trial date, the 27th of February, 1945, to suit the convenience of plaintiff's counsel. The defendant's proctor seems to have consented to the proposed adjournment ; the trial date was then fixed for the 11th of May, 1945. On the 3rd of May, 1945, the following journal entry appears :—

" 3-5-45 :

As the plaintiff's evidence will have to be recorded on Commission, Proctors for plaintiff move that pending the issue of such Commission the trial fixed for the 11th instant be postponed.

Take case off trial roll.

(Intd.) S. C. S.

Later

Case called in open Court.

Advocate D. W. Fernando, for plaintiff.

Advocate Choksy, for defendant says he has no objection to the case being taken off the trial roll but that he may object to the issue of a Commission.

The order last made will be without prejudice.

(Sgd.) S. C. SWAN."

On the 11th of May, 1945, appears the following journal entry :—

" 11-5-45.

Case called.

Put by.

(Intd.) S. C. S."

On the 3rd of July, 1945, the appellant's proctor filed a petition that the Court be pleased to allow a Commission to issue to a Mr. Edward Haym of Cairo empowering him to examine the appellant and certain other witnesses. The order, which is the subject-matter of this appeal, was made on the 27th of August, 1945.

The granting or withholding of a Commission is, of course, a matter within the discretion of the Court and normally an Appellate Court would be slow to interfere with the exercise of this discretion. In the present matter, however, it is quite clear that the discretion was exercised in substance for one reason only and I am, therefore, in agreement with the contention of Counsel for the appellant that it is the duty of this Court to examine the principles which should govern the exercise of a discretion in cases where it is alleged that a plaintiff has failed to show due diligence in making his application.

In L. R. 1877, 7 Ch. D. at page 394, Fry, J. ays :

"Now, I have a very strong opinion that when a plaintiff comes to ask that the hearing of his cause may be postponed he must show due diligence on his own part in making the application. I think it is a great hardship upon defendants to have the hearing of causes postponed and suspended, and, so far as I am concerned, I shall always endeavour to avoid granting the indulgence of postponing a trial unless the plaintiff has used due diligence in applying, and has some good and strong reason for seeking a postponement."

It is to be noted that Fry, J. considers the natter from the point of view whether the appli- ation for the issue of a Commission involves a ostponement of the trial date. Now, in the resent matter had Counsel for the respondent on he 3rd of May, 1945, taken up the position that e objected to the postponement of the trial hich was then fixed for the 11th of May, 1945, n the ground that the appellant had at that time hown a lack of due diligence having regard to is passivity between the 27th of February, 1945, hich was the earlier trial date, and the date of he application, I am of opinion that the learned udge could properly have refused the appellant's pplication. In fact, however, learned Counsel or the respondent took up a different position in hat he agreed to the case being taken off the rial roll. It is true that the order of removal as made "without prejudice" and that respond- nt's counsel intimated that "he may object to he issue of a Commission" but it seems to me hat the only reasonable interpretation to be iven to that matter is that it only remained open for respondent's counsel to object to the issue of a Commission on grounds existing at the time of the new application, that is to say, in the event, on the 3rd of July, 1945. It seems to me that on the latter date the appellant's application did not necessarily involve any, or any appreciable, postponement of the trial date, inasmuch as at that time the case had not been replaced on the trial roll, and it was then too late for the respondent's counsel to revert to the state of affairs existing prior to the order of Court of the 3rd of May, 1945, of which of course, as I have already said, he could then have availed himself.

Having regard therefore to the state of affairs existing on the 3rd of July, 1945, I am of opinion that there was no material on which the learned Judge could properly hold that the appellant had shown a lack of due diligence in making his application. I would add that on the merits nothing has been adduced to us in argument to show that the appellant's request for a Commission to issue is unreasonable or would prejudice the respondent nor was this aspect of the matter pressed before the learned District Judge.

In my opinion, therefore, the appeal must be allowed and the matter remitted to the District Court for the necessary order to be made on such conditions as may seem fit to the learned Judge. In all the circumstances I am of opinion that the fair order is that the costs of this appeal and those involved in the hearing of the application before the District Judge should be in the cause.

Soertsz, A.C.J.

I agree.

Appeal allowed.

(*IN THE COURT OF CRIMINAL APPEAL*)

Present : Keuneman, S.P.J. (President), Rose, J. & Canekeratne, J.

REX vs. APPUHAMY

Application Nos. 162-165 *of* 1945—*S. C. No.* 75/*M. C. Rakwana* 41871.
Argued on : 26th and 27th November, 1945.
Decided on : 30th November, 1945.

Court of Criminal Appeal—Common intention—Misdirection—Reference by Crown in opening ase to evidence not subsequently proved—Curable irregularity.

Held : (i.) That when several accused are jointly charged with murder in that they acted with a common inten- , the "common intention" that must be proved against each accused, in order to establish the charge of murder ·st him, is a murderous intention and not merely a criminal intention, and that a failure to make this clear to the ·ders a verdict of guilty of murder insupportable.

·r). That when, in opening the case to the Jury, the Crown refers to evidence which is not subsequently is cured by the Judge warning the Jury that they must disregard such reference entirely and ·he evidence led at the trial.

Wanigatunga and *S. Mahadevan*, for applicants.

Counsel, for the Crown.

KEUNEMAN, S.P.J.

In this case five accused were indicted for the murder of Maddumage Mathes. The Jury by a majority of five to two, in the case of the 1st accused, and unanimously in the case of the 2nd, 3rd and 4th accused, found these applicants guilty of murder. The 5th accused was unanimously acquitted.

The points which have been raised in these applications are as follows :—

(1) Crown Counsel at the commencement of the trial mentioned to the Jury a statement alleged to have been made by the deceased to Martin, but added that Martin was unwell and that if he were absent on the next date of trial the defence counsel had no objection to the deposition of Martin in the Magistrate's Court being read. Eventually Martin was not called and his deposition was not read. What actually took place in Court in this connection is not very clear.

In his charge the trial Judge says : " The defending Counsel submitted that this was somewhat irregular but I held it was not. After all it is a common thing for the Crown sometimes to open evidence which it cannot prove, and I must ask you, gentlemen, to completely put out of your minds anything you might remember of learned Crown Counsel's opening in regard to what Martin is supposed to have said. His evidence is not before us. He is not before us. And the oath you took as Jurymen makes it incumbent on you to decide this case on the evidence led in this Court and nothing else."

It is now contended that the accused should have been entitled to call Martin or to have his deposition read, as his evidence was material for the defence. But it seems clear that no application was made to Court for either of those purposes, and we do not think the application can be allowed by us. As regards the irregularity complained of, we think the Judge's warning to the Jury was emphatic and adequate.

(2) The proof in this case was principally based on the evidence of deceased's wife Kalinguhamy, who spoke to a statement made by the deceased to her implicating these accused as well as the 5th accused. Certain matters which were said to have cast a serious doubt upon her evidence, and also on the truth of the deceased's statement, were detailed to us, but these matters were clearly put to the Jury by the Judge and we think the Jury were entitled after weighing these matters to decide to accept the evidence.

(3) It was argued that the Jury showed a confusion of mind in that they acquitted the 5th accused and convicted the 1st accused whose case was not materially different. But in fact th alleged statement of the deceased referred wit particularity to certain acts of the 1st accused i his attack on the deceased, and only generall mentioned that the 5th accused had also partic pated in the attack. We think it was open t the Jury to draw a distinction between these tw accused and to give the benefit of a reasonab doubt to the 5th accused which they were unab to extend to the 1st accused. We think the fac that the Jury were divided as regards the 1s accused shows that they had considered his cas

(4) It was argued that the fact that the 3r and the 4th accused had injuries had not bee adequately taken into account. It is true tha the witnesses for the prosecution have given n explanation of these injuries. The 3rd accuse has offered an explanation of his injuries whic if accepted, would have exonerated him com pletely. But it is clear from the verdict that th story of the 3rd accused has been rejected. Th 4th accused did not enter the witness-box no lead any evidence to show how he was injured The evidence for the prosecution in this cas showed that the accused had assaulted a numbe of persons in succession, and they may have re ceived their injuries after the attack on the de ceased, and even if the deceased had struck som blows on the 3rd and the 4th accused, the possi bility that it was after he was attacked was no excluded. We do not think it is possible to dra any inference in this case from the fact that th 3rd and 4th accused had injuries in the absenc of evidence to explain these injuries ; they hav a bearing on the special defences set up by th accused, where the burden lay on them.

(5) It was argued that the Judge's charge wa misleading on the question of common intention The Judge read section 32 of the Penal Code t the Jury and gave a simple example. He the warned the Jury that mere presence at the scen of an offence was not evidence of common inten tion. He then went on to say : " If you ar satisfied that these accused got together and di an act which is criminal with a common intentio then regardless of the individual parts taken b these persons they are each responsible for th result produced ".

Later, the Judge said : " You must hold th assailant or assailants who were actuated eithe by a common intention or a murderous intentio guilty of murder ". And he continued ; " Ha the prosecution satisfied you that these fiv accused, acting with a common intention as have defined it, or any one or more of them actuated by a murderous intention, caused th death of the deceased man ? "

At the end of his charge the Judge came back to this matter and said : " You will have to see.... whether the 1st, 2nd, 3rd, 4th and 5th accused took part in the transaction which culminated in his death, and if so whether they were actuated either by a common intention in the sense in which I have explained to you, or with a murderous intention ".

It has been urged, we think with justice, that the Judge has not indicated to the Jury that the common intention must be a " murderous intention ", and that the Jury may have been led to think that any form of common criminal intention was sufficient to bring home the charge of murder to the accused. Undoubtedly the language used may be taken to indicate that while " murderous intention " was necessary to be proved in respect of the person who was shown to have caused the death, in the case of his associates any form of common criminal intention would suffice to render them guilty of the same offence. The Judge has not emphasised to the Jury that under section 32 of the Penal Code, to support the charge of murder the common intention must itself be a " murderous intention " within the meaning of section 294, and that if the common intention was something less, *e.g.* to cause grievous hurt, the persons who shared that common intention were only guilty of the lesser offence.

We accordingly think that the verdict of guilty of murder entered in this case cannot be supported. We think the Jury have come to the conclusion that the four accused participated in the attack on the deceased man Mathes and that they were actuated by a common criminal intention. Crown Counsel has argued that the case, at any rate of the 2nd accused, may be treated on a special footing, and that the deceased's statement—as given by his wife Kalinguhamy—indicated that the fatal injury was inflicted by the 2nd accused, and that there was further evidence that at a stage after the deceased had been assaulted and knocked down the 2nd accused came back to the deceased and struck him on the leg with a katty and said : " This fellow is not yet dead ". Had the Jury acted upon this evidence it would have been difficult for us to interfere with the verdict of murder as against the 2nd accused. But it appears to us, and Crown Counsel does not dispute this, that the Jury may have acted merely on their conviction that the four accused participated in the assault on the deceased, and were actuated by a common criminal intention, without definitely deciding what acts had been done by each of them, and we think we must deal with the 2nd accused on the same footing as the other accused.

We have carefully considered the evidence and come to the conclusion that, had the Jury been correctly instructed, they would at least have found in this case that all these accused were actuated by a common intention to cause grievous hurt.

We accordingly set aside the verdicts of murder entered against these four accused, and substitute in their place verdicts against each of them of voluntarily causing grievous hurt by dangerous weapons under section 317. We impose on each of these accused a sentence of seven years' rigorous imprisonment.

Verdicts varied.

Present : JAYETILEKE, J.

SARANADASA, INSPECTOR OF LABOUR, vs. CHARLES APPUHAMY

S. C. No. 1206—*M. C. Kandy No.* 19336.
Argued on : December 7, 1945.
Delivered on : December 20, 1945.

Evidence Ordinance, sections 65 *and* 66—*Nature of the notice under—Procedure in Criminal Proceedings—Summons on accused to produce document in his possession—Failure to produce—Acquittal of accused—Complainant's right to lead secondary evidence—Criminal Procedure Code section* 66.

Held : (1) That the notice to produce referred to in sections 65 and 66 of the Evidence Ordinance is a notice issued by process of Court under the Civil or the Criminal Procedure Code.

(ii) That the true principle on which notice to produce a document is required is merely to give sufficient opportunity to the other side to produce it.

(iii) That, where in criminal proceedings, an accused person, who was summoned to produce a document in his possession failed to do so, the complainant is entitled to lead secondary evidence of the contents of such document.

Cases referred to :—Dwyer vs. Collins 7 Exch. 639.

S. W. Jayasuriya and *A. C Nadarajah*, for accused-respondent.
A. C. M. Ameer, Crown Counsel, for the complainant-appellant.

JAYETILEKE, J.

The accused was charged under section 25 of the Shops Ordinance No. 66 of 1935, with having exhibited in form J3 of the schedule a false entry to the effect that he had given a full holiday on March 5, 1945, to one Podisingho, an employee in the Pavilion Hotel. The complainant, who is an Inspector of Labour, said that he went to the hotel on March 5, 1945, and found Podisingho working in the hotel. He went a few days later and found that a false entry had been made in form J3 that was exhibited in the hotel, to the effect that Podisingho had been given a full holiday on March 5. He initialled the form and left it in the accused's charge. J3 was not produced at the trial but the complainant said that he had noticed the accused to produce it. The Magistrate held that as the document had not been produced there was no legal proof of the entry complained of and acquitted the accused. The present appeal is taken with the sanction of the Attorney-General against that order. Mr. Ameer contended that the complainant was entitled to lead secondary evidence of the contents of J3 under section 65 of the Evidence Ordinance. The question is whether that contention is sound. Section 65 provides that secondary evidence may be given of the contents of the document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved or when, after notice mentioned in section 66, such person does not produce it. Section 66 provides that secondary evidence of the contents of the document referred to in section 65 shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power such document is, such notice to produce it as is prescribed by law, and if no notice is prescribed by law, then such notice as the court considers reasonable under the circumstances of the case.

The notice to produce referred to in sections 65 and 66 is a notice issued by process of court under the Civil or Criminal Procedure Code. (Ameer Ali on Evidence 9th Edn. p. 545.) Section 66 of the Criminal Procedure Code provides that whenever any court considers that the production of any document is necessary for the purpose of any proceeding under the code it may issue a summons to the person in whose possession or power such document is believed to be requiring him to attend and produce it. The record shows that the complainant had moved the court for a summons on the accused to produce the document and that the court had, in fact, summoned the accused to do so. The summons was served on the accused 4 days before the trial. The accused was present at the trial but he did not produce the document. In the case of *Dwyer vs. Collins*—7 Exch. 639—it was held that the true principle on which notice to produce a document is required is merely to give a sufficient opportunity to the opposite side to produce it, and thereby to secure, if he pleases, the best evidence of the contents. All that is necessary before secondary evidence becomes admissible is a proper notice to produce. (Ameer Ali on Evidence 9th Edn. p. 544.) Such a notice was given to the accused in this case and the complainant was entitled to give secondary evidence of the contents of the document. It was the duty of the accused to have produced the document if he wished to have the best evidence of its contents. I would set aside the order of acquittal and send the case back so that the Magistrate may convict the accused and pass such sentence on him as he thinks fit.

Order of acquittal set aside.

Present : ROSE, J.

DIAS vs. INSPECTOR OF POLICE, MATALE

S. C. No. 1104—*M. C. Matale No.* 5390.
Argued and Decided on : November 9, 1945.

Criminal Procedure Code, section 425—*Exercise of discretion by Appeal Court—Charges under Poisons, Opium and Dangerous Drugs Ordinance, sections* 26 *and* 28—*No evidence to prove charges as framed.*

Held : That the Supreme Court will not exercise its discretion under section 425 of the Criminal Appeal Code, to uphold a conviction on the ground that no miscarriage of justice has occurred, in a case where the prosecution has failed to take due care to see that the charges were properly framed in accordance with the evidence which it was proposed to adduce.

H. W. Jayawardene, for accused-appellant.
V. T. Thamotheram, C.C., for Attorney-General.

ROSE, J.

In this case the appellant was convicted on two counts, charges contra sections 26 and 28 of the Poisons, Opium and Dangerous Drugs Ordinance.

As to the charge contra section 26, Counsel for the appellant says and I agree with him, that there is no evidence to show that the appellant was in possession of any seeds, pods, leaves, flowers or any part of the hemp plant or of any other plant mentioned in that section. It seems to me therefore, that the charge under that section cannot be sustained. As to the charge under section 28, it is alleged that the appellant was in possession of a tin of legium which the Crown suggests is a preparation of which the resin of ganja forms a part. That may or may not be so. But in this particular case the only evidence as to the finding of legium and as to what legium is is contained in the evidence of Mr. Ekanayake, Assistant Superintendent of Excise, who says, "I found a tin containing legium. I produce it (P3)". It appears that the Magistrate appreciated that there should be some evidence to show that legium is in fact a preparation within the meaning of section 28 of the Poisons, Opium and Dangerous Drugs Ordinance and it was no doubt for that reason that this exhibit was sent to the Government Analyst. In fact the report of the Government Analyst was not produced in evidence and is therefore not before the Court, but leaving that aside, on looking at the report of the Government Analyst which is attached to the record it seems to me, as Counsel for the appellant says, that it is quite inconclusive for the purpose for which the Crown intends to use it. For that reason it would seem that the charges under sections 26 and 28 have not been proved.

Learned Crown Counsel asks me to use my powers under section 425 of the Criminal Procedure Code on the ground that in fact no miscarriage of justice has occurred by the conviction of the appellant. That is a matter within the discretion of an Appeal Court, but in this particular instance I do not propose to exercise that discretion. It seems to me that this is a case where the person in charge of the prosecution should have taken care to see that the charges were properly framed in accordance with the evidence which it was proposed to adduce.

For these reasons the appeal succeeds and the conviction and sentence are quashed.

Appeal allowed.

Present : ROSE, J.

GUNADASA vs. WIJESEKERA

S. C. No. 1316—*M. C. Kalutara No.* 34878.

Argued and Decided on : 15th November, 1945.

Evidence of decoys—Natural caution to be exercised by Court—Explanation given by accused raising doubt as to his guilt.

Accused was charged with selling a pound loaf of bread for 11 cents more than the control price. He stated that in charging 11 cents extra he was recovering a debt of that sum owed to him by the decoy. The decoy admitted having an account with the accused, debts of a few cents at a time being occasionally outstanding, but stated that on the day in question the deduction of such a sum was not discussed.

Held : That, "having regard to the natural caution which a Court must always adopt in cases in which decoy witnesses are produced by the prosecution," the Magistrate should have in the circumstances felt some doubt as to the guilt of the accused and acquitted him.

E. A. G. de Silva, for accused-appellant.

V. T. Thamotheram, C.C., for Attorney-General.

ROSE, J.

In this case the appellant was convicted of selling a pound loaf of bread for 35 cents instead of 24 cents which is the control price.

The case for the prosecution depended on the usual decoy who was provided with a rupee note, went in and made the purchase. The defence is that this witness ran a small account at the boutique in question and in fact for some three months was in debt for a sum of 11 cents which was in fact the difference between the control price and the actual price charged. He says, on this particular day he took the opportunity of equalising the account by charging 35 cents instead of 24 cents for the loaf. Somewhat

surprisingly the decoy himself agrees that he was in that position, debts of small odd cents at a time being incurred by him to this boutique. He says on the day in question there may have been 8 or 9 cents or perhaps 11 cents due to the boutique-keeper. He went on to say that there was no discussion between him and the boutique-keeper as to whether or not this sum should be deducted on the particular day.

It seems to me having regard to the natural caution which a Court must always adopt in cases in which decoy witnesses are produced by the prosecution, the Magistrate should in this evidence have felt some doubt as to whether or not the appellant's explanation was true and that when he handed over this loaf, he did in fact add on to the price the few cents that were owed to him. A further point was raised by Counsel for the appellant that the loaf which was purported to be one pound and which was weighed on th scales in the boutique should have been furth tested, as it may be that the scales in the boutiqu were inaccurate and he cited a case reported i 46 N.L.R. page 95, in which on the particula facts of the case that view appears to have bee adopted. It seems to me, however, that th case can be distinguished, if indeed it is necessar to do so. As far as this present case is concerne it must surely be taken, in the absence of an challenge by the defence, to be a reasoanble pr sumption that when a boutique-keeper sells standard form of loaf as a one pound loaf, th loaf does not weigh more than one pound.

Having regard to my decision on the first poin I feel that the appeal must be allowed and th conviction quashed.

Conviction quashed.

Present : Soertsz, A.C.J. & Rose, J.

COMMISSIONER OF INCOME TAX vs. BANK OF CHETTINAD, LTD.

S. C. No. 84/S.—Income Tax.

Argued on : 19th & 20th December, 1945.

Delivered on : 17th January, 1946.

Case stated under the provisions of the Income Tax Ordinance, No. 2 of 1932 for the opinion of the Honourable the Supreme Court of the Island of Ceylon upon the application of the Commissioner of Income Tax, Ceylon.

Income Tax—Rules made under section 90 of the Income Tax Ordinance—Scope of expressio "bank" in Rule I (1) and I (2).

Held : (i) That for the purposes of Rule I (1) and (2) a banker means a company or persons carrying on as it or his principal business the acceptance of deposits of money on current account or otherwise subject to withdraw by cheque, draft or order.

(ii.) That it is for the person claiming relief to establish affirmatively that he is a "bank" within the meanin of the rule.

Per Rose, J. :—"I consider nevertheless that the question as to whether by the evidence adduced before th Board the Chettinad Bank and its Branch can reasonably be held to have satisfied the test to which I have referre is a matter of law, or at least of mixed fact and law, to which it is proper that this Court should apply its mind."

Cases referred to : *Currie vs. Inland Revenue Commissioners* (1921, 2 K.B.D. at page 339).

H. H. Basnayake, Solicitor-General, with *T. S. Fernando, Crown Counsel,* for the Commissione of Income Tax-appellant.

H. V. Perera, K.C., with *N. Nadarajah, K.C.,* and *S. J. Kadirgamar,* for the Assessee respondent.

Rose, J.

This is a case stated under section 74 of the Income Tax Ordinance (Chapter 188). The matter concerns the interpretation to be given to Rule 1 (1) of the Rules made by the Board of Income Tax in accordance with the provisions of section 90 of the Income Tax Ordinance.

The Bank of Chettinad, Limited, at the material time had its Head Office at Rangoon and a branch in Ceylon. In the course of carrying on its business in Ceylon the Ceylon Branch paid a sum of Rs. 53,226 to the Head Office in Rangoon by way of interest on money advanced by the Head Office during the financial year ending 31st March, 1940. This sum was credited in the books of the Ceylon Branch as a payment to the Head Office by way of interest for that year. The Bank claims that this sum should be allowed as a deduction under Rule 1 of the Board of Income Tax Rules in assessing the income tax payable by the Bank in respect of the year of assessment, 1st April, 1940, to 31st March, 1941. The assessor disallowed the Bank's claim. There was no argument before us as to the actual figures involved, it being common ground that if the claim is sustainable the amount of tax payable for the year in question should be reduced by Rs. 10,646·30.

The relevant definitions in Rule 1 (1) are as follows :—" ' Bank ' means any non-resident banker within the meaning of these expressions as defined in section 2 of the Income Tax Ordinance. ' Ceylon Branch ' means the business carried on in Ceylon by any such Bank ' ". It was contended before the Board of Review and held by them that provided the Bank was able to establish that it was a non-resident bank in Rangoon within the meaning of the above definition, it was immaterial whether the Ceylon Branch carried on banking business or not, so long as it performed some kind of commercial activity. This proposition, which in my opinion has only to be stated to show that it cannot be sustained, was not seriously argued before this Court by Counsel for the Bank, counsel contenting himself with the proposition that while the Branch must be shown to perform some banking functions it need not necessarily be shown to perform all the functions of a bank.

It is necessary, therefore, for the Bank to establish two matters, first that the Head Office in Rangoon carried on the business of banking in Burma, and secondly, that the Ceylon Office did like-wise in Ceylon. In order to decide this question it is necessary to discover what the legislature means by the word " bank " and " Banking ". The definition of " banker " contained in section 2 of the Income Tax Ordinance carried the matter no further and reads as follows :— " Banker means any company or body or persons carrying on the business of banking ".

Counsel for the Bank contends in the first place that a wide interpretation should be given to the word " bank " and suggests that the true test as to whether an institution is a bank or not is whether it utilizes for profit its own monies or the monies of other persons and refers to volume 4 of the Supplement to Stroud's Judicial Dictionary at page 51, where reference is made to a statement by Fitz Gibbon, L.J., that for the purpose of the Irish Act, 33 G. 2, c. 14, a " Banker " is one " who traffics with the money of others for the purpose of making profit " even, apparently, though he issues no cheque books and does not honour drafts on demand.

Whatever may be the position under the Irish Law, it seems to me that that is too wide a conception of a bank according to the law of England and Ceylon. It is to be noted that section 330 of the Companies Ordinance No. 51 of 1938 gives the following definition :—" A ' banking company ' means a company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order, notwithstanding that it engages in addition to any one or more of the following forms of business..... ". It is no doubt true, as Counsel for the Bank pointed out, that the Companies' Ordinance was enacted in 1938 whereas the Income Tax Ordinance was enacted some six years earlier. The learned Solicitor-General contends, however, that section 330 of the Companies' Ordinance merely crystallized what was already the legal conception of a " bank " in Ceylon which he says is substantially the same as that of English Law. The relevant definition in Mr. Hart's book on the Law of Banking at page 1 reads as follows :—" A Banker or Bank is a person or company carrying on the business of receiving monies, and collecting drafts, for customers subject to the obligation of honouring cheques drawn upon them from time to time by the customers to the extent of the amounts available on their current accounts ". It is also perhaps helpful to turn to a layman's view of the matter to be found in an English Dictionary of wide currency and acceptance, the Concise Oxford Dictionary, which defines a " bank " as an " establishment for custody of money, which it pays out on customer's order ".

I am of opinion that the contention of the learned Solicitor-General is correct and that the test to be applied is that stated, so far as companies are concerned, in section 330 of the Companies' Ordinance, and, therefore, a banker

means a company or persons carrying on as its or his principal business the acceptance of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order.

Now, whether the Head Office of the Chettinad Bank in Rangoon and its branch in Ceylon satisfy this test is no doubt, in part at least, a question of fact, and Mr. H. V. Perera, Counsel for the Bank, contends that the Board of Review have come to findings with which it would be wrong for us to interfere as our functions are limited in these matters to questions of law. He referred to a passage in the judgment of Scrutton, L.J., in *Currie vs. Inland Revenue Commissioners* (1921, 2 K.B.D. at page 339), in which after quoting the following words from a judgment of Lord Parker : " It may not always be easy to distinguish between questions of fact and questions of law for the purpose of the Taxes Management Act, 1880, or similar provisions in other acts of Parliament. The views from time to time expressed in this House have been far from unanimous ", Scrutton, L.J. goes on to say, " I think the reason is, as has been suggested by the Master of the Rolls, that there has been a very strong tendency, arising from the infirmities of human nature, in a judge to say, if he agrees with the decision of the Commissioners, that the question is one of fact, and if he disagrees with them that it is one of law, in order that he may express his own opinion the opposite way ".

While giving full weight to this wise and witty pronouncement which, in my opinion, might well be taken to heart by Appellate Courts in matters coming before them even otherwise than by case stated, I consider nevertheless that the question as to whether by the evidence adduced before the Board the Chettinad Bank and its Branch can reasonably be held to have satisfied the test to which I have referred is a matter of law, or at least of mixed fact and law, to which it is proper that this Court should apply its mind.

It must be borne in mind that it is for the person claiming relief to establish affirmatively that he is a " bank " within the meaning of the Rule. As regards the Ceylon Branch, as it is pointed out in the case stated, it was not disputed at the hearing before the Commissioner that it had been mainly carrying on the business of lending money on promissory notes or on mortgage of property in Ceylon and the management of estates and house property owned by the Bank in Ceylon. Further, no cheque books had been issued by the Branch and there was no evidence before the Commissioner that any monies on deposit in any shape or form could have been withdrawn by cheque, draft or order ; or *a fortiori* that any such monies were in fact so withdrawn. The only exhibit produced which can be said to have any bearing, exhibit A 3, shows that at the material time the only current and deposit accounts with the branch were those of the Chettinad Corporation, Limited, and seven other persons, which seven were shown to have closed their accounts during the financial year ending the 31st March, 1940. Thus, as is pointed out in the case stated, the only current and deposit accounts at that date were those of the Chettinad Corporation, Limited, which at that time showed a debit balance.

It seems to me, with all respect to the Board of Review, that it is impossible on this material to say that it can reasonably be held that the Bank has shown that the Ceylon Branch has satisfied the test as set out above. The Bank having, therefore, failed to show that the Ceylon Branch was carrying on the business of banking it becomes unnecessary to consider whether the Head Office of the Chettinad Bank in Rangoon was doing so. I will, therefore, express no opinion on that matter but would merely observe that in a letter dated the 4th August, 1939, addressed to the Registrar of Companies, Colombo, the Proctor of the Chettinad Bank, Limited, stated as follows :—" I am instructed by the Bank of Chettinad, Limited, to inform you that the principal business of my clients is not the accepting of deposits of monies on current account or otherwise subject to withdrawal by cheque draft or order. In these circumstances my clients are not a banking company as defined by the Ordinance and I have to point out that their name has been incorrectly entered in the 7th schedule to the above Ordinance. In this connection I should like to add that a similar application was made by the Head Office in Burma and my client's contention that they were not a banking company was accepted by the Registrar of Joint Companies, Rangoon, and the Controller of Currency, Calcutta ". In the light of this statement of the position made by the Chettinad Bank's Proctor, it would seem, if it was necessary for the point to be decided, that the Chettinad Bank might well experience difficulty in establishing that their Head Office in Rangoon was carrying on a banking business in the sense attributed to that term in Ceylon.

For these reasons, I am of opinion that the Chettinad Bank, Limited, is not entitled to the relief it claims. It must pay the costs of the proceedings in this Court, before the Board of Review and before the Commissioner.

Soertsz, S.P.J.

I agree.

Appeal allowed.

Coram : KEUNEMAN, S.P.J. & ROSE, J.

KING vs. DAYARATNE & ANOTHER

S. C. No. 76—D. C. (Cril.) Colombo No. 620/30132.
Argued on : 19th November, 1945.
Decided on : 23rd November, 1945.

District Court—Indictment charging accused under section 317, Penal Code—Discharge of accused without proceeding to trial on ground that injury did not constitute grievous hurt and consequently committal was a nullity—Legality of order.

Held : That once an accused is committed for trial before the District Court after a preliminary inquiry, on an indictment forwarded by the Attorney-General, it is not open to the District Judge to "embark upon an inquiry as to whether the proceedings were irregular. In fact the only remaining step was for the District Judge to try the case."

Cases referred to : *King vs. Harip Boosa* (11 N.L.R. 355)
Attorney-General vs. Appuwa Veda (10 N.L.R. 199)
King vs. Kolonda (5 N.L.R. 236)
Queen vs. Thomis (1 Br. 20)
Queen vs. Don Davith (1 Br. 400).

H. W. R. Weerasooriya, Crown Counsel, for Attorney-General.
G. E. Chitty, for accused-respondents.

KEUNEMAN, S.P.J.

This is an appeal by the Attorney-General against an order of discharge entered by the District Judge under the following circumstances.

The 1st accused was indicted on a charge of having caused grievous hurt to P. Edwin Silva with a knife, under section 317 of the Penal Code. The 2nd accused was charged with abetment under sections 317 and 102. It is to be noted that offences under section 317 are triable by the District Court and not by the Magistrate's Court. The matter had been inquired into by the Magistrate who committed the accused, and the Attorney-General forwarded the indictment to the District Court. When the matter came up for trial before the District Judge, counsel for the accused submitted that the medical evidence recorded in the Magistrate's Court did not disclose an offence under section 317 (viz. grievous hurt), and that the Magistrate had no authority to proceed to non-summary inquiry but should have tried the accused summarily, viz. for simple hurt. It was pointed out that Dr. Fernando, speaking to the injury on Edwin Silva said that "the wound was scalp deep..... The bone was chipped over an area of about $\frac{1}{4}'' \times \frac{1}{2}''$. The outer table was not penetrated. The injury was grievous..... The injured man was in hospital for 23 days." Dr. Handy describing the injury said "The bone had been cut. The injured man was in hospital for 23 days. The injury is grievous." It was argued that this was insufficient to show that grievous hurt had been caused, and certain authorities were cited to show that a cut in the bone which does not penetrate or sever the bone does not amount to grievous hurt, and that the residence in hospital was not shown to have been accompanied by inablity to follow ordinary pursuits.

Now, even if the District Judge had power to consider the matter—a position I shall presently examine—I do not think the District Judge was entitled to act as though he was constituted a Court of Appeal from the Magistrate's Court. It may well be that the Magistrate was satisfied on the evidence that grievous hurt had been caused, and there was the positive evidence of both doctors that the injury was grievous. Whether that was correct or not the District Judge could well investigate at the trial, and could enter a verdict according to his findings.

In this case the District Judge took an unusual step. He had the doctors summoned under section 406 (5), Criminal Procedure Code, recorded their evidence, and proceeded to find that grievous hurt had not been caused. The District Judge went on to find that the committal was a nullity, and he therefore discharged the accused. I am of opinion that the District Judge had no power to employ section 406 (5) for the purpose for which he did in fact employ that section, and that he had no authority to hold the further inquiry which he purported to hold.

Had the District Judge authority to declare the committal a nullity? Mr. Chitty depends mainly on section 152 (1) and (2) of the Criminal Procedure Code and argued that an imperative duty lay upon the Magistrate to apply the procedure in Chapter XVI (Non-Summary Procedure) to cases "not triable summarily by a Magistrate's Court," and also to apply the procedure in Chapter XVIII (Summary Procedure) to cases "triable summarily by a Magistrate's Court." It is unnecessary to consider whether such an imperative duty was imposed on the Magistrate, and whether the accused persons had some remedy in law where that imperative duty was infringed. The real question is whether the District Judge had power to grant relief in such cases.

Section 152 is a section which was present in the Criminal Procedure Code even before the amending Ordinance of 1938. But in spite of this the Supreme Court found no difficulty in finding that "a District Court, before which an accused person is brought for trial upon a warrant of commitment regular on its face and to which an indictment is presented by the Attorney-General, is not competent to enquire whether the proceedings that culminated in the committal were regularly instituted or regularly conducted. It is its duty to try the accused."

This was an indictment under section 180 of the Penal Code, and the objections taken were (1) that the sanction of the Attorney-General was required under section 147 of the Criminal Procedure Code but no such sanction had been given, and (2) that the complaint had not been made by the public servant concerned or by an officer to whom he was subordinate : see *King vs. Harip Boosa* (11 N.L.R. 355). This followed a number of earlier cases, see *Attorney-General vs. Appuwa Veda* (10 N.L.R. 199) *King vs. Kolonda* (5 N.L.R. 236), where the indictment was for grievous hurt but the judge thought the evidence pointed to culpable homicide ; *Queen vs. Thomis* (1 Br. 20), *Queen vs. Don Davith* (1 Br. 400)—both these were indictments for theft of cattle under Rs. 50 in value ; and also other cases decided before 1898.

I do not think Chapter XV confers upon the District Judge any power to enquire into the question as to whether the proceedings in the Magistrate's Court were irregular.

Section 12 states—"No District Court shall take cognizance of any offence unless the accused person has been committed for trial by a Magistrate's Court duly empowered in that behalf....."

In the present case the Magistrate has committed, and no question of jurisdiction arises. There is no question affecting territorial jurisdiction, and both the District Court and the Magistrate's Court had jurisdiction to try offences under sections 314, 315 and 316, and the District Judge had jurisdiction to try offences under section 317 (see Schedule A). In my opinion the Magistrate's Court was "empowered in that behalf" and the Magistrate had held the Preliminary inquiry under Chapter XVI.

Under section 163 (1) "If the Magistrate considers the evidence sufficient to put the accused on his trial, the Magistrate shall commit him for trial." Section 164 deals with the case of conflict of evidence. There can be no doubt in this case that the Magistrate considered the evidence sufficient and committed.

Under section 165 (F) where the Attorney-General is of opinion that the case is one which should be tried on indictment, the indictment shall be drawn up and when signed in the manner provided shall be forwarded to the Court of trial selected by the Attorney-General to be filed in that Court. "The fact that the indictment has been so signed, forwarded and filed shall be equivalent to a statement that all conditions required by law to constitute the offence charged and to give such court jurisdiction have been fulfilled in the particular case."

All the steps mentioned have been taken, and I do not think it was open to the District Judge thereafter to embark upon an enquiry as to whether the proceedings were irregular. In fact the only remaining step was for the District Judge to try the case : see section 203 (1). "If the case comes before the court on the committal of a Magistrate's Court, the accused shall be arraigned on the indictment served on him as provided by section 165 (F)."

It is possible that relief may be obtained in the case of a serious irregularity on application to the Supreme Court, but in my opinion the District Judge has no authority to inquire into such a matter.

I allow the appeal and set aside the order of discharge, and send the case back for trial by the District Judge in due course.

ROSE, J.

I agree.

Order of discharge Set aside.

IN THE PRIVY COUNCIL: APPEAL NO. 61 OF 1944

Present at the hearing: LORD THANKERTON, LORD GODDARD, SIR JOHN BEAUMONT

KARUNAPEJJALAGE BILINDI AND OTHERS (APPELLANTS) vs. WELLAWA ATTADASSI THERO (RESPONDENT)

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON

Judgment of the Lords of the Judicial Committee of the Privy Council, delivered the 19th November, 1945.

Preliminary objection—Appeal—One petition by several defendants who had given separate proxies to the same proctor and who acted jointly—Should the appeal be regarded as one for purposes of stamping—Civil Procedure Code, sections 754, 755.

Appellants Nos. 1—11 were defendants in a suit for ejectment and were represented by one proctor who duly filed his proxy. From the answer filed it appeared that appellant No. 12 was interested in the property and was duly added as a defendant. He elected to be represented by the same proctor (who filed proxy) and to abide by the answer of the defendants already filed.

Judgment was entered for plaintiff and all defendants appealed. The same proctor acting for all the defendants filed one petition of appeal which bore a stamp sufficient to cover only one appeal.

In the Supreme Court a preliminary objection to the hearing of the appeal was taken on the ground that the petition was improperly stamped inasmuch as the stamp affixed was sufficient to cover only one appeal although in fact there were two appeals before the Court. This objection was upheld and the defendants appealed to the Privy Council.

Held: (i.) That in the circumstances there was only one appeal before the Court.

(ii.) That as soon as the added-defendant gave his proxy to the proctor who was acting for the other defendants and threw in his lot with them by adopting their defence, he became a joint defendant with them for all purposes.

Per LORD GODDARD:—As this is enough to dispose of this appeal their Lordships do not propose to express any opinion as to whether it is open to the Supreme Court, once the petition has been accepted by the Court of first instance, to take or give effect to an objection as to the sufficiency of the stamp, nor as to whether by the combined effect of sections 756 and 839 it may not be possible for a *bona fide* mistake as to the stamp required to be remedied and thus perhaps avoid a miscarriage of justice. They say no more than that both points appear susceptible of considerable argument and that it would be an unfortunate and probably unintended result of the Stamp Ordinance if a litigant should be debarred from an appeal on a ground which is from a practical point of view capable of easy remedy without injustice to anyone.

Commented upon: *James vs. Karunaratne* (1935) 37 N.L.R.154.

Overruled: *Supper and Another vs. Muttiah and Another* (1939) 14 C.L.W. 70.

Rewcastle K.C., with *Handoo*, for appellants.

Stephen Chapman, for respondents.

Delivered by LORD GODDARD

This is an appeal from a decree of the Supreme Court of the Island of Ceylon dismissing an appeal by the appellants from a decree of the District Court of Kurunegala on a preliminary objection. The objection which the Supreme Court upheld was that there was only one petition of appeal before the Court whereas it was said that there were in truth two appeals and as the petition bore a stamp sufficient to cover only one it was not properly stamped and the Court was bound not to proceed upon it but to dismiss the appeal. In support of their judgment the Supreme Court cited two cases: *James vs. Karunaratna* (1935) 37 N.L.R. 154 and *Supper and Another vs. Muttiah and Another* (1939) 14 Ceylon Law Weekly 70), with both of which their Lordships will deal in this judgment.

The action out of which this appeal arose was one of ejectment and was originally brought by the present respondent against the present apellants 1 to 11. They were all represented by the same proctor, who duly filed a proxy showing that he was acting for them. During the course of the proceedings, in consequence of the answer filed by them it appeared that appellant No. 12 was interested in the property in question and was therefore a necessary party to the action, and accordingly an application was made to the Court to add him as a defendant to the suit, and this

was granted. He elected to be represented by the same proctor, Mr. Gomis, who appeared for the other defendants, and who was then directed to file his proxy and answer. This was done and the Court journal records that "the added-defendant abides by the answer of the defendant already filed." Judgment was given in the action for the plaintiff and all the defendants decided to appeal; as has already been stated one notice of appeal was given on their behalf by Mr. Gomis who was still acting as proctor for them all. The Stamp Ordinance, Cap. 189 of the Legislative Enactments of Ceylon requires that a petition of appeal should be stamped according to the value of the amount involved in the appeal. The Civil Procedure Code, which is Cap. 86 of the Enactments, provides by section 754 that every appeal to the Supreme Court from any judgment, decree or order of any original Court, shall be made in the form of a written petition and that the petition shall be presented to the Court of first instance for this purpose by the party appellant or his proctor within certain periods. By section 755 all petitions of appeal shall be drawn and signed by some advocate or proctor, or else the same shall not be received, and this section contains a proviso, immaterial for present purposes, designed to help appellants in person. There is nothing in either of these sections or in the Stamp Ordinance which prevents parties all of whom have the same interest and who appear by the same proctor from giving one notice of appeal; there is only one appeal in such a case, not as many appeals as there are appellants. This was recognised by the Court in the first of the two cases above mentioned in which Koch, J. referred to "the accepted practice that two or more persons who sign a joint proxy in favour of a proctor to represent them can be treated for the purpose of pleadings and the appeal as constituting one party". In their Lordships' opinion this is not a matter in which one need have recourse to some accepted practice; the fact is that in such a case there is one appeal and one only. In that case however the defendants had severed in their defences and had employed two different proctors. Both those proctors had signed the notice of appeal which only bore one stamp. In such a case it may well be said that there were two appeals because the defendants were not acting jointly but severally. It was sought in the present appeal to say that this case applied because appellant No. 12 had been brought in as an added party. But once he was brought in his position was the same as though he had originally been made a defendant and as he had given a proxy to the same proctor and had adopted the defence of the other defendants their Lordships are unable to see how it can be said that he was in any different position to any one of the other eleven. He was acting jointly with them and there was never more than one appeal. The case of *Supper vs. Muttiah* already referred to was in their Lordships' opinion wrongly decided and must be overruled. The facts were not the same as in the case in 37 N.L.R. 154 because the appellants were not appearing by different proctors. It was argued in the present case that there was no joint proxy, apparently because the added-defendant gave his proxy at a different time to the others. That is a fallacy; as soon as he gave his proxy to the proctor who was acting for the others and threw in his lot with them by adopting their defence he became a joint defendant with them for all purposes. As this is enough to dispose of this appeal their Lordships do not propose to express any opinion as to whether it is open to the Supreme Court, once the petition has been accepted by the Court of first instance, to take or give effect to an objection as to the sufficiency of the stamp, nor as to whether by the combined effect of sections 756 and 839 it may not be possible for a *bona fide* mistake as to the stamp required to be remedied and thus perhaps avoid a miscarriage of justice. They say no more than that both points appear susceptible of considerable argument and that it would be an unfortunate and probably unintended result of the Stamp Ordinance if a litigant should be debarred from an appeal on a ground which is from a practical point of view capable of easy remedy without injustice to anyone. Their Lordships will humbly advice His Majesty that this appeal should be allowed with costs and the case be remitted to the Supreme Court with a direction to hear and determine the appeal.

Appeal allowed.

Present: Soertsz, A.C.J. & Jayetileke, J.

CARLINA vs. SILVA

S. C. No. 469/1945—*Application for Revision in D. C. Kalutara Case No.* 28406.

Argued on: 12th December, 1945.
Delivered on: 20th December, 1945.

Appeal—Civil Procedure Code, Sections 756 (1) *and* (2)—*Notice of security served on respondent's proctor—Failure to serve on the respondent—Order of abatement—Application in Revision for relief under section* 756 (3) *of the Civil Procedure Code—Is such application in order.*

Held : (i.) That the service of notice of tendering security for costs of appeal on the respondent's proctor is a sufficient compliance with the requirements of section 756 of the Civil Procedure Code.

(ii.) That where an order of abatement of appeal is made for failure to serve such notice on the respondent personally the remedy is by way of appeal inasmuch as it is an error of law committed by the District Judge.

J. A. L. Cooray for the Petitioner.

Issadeen Ismail for the Plaintiff-Respondent.

AYETILEKE, J.

The question at issue in the application before s is simple and short. The answer, in our pinion, is equally so. The respondent filed ction No. 23406 of the District Court of Kalutara r the partition of a land. The Petitioner sought intervene in the action and his application was fused. On October 2, 1945, he tendered his etition of appeal and moved that notice of curity be issued returnable on October 11, 1945, n which date the notice was reported to have een served on the respondent's proctors. The istrict Judge held that the service of notice on he respondent's proctors was bad in law and ade an order of abatement under section 756 (2) f the Civil Procedure Code. The present appli- ation is for relief under section 756 (3). The ub-section reads as follows :—

" In case of any mistake, omission, or defect on the part of any appellant in complying with the provisions of this section, the Supreme Court, if it should be of opinion that the respondent has not been materially prejudiced, may grant relief on such terms as it may deem just."

t the argument before us Mr. Cooray contended hat the petitioner had complied with the pro- isions of section 756 (1). He relied on the judgement of De Kretser, J. in *De Silva vs. Francinahamine* (41 N.L.R. 191), where it was held that the service of notice of tender of security for costs of appeal on the respondent's proctor was sufficient compliance with the requirements of section 756 of the Civil Procedure Code.

It seems to us that this contention is sound. The question for our decision is whether the present application is in order. On the materials before us we are of opinion that the petitioner is not entitled to ask this court for relief under section 756 (3). He does not say that he failed to comply with the provisions of section 756 (1) owing to a mistake omission, or defect on his part. On the contrary he questions the legality of the order made by the District Judge. In these circumstances his remedy was clearly by way of appeal. This view has the support of Keuneman and Rose, J. J. in *Alima Natchia vs. Marikar and others* (438 D. C.* Kalutara, 24682, S. C. Min. 29th November, 1945). The preliminary objection taken by Mr. Ismail is entitled to succeed. We would, accordingly, dismiss the application with costs.

SOERTSZ, A.C.J.

I agree.

Application Dismissed.

Present : KEUNEMAN & ROSE, J. J.

*ALIMA NATCHIA vs. MARIKAR & OTHERS

Application in revision in D. C. Kalutara No. 24682.

Argued & Decided on : 29th November, 1945.

E. D. Cosme for the petitioner.

J. M. Jayamanne for the plaintiff respondent.

H. W. Jayawardene for the 2nd defendant respondent.

I. M. Ismail for the 4th and 5th defendants respondents.

EUNEMAN, J.

We think that Mr. Jayawardene for the 2nd respondent is right in arguing that a right of appeal lay in this case correct an error of law committed by the District Judge. In the circumstances we should be slow to exercise our iscretion to allow an application for revision in view of the fact that no appeal has been taken in this case.

The application for revision is dismissed with costs.

Present : SOERTSZ, J. & CANNON, J.

FERNANDO vs. SILVA & OTHERS

S. C. No. 98—*D. C.* (*Inty.*) *Colombo* 2463.
Argued on : 5th February, 1946.
Decided on : 8th February, 1946.

Conveyance of land—Vendor entitled to 3/16 *purporting to convey* 1/2 *of land—Title recited in deed only as to* 2/16*—Conveyance by vendor of all his right, title and interest in the land—Does conveyance pass* 2/16 *or* 3/16 *of the land.*

A vendor, who was entitled to 3/16 of a land, purported to convey 1/2 the land. In the conveyance the title recited pointed to a deed whereby only 2/16 of the land was acquired by the vendor. The question was whether the conveyance passed 3/16 or only 2/16 of the land. In the conveyance, the vendor conveyed to the vendee "all the estate, right, title, interest, claim and demand whatsoever of the said vendor in to or upon the said premises and every part thereof." For over a third of a century the vendor did not make any claim to the land.

Held : That 3/16 of the land passed under the conveyance.

E. B. Wickramanayake, for the 9th added-appellant.

L. A. Rajapakse, K.C., with *H. A. Koattegoda*, for the plaintiff-respondent.

SOERTSZ, S.P.J.

I agree with the learned trial Judge that this was a misconcieved intervention on the part of the Appellant. Indeed, I think it was worse than that. It was an impossible intervention, although not by reason of the fact that as the trial Judge thought, the *exceptio rei venditae et traditae* applied. That exception clearly does not apply on the facts of this case. This is, rather, a case of the interpretation that ought to be put on a deed of transfer in order to ascertain what really passed upon it in view of the fact that the description of the thing conveyed is inaccurate. The facts are these. Noris and Sophia Fernando who had married in community of property were together entitled to a half share of the land in suit. Noris died leaving four children and his widow. Thereupon the widow became entitled to a fourth and each of the children to a sixteenth. Intervenient is one of those children. Sophia by deed P6 of the 5th of November, 1902, conveyed to the intervenient and her husband "all that undivided one fourth share" of this land. Thus the intervenient became entitled to an eighth in addition to the one-sixteenth she had inherited from her father. She then had 1/16+1/8 or 3/16. When her husband died she got his 1/8 too and had 5/16 in all. In September, 1910, by deed P11, she conveyed 2/16, reciting title by inheritance from her husband. She was left with 3/16ths. In December, 1910, she purported to convey half of the entire land, reciting her title as the title she had derived from her mother on P6 of 1902. What she had derived from her mother was not *half* the land but *half of one-fourth* of the land. She now contends that that deed of December, 1910, operated to convey one-eighth and that there still remains to her a one-sixteenth. The trial Judge has taken the view that, she having purported to convey half the land, that is to say 8/16ths, at a time when she had only 3/16ths, all the 3/16ths passed. For her it is contended that inasmuch as in her conveyance P7 of December, 1910, she based her title on her mother's deed in her favour in the year 1902, only 2/16ths passed on that deed and that the description of the land conveyed as 8/16ths or 1/2 is *falsa descriptio*, and that the 1/16th she had inherited from her father was not caught up by that deed.

The question, then, is whether we ought to pay greater attention to the fact that, at the time she purported to convey half the land, she was entitled to 3/16ths and hold that all the 3/16ths passed, or to the fact that in purporting to convey half the land she recited the title thereto as title derived on P6 and hold that only 2/16ths passed.

An examination of deed P7 shows that in the recitals there is the inconsistency already referred to between the share conveyed as a half share and the title set forth which gave only one-eighth but that inconsistency ought, in my opinion, to be disregarded in favour of the vendee because in a later part of the deed the vendor goes on to "grant, convey, assign, transfer, set over and assure to the vendee the hereinbefore described.....*together with all the privileges.....and all the estate right title interest claim and demand whatsoever of the said vendor in to or upon the said premises and every part thereof.*"

It is clear from the circumstances of this case and the belated intervention of the appellant that, for over a third of a century she did not even pretend to have any interest in this land a fact that speaks eloquently of a realisation by her that after the sale in December, 1910, she had nothing left.

I dismiss the appeal with costs.

CANNON, J.

I agree.

Appeal dismissed.

Present : ROSE, J.

JAMEELA UMMA vs. ABDUL AZEEZ

S. C. No. 242—*C. R. Colombo* 97751.
Argued on : 30th January, 1946.
Decided on : 1st February, 1946.

Action—Dismissal owing to plaintiff's failure to appear—Plaintiff given permission by Commissioner of Requests to institute fresh action upon paying costs of previous action—Must costs be paid before institution of fresh action—Civil Procedure Code section 823.

An action in the Court of Requests was dismissed for non-appearance of the plaintiff. The Court later granted the plaintiff permission to institute a fresh action " upon the plaintiff paying the costs of the previous action." The fresh action, which was duly instituted, was dismissed on the ground that the condition precedent to its institution had not been complied with.

Held : (i.) That the only authority for permitting the institution of a fresh action was section 823 (5) of the Civil Procedure Code.

(ii.) That under that section payment into Court is a condition precedent to the institution of the action.

(iii.) That where the order was not in the terms of the section, the wording of the former should if possible, be reconciled with the wording of the latter.

Cases referred to : *Perera et al. vs. Silva et al.*, 42 N.L.R. 143.

H. W. Thambiah, for the plaintiff-appellant.

S. Mahadevan, for the defendant-respondent.

ROSE, J.

In this case the plaintiff appellant instituted an action against the defendant respondent for arrears of rent and ejectment. The plaintiff having failed to appear when the case was called the action was dismissed, but upon subsequent application being made the learned Commissioner in the exercise of his powers under section 823 (5) of the Civil Procedure Code ordered that a fresh action might be instituted upon the plaintiff paying the costs of the previous action.

The plaintiff duly instituted a fresh action and the matter came up for hearing on the 19th of June, 1945, when, upon objection being taken by the defendant-respondent, the learned Commissioner dismissed the action on the ground that the condition precedent to its institution had not been complied with. It is against that order that the plaintiff now appeals.

It is common ground that the defendant's costs relating to the previous action have not been taxed. It is further admitted that the plaintiff neither requested the defendant's proctor to expedite taxation nor moved the Court of Requests in the matter ; nor was payment made into Court of an amount equivalent in the appellant's own estimation to what the defendant's taxed costs were likely to be or of any sum.

The appellant contends in the first place that the wording of section 823 (5) which reads as follows :—"..... the Commissioner may grant to the plaintiff permission to institute a fresh action upon payment into court of the amount (if any) due to the defendant as costs in the previous action " does not mean that the payment into court must necessarily precede the institution of the fresh action. With that contention I am unable to agree. Not only in my opinion is it clear from the wording of the section itself that the payment into Court is a condition precedent to the institution of the action but that view has already been expressed by Soertsz, J. in *Perera et al. vs. Silva et al.*, 42 N.L.R. at page 143, where the learned Judge says " The Commissioner is required by that section to direct that the plaintiffs shall pay into court the amount of the costs incurred by the defendants in the previous action before instituting the fresh action."

The appellant contends in the alternative that the learned Commissioner's order was not in the terms of the section and therefore—not having been appealed from—should be interpreted according to the meaning of the words actually used.. The order in question stated that a fresh action may be brought " on plaintiff paying costs of action." Having regard to the fact that in the present circumstances the only authority for the Commissioner to permit the institution of a fresh action is supplied by section 823 (5) it seems to me that it is my duty if possible to reconcile the wording of the order actually made with the wording of the section. In my opinion not only is it possible to reconcile the wording of his order but the natural interpretation to be given to it is that he intended the payment into Court to be a

condition precedent to the institution of the action.

Counsel for the appellant referred me to one or two cases relating to section 406 of the Civil Procedure Code and its corresponding section in India—section 373 of the (Indian) Civil Procedure Code. In my opinion, however, they are of no assistance to the appellant because under section 406 a discretion is vested in the court to impose such terms as to costs or otherwise as it may think fit. Each case, therefore, under that section must depend upon the actual terms of the order made, which may or may not impose as a condition the prior payment of the defendant's costs in the earlier action.

For these reasons I am of opinion that the appeal fails and must be dismissed with costs.

Appeal dismissed.

Present : Howard, C.J.

HAMID vs. BADURDEEN

S. C. No. 166—*C. R. Matale No.* 7428.
Argued on : 22nd January, 1946.
Decided on : 1st February, 1946.

Court of Requests—Action for return of jewellery valued at over Rs. 300 *on payment of sum less than Rs.* 300—*Demand together with Interest claimed exceeding Rs.* 300—*Jurisdiction of court—Courts Ordinance section* 75.

The plaintiff claimed the return of certain articles of jewellery on payment of a sum of Rs. 231, or in the alternative, judgment for the sum of Rs. 269, (being the value of the articles, which for the purposes of the alternative claim were assessed at Rs. 500, less Rs. 231) together with legal interest from date of plaint till payment. The plaintiff admitted that the value of the jewellery was Rs. 735. The legal interest brought the demand to a sum exceeding Rs. 300.

Held : (i.) That the claim for the return of articles valued at Rs. 735 on payment of Rs. 231 was outside the jurisdiction of the Court of Requests.

(ii.) That the interest claimed in the alternative claim brought the demand to a sum exceeding Rs. 300 and that the claim was therefore outside the jurisdiction of the Court of Requests.

Cases referred to : *Caro vs. Arolis* 10 N.L.R. 173.

Cyril E. S. Perera, with *E. A. G. de Silva*, for the plaintiff-appellant.

H. W. Jayawardene, for the defendant-respondent.

Howard, C.J.

The plaintiff appeals from a judgment of the Commissioner of Requests, Matale, dismissing his action on the ground that the claim was not within the jurisdiction of the Court of Requests. In his plaint the plaintiff claimed an order for the return of certain articles of jewellery on payment of the sum of Rs. 231. In the alternative he claimed judgment against the defendant for the sum of Rs. 269, that is to say, the value of the said articles Rs. 500 less the sum of Rs. 231. It would appear from the evidence which was accepted by the Commissioner that the plaintiff on the 16th August, 1939, deposited the jewellery with the defendant as security for a loan of Rs. 231. In holding that he has no jurisdiction the Commissioner, relying on the judgement of Wood Renton, J. in *Caro vs. Arolis* (10 N.L.R.173), held that the test of jurisdiction is the amount demanded and not the amount awarded. He has further held that the value given by the plaintiff in his plaint must always be taken to determine the forum except in cases where the plaintiff has misrepresented the value with the intention of getting a trial in a different Court from that intended by the Legislature.

The jurisdiction of the Court of Requests is formulated in section 75 of the Courts Ordinance (Cap. 6) which is worded as follows :—

> " Every Court of Requests shall be a court of record and shall have original jurisdiction, and shall have cognizance of and full power to hear and determine all actions in which the debt, damage, or demand shall not exceed three hundred rupees, and in which the party or parties defendant shall be resident within the jurisdiction of such court, or in which the cause of action shall have arisen within such jurisdiction, and all hypothecary actions in which the amount claimed shall not exceed three hundred rupees, and the land hypothecated or any part thereof is situated within the jurisdiction of such Court, and also all actions in which the title to, interest in, or right to the possession of any land shall be in dispute, and all actions for the partition or sale of land, provided that the value of the land or the particular share, right, or interest in dispute or to be partitioned or sold shall not exceed three hundred rupees, and the same or any part thereof is situate within the jurisdiction of such Court.

Provided always that such court shall not have cognizance of any action for criminal conversation, or for seduction, or for breach of promise of marriage, or for separation a *mensa et thoro*, or for a divorce a *vinculo matrimonii*, or for declaration of nullity of marriage."

The only question that arises is whether the Commissioner was right in holding that the debt, damage or demand exceeded Rs. 300. In addition to the cases cited to me by Counsel I have also considered the cases of *Thaynappa Chetty vs. Packier Bawa* (Ramanathan's Reports 1863-1868, 216), *Areppin Ahamat vs. T. D. Martinus* (Wendt's Reports 341), and *Maclachlan vs. Maitland* (8 Supreme Court Circular 133). In the first case the action was brought in the District Court and the amount due on the day of the libel was £10. The libel in regular form claimed further interest till payment in full. This further claim raised the amount for which the plaintiff got judgment to a sum exceeding £10. Creasy, C.J. giving the judgment of the Full Bench held that in construing Court of Requests' acts and ordinances as to jurisdiction, it is the amount which the plaintiff has judgment to recover that determines whether the action was within the jurisdiction of the inferior court. The action was, therefore, properly instituted in the District Court and was not within the jurisdiction of the Court of Requests. In the second case, it was held by Burnside, C.J. and Clarence, J. that an action to recover Rs. 100 and interest thereon must be brought in the District Court and that a judgment giving plaintiff Rs. 100 and interest on Rs. 100 at 9 per cent. per annum from the institution of the action to the date of judgment is a judgment for more than Rs. 100 and therefore the Court of Requests had no jurisdiction. In *Maclachlan vs. Maitland* the head note was as follows :

> " In an action brought against an hotel keeper for the loss of goods stolen from the plaintiff's bedroom whilst a guest of the hotel, the plaintiff claimed Rs. 162·50 as damages. From this sum he set off a sum of Rs. 37·50 as due to the hotelkeeper for his board, and waiving a further sum of Rs. 25·20, he prayed that the balance sum of Rs. 100 might be decreed to him as damages, after deducting the debt due from him to the hotelkeeper, together with interest thereon at nine per cent. from the institution of the suit.
>
> Held, per Dias, A.C.J., that the plaintiff's action was well laid in the Court of Requests, as it was substantially an action to recover Rs. 100 as damages due at the date of the filing of the plaint, with interest thereafter at nine per cent."

These three decisions cannot be reconciled. In *Maclachlan vs. Maitland*, Dias, A.C.J. held that, if the actual amount claimed as due at the date of action was within the jurisdiction, the interest, accrued after the date of the plaint, was a mere incident connected with the debt and had nothing to do with the question of jurisdiction. This decision was the exact opposite to the decision in *Areppin Ahamat vs. T. D. Martinus.* In *Thaynappa Chetty vs. Packier Bawa*, however, the Full Bench decided that interest is not something merely incidental to the cause of action and to the process of action, as costs are, but it forms part of the cause of action itself. Reference was made by Creasy, C.J. in the course of his judgment to *Baddely vs. Oliver* (1 C & M 219) and to a dictum of Mr. Justice Byles in Byles on Bills p. 264, 7th Edition where the latter said " Interest is in the nature of damages for the retention of the principal debt." The decision in *Thaynappa Chetty vs. Packier Bawa* was cited with approval by de Sampayo, J. in *Banda vs. Menika* (21 N.L.R. at p. 282) in so far as that it related to an action for the recovery of " a debt, damage or demand," that is to say of the character declared in the first part of section 75 of the Courts Ordinance. *Banda vs. Menika* was the decision of a Full Bench. Again in *Pedris vs. Mohideen* (25 N.L.R. 105), another Full Bench decision, Schneider, J. at pp. 110-111 stated as follows : " although section 77 limits the jurisdiction in actions for debt, damage or demand, no such limitation is imposed as regards the damages which may be claimed in actions for recovery of possession."

In the present case the plaintiff claims the return of articles of jewellery on payment of the sum of Rs. 231 or in the alternative judgment for the sum of Rs. 269, being the value of the articles which for the purpose of this alternative claim are assessed at Rs. 500 less Rs. 231, together with legal interest from date of plaint till payment thereof. In evidence the plaintiff states that the value of the jewellery is Rs. 735. So, in the first demand, the plaintiff is claiming the return of articles valued at Rs. 735 on payment of Rs. 231. This demand is clearly outside the jurisdiction of the court. In the alternative claim the plaintiff asks for the value of the articles which for the purpose he assesses at Rs. 500 less Rs. 231 or Rs. 269 and legal interest on this sum until payment. As the plaint was issued on the 6th October, 1942 interest is claimed for over 3 years. This interest will bring the demand to a sum exceeding Rs. 300 which, in view of the Full Bench decisions cited is outside the jurisdiction of the Court of Requests.

For the reasons I have given I am of opinion that the Commissioner came to a correct conclusion and the appeal is dismissed with costs.

Appeal dismissed.

Present : SOERTSZ, S.P.J.

VANDER POORTEN vs. VANDER POORTEN & ANOTHER

Application in revision in M.C. Kandy 14960 (428)
Argued on : 28th January, 1946.
Delivered on : 1st February, 1946.

Abetment of forgery—Abetment of fabrication of evidence for the purpose of being used in or in relation to a judicial proceeding—Is the sanction of the Attorney-General necessary to enable a private party to prosecute—Penal Code sections 109, 190 *and* 454*—Criminal Procedure Code section* 147.

Held : That the abetment of an offence is an offence in itself and that the sanction of the Attorney-General is not necessary to enable a private party to prosecute an alleged offender for the offence of abetment of forgery or abetment of fabrication of evidence for the purpose of being used in or in relation to a judicial proceeding.

Cases referred to : *Queen Emperor vs. Abdul Kader Sheriff Saheb*, 20 Mad. 8.

N. Nadarajah, K.C., with *Nihal Gunasekera* and *Samarawickrama*, for the appellant.
H. V. Perera, K. C., with *Muttusamy*, for the respondent.

SOERTSZ, S.P.J.

The petitioner lodged a complaint in the Magistrate's Court at Kandy alleging that the two respondents named in his complaint had, in or about the month of December 1934, abetted one Antoine Joseph Vander Poorten to commit the offence of forgery by instigating him to fabricate a document bearing a date in the year 1920, an offence which he alleged was punishable under section 109 of the Penal Code read with section 454 of that Code. In supporting the complaint he gave evidence stating that the intention of the respondents when they instigated Antoine Joseph Vander Poorten was to use that document in certain judicial proceedings then pending between the petitioner and the first respondent. On this complaint the Magistrate issued summonses on the respondents and thereafter fixed the inquiry into the complaint on the 1st of November, 1944. On that date, the petitioner was examined-in-chief and was cross-examined. Two witnesses were then examined and cross-examined and, thereafter, Counsel for the respondents took the objection that " the case cannot proceed without the sanction of the Attorney-General."

This question was fixed for argument and after Counsel on both sides were heard on it the Magistrate made order upholding the objection and directing that " the case be called on the 27th of October, 1945 for the complainant to produce the necessary sanction of the Attorney-General." He added, " If this sanction is not forthcoming, I shall make order in due course discharging the accused." The petitioner prays that this order of the Magistrate be dealt with in the exercise of the revisionary powers of this Court. When the matter came up before me, Counsel for the respondents took a preliminary objection contending that an appeal lay from the order made by the Magistrate, and that, therefore, I ought not to deal with the order by way of revision. I am clearly of the opinion that this was not a final order, and that therefore, no appeal lay and that revision was the proper course.

The question, then, that arises for determination is whether the sanction of the Attorney-General is necessary for the prosecution of the offence or offences foreshadowed by the petitioner's case as it stood at the stage at which the Magistrate made his order. Those offences appear to be the offence charged in the petitioner's complaint of abetment of forgery, and for the offence that the Magistrate thought would be the offence if the facts adumbrated were established, that is to say, the abetment of the fabrication of evidence for the purpose of being used at any stage of a judicial proceeding or in relation to a judicial proceeding. It seems to me that both these offences are disclosed and that a proper charge would be a charge framed in the manner indicated by section 180 of the Criminal Procedure Code.

Now it is quite clear that for the prosecution of the offence of forgery as described in section 452 of the Penal Code and of fabricating false evidence for the purpose of using it in or in relation to a judicial proceeding made punishable under section 190 of the Penal Code, the sanction of the Attorney-General is necessary to enable a private party to prosecute the alleged offender or offenders. Is the abetment of those offences subject to the same requirement? That is the question. It arose in Madras many years ago in the case of *Queen Emperor vs. Abdul Kader Sheriff Saheb*, 20 Madras 8 and a Bench of which the

eminent Indian Judge, Justice Subramania Aiyar, whose a member expressed their opinion on it thus :

" The abetment of an offence is an offence of itself and is punishable under separate sections of its own. None of those sections is mentioned in clause (*b*) of section 195 of the Code of Criminal Procedure and, therefore, sanction need not be obtained in respect of them." Section 195 of the Indian Code is the same as section 147 of our Code. If I may respectfully say so, I am in complete agreement with that view, and I am unable to follow the learned Magistrate when he says that he is " unable to follow that decision." At any rate "*malo cum Scaligero errare.*" When the Legislature thought fit to place the abetment of an offence on the same footing as the offence itself for the purpose of enabling cases to be compounded, it took care to say so in section 290 (3) of the Criminal Procedure Code, and it is a reasonable inference that the Legislature deliberately refrained from making a similar provision in section 147 of the same Code. If that inference is contrary to what the Legislature intends today, it is for that body to take the necessary action.

I see no justification whatever for reading section 147 as if it contained the words " and the abetment of these offences." That would be to legislate, not to interpret. As was pointed out in the Madras case " abetment of an offence is an offence of itself and is punishable under separate sections of its own." Reference is generally made in charges of abetment or attempt to the sections rendering the principal offences punishable merely for convenience sake. In a case such as the present case, it would, in my view, be a sufficient compliance with the requirements of section 167 (3) and (4) of the Criminal Procedure Code if the charges were laid thus : did abet the offence of fabricating false evidence for the purpose, etc. and did thereby commit an offence punishable under section 109 of the Penal Code inasmuch as the said offence was not committed ; or did abet the offence of forgery and thereby commit an offence punishable under section 109 of the Penal Code, inasmuch as that offence was not committed.

A word in regard to the submission made about the delay in prosecuting the alleged offences. There is no doubt of that. But the prosecution of these offences is not barred till twenty years have elapsed.

I set aside the order made by the Magistrate and remit the case for inquiry in due course.

Application allowed.

Present : JAYETILEKE, J. & ROSE, J.

NAKANTHAR vs. SINNAMMAH

S. C. No. 221—*D. C. F. Jaffna No.* 1850/*P*
Argued on : 22nd January, 1946.
Decided on : 7th February, 1946.

Deed of gift—Recital in deed that it is irrevocable—Gross ingratitude of donee—Revocability of deed—Roman-Dutch Law.

Held : (i.) That under the Roman Dutch Law a deed of gift can be revoked on the ground of ingratitude even though the donor may have expressly agreed not to revoke it.

(ii.) That such an agreement not to revoke is null and void as being *contra bonos mores.*

N. Nadarajah, K.C., with *H. W. Jayawardene* and *S. Sivasubramaniam*, for the defendant-appellant.

L. A. Rajapakse, K.C., with *H. W. Thambiah*, for the plaintiff-respondent.

JAYETILEKE, J.

This is an action for the revocation of a deed of gift bearing No. 12396, dated November 16, 1932, (P3) executed by the plaintiff in favour of her husband, the defendant, on the ground of gross ingratitude. The parties were married in the year 1923. The plaintiff alleged that in the year 1942 the defendant opened a tea boutique and employed a woman called Eliyapillai to assist him. The defendant became intimate with that woman and took her from the boutique to his house. The plaintiff objected to Eliyapillai being brought to her house whereupon the defendant entered upon a course of conduct which amounted to cruelty. On one occasion he assaulted her and fractured her arm. The plaintiff was miserable thereafter, and she separated in July, 1942. The defendant denies the allegations made by the plaintiff, and disputed the plaintiff's right to revoke the deed. After a very careful review of

the facts the trial judge arrived at the following conclusions.

(1) That the defendant had assaulted the plaintiff.

(2) That the defendant had kept Eliyapillai as his mistress.

Having come to these conclusions the trial judge considered himself bound by the authority of a judgment of this court in *Savarasipillai vs. Anthonippillai* 8 C.L.W. 121 to hold that the first finding was fatal to the defence. In so holding we are of opinion that he was clearly right. In the Roman-Dutch Law there is the most ample authority that a donation can be revoked if the donee assaults the donor (Voet 39-5-22, Krause's Translation page 50; Grotius 3-2-17, Herberts Translation page 286; Van Leuwen 30-4-7, Kotze's Translation page 235; 2 Burge page 146).

Mr. Nadarajah contended that the plaintiff cannot maintain this action as on the face of it P3 is irrevocable. The habendum clause is expressed in the following terms:

"I Sinnamah, wife of Nallanathar of Thunnalai South for and in consideration of the natural love and affection I have towards my husband Vallipuranathar Nallanathar of the same place do hereby give, grant and convey by way of irrevocable donation the property described herein below in the schedule unto him subject to my life interest."

He based his argument upon two cases *Ukku Banda vs. Paulis Singho* 27 N.L.R. 449 and *Razeeka vs. Mohamed Satheek* 33 N.L.R. 176 In those cases it was held that where a deed of donation contains an express recital that it is irrevocable the donor must be taken to have renounced the right to revoke it. There can be no question that the principle of those decisions still remains good but, in my view, they are not relevant to the present case. It must be remembered that under the Kandyan Law and Mohemedan Law the general rule is that the power of revocation is inherent in the donor of every gift. The gift may be revoked by the donor himself by the execution of another deed. By a renunciation clause or by making the gift irrevocable the donor merely gives up the right to resume the property at any time voluntarily. Under the Roman-Dutch Law, however, a donation once made is valid and irrevocable but it may be cancelled by decree of court under exceptional circumstances. The Dutch writers mention among the grounds of revoking donations the case of the donee attempting the donor's life, striking him, attempting to ruin him, maliciously slandering or otherwise injuring the donor. The donation by the plaintiff to the defendant being irrevocable according to law, I do not think that there is any particular magic in the words "irrevocable" in P3. There is, however, very clear authority which concludes the question. According to Voet 39-5-22 Sampayo's Translation p. 24 a donation *inter vivos* can be revoked even though the donor may have expressly agreed not to revoke it on the ground of ingratitude. Such an agreement is null and void as being *contra bonos mores*.

The section reads:

"Although a donation *inter vivos* cannot be revoked at pleasure, not even by the rescript of the Sovereign, nor even if the donor alleges that he made the donation in fraud of another person, yet there are five instances of ingratitute, which if the donee is guilty of them towards the donor, are considered just causes for revocation or change of mind, notwithstanding that at the time of the donation it may have been agreed by a pact confirmed even by oath, that the donation cannot be revoked on account of ingratitude, since such an agreement is null and void as being an incentive to misconduct and involving a condonation of future crime."

The opinion of Voet seems to be based on the following passage in the Digest (2-14-27. s 4).

"An agreement not to institute an action for an injury to be committed by another is invalid."

I do not think it is necessary to deal with the second limb of Mr. Nadarajah's argument that the order made on the plaintiff's application for maintenance against the defendant in action No. 1760 of the Magistrate's Court of Point Pedro is a bar to the present action. The proceedings show that the question at issue between the parties in that action was whether the defendant was living in adultery with Eliyapillai at the time of the application. The trial judge has in my opinion, come to a correct conclusion both on the facts and on the law. I would, accordingly, dismiss the appeal with costs.

Appeal dismissed.

ROSE, J.

I agree.

Present : DALTON & AKBAR, J.J.

DASSANAYAKE vs. DASANAYAKE

S. C. No. 191—*D. C. (Inty) Ratnapura No.* 3884.
Argued and Decided on : 21st March, 1934.

Civil Procedure Code, section 622—*Application with respect to maintenance of minor children after decree absolute for divorce—Leading of evidence in summary proceedings—Section* 384.

Held : (i.) That section 622 of the Civil Procedure Code enables a party to petition the Court from time to time for all such orders and provisions as come within the purview of the section.

(ii.) That the leading of evidence in summary proceedings is governed by section 384 of the Civil Procedure Code.

E. Navaratnam, for defendant-petitioner-appellant.

H. V. Perera with *M. C. Abeywardene*, for plaintiff-respondent.

DALTON J.

The appellant is the petitioner who took proceedings under sections 618 and 622 of the Civil Procedure Code, asking first of all that he be formally appointed as the guardian of three minors, the children themselves being the children of himself and the respondent, secondly that maintenance of the minors be provided for the present to be paid out of money deposited in Court, or out of the properties to be transferred to the minors or from such other means as to the court may deem fit ; thirdly, under section 618, for a settlement on the minors of properties referred to in a certain settlement.

On the appeal Mr. Navaratnam for the appellant only presses the appeal in respect of the appointment of the guardianship and the maintenance of the minors. The question of the settlement of the properties is apparently the subject of other actions which have already been decided or are still pending.

Each party filed an affidavit, one in support of the petition and the other denying the allegations set out in the petition and the affidavit. When the petition came up for hearing, the date of the enquiry being 28th August, 1933, the petitioner appeared in person but apart from the affidavit in support of the petition there is no other evidence led by him. The learned District Judge however made certain notes of argument adduced by him from which it would seem to appear that the petitioner desired to lead certain evidence, presumably oral evidence, to prove the allegations set out in the petition. Although he is stated to be a barrister he seems to have been under some misconception as to the procedure governing the matter and as to his right to lead evidence, and the trial Judge held that as the enquiry had proceeded he saw no reason to allow petitioner to lead oral evidence at that stage. Under the circumstances it is impossible to say the learned Judge was wrong, although it does seem to me that he has not had a full opportunity of putting his case under section 622 before the court. This would appear to be due to his own fault.

Under all the circumstances, therefore, I do not think it would serve any useful purpose in referring the case back to the court for further enquiry. Section 622 makes it clear however that a party may petition the court from time to time for all such orders and provisions as come within the purview of the section. If there be any doubt, however, as to the right of petitioner to renew his application under section 622 we will make it clear in dismissing this appeal that if it is necessary for the petitioner to be given leave to file a fresh petition under section 622 for the custody and maintenance of the children he may do so. We would also point out at the same time particularly for his benefit that the leading of evidence in summary proceedings such as this is governed by the section 384. He should, therefore, be prepared to support any petition with such evidence in the form of affidavits as he may be able to, in support of his plea and allegations.

Subject to that the appeal must be dismissed, and under the circumstances, I think the appeal must be dismissed with costs.

Dismissed.

Present : JAYETILEKE & ROSE, J.J.

GUNAWARDENE vs. BABY NONA & ANOTHER

S. C. No. 87—*D. C. (F) Matara No.* 14770.
Argued on : 21st January, 1946.
Delivered on : 29th January, 1946.

Partition—Lease of undivided share by co-owner—Can such co-owner bring partition action pending lease—Partition Ordinance, section 2.

Held : That a co-owner who leases his undivided share can institute an action to partition the land pending such lease.

L. A. Rajapakse, K.C., with *S. W. Jayasuriya*, for 1st and 2nd defendants-respondents.
C. V. Ranawaka, for plaintiff-appellant.

JAYETILEKE, J.

This is a partition action. The plaintiff was entitled to one sixth share of the land, the first defendant to a one sixth share, and the second defendant to the remaining four sixths shares. The plaintiff had leased his sixth share to the third defendant, who is the wife of the second defendant, by 2D7 for a period of six years commencing from January 9, 1939. The 1st and 2nd defendants contended that the plaintiff could not maintain the action as the lease in favour of the 3rd defendant had not expired. The District Judge upheld their contention and dismissed the plaintiff's action with costs. The present appeal is against that order. The District Judge has based his order on the judgment of this court in *Charles Appu vs. Dias Abeysinghe* (35 N.L.R. 325) where it was held that the person entitled to the *dominium* only of an undivided share of the land, the usufruct being vested in another, is not entitled to bring a partition action. The reasoning of Dalton, J. in that case, which is summed up in these words, seems to me to be applicable to the present case:

> "However the trend of opinion would appear to support the conclusion that the effect of the Partition Ordinance is that, to maintain a partition action, a person must be the owner or claim to be the owner of an undivided share, and also be in possession or be entitled to be or have a claim to be in possession of that share."

The plaintiff in this case was at the date of the institution of the action in possession of the undivided one sixth share to which he was entitled through his lessee, the third defendant, and his right to institute this action under section 2 of the Partition Ordinance cannot be questioned.

Indeed Mr. Rajapakse who appeared for the respondent candidly admitted that he could not support the judgment. I would set aside the judgment appealed from and send the case back for trial in due course. The appellant is entitled to the costs of the contest and of this appeal.

ROSE, J.
I agree.

Appeal allowed.

Present : JAYETILEKE, J.

WILSON vs. KOTALAWALA, EXCISE INSPECTOR

S. C. No. 765—*M. C. Badulla No.* 12071
Argued on : 20th December, 1945.
Delivered on : 21st January, 1946.

Poisons, Opium and Dangerous Drugs Ordinance—Cap. 172, *sections* 25, 26 *and* 76 (5) *(a)—Possession of seeds, leaves and stems of the hemp plant (ganja)—Does ganja come within the definition of hemp plant.*

Where the accused was charged with possessing seeds, leaves and stems of a hemp plant (ganja) in contravention of section 26 of the Poisons, Opium and Dangerous Drugs Ordinance, and it was contended that there were two varieties of the hemp plant, namely, Canabis Sativa and Canabis Indica and that the Ordinance penalised only the possession of Canabis Sativa.

Held : That Canabis Indica is a species of Canabis Sativa and that ganja comes within the definition of hemp plant in the Ordinance.

G. T. Samarawickreme, for accused-appellant.
T. K. Curtis, C.C., for Attorney-General.

JAYETILEKE, J.

This is a prosecution under section 76 (5) (*a*) of the Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172) for possessing seeds, leaves and stems of a hemp plant in contravention of section 26 of the Ordinance.

Section 25 of the Ordinance defines the expression " hemp plant " as follows :

" Hemp plant means the plant known as Cannabis Sativa L " The Excise Inspector who gave evidence in the case said that he found in a suit case belonging to the accused parts of hemp plant commonly known as ganja. The meaning of the word " ganja " was considered by Moncreiff, A.C.J. in *Ukku Banda vs. Ukku Banda* (7 N.L.R. 1) He said :

" Under the word ganja in the Century Dictionary I find the following : The hemp plants of the North of India, specifically the dried plant which has flowered. In the Standard Dictionary ganja or janja is said to be the Hemp plant of India and Persia (Cannabis Sativa) dried with its flowers and gum. It is smoked in pipes for its narcotic effect. In the Encyclopædia Britannica under the word bhang I find an East Indian name for the hemp plant Cannabis Sativa, but applied specially to the leaves dried and prepared for use as a narcotic drug..... In India the products of the plant for use as a narcotic and intoxicant are recognised under the three names and forms of bhang, ganga or gunja, and churrus or charras..... Ganja is the flowering or fruitbearing tops of the female plants. I find also under the word hemp in the same publication that bhang is said to be the Hindustan Siddhi or Sabzi, consisting of the dried leaves and small stalks of the hemp and ganja is said to be the ganja of the London brokers, consisting of the flowering and fruiting heads of the female plant."

From these observations it seems fairly clear that the botanical name for the hemp plant is Cannabis Sativa. Mr. Samarewickreme contended that there are two varieties of the hemp plant, namely *Cannabis Sativa* and *Cannabis Indica*. He referred to section 25 of the Ordinance No. 17 of 1929 in which the expression hemp plant was defined thus :

" Hemp plant means the plant known as Cannabis Sativa or Cannabis Indica."

That section was amended by section 6 of Ordinance 43 of 1935 by the deletion of the words " or Cannabis Indica." According to the Oxford Dictionary ganja is a preparation of Indian Hemp (Cannabis Sativa variety Indica). Cannabis Indica is a species of Cannabis Sativa, and that, presumably, is the reason why the section was amended. In my view ganja comes within the definition of hemp plant in the Ordinance.

I would accordingly dismiss the appeal.

Appeal dismissed.

Present : JAYETILEKE, J.

DASANAYAKE vs. JIRASINGHE, EXCISE INSPECTOR

S. C. No. 1356-57—*M. C. Panadura No.* 37703

Argued on : 15th January, 1946.

Delivered on : 23rd January, 1946.

Criminal Procedure Code, section 440—*Summary Punishment for giving false evidence—Conflict between evidence of two witnesses—Do provisions of the section apply.*

A was charged with an offence under the Excise Ordinance and was convicted on the evidence of the Excise Inspector. The village headman who was also a witness gave evidence conflicting with that of the Excise Inspector on a material point. At the conclusion of the trial the Magistrate called upon the headman to show cause why he should not be dealt with under section 440, of the Criminal Procedure Code for giving false evidence. The headman stated " I have made a mistake, I beg the court's pardon." The Magistrate treated this statement as an unqualified admission of guilt and fined the headman Rs. 50.

Held : (i.) That the statement of the headman could not be treated as an unqualified admission of guilt.

(ii.) That the provisions of section 440 of the Criminal Procedure Code are not intended to apply to a case where a conflict arises between the testimony of two witnesses.

N. E. Weerasooria, K.C., with *S. R. Wijayatilake*, for accused-appellant.

T. K. Curtis, C.C., for the Attorney-General.

JAYETILEKE, J.

In this case one Charles was charged under section 40 (*a*) of the Excise Ordinance (Cap. 42) with having failed to give notice to the proper authorities that one Seneris was unlawfully tapping for toddy two coconut trees standing on a land belonging to him. The Excise Inspector who entered the prosecution stated that Charles had not given information about the tapping to any authority. The appellant, who is the headman of the village in which the tapping took place, stated that Charles had given information to him about the tapping and that he told the Inspector several times about it. The Magistrate convicted Charles on the evidence of the Excise Inspector and called upon the appellant to show cause why he should not be dealt with under section 440 of the Criminal Procedure Code for giving false evidence. The appellant stated :

> "I have made a mistake. I beg of the Court's pardon."

The Magistrate treated this statement as an unqualified admission of guilt and fined the appellant Rs. 50. I think the Magistrate has erred in treating the appellant's statement as an unqualified admission of guilt. But quite apart from that it seems to me that the conviction cannot stand. There is an entry in the appellant's diary under date December 13, 1944, which reads as follows :—

> "This day at about 12 a.m. Charles complained that of the lease trees leased out by him to M. D. M. Gunasekera two trees are being tapped by Dasanayakege Seneris without a licence."

The entry supports the evidence which the appellant gave at the trial that Charles gave him the information about the tapping. The Excise Inspector has not stated affirmatively that the appellant did not tell him what Charles had conveyed to him, but his evidence seems to suggest that he was not aware of the fact. It may well be that he was mistaken and that if he had been reminded of the occasion on which the appellant gave him the information he may have remembered it. Mr. Weerasooria invited my attention to two decisions of this Court, *Ahamath vs. Silva* (22 N.L.R. 444) and *Mohamadu vs. Porlentina* (7 Law Rec. 120) where it has been held that the provisions of section 440 are not intended to apply to a case where a conflict arises between the testimony of two witnesses. These decisions seem to me to apply to this case. I would set aside the conviction and acquit the accused.

Conviction set aside.

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

KING vs. FONSEKA & 5 OTHERS

S. C. No. 4—*D. C.* (*Cril.*) *Mannar No.* 166.
Argued and Decided on : 14th February, 1946.

Criminal Procedure—Trial by District Court upon Indictment—Absence of prosecuting Crown Counsel—Refusal of application for postponement—Discharge of accused without calling upon him to plead—Nullity of trial.

On the date fixed for a criminal trial in the District Court the prosecuting Crown Counsel was absent, being held up in another case. A postponement was applied for, but was refused by the District Judge, who thereafter discharged the accused as there was no prosecutor.

Held : (1) That the District Judge had no power to discharge the accused without trial in a case where they were tried upon indictment.

(2) That the discharge of the accused without calling upon them to plead to the indictment rendered the trial a nullity.

(3) That the District Judge might have granted an adjournment on the costs of accused being paid by the Crown.

H. H. Basnayake, Acting Attorney-General, with *G. P. A. Silva, Crown Counsel,* for the Crown-appellant.

N. Nadarajah, K.C., with *C. S. Barr Kumarakulasingham,* for the accused-respondents.

HOWARD, C.J.

We are of opinion that this appeal must be allowed. It appears that on the date of trial, which had been postponed on the application of the Crown from the previous day, an application was made on behalf of the Crown for a further postponement as Crown Counsel was in Colombo. The District Judge refused the application and, according to the record, as there was no one to prosecute in the case he discharged all the accused. We think that he had no power to do this as there had been no trial whatsoever. It might have been different if he had called upon the accused to plead and then asked the prosecution to open their case, but he did not do so, and the trial was therefore a nullity. On the other hand, we think that the District Judge might have granted an adjournment on the costs of the accused being paid by the Crown. In these circumstances we set aside the order of discharge and direct that the accused be tried. At the same time we suggest that the costs of the accused amounting to Rs. 315 be paid to them by the Crown.

Appeal allowed.

Present : JAYETILEKE, J.

CHOW & TWO OTHERS vs. DE ALWIS, PRICE CONTROL INSPECTOR

S. C. No. 937/39—*M. C. Colombo No.* 48698.
Argued on : 21st December, 1945.
Delivered on : 24th January, 1946.

Defence (*Restriction of Meals*) (*No.* 3) *Regulations*, 1944, *Regulation* 2 (1)—*Serving of chicken and milk at restaurant—Essential question—Was restaurant in existence on September* 1*st*, 1939.

Accused, the proprietors of Shanghai Restaurant, were charged with having on 30th November, 1944, served chicken and milk to a customer in contravention of Regulation 2 (1) of the Defence (Restriction of Meals) (No. 3) Regulations, 1944, which prohibited the serving of chicken and milk in any catering establishment, which was not in existence on September 1st, 1939, and were convicted by the Magistrate. The prosecution admitted that on that date there was an eating-house at the said premises which was run by one Iyer. The accused had not purchased that business and could not therefore be said to be their successor. It was contended in behalf of the accused that as meals were sold by Iyer at the said premises on September 1st, 1939, the premises were excluded from the application of Regulation 2 (1).

Held: That 'catering establishment' in the Regulation did not mean merely the building in which business was carried on, but meant the business itself and that the accused were rightly convicted.

Per JAYATILAKE, J.—"The Regulation is in a group of regulations which deal with restrictions of meals, and in my opinion it shall be so interpreted, if it presents any ambiguity, as to promote the restriction of meals."

Cases referred to:—River Wear Commissioners *vs.* Adamson (1877—2 A. C. 743.)
Sussex *vs.* Peerage (1844—11 Cl. & F. 83.)

H. V. Perera, K.C., with *G. E. Chitty*, for accused-appellant.

T. K. Curtis, Crown Counsel, for Attorney-General.

JAYETILEKE, J.

The accused are the proprietors of a restaurant called Shanghai Restaurant at No. 81, Galle Road, Bambalapitiya. One Iyer had an eating-house at the premises up to March, 1942. Shortly after the Japanese raids he left for India leaving all his belongings in the charge of the landlord. In July, 1942, the accused took the premises on rent from the landlord and opened the restaurant. They were charged with having served chicken and milk to one Salgado on November 30, 1944, in contravention of Regulation 2 (1) of the Defence (Restriction of Meals) (No. 3) Regulations, 1944. After trial they were convicted and fined Rs. 400 each. The Regulation reads :—

> "No food, consisting of or containing any article specified in the schedule hereto, shall be sold, supplied or served at any catering establishment which was not in existence on September 1, 1939."

The essential question is whether the Shanghai Restaurant was in existence on September 1, 1939. The prosecution admitted that on that date there was an eating-house at the said premises which was run by Iyer. The accused has not purchased Iyer's business, and it cannot, therefore, be said that they are successors of Iyer in that business. Mr. Perera contended that as meals were sold at No. 81, Galle Road, by Iyer on September 1, 1939, the said premises were excluded from the application of Regulation 2 (1). The Regulation is in a group of regulations which deal with restrictions of meals, and in my opinion it shall be so interpreted, if it presents any ambiguity as to promote restriction of meals. This interpretation, I think, accords with the principle enunciated by Lord Blackburn in *River Wear*

Commissioners vs. Adamson (1877) 2 A. C. 743 at 763-65 and per Tindal, C.J., in *Sussex vs. Peerage Case* (1844) 11 Cl. & F 83 at 143.

> "But if any doubt arises from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the Statute, and to have recourse to the preamble, which, according to Chief Justice Dyer in *Stowel vs. Lord Zouch* (Plowden 369) is 'a key to open the minds of the makers of the Act and the mischiefs which they intended to remedy'".

The expression "catering establishment" is defined in Regulation 5 as follows :—

> "Catering establishment means a hotel, restaurant, cafe, resthouse, eating-house, tea or coffee boutique, or other place of refreshment open to the public."

On the materials before me, I am of opinion that the catering establishment that is excluded from the application of Regulation 2 (1) is the eating-house that was run by Iyer. That catering establishment ceased to exist in April, 1942. I think it would require the clearest and the most precise language to give the accused, who did not have a catering establishment on September 1, 1939, the right to open one after that date and to serve therein meals prohibited by the Regulation. I can find nothing in the language of Regulation 2 (1) or in the definition of "catering establishment" in Regulation 5 which would justify me in holding that the intention of the Legislature was to exclude from the application of Regulation 2 (1) merely the building in which Iyer carried on his business. The Shanghai Restaurant was not in existence on September 1, 1939, and the convictions of the accused are, therefore, right. I would accordingly dismiss the appeals.

Appeals dismissed.

Present : HOWARD, C.J.

CECILY HAMY vs. P. C. 78 ZOYSA

S. C. No. 58—*M. M. C. Colombo No.* 68088
Argued and Decided on : 18th February, 1946.

Vagrants' Ordinance (*Cap.* 26), *section* 3 (1) (*c*)—*Person found wandering abroad and not having any visible means of subsistence and not giving a good account of himself—Ingredients of offence—Burden of proof.*

Appellant was found by two policemen on a street in the early hours of the morning with a naval man and a boy. When the police came the boy ran away but was arrested. The appellant too was arrested and charged under section 3 (1) (*c*) of the Vagrants' Ordinance and was convicted by the Magistrate on the ground that the accused and her witnesses did not appear to be speaking the truth.

Held : That it was incumbent upon the prosecution to prove the ingredients of the offence and that the appellant could not be convicted in the absence of evidence from the prosecution to prove that the appellant was a person without any means of subsistence.

M. M. Kumarakulasingham, for the accused-appellant.
R. A. Kannangara, Crown Counsel, for the Attorney-General.

HOWARD, C.J.

In this case the appellant was charged under section 3 (1) (*c*) of the Vagrants' Ordinance (Cap. 26). That section is worded as follows :— "Every person wandering abroad or lodging in any verandah, outhouse, shed or unoccupied building, or in any cart, vehicle or other receptacle without leave of the owner thereof, and not having any visible means of subsistence and not giving a good account of himself shall be deemed an idle and disorderly person within the true intent and meaning of this Ordinance, and shall be liable upon the first conviction to be imprisoned, with or without hard labour, for any term not exceeding 14 days or to a fine not exceeding ten rupees."

The appellant was found by two policemen in the early hours of the morning in Schofield Place in company with a naval man and a boy. When the police came the boy whistled and ran away, but was arrested. The naval man also ran away and the appellant was arrested. The Magistrate seems to have convicted the appellant on the ground that she and her witnesses did not appear to be speaking the truth. He seems to have forgotten that it was incumbent on the prosecution to prove the ingredients of the offence with which the appellant was charged. One of the ingredients of this offence was that the appellant was a person without any visible means of subsistence. There was no evidence supplied by the prosecution to prove this. In fact, so far as the appellant is concerned, the evidence was all the other way inasmuch as she called in evidence a man called Edwin Singho who stated that she was his mistress and that he was keeping her at her parents' house. This was borne out by her father who gave evidence. This ingredient of the offence not having been established, the conviction must be set aside.

Conviction set aside.

Present : KEUNEMAN, J., & CANEKERATNE, J.

KARTHELIS APPUHAMY vs. SIRIWARDENE

S. C. No. 75—D. C. Inty. Colombo No. 10277.
Argued on : 7th, 8th, 9th and 14th November, 1945.
Decided on : 22nd November, 1945.

Will—Disputed—Exclusion of blood relatives of testator from specific devices of acquired property—Inherited property to be dealt with as on intestacy—Is will unreasonable or unnatural—When should Appeal Court interfere with findings of lower Court on questions of fact—Misdirection—Failure on the part of trial judge to consider all the evidence, or to appreciate evidence correctly or to give adequate reasons for his conclusions.

Where a testator made specific devises of his acquired property to certain beneficiaries, who were not his relatives, excluding from the operation of his will his inherited property, which would devolve as on intestacy on the "admitted relatives".

Held : (1) That the will was not unreasonable or unnatural.

(2) That the actual feelings of the testator towards his relatives should be considered in deciding whether a will is reasonable and natural or not.

(3) That where a trial Judge has come to a conclusion without weighing or deciding the facts on which he could base his inference and where such conclusion has also coloured the attitude of the Judge to the other features of the case, his judgment is vitiated, as it amounts to a serious misdirection.

Per KEUNEMAN, J.—It has been strongly urged on us that we should not interfere with findings of fact by the trial Judge, and a long series of cases upon this matter decided both in Ceylon and in England have been cited to us. I may say that in this case, as I have shewn earlier, we are not dealing with a finding as to the truth of the oral evidence based upon observation of the manner and demeanour of witnesses, although even in such a case we are not entirely absolved from the obligation of rehearing the case : see *Yuill vs. Yuill* (29 C. L. W. 97). In this case the Judge has decided upon the "probabilities" of the case, and a Court of Appeal is in as good a position to weigh the probabilities as the trial Judge.

N. Nadarajah, K.C., with *N. E. Weerasooriya, K.C.*, *S. R. Wijayatilake* and *S. Rajendra*, for petitioner-appellant.

H. V. Perera, K.C., with *S. P. Wijewickreme* and *H. W. Jayawardene*, for 1st respondent.

KEUNEMAN, J.

The petitioner claimed probate of a will alleged to have been made by Don Fredrick Siriwardene (hereafter referred to as the testator) on the 5th of October, 1942. The testator died on the 12th October, 1942, in Colombo. He excluded from the operation of his will the properties which he had inherited from his father, and out of his acquired properties he devised specified lands to the Sailanthayatana Pirivena of Bentara and to Ananda College. The remainder of his acquired property the testator devised to the petitioner "who has been assisting me chiefly residing at my house for about 29 years and regularly serving me obediently", and to his "two poor sisters", Cecilia Siriwardene and Lily Siriwardene, in equal shares, with the proviso that "they, their children and grandchildren shall be entitled to possess the said properties". The testator also devised his residing house to the petitioner and Cecilia Siriwardene, and directed that the three beneficiaries he had named should pay Rs. 300 to the preaching hall fund of the Welegedera Vihare. The petitioner was appointed executor of the will.

The 1st respondent opposed the grant of probate, and the trial Judge held that the evidence produced before him had not satisfied him that the will propounded was the act and deed of the deceased, and dismissed the application of the petitioner. From this judgment the petitioner appeals.

It was in evidence that the testator's father Don Cornelis Siriwardene married three times. The testator was the only child of the first marriage, and himself did not marry. The children of the second bed were the 1st respondent and Davith who died leaving children, and two daughters. On the third occasion Don Cornelis married Elpi Nona who had two daughters, Cecelia and Lily Siriwardene, the devisees. But on the evidence recorded in this case it is at least doubtful whether these two can be regarded as the lawful children of Don Cornelis. The petitioner himself is not a relation of the testator and appears to have entered the house of the testator at the age of 12 in the capacity of a servant, but the petitioner stated that for 20 years he had been living with the testator and assisting him in all his personal and business affairs, including the management of his properties for a few years before the testator's death, and had become his trusted manager and steward.

In this capacity he used to visit the deceased's estates and pay all his labourers, and was also entrusted with the control both of his domestic and his business matters.

The will was alleged to have been signed by the testator on the 5th October, 1942, in the presence of five witnesses, at a time when the testator was ill. The petitioner says he was unaware of the execution of the will at the time and till after the death of the testator. On the 7th October the testator was removed to the General Hospital, Colombo, and on his way is said to have stayed for a short time at Maliban Hotel in the Pettah, where John Perera was Manager.

The testator died at the General Hospital on the 12th October, but his death had not been anticipated earlier. The body was brought to his village. On the 13th October the 1st respondent as next of kin arrived at the testator's house and demanded the keys which the petitioner refused to give up except to the headman. Eventually the headman, Jayanetti, was brought and in his presence the petitioner locked up all the drawers and cupboards and handed the keys to him. At this stage the petitioner did not make any claim as executor under the will. There is evidence on the part of another servant of the testator, Sammy Jayasinghe, that he told the petitioner on the 13th that he was executor and devisee under a will executed by the testator. Sammy Jayasinghe is said to have been the person who took down the terms of the will from the testator and transcribed the will, and also signed as a witness.

There is a discrepancy in the evidence here, for the petitioner says that Sammy Jayasinghe only gave him this information on the 15th, though he had heard on the 13th from another witness to the will, Thomas Appuhamy, of the execution of a will. But no one appears to have informed the 1st respondent about the execution of the will, and the will itself was not forthcoming at this stage.

The cremation took place on the 15th October. A few days before the 20th October the petitioner consulted Neil de Alwis, Crown Proctor of Balapitiya, about this matter, and on his advice the five witnesses to the alleged will were taken to the proctor and swore affidavit P18 on the 20th October. In P18 it was stated that a will was signed and attested by them on the 5th October, and the witness, Thomas Appuhamy, added that the will was taken in the testator's suitcase to Colombo when he went to enter the hospital.

Later, on the 5th November an advertisement P4 was inserted in the "Daily News" offering a reward of Rs. 50 for an "important document" lost on the 7th October between Colpetty and the General Hospital. The document was said to be enclosed in a cover bearing the name of Wilson de Silva, Proctor, Kalutara. The name and address of the advertiser were not given, but merely a number. A similar advertisement P5 was inserted in the "Dinamina" of the 6th November.

In response to this, John Perera of the Maliban Hotel wrote P6 on the 12th November to the "Dinamina" that he had the document in the envelope described and requested that the advertiser should see him. Owing to delay—which the evidence shows was attributable to the office of the "Dinamina",—the letter of John Perera was not forwarded to the advertiser for some time. So on the 17th November John Perera wrote another letter (P7) to the "Dinamina". Eventually the petitioner met John Perera and obtained the envelope. Inside the envelope were found the will in question, and also certain documents relating to a different matter in respect of which Proctor Wilson de Silva had obtained a legal opinion for the testator. John Perera's evidence was that on the 7th October the testator had handed him the envelope to keep for him as he was going to enter hospital and would return in three or four days.

A large body of evidence was called on both sides. With regard to this evidence the trial Judge said he was "unable to refer to any particular witness and say that his evidence can be accepted as true or rejected as false". He added that "the only witness whose looks and appearance caused a prejudice in my mind is Sammy Jayasinghe, and the only witness who impressed me as speaking nothing but the truth is Gomis. As regards the witness Jayanetti, Headman of Welagedera, and Don Lewis Appuhamy, I think they cut a sorry figure under the cross-examination". But he makes it clear in his next sentence that he is referring to "demeanour and deportment", and adds: "I have *therefore* to decide the case on probabilities". I think the Judge held here that he was unable to say that the evidence of any witness was true, though he was favourably impressed by the demeanour of Gomis and unfavourably by the demeanour of Sammy Jayasinghe, and probably also of headman Jayanetti and Don Lewis Appuhamy.

It has been urged by Counsel for the 1st respondent that the evidence of Gomis has been accepted as true, and that this evidence demolishes the case of the petitioner that a will was signed on the 5th October. The District Judge has made it abundantly clear that he was unable to

say that the evidence of any single witness " can be accepted as true " and was unable to decide the case on the oral evidence. He has certainly not regarded the evidence of Gomis as decisive of the case. I think it would be wrong on our part to hold in appeal that the evidence of Gomis destroys the story of the petitioner and his witnesses. The Judge has really decided the case on the " probabilities ", and I think it is our duty to consider the case upon that basis.

At an earlier stage of his judgment the trial Judge said: " I felt some difficulty in deciding this case, and the special difficulty arose from the episode of the Maliban Hotel and the legal advice sought from Mr. N. de Alwis. I could not easily reconcile myself to the view that these villagers possessed the degree of cleverness to think out and execute a plan so elaborate and so full of circumstances as the Maliban episode and the legal advice from Mr. N. de Alwis ". There is no doubt that the Judge has touched upon a very important factor in the case which may well be regarded as favouring the case for the petitioner. Unfortunately the Judge has not discussed this matter in detail, and he has not touched upon the advertisement in the papers and the two letters written by John Perera to the " Dinamina." Possibly his language may be regarded as covering that also, but the language is not clear. In my opinion this aspect of the case should have been fully discussed and the Judge should have given the benefit of his findings and the reasons on which they were based. All that he has done is to mention that " after much see-sawing " he settled to the view that the story of the witnesses in support of the will is " irreconcilable with probabilities ", the Maliban episode " a fake ", and the legal advice from N. de Alwis " a make-believe ". In my opinion the Judge has not been helpful in assisting us to form a just appreciation of the case.

As regards the " probabilities ", the first and also the last point the Judge makes is that " None of the admitted relatives of the deceased is a beneficiary under the will ", and that " The will in question is not a reasonable or natural will ". There can be little doubt that these findings affected the Judge's attitude towards the case, and I think they should be examined. If by these words the Judge suggested that the " admitted relatives " have been entirely cut off, that suggestion is incorrect. For the testator purports to have excluded from the operation of the will the property he inherited from his father, and this property would devolve as on intestacy on the " admitted relatives ". Perhaps the Judge was not entirely unmindful of this, as he had earlier pointed out that it was only the acquired property of the testator that had been devised to the named beneficiaries, but he said that there was no evidence in the case as to the nature and extent of the inherited property. This last comment is however not accurate, for the document P16 shows that the testator's father left to his heirs an intestate estate consisting of 31 lands which in 1923 were valued at about Rs. 10,000, and at the time of the testator's death would probably have been more valuable. On the face of the will then the testator had drawn a sharp and intelligible distinction between his inherited and his acquired property, and had contrived that the inherited property should pass to his " admitted heirs ".

The Judge has not given his reasons for holding that the will was unreasonable or unnatural. It has to be remembered that the testator had left behind him no wife, no children, and no full brothers and sisters. The only " admitted heirs " were half brothers and sisters of the second bed. That the testator had a special kindness for Cecilia and Lily there can be little doubt. Whatever their real claims to be the children of the testator's father, the testator had always recognised them as sisters. In fact the Judge does not reject and appears to accept the evidence of Cecilia that the testator was not on very good terms with anybody except her, her sister Lily, and the petitioner, and the Judge himself recognises the likelihood " the the sisters were the special objects of his bounty ". The documents P2, P25, P26 and P27 also show that the teatator was fond of Cecilia and Lily and regarded them as sisters. Admittedly Cecilia was living with the testator for some time before his death. The petitioner said that Lily was also living with the testator. That was denied by Gomis, but another witness for the 1st respondent, Amerasinghe, admitted that Lily also lived with the testator for some time. In fact the 1st respondent himself admitted that he had stated that Lily was his sister " for the purpose of giving her in marriage." There had been no objection to the inclusion of the names of Cecilia and Lily as heirs of the testator's father in the testamentory proceedings (P16) although the question of their descent was raised in a later partition case (P17).

There has been a considerable body of evidence as to the relations between the testator and his half brothers, the 1st respondent and Davith. There had been litigation between Davith and the testator in 1927 (see P2), and the petitioner alleged that the 1st respondent was not in the habit of visiting the testator. At the same time there was the evidence of Gomis and others that 1st respondent visited the testator. The Judge

has not discussed this important question nor recorded his findings. I am not satisfied that the Judge gave his attention to these matters and the failure to consider them considerably vitiates his judgment.

Let me turn to the case of the petitioner. Admittedly he was not a relation and had joined the testator as a servant at the age of 12. But about 20 years had elapsed since that time. The billhead P1 shows that he had risen to the position of a partner whose name was included in the business in at least one important venture by the testator. The petitioner claimed that he was also in reality the manager of all the testator's affairs and had performed genuine and valuable service on behalf of the testator. The witness, Thomas Appuhamy said that the petitioner was "like an adopted son" to the testator. The trial Judge should have considered all this evidence as well as evidence to the contrary, but there is nothing to show that he has done so, and I think he has misdirected himself in this connection.

Finally, there is the fact that on the face of the will the testator had provided for certain devises to charities.

All these matters which I have mentioned have a strong bearing on the question whether the will in question can be regarded as unreasonable or unnatural. I think it would be an error to suggest that the preference of a testator for persons who are on terms of friendship and cordiality, though not of relationship, over those who are to some extent connected by blood but are not on terms of intimacy can be branded as unreasonable or unnatural. On the contrary I should regard it as natural and reasonable that a testator should choose as recipients of his bounty those who are near and dear to him, whether connected by blood or otherwise, and in this respect I do not think a Sinhalese testator differs from any other testator.

I have dealt at some length on this subject because I think it shows a fundamental weakness in the judgment and because the Judge's views on this matter must inevitably have coloured his opinion on the other aspects of the case.

The other points which the Judge makes as regards the probabilities are as follows :—

(1) He records his "conjecture" that the will was fabricated on the 11th October when the petitioner returned to the village after leaving the testator in hospital. He also holds that the will could not have been fabricated after the death of the deceased. There is not an atom of evidence to support either of these points. The second point may actually be regarded as favouring the petitioner's story, and Counsel for the 1st respondent himself strongly attacked that finding.

(2) The Judge comments on the fact that the testator did not before the date of the execution of the will give any indication that he was going to execute a still. I do not say that this point could not be considered by the Judge, but it does not appeal to me as a conclusive argument.

(3) The trial Judge said that the evidence of Peter Jayasinghe was "irreconcilable" with that of Sammy Jayesinghe because Sammy Jayasignhe says he was called into the room by the testator and asked whether Peter Jayasinghe and other witnesses had come to the house, while Peter Jayasinghe says that during all that time he waited in the house of the deceased. In the first place the evidence of Peter Jayasinghe is not correctly given ; what he did say was : "I waited from 1-30 till about 4-30 p.m. *Meanwhile I went to a school and came back*". This shows that Peter Jayasinghe was not in the house all the time, and it is possible that the testator had discovered this. In the second place, even if at the most there was a discrepancy, that does not make the evidence of the two witnesses "irreconcilable". In fact the two witnesses corroborate each other on material points.

(4) The trial Judge says that as regards the 5th October the petitioner said he was away from home for a good part of it, he did not say that he was away from home from 10-30 a.m. to 4-30 p.m. What the petitioner actually said was : "In the morning I went out to fetch Dr. Ratnayake and returned with the doctor. Then I went back in the same car to fetch medicine and returned home about 6 p.m. I was out practically that whole day. I had also on that day to go to a boutique". It is at least possible that the short interval during which the petitioner was in the house did not coincide with the dictation or the drafting or the signing of the will.

(5) The trial Judge says that if the testator desired secrecy as regards the will, as the witnesses assert, his object was likely to be defeated by having it witnessed by five villagers, and that he could easily have arranged for a quiet execution of the will before a notary. The testator could not easily have gone out that day without hav ng caused comment. To my mind it is a question whether the coming of a notary or of the five villagers to the house would have caused greater publicity—and even a notary would have needed two witnesses. I do not regard this argument as a strong or unequivocal one.

(6) The Judge says that he doubts whether the envelope containing the will was put into the

suitcase; it would have been returned to Proctor Wilson de Silva at Kalutara, or at any rate the petitioner would have seen it at Colpetty when he opened the suitcase. The first point has some substance, for the testator actually met and talked to Proctor Wilson de Silva on his way to the hospital, and he certainly had an opportunity to give over the envelope with its contents to the proctor. As regards the second point, it would depend on how the bag was packed and unpacked, as to whether the petitioner would have seen the envelope—and even if he saw it he may not, if his story be true, have known what the importance of the envelope was, and may not have registered that fact of having seen the envelope in his mind.

The Judge comments on that fact that the testator kept the envelope containing the will with John Perera rather than with Proctor Wilson de Silva. As I suggested before, this is a point which was worthy of consideration, but at the same time one has to bear in mind that fact that individual testators have their idiosyncracies and that explanations which may have been available if they were alive are not obtainable after their death.

(7) The Judge also comments on the fact that no mention was made by the testator to the petitioner, who had been appointed executor, of the making of the will. Here again, this is a point worthy of consideration, but as against it one has to bear in mind that desire for secrecy spoken to by the witnesses. Further, there is the fact that the testator did not anticipate that he was going to die so soon.

(8) The trial Judge thought that the Maliban incident and the subsequent incidents which led to the discovery of the will were " too good to be true ". As I suggested before, this is too facile a finding, and the Judge has not thought fit to examine the whole of those events in detail and to record his reasons for the finding.

(9) The Judge comments on the fact that the petitioner had gone to Proctor N. de Alwis. He says : " Galmatte is within the jurisdiction of the District Court of Kalutara, and ordinarily people of Galmatte would transact their business at Kalutara ". This may be true with regard to cases instituted in the Kalutara Courts, but there is nothing to show that for legal advice people of Galmatte always go to Kalutara, and there is definite evidence in that case that Proctor N. de Alwis's residence is much nearer to Galmatte than is Kalutara.

(10) The Judge says that the readiness with which the five witnesses appeared before Mr. de Alwis for affirming to the affidavit made him think " that they are conspirators who are prepared to collaborate to the end ". All I can say is that this is a most startling assumption, and no reasons are given for it.

Further, the Judge held that Lewis Appuhamy the husband of Cecilia was a collaborator. Not only is this not supported by any evidence, but in fact Lewis was called by Counsel for the 1st respondent into the witness-box and no suggestion whatsoever of collaboration was put to him. I think the assumption of the Judge is unwarranted.

(11) The trial Judge makes a very strong comment on the fact that the 1st respondent was never told shortly after the death that a will had been executed, and that his claim for the keys was not challenged. Here I think the Judge is on much stronger ground, and that this is a matter which deserved the fullest consideration. This aspect of the case affects the petitioner, Sammy Jayasinghe, the headman Jayanetti, and possibly Thomas Appuhamy. One difficulty however is that the Judge has not really considered possible explanations. In fact throughout his judgment—although he does mention that fact that it was " after much see-sawing'' that he arrived at his decision—there is hardly anything to show why the " see-saw " was necessary or what considerations really caused any judicial vacillation.

(12) The Judge has not decided the case on the expert evidence called as regards the genuineness of the signature.

I have been at great pains to consider the trial Judge's reasons because it has been strongly urged on us that we should not interfere with findings of fact by the trial Judge, and a long series of cases upon this matter decided both in Ceylon and in England have been cited to us. I may say that in this case, as I have shewn earlier, we are not dealing with a finding as to the truth of the oral evidence based upon observation of the manner and demeanour of witnesses, although even in such a case we are not entirely absolved from the obligation of rehearing the case : see *Yuill vs. Yuill* (29 C. L. W. 97). In this case the Judge has decided upon the " probabilities " of the case, and a Court of Appeal is in as good a position to weigh the probabilities as the trial Judge. On one matter, viz., whether the will can be regarded as an " unnatural or unreasonable " will—the Judge has come to a conclusion without weighing or deciding the facts on which he could base his inference, and I think this conclusion has coloured the attitude of his inference, and I think this conclusion has also coloured the

attitude of the Judge to the other features in the case. I think this amounts to a misdirection and a serious one. To some extent the Judge has depended on conjectures and assumptions which cannot be justified. There have been a number of points decided by the Judge on an incorrect appreciation of the evidence. For some of his findings the Judge has given no reasons or inadequate reasons. And finally, though it was obvious—and at one stage the Judge himself so felt—that there were some strong points in favour of the petitioner, the Judge has drawn a picture of the petitioner's case in unrelieved funeral colours.

In the circumstances I am unable to support the judgment of the District Judge, and I think it must be set aside. I have carefully considered what further order should be made in this matter. In my opinion it is not possible for us to enter any final order in this matter, more especially as many points of importance have not been decided by the Judge, some of which have been indicated in this order. In these circumstances, I set aside the judgment and send the case back for trial *de novo*.

It may be possible by agreement of parties to make the evidence already taken evidence in the case, but I think it is desirable that each witness should at least be retendered for cross-examination so that the Judge who re-hears the case may have an opportunity of deciding on the truth or otherwise of the evidence given. I wish to impress on the Judge that he is not to take as final any arguments on fact which may appear in this order but that he should give his consideration to all aspects of the case.

The appellant is entitled to the costs of appeal. The costs of the trial already held will be in the discretion of the Judge who re-tries the case.

Set aside and sent back.

CANEKERATNE, J.
I agree.

Coram : SOERTSZ, S.P.J., & CANNON, J.

MUTHUSAMY *vs.* SENEVIRATNE

S. C. No. 200/*L*—*D. C. Badulla* 7155.
Argued on : 18th February, 1946.
Delivered on : 21st February, 1946.

Action rei vindicatio—*Burden of proving plaintiff's title—Misdirection.*

Held : (i.) That in an action for declaration of title it is for the plaintiff to establish his title to the land he claims and not for the defendant to show that the plaintiff has no title to it.

(ii.) That it is a serious misdirection on the part of a Judge to overlook this rule.

H. V. Perera, K.C., with *F. A. Tisseverasinghe* and *H. W. Thambiah*, for defendant-appellant.
No appearance for *plaintiff-respondent.*

SOERTSZ, S.P.J.

The learned trial Judge has reached the conclusion to which he came in this case by what appears to me to amount to grave misdirection. He begins the material part of his judgment by observing that—

> " The obvious course for the defendant to take was to locate these lots in reference to plaintiff's plan X. He had a plan of the estate he bought, viz. : 196 (D1) and he could have surveyed the estate in reference to plan X for the purpose of ascertaining whether plaintiff's lot forms part of this estate. Instead of following the obvious course, he chooses to adopt a very dubious method of proving that plaintiff's lot is included in the settlement order. He calls Mr. Crofton, a surveyor. Upon reading his evidence one comes to the conclusion that his evidence is most unsatisfactory and utterly unworthy of credit."

In regard to the first part of this observation, it is a serious misdirection in that it overlooks the elementary rule that in an action for declaration of title it is for the plaintiff to establish his title to the land he claims and not for the defendant to show that the plaintiff has no title to it. The plaintiff relying on deed P 1 of 1932 pointed out to his surveyor, Crofton, the land that he alleged was the land conveyed on that deed. That is the land depicted in the plan made for this case and marked X. A comparison of the boundaries shown on this plan with the boundaries mentioned in deed P 1 shows that they are entirely different and that they cannot apply to one and the same land. Moreover, the extent surveyed is also much less than the extent of the land conveyed by P 1. These facts make it antecedently probable that the Mahena of plaintiff's deed, if it existed at all must be sought outside the land that has for long been Wegedera estate. The

Surveyor has identified the lot of land he surveyed at plaintiff's instance—and plaintiff admits he pointed it out to the Surveyor—as that part of Wegedera estate which is shown as the narrow southern block of land on the sketch P 11. The Surveyor says he was able to locate the land in that manner without difficulty because in an earlier case he had surveyed the land to the north and was thus familiar with the locality and also because the plans supported that identification. An examination of the several plans filed in the case does, I think, clearly, support the Surveyor's evidence. Such an examination also shows that the land in dispute is within the Settlement Order made in favour of the defendant after an inquiry at which the plaintiff himself preferred a claim to this land unsuccessfully.

A perusal of the plaintiff's evidence leaves one with the impression that he was unable to make up his mind as to the best way of presenting his case. It seems fairly clear that when Tea Control came into force, relying upon this deed P 1 which he obtained from his uncle, Vedangan, the plaintiff asked for and obtained coupons by pointing out this part of Wegedera estate as the land covered by that deed. The defendant too was receiving coupons in respect of this block as part of Wegedera estate. Soon, this simultaneous issue of coupons to two parties in respect of this lot came to light and the issue to the plaintiff was stopped. He gave vent to his chagrin by means of this action. He has, in my opinion, signally failed to prove his case but, nevertheless, obtained a verdict in his favour because the defendant by foolishly evading service of summons for over two years created in the mind of the Judge a strong impression that a rich defendant was contending against a humble labourer and that the rich man was even able to enlist the support of the surveyor. That is the impression one receives from the judgment.

After careful consideration, I am satisfied that the evidence of the Surveyor is above reproach and that the learned Judge's censure on him was hardly called for. I would set aside the judgment and dismiss the plaintiff's action with costs in both Courts.

Appeal allowed.

CANNON, J.
I agree.

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

THAMBIPPILLAI vs. KURUKKAL & OTHERS

S. C. No. 80—*D. C. Inty. Jaffna No.* 16608.
Argued on : 12th and 13th December, 1945.
Decided on : 18th December, 1945.

Trusts Ordinance, section 102—*Religious Trust—Petition to Government Agent by* 79 *persons claiming to be interested in—Grant of certificate by Government Agent after inquiry—Action instituted by eight of the petitioners and four others—Can action be maintained—Nature of the inquiry by the Government Agent regarding interestedness of plaintiffs—Is the Government Agent's finding final—Matter of semi-public interest—Desirability of remitting case to enable plaintiffs to regularise plaint.*

Seventy-nine persons claiming to be interested in the matters relating to a religious trust which are set forth in the plaint, presented a petition to the Government Agent, Northern Province, in compliance with the requirements of section 102 of the Trusts Ordinance (Chap. 72) praying for a certificate in terms of paragraphs (*a*) and (*b*) of sub-section (3) of section 102. Having obtained this certificate eight of the 79 petitioners and four strangers to the petition instituted this action.

On a preliminary issue raised as to whether the plaintiffs had complied with section 102 (3) of the Trusts Ordinance before filing action the learned District Judge dismissed the action as Counsel for the plaintiff stated that he was not applying to strike out the names of any of the plaintiffs.

Held : (i.) That the trial Judge was right in dismissing the action as the plaintiffs refused to ask that the names of the non-petitioner-plaintiffs be struck out.

(ii.) That the finding of the Government Agent or the Assistant Government Agent regarding the interestedness of persons within the meaning of section 102 (2) is not final, and it would be open to a Court to consider that question independently should it arise before it.

Per SOERTSZ, A.C.J.—" As I have already observed, the trial Judge had no alternative but to make the order he made. It was not for him, even if he had the power, to strike out those who had not been petitioners. I should have, therefore, dismissed this appeal but that the questions involved are of semi-public interest, and for that reason I would accede to the application of appellants' counsel, make order that the case be remitted to enable the parties to apply to the Court for such of them as had not joined in the petition to withdraw from the action, and for the action to proceed thereafter. The *locus standi* of the eight others was not questioned.

N. Nadarajah, K.C., with *N. Kumarasingham*, for the plaintiffs-appellants.
H. V. Perera, K.C., with *S. J. V. Chelvanayagam*, for substituted defendants-respondents.
S. Mahadeva, for 2nd defendant-respondent.

SOERTSZ, A.C.J.

Seventy-nine persons, claiming to be interested in the matters set forth in the plaint filed in this action, presented a petition to the Government Agent of the Northern Province, in compliance with the requirements of section 102 of the Trusts Ordinance (Cap. 72), praying for the appointment of a Commissioner or Commissioners to inquire into the subject matter of their plaint and for a certificate from the Government Agent in terms of paragraphs (*a*) and (*b*) of sub-section (3) of section 102. Having obtained this certificate, eight of the 79 petitioners and four strangers to the petition instituted this action.

On the trial date, 47 issues were framed and adopted, but by agreement of Counsel appearing for the various parties, issues 33 and 34 were submitted for determination as preliminary issues. Those issues are :—

(33) Did the plaintiffs submit a petition to the Government Agent as required by section 102 (3) of the Trusts Ordinance before filing this action ?

(34) If not, can the plaintiffs maintain this action ?

In the course of the argument Counsel appearing for the plaintiffs declared that he was not making an application to strike out the names of any of the plaintiffs. The learned Judge thereupon dismissed the plaintiff's action with costs to the 2nd, 3rd, 4th defendants and 1st substituted defendant. The appeal is from that order.

I am clearly of the view that the trial Judge had no alternative but to make the order he did make in view of the stupid and petulant attitude of the plaintiffs when they refused to ask that the names of the non-petitioner-plaintiffs be struck out.

Counsel appearing for the plaintiffs in the appeal, however, declared that he could not support the contention of his clients in the Court below, and he asked that in view of the substantial interests involved in the litigation, the case be sent back for an application to be made to the Court for the non-petitioner-plaintiffs to be permitted to withdraw from the action. But Counsel appearing for the respondents contended strongly that the contemplated withdrawal would not be of any avail because, he maintained, there would still be nothing to show that the eight remaining plaintiffs were those found by the Government Agent to be interested within the meaning of section 102 (2) of the Ordinance in the matters for consideration and adjudication by the Court. His argument was that inasmuch as, for the purpose of appointing Commissioners, and, thereafter, on their report, granting or refusing the requisite certificate, the Government Agent was not required to go beyond satisfying himself that any five of the petitioners were interested, it would be reasonable to suppose that he would not address himself to the question whether all 79 were interested and that, in that view of the matter, it would be impossible to say that the 8 remaining petitioners-plaintiffs in this case, or 5 of them, are the persons on whose interestedness the Government Agent based himself in appointing Commissioners and granting the certificate. Mr. H. V. Perera carried his argument to the point of maintaining that all the 79 petitioners should have joined as plaintiffs and that an action by any fewer must fail. The fallacy of this argument, I think, lies in the assumption that the question of interestedness is once for all considered and determined by the Government Agent or the Assistant Government Agent in the course of discharging the duty imposed on him by sub-section 4. There, certainly, are no words in the section that provide that his finding in that respect is final, and it would hardly be reasonable to read that section as implying such finality. The inquiry held by the Government Agent or the Assistant Government Agent is primarily, for the purpose of satisfying himself that there is a substantial matter for investigation by a Court, and that, *prima facie*, five persons at least are interested in it. The inquiry is held *ex parte* and it would cause great hardship if persons who had not an opportunity of being heard in regard to the question of interestedness were held to be bound by the Government Agent's or Assistant Government Agent's view of the matter. In my opinion, it would be open to a Court to consider the question of interestedness independently should it arise before it. Mr. Perera's argument, by its implication, conceded that the case would be properly brought if all the 79 petitioners joined as plaintiffs but that contention ignores the possibility or, according to his submission, the probability that among the 79 there would be many whose interestedness had not been considered at all, and in respect of them, there would, ordinarily, be misjoinder in that persons found to be interested in the litigation had joined with others not found to be so interested. To surmount that difficulty, Mr. Perera resorted to what may be described as the " Group theory." He said, if I understood him aright, that in a case in which 79 persons had petitioned under section 102 (2) and the Government Agent, satisfied that 5 of them were interested, granted his certificate, the ascertained interestedness of those 5 attracted the other 74 as co-plaintiffs by force of their having joined in the petition. This is very

ingenious, but hardly satisfactory. The words in section 102 seem to me to repudiate the argument for it lays down that "any five persons interested in.....may without joining as plaintiff any of the other persons interested institute an action....." Those words seem to me to say very clearly that if, for instance, in this case, assuming that the Government Agent's finding of interestedness disposes of the question of interestedness finally, the Government Agent was called as a witness and he deposed to the fact that he examined the interestedness of all 79 and found 30 of those were interested, 5 of those 30 could bring the action without joining the other 25 or any other interested parties outside the 79 petitioners. Forty-nine having no interest would taint the action with misjoinder if they came in. The more the section is examined the clearer it appears to be that this question of interestedness is one of the matters for the consideration of the Court quite independently of the inquiry by the Government Agent, that is, of course, if the question is raised before the Court. After all, adjudication is made between parties, according to their rights and obligations as at the date of action, and a Court must be satisfied that at the date the case comes up for trial there are at least five interested parties who had petitioned the Government Agent or Assistant Government Agent, before the Court.

As I have already observed the trial Judge had no alternative but to make the order he made. It was not for him, even if he had the power, to strike out those who had not been petitioners. I should have, therefore, dismissed this appeal but that the questions involved are of semi-public interest and for that reason I would accede to the application of appellants' Counsel, and make order that the case be remitted to enable the parties to apply to the Court for such of them as had not joined in the petition to withdraw from the action and, for the action to proceed thereafter. The *locus standi* of the eight others was not questioned.

Then, there is the question of costs and I would direct that as a condition for proceeding with the action, the plaintiffs must prepay the costs of the inquiry and of this appeal. If this is not done within three months of the case being received in the Court below, the order of the trial Judge will stand.

Sent back.

ROSE, J.

I agree.

IN THE PRIVY COUNCIL

Present : VISCOUNT SIMON, LORD THANKERTON, SIR JOHN BEAUMONT

E. L. EBRAHIM LEBBE MARIKAR vs. AUSTIN DE MEL LTD.

PRIVY COUNCIL APPEAL No. 8 of 1945.

Decided on : 19th December. 1945.

Contract—Purchase and sale of rubber coupons—Request to broker to purchase coupons—Purchase by broker from undisclosed principal—Usage of market—Broker liable to deliver coupons to buyer whether received from seller or not—Buyer liable to pay contract price to broker direct—Right of each party to look to broker for performance of contract—Buyer wrongfully refusing to accept delivery—Can broker sue to recover damages—Is broker in the position of surety for due performance of contract—Wagering contract.

Where according to the agreed usage of the market where business in the purchase and sale of rubber coupons is transacted—

(*a*) the broker's bought note or the sold note never discloses the name of the other party to the contract ;

(*b*) the broker was liable to deliver to the buyer the coupons sold, whether or not he had received them from the seller, and the buyer was liable to pay the contract price direct to the broker if delivery is accepted ;

(*c*) the buyer and seller have no dealings with each other direct in regard to the performance of the contract, and each party is entitled to look to the broker for performance of the contract ;

Held : (i.) That in the event of the buyer accepting delivery and refusing payment, or if the buyer wrongfully refuses to accept delivery, the broker is the person to recover damages for breach of contract.

(ii.) That, if the buyer is entitled to delivery of the coupons purchased by the broker, the contract is not a wagering one.

(iii.) That the broker's position is not one involving suretyship as there is nothing in the contract to suggest that the buyer must first claim delivery of the coupons from the seller before having recourse to the broker.

Sir John Beaumont.

This is an appeal from a judgment and decree of the Supreme Court of the Island of Ceylon, dated 15th January, 1943, setting aside a judgment and decree of the District Court of Colombo, dated 16th January, 1942, and entering judgment in favour of the defendant-respondent for the sum of Rs. 107,055·81 with interest and costs.

The appellant instituted this action on the 16th October, 1940, in the District Court of Colombo against the respondent for the recovery of the sum of Rs. 56,185·18 being damages sustained by him between the 1st day of April, 1940, and the 27th day of May, 1940, on certain contracts relating to coupons issued by the Rubber Controller under a Rubber Restriction Scheme in force in Ceylon during the relevant periods under the Rubber Control Ordinance. The export of rubber without such coupons was prohibited.

The respondent which was a Company doing the business of brokers in Colombo admitted its liability to the appellant in respect of the said sum, but alleged that on the 15th May, 1940, the appellant had instructed it to purchase one million coupons each covering the export of a single pound of rubber, that on the same date it had arranged for the purchase of the said quantity of coupons on the appellant's account with an undisclosed principal, and that the appellant had subsequently repudiated the said contract without lawful cause. The respondent claimed that the appellant was liable to pay to it damages in respect of the said contract, or to indemnify it against liabilities incurred as his brokers, and, giving credit in certain sums admittedly due by it to the appellant, claimed in reconvention a sum of Rs. 107,055·81.

At the trial the market price at which the coupons were sold on various dates was admitted, and the figures were not in dispute. It was agreed that if the respondent succeeded in establishing its claim in reconvention judgment would be entered for it for Rs. 107,055·81, and that if the respondent's claim in reconvention was rejected judgment would be entered for the appellant for Rs. 56,185·18.

The making of the contract of the 15th May, 1940, on which the respondent's claim in reconvention was founded, was denied by the appellant. At the trial the learned District Judge disbelieved the evidence of the appellant and held that the contract was made as alleged by the respondent. This finding was upheld by the Supreme Court and has not been challenged before the Board.

The appellant also denied receiving the bought note embodying the contract and did not produce it, but its terms were proved from an entry in the respondent's contract book. That note was in the following terms :—

"Austin de Mel Ltd. Colombo, 15th May, 1940.

"Rubber Coupon Contract No. R 6661.

"Messrs. E. L. Ebrahim Lebbe Marikar, Esq.

"Dear Sirs,

"We have this day bought by your order and for your account from Our Principals (1,000,000) lbs. of Rubber Coupons at 30½ cts., per coupon lb. Delivery 2nd issue 1940. Payment on Delivery.

"Yours faithfully,
for Austin de Mel, Ltd.,
"(Sd.) Austin C. de Mel,
Brokers.

"Sold according to Chamber of Commerce

"Conditions of Sales.

"This Contract shall be subject to any alteration in the Rubber Control Ordinance or conditions that may be imposed under that Ordinance, or by further legislation affecting transactions in Rubber Coupons"

It was admitted by the respondent that the seller was Kathleen de Mel, wife of Austin de Mel, the Managing Director and principal shareholder in the respondent company. The appellant contended that Kathleen de Mel was a mere *alias* for the respondent company which had really sold its own coupons to the appellant. The learned trial Judge held that there was no conflict of interest between Kathleen de Mel and the respondent company and that the respondent company dealt with Mrs. de Mel in the ordinary course of business, and this finding was accepted by the Appellate Court. Their Lordships accept this concurrent finding of fact.

A further contention raised by the appellant, which can be disposed of at the outset was that the contract of the 15th May, 1940, was a wagering contract and unenforceable. This claim was rejected by both the lower Courts, and so far as the question is one of fact Their Lordships accept the findings of the lower Courts. So far as the matter involves any question of law, it is clear that if the appellant was entitled to delivery of the coupons purchased the contract was not a wagering one. There is nothing in the terms of the contract to preclude the appellant from demanding delivery and he was, in fact, by the letter of the respondent's proctor dated 11th June, 1940, offered formal tender of the coupons sold, which offer he declined. Their Lordships, therefore, agree with the lower Courts in holding that the contract was not a wagering one.

The principal question discussed in the judgments of the lower Courts, and the only question which really arises on this appeal, is whether the respondent company is entitled in law to maintain its claim in reconvention. In order to determine this question it is necessary to notice the course of business and the custom or usage as regards contracts relating to rubber coupons in force in the Colombo market when the contract in suit was made. At the outset of the trial the parties, by their Counsel, agreed as noted in the judgment of the learned District Judge that this custom or usage was as follows :—

> " The broker's bought note, or sold note (as the case may be) never discloses the name of the other party to the contract.
>
> " The broker is, as far as the seller is concerned, liable to accept delivery of all coupons tendered, and to pay the full contract price of the amount tendered by the seller whether the buyer accepts delivery or not.
>
> " The seller may, instead of tendering the coupons, instruct the broker to negotiate a fresh contract for the purchase of the same quantity of coupons as that covered by the original contract. In such a case the seller is entitled to receive from, or liable to pay to, the broker direct the difference between the original contract price and the new contract price on a stated account.
>
> " As far as the buyer is concerned, the broker is liable to tender and deliver the coupons irrespective of whether the seller has tendered or not. If the buyer accepts delivery he is liable to pay the contract price direct to the broker. The buyer may, instead of accepting delivery of the coupon, direct the broker to sell the tendered coupons on his behalf at the market price of the day of tender. In that event the difference between the original contract price and the market price is received from or paid to the broker direct.
>
> " The buyer and seller have no dealings with each other direct in regard to performance of the contract. Each party is entitled to look to the broker for performance."

The District Judge having found all the facts against the appellant nevertheless decreed his suit and dismissed the respondent's claim in reconvention upon a point of law. He held that the respondent having entered into the contract in suit as agent for Kathleen de Mel could not sue upon it ; that to allow an agent for an undisclosed principal to sue in his own name upon the principal's contract would be to disregard a well-established principle in the law of agency ; and that the market usage subject to which the contract was made could not alter the intrinsic nature of the contract. The Supreme Court in Appeal took a different view of the law, and gave judgment for the respondent upon its claim in reconvention. Their Lordships entertain no doubt that the view of the Supreme Court was right. The fallacy underlying the judgment of the learned District Judge lies in the assumption that the respondent was suing on a contract made by his principal. This was not the case ; he was suing in his own name under a special power conferred upon him by his contract of employment. Under the agreed usage of the market the broker was liable to deliver to the buyer the coupons sold whether or not he had received them from the seller, and the buyer was liable to pay the contract price direct to the broker if delivery was accepted. In the event of the buyer accepting delivery and refusing payment it is plain that the broker must have a right to enforce the liability. It follows logically from this position that if the buyer wrongfully refuses to accept delivery (as in this case he did) the broker is the person to recover damages for the breach of contract. The fact is that the contract in this case imposed upon the broker obligations far more onerous than would normally rest upon an agent. The broker in making payment to the seller and delivery to the buyer was required to act as a principal, and these obligations conferred corresponding rights. There is no objection in law to parties entering into a contract of this nature, and, as the Supreme Court pointed out the respondent is not to be deprived of his rights under his particular contract because they would not have arisen under a normal contract of agency.

A further point taken by Mr. Sellers for the appellant was that on the true view of the contract of 15th May, 1940, the broker became a surety for the due performance of the contract by the seller and the buyer, and that he could not claim indemnity from the buyer unless he proved that he had suffered loss, and that he had not done this since he had tendered no evidence of any payment made to the seller. The answer to this argument is that the contract is not one involving suretyship ; there is nothing in the contract to suggest that the buyer must first claim delivery of the coupons from the seller before having recourse to the broker. On the contrary, the last paragraph of the agreed market usage expressly provides that the buyer and seller have no dealings with each other direct in regard to the performance of the contract, and that each party is entitled to look to the broker for performance. This negatives the theory that the broker was only a surety.

For these reasons, which are substantially those upon which the Supreme Court acted, Their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs of the respondent.

Appeal dismissed.

Present : HOWARD, C.J., & DE SILVA, J.

PERERA vs. PEIRIS & ANOTHER

S. C. No. 84—*D. C.* (*F*) *Colombo No.* 15069.
Argued on : 24th and 25th January, 1946.
Delivered on : 12th February, 1946.

Defamation—Roman-Dutch Law and English Law—Publication of an extract from the report of the Bribery Commissioner concerning plaintiff—Pleas of justification, fair comment, privileged occasion—Burden of proof—Is the Bribery Commission a Judicial Tribunal—Is his report a matter in which the public is interested, and is its publication for the public benefit—Right of Appeal Court to decide whether what was published was a matter of public interest—Commissions of Inquiry Ordinance (*Chap.* 276)—*Special Commission* (*Auxiliary Provisions*) *Ordinance, No.* 25 *of* 1942—*Sections* 5, 6 *and* 9.

The plaintiff sued the defendants—the publisher and the owner of the " Ceylon Daily News "—for the recovery of Rs. 50,000, being alleged damages sustained in consequence of the publication in the issue of the " Ceylon Daily News " of 25-5-43 of the following words which are an extract from Appendix C attached to the report of the Commissioner appointed by the Governor to inquire into charges of bribery and corruption made against the members of the State Council :—

Appendix C.—" Dr. M. G. Perera (the plaintiff) who gave evidence was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did."

The plaintiff alleged that these words imputed dishonesty to him and implied that he gave false evidence before the Bribery Commission, which evidence was taken in camera and that they are defamatory of him.

The defendants answered that they published the statement complained of concerning the plaintiff, but denied that the words were defamatory or that the plaintiff suffered any damages. Further answering they stated *inter alia* :

(*a*) that they published an accurate report of Appendix C which is a part of the finding of the Commissioner which was a Judicial Tribunal and therefore the publication was privileged ;

(*b*) that the said report was issued by the Government of Ceylon as a Sessional Paper and was available for purchase at the Government Record Office, and therefore privileged ;

(*c*) that the said extract consists of comment on a matter of public interest and that the words complained of were true in substance and in fact ;

(*d*) that they are *bona fide* comments on matters of public interest and were published *bona fide* for the benefit of the public without malice ;

To supplement the provisions of the Commissions of Inquiry Ordinance a special Ordinance, No. 25 of 1942 was enacted. The material provisions of which are as follows :—

Section 5 : " The Commissioner may, in his discretion, hear the evidence or any part of the evidence or any witness in camera and may for that purpose exclude the public and the press from the inquiry or any part thereof.

Section 6 (1) : " Where the evidence of any witness is heard in *camera* the name and the evidence or any part of the evidence of that witness shall not be published by any person save with the authority of the Commissioner.

(2) : " A disclosure, made *bona fide*, for the purposes of the inquiry, of the name or of the evidence or part of the evidence of any witness who gives evidence in *camera* shall not be deemed to constitute publication of such name or evidence within the meaning of sub-section (1)."

Evidence was led to show (*a*) that the Commissioner in his report to the Governor requested that certain Appendices (among which Appendix C was not included) be not published.

(*b*) That the Government Printer was requested by the Acting Secretary to the Governor to print the report as a Sessional Paper.

(*c*) That 472 copies of the report were printed of which some were circulated and others were sold.

(*d*) That of the circulated copies one was sent to the defendants by the Government Printer free of charge.

(*e*) That the events leading up to the appointment of the Commission was a matter of considerable public interest and the report was eagerly awaited by the public.

(*f*) That the extracts selected for publication quoted the Commissioner *verbatim*.

(*g*) That the plaintiff was a stranger to the 1st defendant who authorised the publication.

There was no evidence that the defendants in publishing the report were actuated by express malice.

Held : (i.) That the words complained of are defamatory of plaintiff.

(ii.) That since the words are defamatory, whether they are true or not, the law presumes that they were used with an *animus injuriandi* or with malice.

(iii.) That the presumption of malice is rebutted by proof that the words used were in substance and in fact true and that the publication was for the public benefit.

(iv.) That the defendants had led sufficient evidence to negative the *animus injuriandi*.

(v.) That the evidence on which the Commissioner has founded his report is a matter in which the public is interested and that its publication was for the public benefit.

(vi.) That the Appellate Court was in as good a position as the original Court to decide the question whether what was published was a matter of public interest.

(vii.) That the publication of the report of the Bribery Commissioner is a matter of considerable public interest on which the newspapers could fairly be expected to report in due course and as express malice had been negatived, the publication was privileged.

(viii.) That the proceedings before the Bribery Commissioner could not be regarded as those before a Judicial Tribunal.

(ix.) That the Commissioner must be taken to have authorised the publication of Appendix C inasmuch as it was not included in the Appendices that were not to be published.

(x.) That sub-section (1) of section 6 of Ordinance No. 25 of 1942 does not prohibit the publication of the name, but " the name and the evidence or any part of the evidence ".

Cases referred to :—*Bennett vs. Morris* (10 S. C. at p. 226); *Dippenaar vs. Hauman* (Buch. 1878 at p. 139); *Graham vs. Ker* (9 Cape Supreme Court Reports 185); *Adam vs. Ward* (1917 A. C. 309); *Henwood vs. Harrison* (L. R. 7 C. P. 606, 628); *Montgomerie & Co., Ltd. vs. Wallac-James* (1904 A. C. 73); *The King vs. Charles* (1 Appeal Court Reports 126); *Pickard vs. S. A. Trade Protection Society and Others* (22 S. C. 94); *Smith & Co. vs. S. A. Newspaper Co.* (23 S. C. 310); *Allbutt vs. General Council of Medical Education and Registration* (23 Q. B. D. 400); *Royal Aquarium & Summer & Winter Garden Society vs. Parkinson* (1892, 1 Q. B. 431).

N. Nadarajah, K.C., with *C. Renganathan* and *G. T. Samarawickreme*, for the plaintiff-appellant.

H. V. Perera, K.C., with *N. M. de Silva* and *C. E. L. Wickremesinghe*, for the defendants-respondents.

HOWARD, C.J.

The appellant in this appeal is the plaintiff who appeals from a judgment of the District Court, Colombo, dismissing his action claiming Rs. 50,000 for defamatory libel with costs. The first defendand is the printer and publisher and the second defendant the owner of the " Ceylon Daily News." In their issue of the 25th May, 1943, (P 1), the defendants published the report of Mr. L. M. D. de Silva, K.C., the Commissioner appointed by the Governor in pursuance of a resolution by the State Council of Ceylon that a commission should be appointed to enquire into charges of bribery and corruption made against its members. The appellant's action was founded on the following words which are an extract from appendix C of the Bribery Commissioner's report (D 2) :—

> " Dr. M. G. Perera (the plaintiff) who gave evidence was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did."

In his plaint the appellant alleged that these words imputed dishonesty to him and implied that he gave false evidence before the Bribery Commission which evidence was taken in camera and that they are, therefore, defamatory of him. He further maintained that he has suffered in his reputation as a member of the medical profession practising at Colombo and in his business of distilling arrack and estimates the damages suffered by him at Rs. 50,000. In their defence the defendants state that they published the statement complained of which is a true extract from Appendix C to the report of the Bribery Commission, and that the statement concerns the appellant. The defendants, however, deny that the words have the meaning attributed to them by the appellant. They are, therefore, not defamatory. The defendants also deny that, by the publication of the said words, the appellant has suffered in his reputation as a professional man or as a man of business. Further answering the appellant's claim the defendants state :—

(*a*) That they published an accurate report of Appendix C which is a part of the finding of the Commissioner which was a judicial tribunal empowered by the Governor in August, 1941, to enquire into the question of whether gratifications have been promised, given or paid to members of the State Council and that the said publication was therefore privileged.

(*b*) That the said report was issued by the Government of Ceylon as a Sessional Paper and was available for purchase at the Government Record Office and the said publication was therefore privileged.

(*c*) (1) That part of the said extract consists of comment on a matter of public interest.

(2) That so far as the words complained of consist of statements of fact, they are in their material and ordinary meaning true in substance and in fact and in so far as they consist of expressions of opinion they are fair and *bona fide* comments on matters of public interest and the said statements were published *bona fide* for the benefit of the public and without malice.

The case went to trial on a number of issues. Those relevant and material to this appeal were

answered by the learned District Judge as follows:—

(1) The words complained of were defamatory of the plaintiff.

(2) (*a*) The words " Dr. M. G. Perera who gave evidence....." is a statement of fact.

(*b*) Those words are true in substance and in fact, but it was not for the public benefit that the fact should be published.

(*c*) The words " Dr. M. G. Perera.....was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did " are expressions of opinion by the learned Commissioner.

(*d*) Those words are true in substance and in fact, but it was not for the public benefit that they should be published.

(3) (*a*) The defendants made no comments and the matter is not a matter of public interest.

(*b*) The statement was published *bona fide* for the benefit of the public and without malice.

(4) (*a*) The report was issued as a Sessional Paper.

(*b*) Any person could purchase a copy of the Report.

(*c*) The report was not published on a privileged occasion.

(5) (*a*) The defendants published what was a fair and accurate report or part of a report of a judicial proceeding.

(*b*) The evidence of the plaintiff before the Bribery Commission was taken in camera.

(*c*) The publication was a privileged one.

Having regard to his findings in (1) the District Judge held that a plea of justification must fail. On the replies set out in (2) he held that the defence of fair comment on a matter of public interest was not established. On the answers set out in (3) he held that publication did not take place on a privileged occasion. But on the answers to (4) he held that the alleged libel was published on a privileged occasion. He, therefore, entered judgment for the defendants.

Mr. Nadarajah, on behalf of the plaintiff, has challenged the ruling of the learned Judge on (4) and also his assessement of the damages. Mr. Perera, on behalf of the defendants, whilst maintaining that the District Judge was correct in his assessment of the damages and in holding that the words complained of were a fair and accurate report of a judicial proceeding has also argued that the findings of the District Judge on the questions of justification and publication on a privileged occasion were not in accordance with the law.

I propose first of all to deal with the defence of justification. The learned Judge has found that the words complained of are defamatory, but are true in substance and in fact, but it was not for the public benefit that they should be published. There can be no question that the words in themselves are defamatory. Mr. Nadarajah has not queried the finding of the learned Judge that the words are true in substance and in fact. This finding is based on the Bribery Commissioner's report. The only question that arises is whether the learned Judge was right in holding that it was not for the public benefit that they should be published. He has rightly held that the law to be applied is Roman-Dutch Law of defamation which differs in some aspects from the English law. The law of defamation is discussed in Nathan's Common Law of South Africa (1906 Edition) in Vol. III., p. 1588 *et seq.* Defamation is there classified as an *actio injuriarum* which is the generic name for the remedy which applied to torts in which *injuria* was a constituent element. It is requisite to every *injuria* that the element of malice should be present, or as it is generally called, the *animus injuriandi.* Such malice may be expressly shown to exist or it may be inferred from the language used. If malice is expressly shown to exist, or is inferred from the nature of the language used, it lies upon the defendant to show that the act was not done maliciously, that is, to prove that it was committed in circumstances which rebut the presumption or inference of malice. Thus in an action for libel the falsehood of the statements injurious to the character of the plaintiff which have been published by the defendant is sufficient to prove an *animus injuriandi* as is required to render the defendant liable in damages, unless he shall be able to prove some special circumstance sufficient to negative the presumption of the existence of such *animus injuriandi*, and to prove that in publishing injurious statements, not consistent with truth he was actuated by some motive which in law held sufficient to excuse the error into which the defendant has fallen. In *Bennett vs. Morris* (10 S. C. at p. 226) De Villiers, C.J. drawing attention to the differences from the English Law says that the ground upon which the action for defamation rests is the injuria. No action lies for such injury, as such, unless the defendant was actuated by the *animus injuriandi.* Again it was remarked in *Botha vs. Brink* (Buch. 1878 p. 130). " The rule of the Roman-Dutch Law differs, if at all, from that of

the English Law in allowing greater latitude in disproving malice. Under both systems the mere use of defamatory words affords presumptive proof of malice, but under the Roman-Dutch Law the presumption may be rebutted not only by the fact that the communication was a privileged one—in which case express malice must be proved—but by such circumstances as satisfy the Court that the *animus injuriandi* did not exist. If, therefore, defamatory words are proved to have been used, whether they are true or not, the law presumes that they were used with an *animus injuriandi* or with malice and the burden of disproving the malice is thrown on the defendant. The presumption of malice is rebutted where the truth of the words used is pleaded and proved, if it is proved that the publication was for the public benefit. In this connection see *Dippenaar vs. Hauman* (Buch. 1878 at p. 139). The same principles are formulated in other text books on Roman-Dutch Law. Thus in the (1909) edition of Maasdorp's Institutes of Cape Law, Vol. IV., p. 99-100 the following passage occurs :—

> "*Prima facie* evidence of malice being implied from the mere publication of words which are in themselves defamatory, and general damage being regarded as the natural consequence of such publication, it will be for the defendant, if he wishes to escape liability, to plead circumstances which negative the presumption of malice, or which may, in some few cases, justify their publication, even where there has been actual malice present. With this object in view, he may set up one or other of the following defences :—
>
> (1) That the words complained of are privileged, or were uttered or published on a privileged occasion ;
>
> (2) That the words were true in substance and in fact, and that it was for the public benefit that they should be published ;
>
> (3) That the words were a *bona fide* comment upon the public acts of a public man ;
>
> (4) That the publication took place under other circumstances which negatived the *animus injuriandi*."

In De Villiers' translation of Book 47 Title 10 of Voet's Commentary on the Pandects with annotations on the following passage is to be found in section XX. on page 189 :—

> "Next, with regard to the person who is alleged to have occasioned an injury, the fact that he had entertained no intention to injure (*animus injuriandi*) is a good ground for his not being held liable in an action of injury. The fact that such intention was absent is to be gathered from the circumstances of each particular case ; for an intention of this kind has its seat in the mind, and in case of doubt its existence should not be presumed ; moreover it cannot reveal itself or be proved in any other manner than by the nature of the occurrence being taken into account, in conformity with the principle already laid down in the Title "*De Dolo Malo*."

Again in McKerron on the Law of Delict second edition, p. 165 it is stated as follows :—

> "Falsity is not a necessary ingredient of liability for defamation. Although it is customary for the plaintiff to allege in his declaration that the statement complained of was false, such allegation would appear to be mere surplusage, since the onus of proving the truth of the statement rests on the defendant, and furthermore, according to the better view, truth in itself is not a sufficient defence.
>
> "It is commonly said that *animus injuriandi* is an essential element of liability for defamation. In the Roman-Dutch Law, as in the Roman Law, it is not open to doubt that *animus injuriandi* was regarded as the gist of an action for defamation. Although it is true that where the words complained of were in themselves and in their ordinary meaning defamatory of the plaintiff, the existence of *animus injuriandi* was presumed, it was always open to the defendant to rebut the presumption by leading evidence to show that in fact he had no intention of injuring the plaintiff."

From the principles elaborated by me it is manifest that the question as to whether a statement defamatory *per se* is true does not in Roman-Dutch Law assume the importance that it does in English Law. In Roman-Dutch Law the burden is on the defendant whether the statement is true or false to prove that he had no *animus injuriandi*. Has he negatived the *animus injuriandi* in the present case? It is necessary to consider the circumstances in which the statement was published. The Bribery Commission was appointed by the Governor under a Commission dated the 13th August, 1941, under the Commissions of Inquiry Ordinance (Cap. 276) with the following terms of reference :—

> (*a*) Whether gratifications by way of gift, loan, fee, reward, or otherwise, are or have been offered, promised, given or paid to members of the existing State Council, with the object or for the purpose of influencing their judgment or conduct in respect of any matter or transaction for which they, in their capacity as members of that Council or of any Executive or other Committee thereof, are, have been, may be, or may claim to be, concerned, whether as of tight or otherwise ; and
>
> "(*b*) Whether such gratifications are or have been solicited, demanded, received or accepted by members of the existing State Council as a reward or recompense, for any services rendered to any person or cause, or for any action taken for the advantage or disadvantage or any person or cause, or in consideration of any promise or agreement to render any such services or to take any such action, whether as of right or otherwise in their capacity as members of that Council or of any Executive or other Committee thereof."

The Commission was appointed in pursuance of a resolution to that effect passed by the State Council of Ceylon, on the 15th May, 1941. To supplement the provisions of the Commissions of Inquiry Ordinance a special ordinance intituled the Special Commission (Auxiliary Provisions) Ordinance, No. 25 of 1942 was enacted on the 13th July, 1942. Section 9 gave immunity to the Commissioner in the following terms :—

> "The Commissioner shall not, in respect of any act or thing, done or omitted to be done by him in his capacity as Commissioner, be liable to any action, prosecution or other proceeding in any civil or criminal Court."

For the purpose of this case sections 5 and 6 worded as follows are the only other material provisions :—

"5. The Commissioner may, in his discretion, hear the evidence or any part of the evidence or any witnesses in camera and may, for that purpose, exclude the public and the press from the inquiry or any part thereof.

"6. (1) Where the evidence of any witness is heard in camera, the name and the evidence or any part of the evidence of that witness shall not be published by any person save with the authority of the Commissioner.

"(2) A disclosure, made *bona fide* for the purposes of the inquiry, of the name or of the evidence or part of the evidence of any witness who gives evidence in camera shall not be deemed to constitute publication of such name or evidence within the meaning of sub-section (1)."

On the 3rd April, 1943, the Commissioner made his report (D 2) to the Governor. Appendix 'C' to this report contained the statement on which the plaintiff's action was based. Paragraph 2 of the Report gives the Commissioner's view of the task assigned to him under the terms of reference and is worded as follows :—

"2. Certain members of the public, some of whom gave evidence before me, were under the impression that it was part of the task assigned to me under the terms of reference not merely to find whether or not incidents of the character described therein have taken place, but also, in the event of my finding that they have, to suggest what action should be taken and generally to make comment. It is clear that Your Excellency has constituted me a pure fact-finding Commission and that I would be travelling outside the limits of the authority conferred on me if I proceeded to do anything more. I have accordingly refrained from dwelling upon the political, legal or moral aspects of the incidents, which in the following paragraphs I have found to have occurred, and refrained also from making suggestions for the prevention of similar incidents in the future."

It is manifest that the Commissioner regarded himself merely as a fact-finding Commission, and that he had no authority to suggest what action should be taken. In paragraph 40 of the Report the Commissioner, whilst stating that the question whether the report is to be published or not is not a matter for him requested that Appendices H, HH, H 1 and P be not published because in the absence of proof it would not be fair or proper to publish the names of the Councillors involved. On the 18th May, 1943, the Government Printer was requested by D 3 from the Acting Secretary to the Governor to print the report as a Sessional Paper. The Government Printer was also requested to publish the Sessional Paper simultaneously with the text of a bill connected with the report to be introduced into the State Council. This bill, which was passed by the State Council and became law on the 7th June, 1943, enabled the State Council by resolution to expel from the Council any member found by the Commissioner to have come within the ambit of the terms of reference of the Commissioner. The Government Printer followed these instructions and printed 472 copies of the report altogether. 222 copies, of which one was sent to the respondents, were circulated and 250 were sold. Subsequently a further 225 copies were printed and circulated. In giving evidence Mr. Orion de Silva stated :—

(*a*) that the Sessional Paper was sent to the "Daily News" free of charge by the Government Printer on the 19th May, 1943 ;

(*b*) that the events leading up to the appointment of the Commission was a matter of considerable public interest and the report was eagerly awaited by the public ;

(*c*) that all portions of public interest were published in a series of extracts from the 20th to 28th May ;

(*d*) that he selected the extracts for publication ;

(*e*) that the Commissioner was quoted *verbatim* :

(*f*) that the appellant was a stranger to him and he was not actuated by personal animosity.

The appellant gave evidence and was cross-examined at very considerable length. His evidence amounted in large measure to a vitriolic attack on the Commissioner's *bona fides* and suitability for the onerous duty which had been imposed upon him. The appellant was not able to adduce any evidence of express malice on the part of the respondents. What then are the circumstances in which publication took place ? These circumstances are the fact that—

(*a*) the appellant was a stranger to the first respondent who authorised the publication and that there is no evidence that the defendants in publishing the report were actuated by express malice ;

(*b*) the report was sent to him as a Sessional Paper free of charge by the Government Printer ;

(*c*) the report concerned a matter of public interest eagerly awaited by readers of the "Daily News ;

(*d*) the extracts selected for publication quoted the Commissioner *verbatim*.

The respondents have, in my opinion, proved conclusively that the circumstances in which publication took place negative the *animus injuriandi*. On this ground alone they are entitled to succeed.

I am also of opinion that the defence prevails on other grounds. The learned Judge has found that the statement published by the respondents is true in substance and in fact. This conclusion of fact has not been queried by Mr. Nadarajah. Moreover it would appear from page 14 of the record that the question of the truth of the statement was not contested by Mr. Amarasekera

who appeared for the appellant in the lower Court. The learned Judge, however, has found that the respondents failed in their proof that what was published was for the public benefit. The learned Judge also states that what the public was interested in was not the manner in which this plaintiff gave evidence, but as to whether their representatives in the State Council had accepted bribes. I find it a matter of some difficulty to understand this finding of the learned Judge. It is true of course that the interest of the public was in the question as to whether their representatives had accepted bribes. But as ancillary and complementary to that question, the public are interested in knowing what evidence of proof establishes the fact that a representative has accepted a bribe or on what evidence he has been exonerated on such a charge. Or in other words, on what evidence the Commissioner has founded his report. In my opinion that evidence is manifestly a matter in which the public is interested and its publication was for the public benefit. It brought home to the public the care with which the Commissioner had investigated each particular charge. I would also refer to the case of *Graham vs. Ker* (9 Cape Supreme Court Reports 185). In his judgment De Villiers, C.J. stated that as a general principle he took it to be for the public benefit that the truth as to the character or conduct of individuals should be known. The public was interested in knowing on what testimony the report was made. In this connection I have considered whether it is open to this Court to disturb the finding of the learned Judge on this matter. The latter was sitting as a Judge and Jury. In which capacity did he decide this question? Light is thrown on the question by the judgments of the House of Lords in *Adam vs. Ward* (1917 A. C. 309). At pp. 331-332 Lord Dunedin states as follows :—

> " The second matter is more serious. In order to dispose of the question of privilege he put to the jury certain questions, of which three were as follows :— Was the publication—that is, the document published—of a public nature? Was the subject-matter of that publication by defendant matter about which it was proper for the public to know? Was the matter contained in the letter proper for the public to know? To all of which the jury returned a negative answer, and upon that the learned Judge said : " Upon these findings I hold that the publication was not a privileged publication nor a publication on a privileged occasion ". It is clear that so far as the questions go they assume that the foundation of the duty or right which was invoked to support the privilege was that the matter discussed was one of public interest : whereas the true foundation in this case was the duty of the Army Council to make publicly known their vindication of General Scobell's honour. But apart from that and in view of what I have already stated as to the provinces of Judge and jury, I entirely agree with the learned Judges of the Court of Appeal who held that these questions were for the Judge and not for the jury. If there is some fact left in contraversy which must necessarily be determined one way or the other, to allow the Judge to view the complete situation and thus enable him to decide whether the occasion was privileged or not, it would be right for the Judge to ask the jury to determine that fact. But to put to them questions such as these and then on the findings to find privilege or the reverse is simply to ask the jury to decide for him the question which it is his duty, and not theirs, to determine."

Again on pp. 333-334 Lord Atkinson states :—

> " The learned Judge who tried the case might possibly have ruled, on the question of law, whether or not the occasion on which the alleged libel was published was a privileged occasion but for the answers he had received from the jury in reply to questions as to certain things the existence of which went to make the occasion of the publication privileged. He did not leave the question of privilege or no privilege to the jury, but as he did leave to the jury the question as to the presents or absence of the elements which go to create privilege. For instance, the question " Was the subject-matter of the publication by the defendant matter about which it was proper for the public to know? " And the question " Was the matter contained in the letter proper for the public to know? " It is to be regretted that the remarks of Willes, J., in *Henwood vs. Harrison* (L. R. 7 C. P. 606, 628) were not brought to Darling, J's, notice. Willes, J., a most learned, laborious and accurate Judge, after stating that since the declaratory Act of 1792 (32 Geo. 3, c. 60) the jury are the proper tribunal in civil as in criminal cases to decide the question of libel or no libel, said : " But it is not competent for the jury to find that, upon a privileged occasion, relevant remarks made *bona fide* without malice are libellous ". He then proceeds : " It would be abolishing the law of privileged discussion, and deserting the duty of the Court to decide upon this as upon any other question of law, if we were to hand over the decision of privilege or no privilege to the jury. A jury, according to their individual views of religion or policy, might hold the Church, the Army, the Navy, Parliament itself, to be of no national or general importance, or the liberty of the press to be of less consequence than the feelings of a thin-skinned disputant."

It is clear from these judgments that the question as to whether what was published was a matter of public interest was not a question of pure fact to be decided by the trial Judge on evidence adduced by witnesses whose credibility was a matter particularly his concern. The right of this Court to interfere with this decision of the learned Judge is I think manifest from the decision of the House of Lords in *Montgomerie & Co., Ltd. vs. Wallace-James* (1904 A. C. 73). Lord Halsbury in his judgment states that even with regard to questions of fact the original tribunal is in no better position to decide than the Judges of the Appellate Court where no question arises as to truthfulness and where the question is as to proper inferences to be drawn from truthful evidence. This case was cited by Wood Renton J. in *The King vs. Charles* (1 Appeal Court Reports 126). In that case the learned Judge stated that " question of fact " is a compendious expression comprising three distinct issues. In the first

place, what facts are proved? In the second place, what are the proper inferences to be drawn from facts, which are either proved or admitted? And in the last place, what witnesses are to be believed? It is only in the last question that any special sanctity attaches to the decision of a Court of first instance. In the present case the matter under consideration cannot come under the third issue. The decision of the learned Judge has therefore no sanctity. I hold that he was wrong and what was published was for the public benefit.

The learned Judge has also held that the publication was not privileged by reason of its issue by the Government of Ceylon as a Sessional Paper. In England, papers, votes and proceedings published by or under the authority of either House of Parliament are absolutely privileged by virtue of the Parliamentary Papers Act 1840, S. 1. Moreover by the Law of Libel Amendment Act 1888, S. 4 the publication at the request of any Government Department of any report issued for the information of the public shall be privileged unless it shall be proved that such publication or report was published maliciously. But these provisions being statutory enactments do not apply to Ceylon. It has, however, been held in South Africa that the publication of a fair report of Parliamentary or judicial proceedings is privileged, even though it may contain imputations against the character of third parties though these may not be parties to the proceedings reported, provided that reports are impartial and accurate *Pickard vs. S. A. Trade Protection Society and Others* (22 S. C. 94). A similar privilege has been extended to the proceedings of Harbour Boards and other public bodies *Smith & Co. vs. S. A. Newspaper Co.* (23 S. C. 310). In the course of his judgment in this case Villiers, C.J. at page 316 states :—

> " The matter was of considerable public interest, and one which the newspapers would fairly be expected to report upon in due course. The question therefore arises whether a fair and impartial report of the proceedings is actionable by reason of its casting an aspersion on the conduct of the plaintiff."

And at page 317 as follows :—

> " In this colony the question has never before been raised, and the Court has now to fall back upon the general principle of the Dutch Law for a solution of the question. One of these principles is that an injurious statement or publication is not actionable unless there is *animus injuriandi*, the existence of which must be gathered from the circumstances. (See Voet, 47, 10, 20). If the circumstances attending the publication of an ordinary report of a judicial proceeding are sufficient to exonerate the publisher, I fail to see why a fair and impartial report of the proceedings at a meeting of a public body like the Harbour Board in regard to a matter of public interest should expose the publisher to an action for libel at the suit of a person whose conduct has been unjustly condemned at such meeting."

The principle outlined by Villiers, C.J. in this case with regard to the publication by a newspaper of the proceedings of a Harbour Board apply in my opinion to the publication of the report of the Bribery Commissioner—a matter of considerable public interest on which the newspapers could fairly be expected to report in due course. In this connection I would also refer to Maasdorp Vol. IV., pp. 104-108. In my opinion the principle enacted in the cases I have cited and referred to in Maasdorp would apply to the publication by the defendants of the report of the Bribery Commissioner. Express malice has been negatived, hence the publication was privileged.

Inasmuch as I have held that the publication of the report by the defendants was privileged, it is not necessary to consider whether the learned Judge was right in holding that the proceedings of the Bribery Commissioner were those of a judicial tribunal. If that finding is correct, a *fortiori* the publication of the report was privileged. In *Allbutt vs. General Council of Medical Education and Registration* (23 Q. B. D. 400) it was held that a report of the proceedings of the General Council stands, having regard to the nature of the tribunal, the character of the report, the interests of the public in the proceedings of the Council and the duty of the Council towards the public, on principle in the same position as a judicial report. Lopes, L.J. giving judgment of the Court stated that it would be stating the rule too broadly to hold that to justify the publication of proceedings such as the proceedings must be directly judicial or had in a Court of Justice. The difficulties of deciding what is a " Court " is apparent from the judgments of the Court of Appeal in *Royal Aquarium & Summer & Winter Garden Society vs. Parkinson* (1892, 1 Q. B. 431). It is, however, clear from the judgments of Their Lordships in that case that in England the proceedings of the Bribery Commissioner would not be regarded as those of a Court so as to confer upon the publication of its report by a newspaper absolute. I am, therefore, of opinion that the decision of the learned Judge on this aspect of the case was not correct. But, as I have already said, the matter is of small import inasmuch as the publication was subject to a privilege only negatived by proof of express malice.

There remains for consideration the question whether the provisions of sections 5 and 6 of Ordinance No. 25 of 1942 in any way affect the operation of the defence of privilege in favour of the defendants.

Mr. Nadarajah maintains :

(1) Section 6 prohibits the publication of the name and evidence or any part of the evidence of any witness heard in camera ;

(2) The name of the plaintiff has been published without the consent of the Commissioner ;

(3) The law had been contravened and, therefore, the defendants cannot claim the benefit of the privilege.

I am of opinion that this argument is without substance. The Commissioner has in his report to the Governor invited the latter to publish the report apart from the Appendices specified. Those Appendices do not include " C." Hence by inference the Commissioner must be taken to have authorized the publication of Appendix " C ". Moreover sub-section (1) of section 6 forbids the publication of the name and the evidence or any part of the evidence. In my opinion publication is not prohibited of the name, but " the name and the evidence or any part of the evidence." The name and the evidence or any part of the evidence has not been published. In giving this interpretation I have not been unmindful of sub-section (2) which suggests the meaning for which Mr. Nadarajah contends.

In view of the decision at which I have arrived the question as to whether the learned Judge was right in his assessment of damages does not call for consideration. But in view of the truth of the publication and the absence of any *animus injuriandi* on the part of the respondents I would not be prepared to say that his assessment was wrong.

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

Appeal dismissed

DE SILVA, J.

I agree.

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

MANCHANAYAKE vs. PERERA & OTHERS

S. C. No. 357—*D. C. (F) Colombo No.* 2801.
Argued on : 23rd October, 1945.
Delivered on : 30th October, 1945.

Partition—Conveyance pending partition action of interests to which vendor may be declared entitled to in the final decree—Is it obnoxious to section 17 *of the Partition Ordinance—Nature of the right so conveyed.*

A conveyance executed after the institution of a partition action and before the entering of the final decree purported to " sell, assign, transfer and set over " to the vendee the interest to which the said vendor may be declared entitled to in the final decree to be entered in the said case from and out of all that land (*i.e.*, the subject-matter of the partition suit).

Held : (i.) That the conveyance was not obnoxious to section 17 of the Partition Ordinance.

(ii.) That the right or title conveyed thereunder comes into existence only upon the entering of the final decree in virtue of the *jam tunc* principle of the Roman-Dutch Law or the equitable principle of the English Law, that " when the property comes into existence, the assignment fastens to it ".

Followed : *Khan Bhai vs. Perera* (1923) 26 N. L. R. 204 and *Hewawasam vs. Gunasekera* (1926) 28 N. L. R. 33.

Disapproved : *Fernando vs. Attukorale* 28 N. L. R. 292.

H. V. Perera, K.C., with *S. R. Wijetileke*, for the plaintiff-appellant.

E. B. Wickremanayake, with *H. A. Koattegoda*, for the defendants-respondents.

SOERTSZ, A.C.J.

Section 17 of the Partition Ordinance has proved to be as prolific of difficulties as the serpent of Lernaca is said to have abounded with heads. You cut off one only to find yourself confronted with two others that arose in its place. Likewise, section 17, despite the laborious interpretations to which it has been subjected ever since it was enacted as far back as 1863, continues to vex us, and we do not seem to be within measurable reach of some weapon as effective as the firebrand with which Hercules destroyed his monster. It is time, I think, to abandon the quest for the absolute truth and at least for the sake of a quiet life undisturbed by fruitless speculation, to bow to the authority of the Bench of five Judges in the case of *Khan Bhai vs. Perera* (26 N. L. R. 204), and of the Bench of the three Judges in *Hewawasan vs. Gunasekera* (28 N. L. R. 33) who gave their unanimous ruling on the identical question that is involved in the present appeal. That question is whether a conveyance executed after the insti-

tution of a partition action, and before the entering of the final decree, purporting to " sell, assign, transfer, and set over " to the vendee " the interest to which the said vendor may be declared entitled to in the final decree to be entered in the said case from and out of all that land " (i.e., the subject of the partition suit) is obnoxious to section 17.

Khan Bhai vs. Perera, as it appears to me, gave an unequivocal answer to that question when the five Judges ruled that " persons desiring to charge or dispose of their interests in a property subject to a partition suit can only do so by expressly charging or disposing of the interest to be ultimately allotted to them in the action." Two years later, all the three Judges who considered an allied question in *Hewawasan vs. Gunasekera* were unanimously, in agreement with that view, and two of them went further and held that, although a document executed before final decree is in the form of a conveyance ' effecting an immediate transfer and out-and-out sale ' of certain definite lots which, at the time of the conveyance, a tentative scheme of partition, proposed, for allotment to the vendor, would not offend against section 17 because the substance of the transaction as revealed on an examination of the deed, was that " the respondent *intended* to sell and the appellant to buy the share to be allotted to the respondent." (Garvin J.) Dalton J. agreed and observed " There is not the least doubt as to what both parties *intended* and there is not the least doubt that neither *intended* to deal with any undivided interest in the land." Jayewardene J. dissented strongly from that view and followed the view taken in the same in *Appuhamy vs. Babun Appu* (25 N. L. R. 370) by Ennis A.C.J., Garvin J. concurring. It is not necessary for the purpose of the present case to enter into the controversy or to see if the manner in which Garvin J. and Dalton J. distinguished their case from the earlier case is convincing. What is material here is that all the three Judges in *Hewawasan vs. Gunasekera* had no doubt whatever that a conveyance, pending partition, of the shares that would be allotted to a party is a valid conveyance. And yet, exactly four months after *Hewawasan vs. Gunasekera* had been decided this question was raised again in *Fernando vs. Atukorale* (28 N. L. R. 292) before Lyall Grant J. and Maartensz A.J., and curiously, there appears to have been no reference whatever to this case of *Hewawasan vs. Gunasekera* and they did not follow the view expressed in *Khan Bhai vs. Perera*, Lyall Grant J. observing that " the effect of that decision appears to me to be that a party to an action can enter into a binding *agreement* to dispose of the share which may ultimately be allotted to him. He confers upon the purchaser a personal right against himself. He does not however transfer any real right as at the time no real right had vested in him." Maartensz A.J. while not saying that that was the meaning of the ruling in the Full Bench case, adopted it as the proper effect of a conveyance, pending partition, of the share to be allotted and avoided the authority of *Khan Bhai vs. Perera* by observing that " the statement of the law regarding persons desiring to charge or dispose of their interests during the pendency of a partition was *obiter* to the question at issue." If I may say so respectfully, neither of these views appears to me to be tenable at all. The pronouncement in *Khan Bhai vs. Perera* appears to me to be of the very essence of the *ratio decidendi* in that case and that was how the three Judges understood it themselves. In regard to the view that a conveyance of the share that would be allotted " remains merely an agreement to convey and would not operate as a conveyance or alienation," the difficulty both these Judges appear to have found in accepting the plain meaning of the rule laid down by the five Judges is that they could not reconcile themselves to the idea of a forthright sale when , in the words of Lyall Grant J., " the fact is apparent on the face of the deed that the property did not at the time of the execution of the deed belong to the vendor. All that belonged to the vendor at that date was an undivided share of the property." It was for that reason that he and Maartensz A.J. read what, on the face of it was an immediate sale, as an agreement to sell. But whether a transaction is a sale or an agreement to sell must depend not on the extent of the vendor's title but, in nearly every case, on the words of the document. As Jayawardene A.J. said when a document exactly in the same terms as the deed before us was sought to be construed as an agreement to sell :—" P 1 is clearly not an agreement to convey in the future but a completed transaction intended to pass an immediate interest in the property.....The operative words used " grant, bargain, sell, assign, transfer, set over and assure " are words appropriate to a conveyance transferring property. Clearer and stronger words to effect an immediate transfer and out-and-out sale cannot be conceived."

So much in regard to the question whether the deed is a present conveyance or an agreement to convey. The question whether although in form a conveyance, a deed operates to convey title is a different question and the answer to it would depend on the title of the vendor, the existence of a saleable thing, public policy, morality, statutory prohibition and things like that.

In this instance Lyall Grant J. and Maartensz A.J. took the view that a vendor cannot convey *in praesenti* what he did not own at that time. But, it is well established both in the Roman-Dutch Law and in the English Law that a vendor can sell property which, at the date of the sale, did not belong to him. Wessels, basing himself on Voet and other well-known authorities, sums up the law thus : " If the object of the obligation does not exist at the moment the agreement is concluded but is capable of coming into existence, then the law regards such an obligation to be in *rerum natura*, and the contract is enforceable at law." As he goes on to point out, an obligation in respect of a thing not in existence but capable of coming into existence may result from a *conventio spei*—the mere chance of something coming into existence, or from a *conventio rei speratae*. In the former case, the parties stand bound from the moment the transaction is entered into, whatever the result ; in the latter case, there is a tacit understanding that if there is no result—the obligation will be without an object and, therefore, there will be no contract, but if there is a result the contract operates *jam tunc*. As stated in the Digest 18.1.8 " *nec emptio nec venditio sine re quae veneat potest intelligi et tamea fructus et partus futuri recte ementur, ut cum editus esset partus, jam tunc, cum contractum esset negotium*, venditio facta intellegitur."

The English Law is substantially to the same effect. I am indebted to my brother Canekeratne J. for a reference to the case, *In re Lind* (1915) 2 Ch. 345, in which it was said *in pari materia*, " Directly the property comes into existence the assignment fastens on it and without any actus interveniens the property is regarded in equality as the property of the assignee." It is the *jam tunc* rule in English garb.

Then in regard to the difficulty which Maartensz A.J. thought that section 9 created, section 9 extinguishes whatever right or title all persons *have or claim to have* in the property before the entering of the final decree, that is to say, all the pre-existing rights and titles. In the case of a conveyance such as we are dealing with here, the right or title conveyed comes into existence only upon the entering of the final decree in virtue of the *jam tunc* principle of the Roman-Dutch or the equitable principle of the English Law that " when the property comes into existence, the assignment fastens on it."

For these reasons, I would allow the appeal and direct that judgment be entered for the plaintiff as prayed for with costs in both Courts.

Appeal allowed.

CANEKERATNE J.
I agree.

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

AMARASEKERA APPUHAMY vs. MARY NONA

S. C. No. 69—*D. C.* (*F*) *Ratnapura No.* 7334.
Argued on: 27th February, 1946 and 1st March, 1946.
Delivered on: 11th March, 1946.

Roman-Dutch Law—Exceptio doli—*Land transferred a second time in fraud of prior transferee—Action by subsequent transferee claiming property—Can prior transferee who is in possession raise defence of fraud without making transferor a party to the action—Is priority of deed in favour of subsequent transferee defeated by fraud—Section* 7 (2) *Registration of Documents Ordinance* (*Cap.* 101).

Where X sold a land to the defendant (who entered into possession) prior to the publication of a settlement order declaring her (X) entitled to the land, and later, after the settlement order, re-sold the same land to the plaintiff, who was aware of the earlier conveyance :—

Held : (1) That the defendant could successfully raise the plea of *exceptio doli* (fraud) against the Plaintiff.

(2) That it was not necessary to make X a party to the action if it could be shown that the plaintiff had acted fraudulently.

(3) That as the transaction between X and the plaintiff was a sham, the priority obtained by the registration of the deed in the plaintiff's favour was defeated.

H. V. Perera, K.C., with *E. A. P. Wijeratne*, for the defendant-appellant.

N. E. Weerasooria, K.C., with *E. B. Wickremanayake*, for the plaintiff-respondent.

HOWARD, C.J.

In this case the defendant appeals from a judgment of the District Judge of Ratnapura declaring the plaintiff entitled to the land claimed in the plaint, but subject to her paying compensation of Rs. 750 up to 9th November, 1943. The defendant was allowed a *jus retentionis* until compensation was paid. Prior to 1937 the land in dispute was taken up for settlement under the provisions of the Land Settlement Ordinance (Cap. 319). Prior to the publication of the settlement order one Podinona by deed of the 8th February, 1938, (D2), conveyed the land in question to the defendant for valuable consideration. On the same day Podinona wrote D3 to the Settlement Officer intimating to him that she had sold this land to the defendant and that Crown Grant be made in the latter's favour. The defendant by letter D5 of the same date also wrote to the Settlement Officer asking that Crown Grant be made in his favour. Thereafter the defendant entered into possession of the land and planted it with budded rubber. By a settlement order dated the 6th June, 1940, (P1), and published in the Government Gazette of the 1st April, 1941, Podinona became entitled to the land in question. By deed of the 11th August, 1941, (P2), Podinona sold the land in question to the plaintiff. By virtue of this deed the plaintiff claimed the property. The defendant who bases his claim on D2 contended that the plaintiff and her husband were fully aware of the facts and had acted fraudulently and collusively with Podinona. The defendant asked for the dismissal of the plaintiff's action or in the alternative a *jus retentionis* until a sum of Rs. 750 had been paid to him by way of compensation for improvements. The plaintiff by her reply denies her knowledge of D2 or that she had acted fraudulently or collusively with Podinona. The District Judge has found that the transfer of the 11th August, 1941, (P2), by Podinona to the plaintiff was executed fraudulently and in collusion between Podinona and the plaintiff or her husband. In spite of this fraud the District Judge has held that the plaintiff can claim rights in the land. He comes to this conclusion in view of the fact that P2 was a deed executed by Podinona after she was vested with title by the settlement order P1.

Mr. Perera, on behalf of the defendant, has contended that in view of the finding of fraud the plaintiff's claim cannot be supported. Mr. Weerasooria, on behalf of the respondent, has not challenged the Judge's finding on the question of fraud. In view of Podinona's evidence such findings could not be challenged. Podinona, who was called by the plaintiff, stated in evidence that the plaintiff and her husband saw her and asked her for a deed after she had obtained the Crown Grant. She told the plaintiff and her husband that she had sold the land to a person and might get into trouble. The plaintiff's husband according to Podinona said there was no harm about it. It is difficult to conceive of a clearer case of fraud. Can the plaintiff in these circumstances put forward a claim to the property? The defendant is in possession and it is argued that according to Roman-Dutch Law he can raise the defence of *exceptio doli* which is a plea *in rem* going to the merits and founded on the same facts as give rise to an action based upon fraud. It may be raised against all persons who have acted in a fraudulent manner. There is therefore no substance in Mr. Weerasooria's contention that the defendant cannot succeed in this action unless Podinona is joined as a party and a claim is made for the setting aside of P2. Authority for the proposition I have outlined is to be found in Nathan's Common Law of South Africa Vol. IV paragraph 2,170. We have also been referred to the case of *Vallipuram vs. Vallipuram* (7 Times Law Reports 98). The headnote of this case is as follows :—

> "X was the original owner of a certain land. On September 5th, 1928, he transferred it on a Bill of Sale to his son-in-law A, who in turn transferred it similarly to P on February 17th, 1929. D obtained judgment for a sum of Rs. 123 against X in 1918. On September 14th, 1928, he applied for writ against X. In execution of this writ, the land was seized and sold against X, on January 9th, 1929, D becoming the purchaser. He obtained a Fiscal's Transfer in his favour on April 8th, 1929. In an action for declaration of title brought by P against D."
>
> *Held*, that once it is established that P was a party to the fraud, whereby it was attempted to prevent D from executing his judgment, the deed in his favour can be set aside without making X and A parties to the present action.
>
> *Per* DALTON, J.—" .....even if it be decided that X and his son-in-law should be parties, under the circumstances here, the only order I should make would be to send the case back to allow the defendant to have them added, with the same result."

In *Vallipuram vs. Vallipuram* as in the present case the plaintiff who had been guilty of fraud endeavoured in spite of such fraud to set up his title. The defendant successfully pleaded this fraud without making the transferor to the plaintiff a party to the action. Another authority to the same effect is the Divisional Court case of *Suppiah Naidu vs. Meera Saibu* (3 Balasingham 129) the headnote of which is as follows :-

> " Plaintiff's predecessor in title bought the lands in dispute in this case on a writ against one Hamidu who had previously gifted them to the 3rd, 4th and 5th defendants. In an action by plaintiff for declaration of title.
>
> *Held*, that it was open to plaintiff to raise an issue as to whether deeds of gift executed in favour of defendants were fraudulent, and that it was not

necessary, for the decision of this issue, to make the donor a party to the action."

Apart from the defence put up by the defendant based on Roman-Dutch Law, Mr. Perera has also called in aid the Privy Council case of *Hall vs. Pelmadulla Valley Tea & Rubber Co., Ltd.* (31 N.L.R. 55). In that case it was held by Their Lordships of the Privy Council that the transaction which was being considered was a sham never intended to be anything more than a device for getting priority over the respondent's claim and that this amounted to fraud or collusion within the meaning of section 7 (2) of the Registration of Documents Ordinance (Cap. 101). In these circumstances the priority of the plaintiff's deed by prior registration was defeated. So in the present case the transaction between Podinona and the plaintiff was a sham and the priority obtained by the registration of P2 is defeated.

For the reasons I have given the defendant is entitled to succeed. The judgment of the District Judge is set aside and judgment must be entered for the defendant dismissing the plaintiff's action with costs in this Court and the Court below.

Appeal allowed with costs.

SOERTSZ, S.P.J.
I agree.

Present: HOWARD, C.J.

AMIRTHARETNAM vs. COLLECTOR OF CUSTOMS, JAFFNA

S. C. No. 1207—*M. C. Jaffna No. A* 136/45.
With Application 489.
Argued on: 6th February, 1946.
Delivered on: 12th February, 1946.

Criminal Procedure Code—Section 413 (1)—*Disposal of property brought to Court—Absence of trial or inquiry regarding any offence—To whom should such property be handed over.*

Held : (i.) That a Magistrate has no power under Section 413 (1) of the Criminal Procedure Code to make order regarding disposal of property brought to Court unless an inquiry or trial had taken place regarding an offence committed in respect of it or regarding an offence in the commission of which it has been used.

(ii.) That where no such inquiry or trial is held the property should be returned to the person from whose possession it was taken or to his legal representative.

H. W. Thambiah, for appellant in the appeal and the petitioner in the application.
J. G. T. Weeraratne, C.C., for the Attorney-General.

HOWARD, C.J.

The petitioner appeals from an order of the Jaffna Magistrate directing that 32 balls of gold found as the result of a post-mortem examination in the intestines of the petitioner's deceased husband should be handed over to the Collector of Customs for disposal. The facts leading up the holding of this post-mortem examination are as follows :—On the 4th May, 1945, Ponnampalam Mylvagnam, the husband of the petitioner, arrived in Ceylon from India. He was suspected of smuggling gold by the Customs authorities and was detained until the morning on the 5th when he was released. On the 8th May, 1945, he died. At 11 a.m. on the 9th May, the Coroner, S. F. X. Annasamypillai, held an inquest. After recording the evidence of the petitioner and the brother of the deceased, the Coroner received in evidence three medical certificates. In view of the evidence the Coroner decided that no post-mortem examination was necessary. As however, the Police pressed for one the matter was referred by the Coroner to the Magistrate who directed that a postmortem should be held. The postmortem was held on the 10th May, 1945, by Dr. S. Ponniah, the Judicial Medical Officer. He found that the cause of death was gangrene of the small intestines caused by the swallowing of 32 balls of gold the weight of which had dragged over the small intestines forming a kink in it which blocked the arteries. Dr. Ponniah apparently held the postmortem at 9 a.m. and brought the gold to the Magistrate at 11 a.m. whilst the latter was sitting on the Bench. Thereafter the Magistrate recorded the evidence of the Coroner, Dr. Ponniah and a man called Karthigesu. On the 14th May, 1945, the Magistrate received a letter from the petitioner claiming the gold as the legitimate widow of Ponnampalam Mylvagnam and the natural guardian of his children. The Magistrate fixed the matter for enquiry on the 2nd June, 1945. In view of an allegation in the Police Report that this gold was probably smuggled, he directed that notice of the inquiry should be served on the Police and Customs authorities. On the 2nd June, 1945, the Sub-Collector of Customs filed a motion that the gold be delivered to the Customs for disposal under

section 154 of the Customs Ordinance. The Police supported this motion. On the 24th July, 1945, the inquiry was held and on the 14th August, 1945, the Magistrate directed that the gold be sent for disposal to the Customs authorities.

On behalf of the petitioner Mr. Thambiah has contended that the Magistrate had no power to make the order directing the handing over of the gold to the Customs authorities for disposal. In this connection he invited my attention to section 413 (1) of the Criminal Procedure Code which is worded as follows :—

> " 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."

Mr. Thambiah maintains that the Magistrate had no power to make the order of confiscation inasmuch as " no trial or inquiry " had been held into " any offence " with regard to the gold. No trial, moreover, had been instituted before the Magistrate as no compliance had been made with section 148 of the code. The Magistrate appears to have thought that the offence of smuggling gold had been committed. The offender in such a case would have been Ponnampalam Mylvagnam But such an offence was not the subject matter of the inquiry that the Magistrate held. The perpetrator of such an offence was dead and hence he could not be tried. Nor were proceedings instituted under section 148 of the Code. The provisions of section 413 were considered by Bertram, C.J. in *Silva vs. Hamid* (20 N.L.R. 414) and in my opinion his decision in that case is very relevant to the facts of the present case. At page 416 the learned Chief Justice stated that the words " any offence " in section 413 must mean any offence which was either directly or indirectly the subject of the inquiry or trial. The trial of the offence of smuggling gold was not properly instituted before the Magistrate. The gold was brought to him by the Judicial Medical Officer and he, thereupon instituted an inquiry to determine its ownership. The case of *Martin Silva vs. Kanapathypillai* (14 C.L.W. 41) is another authority for the proposition that no order under section 413 can be made unless a Magistrate has before him a proper complaint as required by section 148 of the Criminal Procedure Code that an offence has been committed. In the case Abrahams, C.J. also held that a Criminal Court is not to be employed as a tribunal to investigate rival claims to property. This seems to be exactly what happened in this case. The rival claimants being the petitioner and the Collector of Customs.

Crown Counsel has argued that the Magistrate was holding an inquiry under section 362 (4) of the Code and therefore the subsequent order made under section 413 was in order. I do not think there is any substance in this argument inasmuch as there is nothing to show that the Magistrate was in fact holding an inquiry as contemplated by section 362 (4).

The Collector of Customs apparently claimed the gold under section 154 of the Customs Ordinance. On a perusal of this section it is obvious that as there has been no seizure and condemnation of the gold for a breach of the Ordinance, the section can have no application.

For the reasons I have given the order of the Magistrate is set aside, the gold to be handed over to the petitioner.

Set aside.

PRIVY COUNCIL APPEAL No. 73 of 1944.

NARAYANAN CHETTIAR & OTHERS (APPELLANTS) vs. KALIAPPA CHETTIAR & OTHERS (RESPONDENTS)

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON

Judgment of the Lords of the Judicial Committee of the Privy Council, Delivered the 11th December, 1945.

Present at the Hearing: LORD THANKERTON, LORD GODDARD, SIR JOHN BEAUMONT.

Held : That questions of valuation (in the absence of an attack in the basis of valuation) and allocation of allotments in proceedings under the Partition Ordinance are not proper subjects for appeal to the Privy Council.

Cases referred to : *N. R. Kapur vs. Murli Dhar Kapur* (71 Indian Appeals, at p. 149).

Partition—Adoption of Commissioner's Report as regards allocation of allotments and valuation—Appeal to Privy Council.

Delivered by LORD THANKERTON.

The present appeal raises a question with regard to the division of an estate in Ceylon which carried both tea and rubber on it and which had been held jointly by a certain number of people.

The action is one for partition under the Ceylon Partition Ordinance and proceeded according to the ordinary procedure beginning with an interlocutory decree fixing the shares of the parties and remitting the matter to a Commissioner to carry out the actual partition and suggest the division. A motion by the present appellants that a sale should be ordered of the whole property was rejected and the partition was ordered in its place. A report was made by the Commissioner, objections were taken to it by the present appellants, and these were disposed of by the learned District Judge. They were all disposed of and the only alteration he made in the Commissioner's Report was a modification, about which there is no dispute, to provide an adequate water supply for one of the lots.

The matter was then appealed to the Supreme Court who affirmed the conclusion of the District Judge without any difficulty.

It is now sought to bring this matter before this Board by way of the present appeal. It appears to their Lordships that this appeal falls directly within the decision which was given in 71 Indian Appeals at page 149 (*N. R. Kapur vs. Murli Dhar Kapur*) for these reasons : The basis of the Commissioner's valuation has never been attacked in this case, but the passage founded on by Mr. Barton in the judgment of the District Judge contains the phrase " dead investment."

In their Lordships' opinion that passage shows clearly that the learned District Judge accepted the Rs. 44,000.00 as a valuation on the basis of the factory being for the time a dead investment owing to the tea restrictions.

Their Lordships in any case, in the absence of an attack on the basis of the valuation, which would raise a question of principle, are bound to assume that the valuer, valuing at the time when the tea restrictions were on, took those into account and took their effect into account in fixing his valuation.

The only other question Mr. Barton raised was with regard to the more convenient allocation, as it may be called, that it was sought to obtain before the District Judge, because it was said that the lots which the parties would have wished to have allotted would be more valuable. That is an ordinary matter which arises in every distribution of assets among partners.

It appears to their Lordships that there is no ground for distinction between the present case and a case of ordinary dissolution of partnership, and distribution of assets and accounting, as was the case in 71 Indian Appeals.

Accordingly, their Lordships are bound to come to the conclusion that the subject of the present appeal is not a proper subject for their Lordships' Board to consider, and they will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the respondents' costs.

Appeal dismissed.

Present: DE SILVA, J.

EGGIE NONA vs. DAVID

S. C. No. 271—*C. R. Colombo No.* 96862.
Argued and Decided on: 19th February, 1946.

Landlord and Tenant—Action for ejectment—Premises reasonably required for plaintiff's occupation—Hardship to defendant—Rent Restriction Ordinance No. 60 *of* 1942.

Plaintiff, a widow with three boys and two girls living with her at Ganewatte, sued the defendant, a tenant under her lessee to whom she had leased the premises in question for eight years. The plaintiff wanted the premises, to reside in Colombo for the purpose of educating her children, and she obtained a surrender of the remaining period of the lease from her lessee on payment to him of a sum of Rs. 255.

The defendant contested the case on the ground that he has a large family and has not been able to secure other accommodation for himself.

Held : That in the circumstances the premises were reasonably required for the plaintiff's use and occupation.

H. W. Thambyah, for plaintiff-appellant.

H. W. Jayawardena, for defendant-respondent.

De Silva, J.

The only question in this case is whether premises No. 496, Waidya Road, Dehiwala is, in the opinion of the Court, reasonably required for occupation as a residence for the plaintiff who is the owner of the premises. Plaintiff is a widow with three boys and two girls living with her at present at Ganewatte. She was residing in Colombo in these premises up to 1937 when she gave a lease of the premises to one Mr. Koelmeyer for a term of eight years. The defendant entered into the premises as a tenant of Mr. Koelmeyer. The plaintiff wishing to come back to Colombo for the education of her children obtained a surrender of the lease from Mr. Koelmeyer paying a sum of Rs. 255 for the remaining term of the lease.

In the circumstances there can be no question that the plaintiff is honestly anxious to come back and reside in Colombo for the purpose of educating her children. The defendant on the other hand has a large family and has been living in the premises and says he has not been able to secure any other accommodation for himself. It is true that there would be some hardship to him in having to leave the premises, but the point for consideration is whether this hardship should prevail over the undoubted hardship on the part of the plaintiff.

The learned Commissioner has suggested that the plaintiff might make arrangements to send the children to Colombo or send them to school at Kurunegala from Ganewatte. Both these proposals do not seem to be feasible and, in my opinion, it would be impracticable for the plaintiff to adopt either of these courses suggested by the learned Commissioner.

In the circumstances of the case I am satisfied that the premises are reasonably required for occupation by the plaintiff and I accordingly set aside the judgment and decree of the learned Commissioner and allow the appeal with costs and enter judgment for the plaintiff as prayed for.

Appeal allowed.

Present : Howard, C.J.

RANASINGHE vs. SIRIMANNE

S. C. No. 76—M. C. Chilaw No. 23343.

Argued on : 4th March, 1946.

Delivered on : 18th March, 1946.

Maintenance—Children born during the subsistence of marriage—Presumption—Evidence Ordinance—Meaning of the word " access " in section 112.

Held : That the word " access " in section 112 of the Evidence Ordinance means no more than opportunity of intercourse.

Followed : *Karapaya Servai vs. Mayandi* A. I. R. (1934) P. C. 49.

Not followed : *Jane Nona vs. Leo* (25 N. L. R. 241).

Cases referred to : *Alles vs. Alles* (46 N. L. R. 217).

H. W. Jayewardene, for the defendant-appellant.

No appearance for the applicant-respondent.

Howard, C.J.

The appellant in this case appeals from a judgment of the Magistrate's Court of Chilaw holding that he is the father of the children (1) Ethelreda, (2) Hector and (3) Alfreda and directing him to pay Rs. 15 per month for the three children at the rate of Rs. 5 for each child. Mr. Jayewardene on behalf of the appellant contends that the Order of the Magistrate cannot be allowed to stand, as the applicant, the mother of the children, a married woman, has not proved that her husband had no access to her at any time when such children could have been begotten. It is contended that the applicant has failed to rebut the legal presumption created by section 112 of the Evidence Ordinance. This section is worded as follows :—

> " The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that such person is the legitimate son of that man, unless it can be shown that that man had no access to the mother at any time when such person could have been begotten or that he was impotent."

In the case of *Karapaya Servai vs. Mayandi* (A. I. R. (1934) P. C. 49) it was held by Their Lordships of the Privy Council that the word "access" means no more than opportunity of intercourse. It had been suggested in that case by Counsel for the appellant that the word implied actual cohabitation. In view of this decision the judgment of the Full Bench in *Jane Nona vs. Leo* (25 N. L. R. 241) that the word "access" in section 112 of the Evidence Ordinance is used in the sense of "actual intercourse" and not "possibility of access" or "opportunity for intercourse" can no longer be regarded as a binding authority. In this connection I have not been unmindful of the judgment of Wijeyewardene, J. in *Alles vs. Alles* (46 N. L. R. 217). At p. 225 I observe that the learned Judge in referring to section 112 of the Evidence Ordinance stated that the section had been construed in *Jane Nona vs. Leo* which was a decision of the Full Court and binding on him. He went on to hold that the first defendant had had actual intercourse with the plaintiff and was the father of the child. The effect of the decision in *Karapaya Servai vs. Mayandi* on the authority of *Jane Nona vs. Leo* does not seem to have been considered by the Judges in *Alles vs. Alles*. The omission to do so is no doubt accounted for by the fact that it was unnecessary for their decision in that case.

From a perusal of the judgment of the Magistrate it would not appear that the latter has addressed his mind to the question as to what evidence is required to rebut the presumption created by section 112 of the Evidence Ordinance. The applicant in her evidence states that she was married to Joseph Goonetilleke of Irattakulama and that after she became intimate with the appellant she had nothing to do with Goonetilleke. Ethlreda was born to the defendant at Madampe, Hector at Kegalle and Alfreda at Dalugama at times when he lived in those respective places.

In cross-examination she says that she cannot remember when she left her husband but in 1935 she was living in a house at Madampe rented out by the defendant near the dispensary. In regard to the birth of Ethelreda the birth certificate (D4) was produced showing that this child was born on the 13th February, 1936, at Madampe and that her husband gave the information and is recorded therein as the father. The applicant also states that she lived with the defendant for 2½ years at Udagama in the Kegalle District and that her husband did not visit her at that time. The birth certificate of Hector was produced (D5) and indicates that this child was born on the 21st May, 1937, at Udagama. The applicant's husband is shown as the father. The applicant denies that she was pregnant before she went to Udagama. The birth certificate of Alfreda (D6) indicates that this child was born on the 9th March, 1938, at Badalgama, Meegahawatta, that the applicant's husband was registered as the father and his profession is described as that of a teacher and that the applicant was the informant. With regard to D6 the applicant states that the appellant took her to the Registrar of Waragoda, Kelaniya, and that something was written and she was asked to sign it. She also says that she was pregnant before she went to Waragoda. She cannot remember the year. The applicant called two witnesses to support her story. Rupesinghe, a landed proprietor of Madampe, and a relation of the defendant, stated that while the defendant was at Madampe the applicant left her husband and lived with him. Thereafter they left the village together, but he cannot say where they went. During the earlier part the defendant visited the applicant at her husband's house. He denies that her husband visited the applicant. Hector Wijesinghe, also a landowner living at Madampe, also states that the defendant and applicant lived together at Madampe and then left the village together. This witness also does not know where they went. The defendant admits that he was intimate with the applicant but maintains that it was with the permission of her husband. He also states that the applicant and her husband are living together in the same house. The defendant called two witnesses. The Village Headman of Ihalagama, Madampe, stated that in 1935 and 1936 the applicant lived with her husband, but he cannot say whether they lived at Madampe after 1937. The Village Headman of Dippitigoda, Kelaniya, states that both the defendant and her husband were visiting the applicant at Badalgoda, Kelaniya between the middle of 1937 and 1938.

In my opinion the applicant has not rebutted the presumption created by section 112 of the Evidence Ordinance. She has not proved that the husband did not have an opportunity of intercourse. Even if her evidence and that of her witnesses is accepted, it merely shows that after 1936 she was living with the defendant in another village and not with her husband at Madampe. This testimony does not establish that there was no possibility of intercousre.

For the reasons I have given, the order of the Magistrate is set aside. I make no order as to costs.

Set aside.