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.

VOLUME XXXII

WITH A DIGEST

HEMA H. BASNAYAKE, K.C.

Solicitor-General
(Consulting Editor)

G. P. J. KURUKULASURIYA,

Advocate of the Supreme Court
(Editor)

B. P PEIRIS, LL.B. (LOND.)
ANANDA PEREIRA | G. P. A. SILVA, B.A. (LOND.)
E. P. WIJETUNGE, (Jnr.), B.A. (LOND.)

Advocates of the Supreme Court
(Asst. Editors)

1946

Subscription payable in advance. Rs. 7/50 per Volume.

Printed for " The Ceylon Law Weekly " by L. J. Soertsz, at the Caxton Printing Works, Dam Street, Colombo—1946.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

INDEX OF NAMES

	Page
Abdul Hameed Sitti Kadija & Another vs. Frederick John de Saram & Others ...	46
Agris Appuhamy & Another vs. Rajasuriya (Inspector of Police)	82
Anthonipillai vs. Thyrainethan & Others	24
Asin Umma & Four Others vs. Cader Lebbe	56
Attorney-General vs. Wijesuriya	89
Bandara vs. Sinappu & Others	54
Bilindi & Others vs. Attadassi Thero	50
Chinniah vs. Singhoappu	105
Christinahamy & Another vs. Conderlag (Inspector of Police)	69
Cooray & Another vs. Samaranayake	43
David vs. Seneviratne and Two Others	9
Dhanapala vs. Sabapathypillai, D.R.O.	63
Dias vs. Wijetunge	86
Don Hendrick & Another vs. Gimarahamine & Others	45
Ebert Silva vs. Wijesekera	1
Eliyathamby vs. Kandiah	5
Eliyathamby vs. Mircando & Others	15
Fernando vs. Thamel & Another	66
Hinniappu vs. Guneratne	102
Iyishammah & Others vs. Ratnasingham	30
Jinaratana Thero vs. Somaratana Thero & Another	11
John Robert Farbridge vs. The Registrar of Patents	7
Kelani Valley Motor Transit Co., Ltd. vs. Colombo-Ratnapura Omnibus Co., Ltd. ...	79
Kurukkal vs. Sarma	85
Mudaliyar Wijetunga vs. Duwalage Rossie *et al*	108
Mudiyanse & Another vs. Auchapillai	14
Noor Mohamed vs. Umma	27
Nugawela and Three Others vs. Mohottala & Others	70
Perera & Another vs. Dharmaratne (Excise Inspector)	31
Perera (Asst. Supdt. of Police) vs. Dr. N. M. Perera	40
Perera vs. Podi Singho & Another	61
Perera vs. Police	108
Periyacaruppen Chettiar vs. Proprietors Agents, Ltd.	19
Piyasena (Asst. Assessor, Dept. of Income Tax) vs. Vaz	25
Ramupillai vs. Zavier & Another	42
Raphiel Appuhamy vs. Alagiah (S.I. Police)	83
Rex vs. Jinasekere	16
Rex vs. Mudalihamy	12
Rex vs. Ranesinghe *alias* Nilame & Another	98
Rex vs. W. F. Fernando	104
Saly vs. Liyanage (Municipal Sanitary Inspector)	71
Sangaram vs. Rajasuriya (Inspector of Police)	100
Selvanayagam vs. Henderson (A. G. A., Kegalle)	94
Sinna Lebbe & Another vs. Kandiah (Inspector of Police)	84
Sinnathamby & Another vs. Kathirgamu	41
Thamotherampillai vs. Govindasamy	39
The King vs. Peiris	64
The Urban Council of Kurunegala vs. Banda & Another	3
The Trustees of the Wijewardena Charitable Trust vs. Commissioner of Income Tax	73
Vander Poorten & Others vs. The Settlement Officer	16
V. S. Subbiah Nadar vs. E. P. Kumaraval Nadar	32
Waldron (Supdt. of Police) vs. James Perera	37
Wijayanarayana vs. The General Insurance Co., Ltd.	57
Wijemanne vs. Fernando	28
Wijeratne vs. Sapugodage Mendis Appu *et al*	105
William Singho vs. Seivadurai (S. I., Police)	72

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

DIGEST

Action

For use and occupation.

See Agreement 5

For breach of contract—quantum of damages.
See Damages 9

Possessory action for plantation.
See Possessory Action 43

Institution of—where agreement was to refer differences to arbitration.
See Contract 57

By one co-owner against another—Necessary parties.
See Co-owner 61

By *fidei commissarii* against purchaser from *fiduciarius*.
See Fidei Commissum 108

Agreement

Informal agreement relating to land—Defendant placed in possession by plaintiff—Plaintiff not the owner of the land—Action for use and occupation—Can action be maintained.

The plaintiff placed the defendant in possession of a land under an informal agreement to which the defendant was a party. The defendant received benefit from his possession. The plaintiff was not the owner of the land.

Held : (1) That as the defendant received the benefit of his possession, he was bound to pay a reasonable amount for use and occupation of the land.

(2) That such amount can be recovered by action.

(3) That the action was available to the plaintiff, although he was not the owner of the land, as he had placed the defendant in possession.

ELIYATHAMBY vs. KANDIAH 5

Agreement to refer all differences to arbitration —Can action be instituted.
See Contract 57

Informal agreement to re-transfer land.
See Trust 66

Analyst

See Criminal Procedure Code 31

Appeal

Does appeal lie from decision of District Court under section 28 of the Patents Ordinance.
See Patents 7

Does appeal lie from order under section 20 of Waste Lands Ordinance, No. 1 of 1897.
See Waste Lands 16

Appeal lies from order refusing postponement of trial.
See Trial 42

Arbitration

Agreement to refer differences between parties to arbitration—Can action be instituted before such reference.
See Contract 57

Arbitration Ordinance (Cap. 83)

Section 7.
See Contract 57

Arrest

Illegal arrest by Forest Officer.
See Forest Ordinance 84

Bail

See Courts Ordinance 16

Buddhist Law

Incumbency of temple—Succession.
See Deed 11

Civil Procedure

Order to re-issue summons on a defendant several times—Failure on the part of plaintiff to take any steps—Order refusing further process—Is it justifiable.

The learned District Judge made order on about nine occasions that summons on the 2nd defendant should be re-issued on fresh stamps. The plaintiff had taken no steps and on the last occasion the Judge made order refusing further process. The plaintiff appealed.

Held : That the Court was justified in making the order.

CHINNIAH vs. SINGHO APPU 105

Civil Procedure Code

Sec. 247—Is decree in action under section 247 an instrument affecting land.
See Registration of Documents 1

Section 384—Summary Procedure—Inquiry—Oral evidence permitted to petitioner—Can the court prevent respondent giving oral evidence or cross-examining petitioner.

Held : That where at an inquiry under summary procedure the court allows the petitioner to give oral evidence, it could not properly refuse the respondent the same privilege or the cross-examination of the petitioner.

NOOR MOHAMED vs. UMMA 27

Section 753—When will powers of revision be exercised.
See Trial 42

Section 247—Judgments between judgment—debtor and claimant——*res judicata.*
See Resjudicata 102

Common Intention

Court of Criminal Appeal—Common intention and same or similar intention—Evidence of sudden and grave provocation—Failure on the part of trial Judge to direct the jury on such evidence—Verdict of murder reduced to culpable homicide not amounting to murder.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Held : (i.) That in a charge to the jury on the point of common intention the trial Judge should instruct them sufficiently to enable them to discriminate between "common intention" and "same or similar intentions."

(ii.) That where there are significant facts which in the opinion of the court indicate that the appellants in causing the death of the deceased were acting on grave and sudden provocation, the offence should be reduced to one of culpable homicide not amounting to murder.

REX VS. S. RANASINGHE *alias* NILAME AND ANOTHER 98

Compensation for Improvements

See Land Settlement Ordinance 19

*Compensation for Improvements—*Bona fide *possessor—Rights and liabilities of—Improvements made during action—Can value of such improvement be claimed—How long can an improver continue to take fruits of improvements—Amount of expenditure recoverable by improver.*

Held : (i.) That where a *bona fide* improver is sued by an owner, the former is not required to pay compensation for the fruits which he has gathered in good faith, whether they have been consumed or are still in existence, but is only bound to restore the principal thing together with such fruits as were extant at the moment when *litis contestatio* took place.

(ii.) That from the moment of *litis contestatio* he is bound to apply the utmost care in the cultivation of the fruits.

(iii.) That if the owner succeeds in proving his ownership, he can require the possessor to hand over all the fruits gathered by him during the action, or pay compensation, and can further claim damages for such fruits as he could have gathered by the exercise of due care.

(iv.) That a *bona fide* possessor is not entitled to claim any sum for improvements effected after the institution of an action against him by the owner.

(v.) That the amount of expenditure which an improver is entitled to recover is restricted to its value at the time he restores the property.

BILINDI AND OTHERS VS. ATTADASSI THERO ... 50

Right of *fiduciary* to claim compensation for improvements from *fidei commissarii.*

See Fidei Commissum 108

Confession

Made under threat and inducement to person in authority.

See Evidence Ordinance 82

Consideration

Transfer of property without consideration.

See Trust 66

Contract

Action for Breach of contract—quantum of damages.

See Damages 9

Impossibility of performance owing to outbreak of war, and alteration of normal conditions by Defence Regulations—Exorbitant sum claimed as interest on loan.

Held : (1) That where the parties had entered into a contract on the assumption that normal conditions would prevail, and such contract became impossible of performance owing to the outbreak of war, and consequent emergency legislation, it was open to the court to do what seems to be equitable between the parties.

(2) That at no time can a creditor sustain a claim to recover more than double the principal which has been lent.

ELIYATAMBY VS. MIRCANDO AND OTHERS ... 15

Contract of Insurance—Clause that all differences between the parties arising out of the contract shall be referred to arbitration—Mere denial of liability by one party—Institution of action—Is reference to arbitration a condition precedent to such action—Failure of defendant to specify grounds on which liability is repudiated—Can it be said that differences which could be referred to arbitration existed—Arbitration Ordinance, section 7.

Held : (i.) That where parties to a contract agreed that all differences arising out of the contract shall be referred to the decision of an arbitrator, a reference to such arbitration is a condition precedent to the institution of an action by one of the parties.

(ii.) That, where one of the parties failed, though requested by the other, to specify the grounds on which liability was denied, and an action was instituted against the party in default, the court had jurisdiction to entertain the action, as it cannot be said that any differences, which could be referred to arbitration, existed between the parties before action was brought.

(iii.) That in view of section 7 of the Arbitration Ordinance the party sued is entitled to have an order staying the action until the matters in difference between the parties have been referred to arbitration.

WIJAYANARAYANA VS. THE GENERAL INSURANCE CO., LTD. 57

Breach of contract—Lease of Crown lands—Action against Crown for damages.

See Lease 89

Co-owner

Possessory action between co-owners for plantation.

See Possessory Action 43

Co-owner of *panguwa*—Exclusive possession of lot in lieu of shares for over twenty years.

See Prescription 54

Co-owner erecting building on co-owned property without consent of other co-owners—Action for an order for demolition—Can such action be maintained without joining other co-owners.

Held : That all co-owners need not be joined in an action in which the plaintiff seeks for a mandatory order to demolish a building put up by a co-owner on co-owned property without the consent of other co-owners.

PERERA VS. PODI SINGHO AND ANOTHER ... 61

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Courts Ordinance

Section 31—Applicability of, to case where re-trial is ordered by Court of Criminal Appeal.

Held: That section 31 of the Courts Ordinance does not apply where a re-trial is ordered by the Court of Criminal Appeal.

Per ROSE, J. ...... "the words 'committed for trial' should be limited in their application to persons committed for trial by a Magistrate."

REX VS. JINASEKERA 16

Court of Criminal Appeal

Common intention and similar intention—Failure on the part of Judge to direct jury on evidence of sudden and grave provocation
See Common Intention... 98

Applicability of section 31 of the Courts Ordinance to a case where re-trial is ordered by the Court of Criminal Appeal.
See Courts Ordinance 16

Verdict of culpable homicide—Right of self defence exceeded.—Trial Judge's view that accused guilty of murder. Sentence.
See Criminal Procedure 104

Criminal Procedure

Re-trial ordered by Court of Criminal Appeal. Section 31 of Courts Ordinance will not apply
See Courts Ordinance 16

Distinction between addition and alteration of a charge.
See Income Tax 25

Conviction set aside due to irregularity in proceedings—Re-trial—When it may not be ordered.

The conviction was quashed on the ground that the proceedings were irregular, and the Supreme Court refused to direct further proceedings to be taken against the accused as it was satisfied that it was not safe to act on the evidence for the prosecution.

RAPHIEL APPUHAMY VS. ALAGIAH (S. I. POLICE) 83

Failure of trial Judge to direct jury on evidence as to sudden and grave provocation.
See Common Intention... 98

Court of Criminal Appeal—Verdict of culpable homicide—Self-defence—Right exceeded—Trial Judge's view that accused guilty of murder—Sentence of ten years' rigorous imprisonment—Is it excessive in the circumstances.

The appellant was found guilty by the jury of culpable homicide not amounting to murder as he had exceeded the right of self-defence. The learned trial Judge, after this verdict, stated that in his view the appellant was guilty of murder and passed a sentence of ten years' rigorous imprisonment.

Held: That the jury's verdict indicated that they accepted the appellant's story of self-defence and in the circumstances the sentence passed was excessive.

REX VS. W. F. FERNANDO 104

Criminal Procedure Code

Sections 172 and 193.
See Income Tax 25

Section 406—Analyst's Report—Application by accused on trial date for summons on Analyst—Should it be allowed.—Accused's right to summon Analyst.

Held: (i) That an accused person has the right to have the Analyst present in court to testify to the contents of his report made by him.

(ii.) That an application to summon the Analyst should be treated in the same manner as one for a summons on any other witness for the prosecution.

PERERA AND ANOTHER VS. DHARMARATNE (EXCISE INSPECTOR) 31

Sections 148 (1) (*d*), 151 (2) *and* 297—*Evidence of witness recorded in the presence of accused produced in court before charged—Can such evidence be read over to witness at the trial or should evidence be recorded afresh.*

Held: That when proceedings against an accused person were instituted under paragraph (*d*) of section 148 (1) of the Criminal Procedure Code, any evidence given by a witness recorded by the Magistrate before charging the accused could be read over to such witness at the trial.

DHANAPALA VS. SABAPATHYPILLAI, D.R.O. ... 63

Crown

Power of Land Commissioner to bind.
See Lease 89

Acquisition of estate by Crown for village expansion—Labourer remaining in occupation of line rooms.
See Penal Code 94

Crown Land

Lease of—Action for damages against Crown for breach of contract.
See Lease 89

Damages

Breach of contract—Principle on which damages for loss in special circumstances are recoverable—Is it the same as in actions for tort.

Held: (i.) That in an action for breach of contract no damages for special loss are recoverable unless the defendant had been informed of the special circumstances in which the loss would be incurred and had entered into contract subject to them.

(ii.) That the rule as to the remoteness of damages is the same whether the damages are claimed in actions of tort or of contract.

DAVID VS. SENEVIRATNE & TWO OTHERS ... 9

Lease of Crown land—Action against Crown for breach of contract.
See Lease 89

Decree

Is decree in action under section 247 Civil Procedure Code an instrument affecting land.
See Registration of Documents 1

*Sale in execution—Purchase by decree-holder—*Bona fide *purchase by third party from decree-holder—Subsequent reversal of decree—Is title of* bona fide *purchaser affected by such reversal.*

Held: That the title of a *bona fide* purchaser from a decree-holder who purchased at a sale held in execution of his decree is not affected by the subsequent reversal of such decree.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

WIJERATNE VS. SAPUGODAGE MENDIS APPU *et al* 105

Deed

Deed—Interpretation of—Incumbency of Buddhist temple—Deed executed by Incumbent gifting the temple property to a particular pupil and expressly giving him the right to give the said lands on a similar instrument to any one of his pupils to succeed him as chief Incumbent—Construction.

Held that: (1) To interpret a deed, the expressed intention of the parties must be discovered.

(2) The words used by the donor in the deed contain a plain intention to appoint the donee as his successor to the incumbency.

JINARATANA THERO VS. SOMARATANA THERO AND ANOTHER 11

Defence Regulations

Defence Regulations (Miscellaneous)—Charge under Regulation 17 (1) for having addressed persons engaged in the performance of essential services—Act likely to prevent or interfere with performance of their duties—Failure to set out in the charge the actual words used in the language spoken—Can conviction be maintained.

Held: That in a prosecution under Regulation 17 (1) of the Defence Regulations (Miscellaneous) for addressing persons engaged in the performance of essential services, having reasonable cause to believe that such act will be likely to prevent or interfere with the carrying on of their work, the failure to set out the actual words of the speaker in the language in which the speech was made is fatal to a conviction.

WALDRON (SUPTD. OF POLICE) VS. JAMES PERERA 37

Defence Regulations (Miscellaneous) Regulation 17 (1)—Charge under, for addressing persons engaged in essential services—Act likely to prevent or interfere with performance of duties of such persons—Meaning of the word "act" in Regulation 17 (1).

Held: That the "act" specified in Regulation 17 (1) of the Defence Regulations (Miscellaneous) is some action which by itself would interfere with the work of persons engaged in essential services and not an argument which leaves the option to the person addressed to follow it or ignore it.

PERERA (ASST. SUPTD. OF POLICE) VS. DR. N. M. PERERA 40

Defence (War Equipment) (Purchase by Civilians) Regulations, 1944—Applicability of to property intended for Admiralty Civilian Personnel.

Held: That the Defence (War Equipment) (Purchase by Civilians) Regulations, 1944, do not apply to property intended for the use of Admiralty Civilian Personnel.

WILLIAM SINGHO VS. SELVADURAI (S.I. POLICE) 72

Dewala

Succession to office of Kapurala—Is it by hereditary right.

Held: That the right of succession to the office of Kapurala of a dewale is a hereditary right.

NUGAWELA & THREE OTHERS VS. MOHOTTALA & OTHERS 70

Estate

Labourer remaining in occupation of line-room after acquisition of estate by Crown for village expansion.

See Penal Code 94

Equity

Grant of equitable relief to prevent Statute of Frauds being used to cover what would amount to a fraud.

See Trust 66

Evidence

Duty of party to lead evidence when material witness absent.

See Trial 42

Evidence recorded before charging accused. When can such evidence be read over to witness at trial.

See Criminal Procedure Code 63

Admissibility of unstamped receipt.

See Promissory Note 85

Of system.

See Penal Code 86

Of sudden and grave provocation.

See Common Intention... 98

Possession of house-breaking instruments—Burden of proof.

See Penal Code 100

To establish that accused is reputed thief.

See Penal Code 108

Evidence Ordinance

Section 32 (1)—Statement by deceased person re circumstance resulting in his death—Admissibility.

M (accused) was charged with the murder of W, who lived with his mistress Mary Nona in the same estate lines as M. On the day of murder M went off to obtain bees' honey in the jungle. In his absence W is alleged to have come to his lines and after the midday meal left the place with some scrap rubber and a box of matches. When Mary Nona questioned W as to where he was going, W is alleged to have said "Mudalihamy (accused) wanted me to go and collect honey and I am going to meet him."

W was not heard of since. Twelve days later his body was found wedged in between two rocks in the middle of a stream.

Objection was taken to the admissibility of the statement made by W to Mary Nona.

Held: That the statement was admissible under section 32 (1) of the Evidence Ordinance.

REX VS. MUDALIHAMY 12

Section 50—Proof of pedigree—When is opinion of a witness as to relationship relevant.

Held: (i.) That in proving pedigrees referring to matters which occurred in times gone by and among persons who have passed away, courts are obliged to allow derivative evidence to be given in certain circumstances.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(ii.) That the opinion of a witness as to the relationship of one person to another is relevant provided such opinion is expressed by conduct, and the witness has a special means of knowledge on the subject.

ANTHONIPILLAI VS. THYIRAINETHAN & OTHERS 24

Section 92 (2).
See Trust 66

Section 24—Evidence—Admissibility—Confession to person in authority—Made under threat and inducement.

The first and second accused were convicted solely on the statements made by the second accused to the Chief Storekeeper of the Co-operative Wholesale Establishment, who was acting under orders of the Deputy Commissioner when threatened by the latter to take them to the police.

The second accused also made a statement in the presence of the Storekeeper acting on an inducement by a third person.

Held : (1) First statement was made under a threat to a person in authority, and therefore is inadmissible.

(2) The second statement is also inadmissible because of the inducement under which it was made.

AGRIS APPUHAMY AND ANOTHER VS. RAJASURIYA (INSPECTOR OF POLICE) ... 82

Sections 14 and 15.
See Penal Code 86

Exceptio Rei Venditae et Traditae

Is it available against party claiming title under Settlement Order.
See Land Settlement Ordinance 19

Execution

Sale in execution of decree. Title of *bona fide* purchaser from decree holder who purchased at sale not affected by reversal of decree.
See Decree 105

Fidei Commissum

Gift subject to condition that after donee's death property should vest in donor's daughters—Death of one of donor's daughters before donee—Are her heirs entitled to rights in the property gifted—Interpretation.

A deed of gift contained the following condition :—

That the donee " shall possess and take the produce thereof from the date of my death until his lifetime without usufructing, mortgaging or transferring them, that after his death the said properties shall devolve on my daughters only, that I the donor and my heirs will have no right whatever to the said properties."

At the time of the gift seven daughters were living. One of them predeceased the donee leaving as her heirs her children.

Held : That the donor's deceased daughter obtained a *spes successionis* when the deed of gift was executed and therefore on her death her rights passed to her heirs.

IYISHAMMAH AND OTHERS VS. RATNASINGHAM . 30

Will, Construction of—General rules applicable—Difference between fidei commissum *and trust.*

The last Will of a Muslim testator was in the following terms :—

" I do hereby will and desire that my wife Assenia Natchia, daughter of Seka Marikar, and my children Mohamadoe Noordeen, Mohamadoe Mohideen, Slema Lebbe, Abdul Ryhiman, Mohamadoe Usboe, Amsa Natchia and Savia Umma, and my father Uduma Lebbe Usboe Lebbe, who are the lawful heirs and heiresses of my estate shall be entitled to and take their respective shares according to my religion and Shafie sect—to which I belong, but they, nor their heirs shall, not sell, mortgage or alienate any of the lands, houses, estates or gardens belonging to me at present or which I might acquire hereafter, and they shall be held in trust for the grandchildren of my children and the grand-children of my heirs and heiresses only that they may receive the rents, income and produce of the said lands, houses, gardens and estates without encumbering them in any way or the same may be liable to be seized attached or taken for any of their debts or liabilities, and out of such income, produce and rents, after defraying expenses for their subsistence, and maintenance of their families the rest shall be placed or deposited in a safe place by each of the party, and out of such surplus lands should be purchased by them for the benefit and use of their children and grand-children as hereinbefore stated, but neither the executors herein named or any Court of Justice shall require to receive them or ask for accounts at any time or under any circumstances, except at times of their minority or lunacy.

" I further desire and request that after my death the said heirs and heiresses or major part of them shall appoint along with the executors herein named three competent and respectable persons of my class and get the moveable and immoveable properties of my estate divided and apportioned to each of the heirs and heiresses according to their respective shares, and get deeds executed by the executors at the expense of my estate in the name of each of them subject to the aforesaid conditions."

Held : (i.) That the language used in the Will made it sufficiently clear that the intention of the testator was to create a separate *fidei commissum* in the case of each devisee.

(ii.) That the language point clearly to a devise of the " plenum proprietas " of the estate to the devisees, subject to the restrictions so far as binding under the Law of Ceylon, and hence, it is inconsistent with the creation of a trust as known to the English Law.

Per LORD THANKERTON.—" It is suggested that the succeeding clause as to the rents, income and produce of the immoveable property makes it difficult to uphold the creation of a valid *fidei commissum*, but their Lordships are of opinion that it is not legally binding on the fiduciaries, to whom alone it relates, and is therefore, of a precatory nature ; in this they agree with the views expressed by Keuneman and Wijeyewardene, J.J. As regards the construction of the clause, their Lordships are of opinion (*a*) that it applies to the devisees and their heirs, who are referred to in the clause which prohibits alienation, (*b*) that it relates only to surplus rents

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

income and produce, and to their incumbrance, and (c) that the purchase of the surplus lands "for the benefit and use of their children and grand-children as hereinbefore stated," sufficiently clearly expresses the desire that the surplus lands should be held on the same terms as the original shares of the testator's immoveable property were to be held. It is clear on the whole terms of the Will that each of the fiduciaries was only to take an interest in his share during his life. The next clause as to a demand for accounts, whether effective or not, cannot affect the valid creation of a *fidei commissum.*

Abdul Hamid Sitti Kadija and Another vs. Frederick John de Saram and Others ... 46

Gift—Acceptance by donee—Sale of gifted property by donor to third party—Improvements made by the third party—Subsequent revocation of conditions of gift by donor—Can donor revoke such conditions—Sale in execution against third party—Action by fidei commissarii *against such purchaser—Compensation—*Jus retentionis.

N and S were entitled to a certain land. In 1906 N gifted his half-share by deed P 3 to his daughter C who accepted it subject to the conditions :

(*a*) that she should not sell, mortgage or otherwise alienate the property.

(*b*) that upon her death the property should devolve upon certain persons designated as "all her children being heirs descending from her and those who have obtained authority as her executor or administrator.

In 1911, N purchased S's half-share and transferred the entirety of the land to E, who planted and otherwise improved it.

In 1918 by deed D 1, N purported to cancel the conditions subject to which gift on P 3 was made and by deed D 6 of the same year gifted the property absolutely to C.

At a sale in execution of a decree against E the property was sold and the defendant-appellant purchased it and obtained conveyance D 4.

C died leaving the four plaintiffs, who in this action claimed a half-share as *fidei commissarii* on deed P 3. The plaintiffs succeeded and the defendant appealed.

Held : (i.) That P 3 created a valid *fidei commissary* donation which involved 'the benefit of the family'.

(ii.) That N, the donor had no power to revoke the gift to the *fidei commissarii* without their consent.

(iii.) That a fiduciary is entitled to claim compensation for improvements against the *fidei commissarii.*

(iv.) That a purchaser from a fiduciary is in the same position as a fiduciary as regards a claim for improvements.

(v.) That the defendant-appellant was a *bona fide* possessor and was entitled to recover compensation for improvements made by E from the plaintiffs and to a *jus retentionis* until compensation is paid.

Mudaliyar Wijetunga vs. Duwalage Rossie *et al* 108

Forest Ordinance (Cap. 311)

Transport of timber by accused on permit—Refusal of Forest Guards to allow them to proceed—Attempt to take accused to Headman to get permit read—Is such conduct legal—Does it amount to arrest.

Held : (i.) That there is nothing in the Forest Ordinance (Chap. 311) which empowers a Forest Guard to stop a person who is transporting timber on a permit and to take him out of his way in order to get the permit read.

(ii.) That the refusal of a Forest Guard to allow such person to proceed on his journey amounted to an illegal arrest of that person.

Sinna Lebbe and Another vs. Kandiah (Inspector of Police) 84

Gift

Interpretation.
See Fidei commissum 30

Acceptance.
See Fidei commissum 108

Improvements

Made by *fiduciarius.*
See Fidei commissum 108

Income Tax

Income Tax Ordinance, Cap. 188—Prosecution under section 87 (1) (b) and 87 (1) (d) for making false statement in return and signing statement or return without reasonable ground for believing same to be true—Can person making and signing such return deny knowledge of contents thereof—Criminal Procedure Code, sections 172 and 193—Distinction between addition and alteration of a charge.

Held : (i.) That, when a return, statement or form required under the Income Tax Ordinance is furnished by a person or by his authority, it is not open to such person, in the absence of proof to the contrary, to say that although he signed the return, statement or form, he was not cognisant of its contents.

(ii.) That, in view of section 172 and 193 of the Criminal Procedure Code, it is open to a Magistrate to add a charge without producing the result that thereby the charge is altered. It is only the substitution of one charge for another that amounts to an alteration of a charge in the Magistrate's Court.

Piyasena Asst. Assessor, Dept. of Income Tax vs. Vaz 25

Income Tax—Last Will—Trust for relief to poor relations of testatrix—Is it a trust of a public character established for a charitable purpose within the meaning of section 7 (1) (c) of the Income Tax Ordinance.

A testatrix devised certain properties to the appellants who were to hold the same in trust and to use the net income thereof for three purposes one of which was as follows :—"To aid either occasionally or regularly my relations who are or may become poor including members of

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

my own family and who, in the judgment of my Trustees are in need of such aid in consequence of illness, financial difficulties and the like or on the occasion of marriage, deaths and the like."

The assessor held that the income derived from the said properties was liable to income tax as the trust created by the above terms was not for a charitable purpose within the meaning of section 7 (1) (*c*) of the Income Tax Ordinance.

The Commissioner and the Board affirmed the assessment and a case was stated for the opinion of the Supreme Court whether the trust in question for the relief of poor relations of the settler constituted a valid charitable trust and therefore is exempt from taxation.

Held : That the trust created by the testatrix for the benefit of her poor relations is a trust of a public character established for a charitable purpose within the meaning of section 7 (1) (*c*) of of the Income Tax Ordinance.

THE TRUSTEES OF THE WIJEWARDENE CHARITABLE TRUST VS. THE COMMISSIONER OF INCOME TAX 73

Insurance

Contract of—Clause that differences between parties to be referred to arbitration—Effect of.
See Contract 57

Interpretation

Of deed—Expressed intention of parties must be discovered.
See Deed 11

Jurisdiction

Of court to entertain action where parties had agreed to refer all differences to arbitration.
See Contract 57

Of Municipal Magistrate to try offences under Quarantine and Prevention of Diseases Ordinance.
See Quarantine and Prevention of Diseases Ordinance 71

Jus Retentionis

See Land Settlement Ordinance 19
See Fidei commissum 108

Kapurala

Of Dewala. Is office held by hereditary right.
See Dewala 70

Land Commissioner

Power of to bind Crown.
See Lease 89

Landlord and Tenant

See Under Rent Restriction Ordinance.

Land Settlement Ordinance

Land Settlement Ordinance, section 8—Claimant declared purchaser of property—Sale of property pending settlement proceedings by claimant—Improvements made by purchasers—Settlement order made subsequently in claimant's favour—Sale of title under settlement order to third party—Due Registration—Plea of exceptio rei Venditae et Traditae—*Is it available against a party claiming title under settlement order—Trust—Compensation for improvements*—Jus retentionis—*Trust Ordinance, section 98 (Cap. 72).*

By Deed 3 D4 of 1928 one G, who was declared the purchaser of the property in question under the Waste Lands Ordinance, No. 1 of 1897 transferred it to the 1st defendant, who in turn conveyed the same to the 3rd defendant.

By a final order dated 27-10-33 made under section 8 of the Land Settlement Ordinance (Cap. 319) and duly registered, G was declared entitled to the property. G's rights were sold in execution against him subsequently and they devolved on plaintiff whose title deeds were registered on the same folio as the Settlement Order. 3 D4 was not registered. No evidence was led to show that plaintiff was not a *bona fide* purchaser. The defendants planted and improved the property for which they claimed compensation and a *jus retentionis.*

Held : (i.) That the Settlement Order vested the property in G and wiped out all previous titles.

(ii.) That in the circumstances the plea of *exceptio rei venditae et traditae* was not available to the defendant against the plaintiff.

(iii.) That as the plaintiff is a *bona fide* purchaser he cannot be said to hold the property in trust for the defendants.

(iv.) That the defendants were entitled to compensation for improvements and to a *jus retentionis* until compensation is paid.

PERIYACARUPPEN CHETTIAR VS. PROPRIETORS AGENTS, LTD. 19

Lease

Is lessee protected by Rent Restriction Ordinance after expiry of lease.
See Rent Restriction Ordinance 56

Lease of Crown Lands—Breach of contract—Action for damages against Crown—Power of Land Commissioner to bind Crown.

The plaintiff sued the Crown in damages in consequence of the failure of the Government Agent, Uva, who, he averred, was acting for and on behalf of the Crown, to fulfil a contract undertaking to lease to him the right to tap and take the produce of rubber trees on certain Crown lands. The Government Agent was acting as the agent of the Land Commissioner.

Held : (1) That the transaction contemplated by the contract was a lease of Crown land and was governed by the Regulations relating to sales and leases of Crown lands and approved by the Secretary of State.

(2) That under those Regulations the Land Commissioner was not competent to enter into this contract or to bind the Crown.

ATTORNEY-GENERAL VS. WIJESURIYA ... 89

Loan

Creditor cannot recover more than double the principal amount lent.
See Contract 15

Motor Car Ordinance No. 45 of 1938

Licences to be reckoned for grant of exclusive road service licence.
See Omnibus Service Licensing Ordinance ... 79

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Municipal Magistrate

Jurisdiction to try offences under Quarantine and Prevention of Diseases Ordinance.

See Quarantine and Prevention of Diseases Ordinance 71

Nuisance

See Rent Restriction Ordinance 39

Oaths

Oath—Agreement of parties to decide case by—Date fixed by Judge without appointing Commissioner to administer oath—Failure to take oath owing to illness of defendant's proctor on the date fixed—Should judgment be entered for plaintiff as agreed.

The plaintiff agreed to his action being dismissed if the defendant took an oath at the "Maligawa" on a date to be fixed by the court. The defendant agreed that, on his failure to take the oath, judgment should be entered for the plaintiff. The court fixed a certain date for the oath, but the name of the Commissioner before whom the oath was to be administered was not named. The defendant did not take the oath on the date fixed owing to the illness of his Proctor, and thereupon judgment was entered for plaintiff.

Held : That judgment should not have been entered for the plaintiff as the court had failed to appoint a commissioner to administer the oath.

Mudiyanse and Another vs. Auchapillai... 14

Omnibus Service Licensing Ordinance No. 47 of 1942

Exclusive road service licence—Meaning of "route" and "highway"—Motor Car Ordinance, No. 45 of 1938.

Both parties to this case applied for a road service licence for the route Colombo-Ratnapura. The respondent had the greater number of omnibus licences covering that route. The appellant had more licences if his omnibuses, licensed for the route Panadure to Badulla *via* Colombo-Ratnapura, were taken into consideration.

Held : That the two routes were not the same and that the only omnibus licences to be reckoned for the purposes of the road service licence were those confined to the Colombo-Ratnapura route.

The Kelani Valley Motor Transit Company, Limited vs. The Colombo-Ratnapura Omnibus Company, Limited ... 79

Panguwa

Co-owner of—Possessing exclusive lot in lieu of shares for over twenty years.

See Prescription 54

Partition

Rival schemes by the Commissioner appointed by Court and another surveyor—Acceptance of scheme by the surveyor appointed by court—How it should be adopted.

Held : That where a court accepts a scheme of partition prepared by a Surveyor other than the Commissioner appointed by court, the proper course is to remit the case to the Commissioner with directions for him to modify his scheme on the lines, more or less of the scheme so accepted.

Don Hendrick and Another vs. Gimarahamine and Others 45

Patents

Patents Ordinance—Sections 28 and 36—Petition under section 28 for extension of patent—When will such extension be granted—Does appeal lie from decision of District Court.

Held : (1) That an appeal lies to the Supreme Court from the decision of a District Court under section 28 of the Patents Ordinance ;

(2) That an extension of a patent will not be granted unless there is proof that the invention is one of more than ordinary utility ;

(3) That an extension will not be granted unless the patentee's accounts show clearly and precisely how he has been remunerated in respect of his patent ;

(4) That the absence of proof that the corresponding patents outside Ceylon are in force is a circumstance unfavourable to the grant of an extension.

John Robert Farbridge vs. The Registrar of Patents 7

Penal Code

Sections 455 and 459—Forgery—Alteration of date in birth certificate using it as genuine document by employee of Municipality to obtain longer period of service than otherwise entitled to.

On the accused entering permanent service under the Municipality he was required to submit a birth certificate. Accused whose birth was registered to have taken place on 24-12-1906 sent a copy of a birth certificate (P3) with the figures of the year altered from 1906 to 1912. He was charged on two counts, viz. : (i.) of forgery, (ii.) of using as genuine a forged document. After trial he was acquitted on the grounds (*a*) that the prosecution had not proved that the alteration was made by the accused, and (*b*) that the ultimate gain or loss to the Municipality by the circumstance that accused may remain in its service for longer period (viz. six years) than he would otherwise be, and may obtain a larger pension than he would otherwise receive was too remote.

The Attorney-General appealed.

Held : That in the circumstances, the accused was guilty of the 2nd count, viz. of using as genuine a forged document.

The King vs. Peiris 64

Sections 398, 399 and 402—Cheating by personation.

The accused, pretending to be the mother of a girl of seventeen, induced a Magistrate to make order for the delivery of the girl to her. The accused was charged and convicted with having cheated the Magistrate by personation and thereby induced him to deliver the girl to her. She was not charged with having induced the Magistrate to make the order of delivery.

Held : That the conviction was bad and must be set aside.

Christinahamy and Another vs. Conderlag (Inspector of Police) 69

Section 400—Cheating—Evidence of system—Evidence Ordinance, sections 14 and 15.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Held : That in a charge of cheating, evidence of one similar transaction is not sufficient to prove system.

DIAS VS. WIJETUNGE 86

Section 449—*Possessing without lawful excuse instruments of house-breaking, a chisel, a clasp knife and torch—What the prosecution should prove before accused is called upon to prove lawful excuse—Explanations consistent with the innocence of the accused—What inference should be drawn.*

Held : (i.) That in a prosecution for possessing without lawful excuse instruments of house-breaking, before the accused can be called upon to prove a lawful excuse for their possession, the prosecution must establish that the accused intended to use them for the purposes of house-breaking.

(ii.) That where there are explanations which are consistent with the innocence of the accused, the selection of those which tend to incriminate him is not justifiable.

SANGARAM VS. RAJASURIYA (INSPECTOR OF POLICE 100

Culpable homicide—Exceeding right of self-defence.
See Criminal Procedure 104

Section 451—*Evidence necessary to establish that accused is a reputed thief.*

Held : That in a charge under section 451 of the Penal Code, evidence of previous convictions of accused cannot be led to establish the fact that he is a reputed thief.

PERERA VS. POLICE 108

Sections 427 *and* 433—*Criminal trespass—Labourer in occupation of line rooms in tea and rubber estate—Acquisition of estate by Crown for village expansion—Possession taken on behalf His Majesty—Superintendent placed in control of estate—Notice that services of labourer not required and that line rooms should be vacated—Refusal to vacate—Does it amount to criminal trespass—Nature of such occupation—Superintendent's right to prosecute—Meaning of occupation.*

The accused is a labourer who worked in the factory of a tea and rubber estate in which he occupied two line rooms with his wife and children. The estate was subsequently acquired by the Crown under the Land Acquisition Ordinance for purposes of village expansion and having been taken possession on behalf of His Majesty it was placed under the control of a Superintendent, who—

(*a*) took up residence on the estate ;
(*b*) was in actual possession of the entire estate including all buildings thereon,
(*c*) allowed the labourers to continue their work without discussing with them any terms or conditions of service,
(*d*) paid all labourers including the accused without making any deduction for the rooms they occupied ;
(*e*) had the right to allot any rooms in the lines to the labourers and to change the rooms occupied by the labourers as he wished.

The Superintendent served on the accused a notice that his services would not be required and that he should vacate the rooms occupied by him before a certain date. He was paid all wages due and his certificate of discharge was tendered to him. The latter, he refused to accept and failed to vacate the rooms.

The Superintendent charged him with having committed criminal trespass by unlawfully remaining in the two line rooms with intent to annoy him. The accused gave evidence and stated that he was born and bred in the estate, and that the estate was his home, and that he intended to remain in the estate till he was able to build a house to move into.

The Magistrate convicted him and he appealed.

Held : (i.) That in the circumstances the conviction was right.

(ii.) That the accused's occupation was not as tenant but was ancillary to the performance of his duties as a labourer.

(iii.) That the line rooms were in the occupation of the Superintendent within the meaning of section 427 of the Penal Code, inasmuch as the accused's occupation was that of a servant and is in law the occupation of the master.

(iv.) That the accused's object in remaining in the line rooms was to annoy the Superintendent.

SELVANAYAGAM VS. HENDERSON, A. G. A. (KEGALLE) 94

Plantation

Possessory action for.
See Possessory Action 43

Possessory Action

Possessory action for plantation—Can it be maintained by one co-owner against another.

Held : That a possessory action for a plantation can be maintained by one co-owner against another.

COORAY AND ANOTHER VS. SAMARANAYAKE ... 43

Postponement

See Trial 42

Prescription

Co-owner of Panguwa—Exclusive possession of lot in lieu of shares without interference by others for over twenty years—Is such possession sufficient to confer prescriptive title to such lot.

Where, in lieu of his interests, a co-owner of a " panguwa ", possessed a separate portion of land out of the panguwa, exclusively for a period of over twenty years without any interference by the other co-owners, who similarly possessed other lots of the " panguwa."

Held : That such co-owner acquired a prescriptive title to such lot possessed exclusively by him.

BANDARA VS. SINAPPU AND OTHERS ... 54

Promissory Note

Action by endorsee—Defence of payment to payee—Unstamped receipt given by payee—Section 35, *proviso* (*b*) *of the Stamp Ordinance—Is such receipt admissible in evidence against the endorsee.*

Held : That an unstamped receipt given by the payee of a promissory note to its maker is not admissible in evidence against the endorsee in an action by the latter against the maker.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

KURUKKAL vs. SARMA 85

Quarantine and Prevention of Diseases Ordinance (Cap. 173)

Quarantine and Prevention of Diseases Ordinance, Chapter 173—Offences under—Jurisdiction of Municipal Magistrate to try.

Held : That the Municipal Magistrate has no jurisdiction to try an offence committed under the Quarantine and Prevention of Diseases Ordinance, chap. 173.

SALY vs. LIYANAGE (MUNICIPAL SANITARY INSPECTOR 71

Rainwater

Right to discharge along defined channel.

See Servitude 41

Registration of Documents

Registration of Documents Ordinance, sections 6, 7 and 8—Prior registration of later deed—Decree in action under section 247 Civil Procedure Code—Is it an "instrument affecting land."

The plaintiff claimed a land on a chain of deeds dating from 1931. After the death of the original owner, his heirs, in 1942, transferred the land to the 2nd defendant. In an action under section 247 of the Civil Procedure Code, the plaintiff was declared entitled to the land. The plaintiff's deeds and the decree in the 247 action were not registered in the correct folio, whereas the 2nd defendant's deed was correctly registered.

Held : (i.) That the deeds in favour of the plaintiff and the 2nd defendant proceeded from the same source ;

(ii.) That the deeds in favour of the plaintiff were void against the subsequent deed in favour of the 2nd defendant by reason of prior registration ;

(iii.) That the 2nd defendant by his deed claimed an adverse interest on valuable consideration to the decree in the 247 action ;

(iv.) That such decree was a registrable document under the Registration of Documents Ordinance and lost priority by non-registration.

EBERT SILVA vs. WIJESEKERA 1

Rent Restriction Ordinance

Premises required for landlord's occupation—Written agreement by tenant to pay rental above standard rent—Can landlord accept such rent under section 17 of the Ordinance—Calculation of standard rent where landlord paid rates—Rent overpaid in landlord's hands—Does it reduce tenant's liability.

Held : (i.) That section 17 of the Rent Restriction Ordinance does not permit a landlord to accept a rental above the standard rent, on the ground that such rental was in accordance with a written agreement between him and the tenant.

(ii.) That where the landlord paid the rates, the standard rent has to be determined in the manner provided by section 5 (1) (*b*), that is to say, by adding the annual value and the amount of rates leviable for the year and dividing the result by twelve.

(iii.) That the overpaid amounts in the hands of a landlord overpaid as rent, and not for any other purpose, extinguished *pro tanto* by operation of law the rent as it fell due.

Per SOERTSZ, S.P.J.—"This question of reasonableness has to be considered and determined in view of the relative difficulties of the landlord and of the tenant in regard to the acute disproportion between supply and demand in the matter of housing accommodation today and for that reason, suitable alternative accommodation is a question of importance and has to be taken into account.

WIJEMANNE vs. FERNANDO 28

Nuisance—Basis of action for ejectment—Tenant a repairer of radio sets turning-in wireless sets in the course of repairs till late at night—Interference with comfort and convenience of persons occupying adjoining premises—Rent Restriction Ordinance, section 8 proviso (c).

The plaintiff sued the defendant for ejectment from a room which the former had let to the latter. The basis of the action was that the defendant caused damage to the premises and annoyance to plaintiff. The room adjoined the premises in which the plaintiff was living. It was in evidence that the defendant was a radio mechanic, who brought home radio sets for repair at night when he was off-duty ; and that in the course of effecting such repairs the defendant created noise practically every night by turning-in wireless sets till late in the night.

Held : That the noise complained of did cause substantial interference with the plaintiff's comfort and convenience and that it amounted to a nuisance within the meaning of section 8 proviso (*c*) of Ordinance No. 60 of 1942.

THAMOTHERAMPILLAI vs. GOVINDASAMY ... 39

Lessor and lessee—Is the lessee protected by the provisions of the Rent Restriction Ordinance after expiry of lease.

Held : That where a person enters into a lease for a definite term, the relationship of landlord and tenant expires at the end of the term and, therefore, he is not entitled to protection under the Rent Restriction Ordinance.

ASIA UMMA AND FOUR OTHERS vs. CADER LEBBE 56

Res Judicata

Co-defendants—Action under section 247 of the Civil Procedure Code by judgment-creditor unsuccessful at claim inquiry—Judgment-debtor made defendant but no relief claimed against him—Failure to file answer or raise issue at trial by judgment-debtor, but evidence given for plaintiff—Issue, whether judgment-debtor or claimant entitled to land—Judgment dismissing action—Does such judgment operate as res judicata *between judgment-debtor and claimant in a subsequent action.*

An unsuccessful judgment-creditor at a claim inquiry instituted an action No. 22031 C. R., Galle, under section 247 of the Civil Procedure Code in respect of a certain property against the claimant (3rd defendant) to which the judgment-debtors (1st and 2nd defendants) were made parties. In his plaint the judgment-creditor claimed no relief from the 1st and 2nd defendants but stated that they were made parties to prove their title. 1st and 2nd defendants filed no answer and no proctor represented them at the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

trial. The 3rd defendant filed answer and the following issues were raised by the plaintiff at the trial :—

(1) Are the 1st and 2nd defendants entitled to the land described in the plaint ?

(2) Is the said land liable to be seized under the plaintiff's writ ?

After trial, at which the 2nd defendant gave evidence and produced deeds in support of his title, the learned Commissioner answered both issues in the negative and dismissed the judgment-creditor's action on 31-3-41.

In March, 1943, the said 3rd defendant became the plaintiff in the present action for declaration of title to the same property against the said 1st and 2nd defendants alleging that they disturbed his possession thereof. These defendants filed answer claiming title on the same deeds as produced in the earlier action 22031.

At the trial an issue was raised as to whether the judgment in C. R., Galle, 22031 operated as *res judicata* between the parties.

The learned Commissioner answered this issue in the affirmative and judgment was entered for plaintiff. The defendants appealed.

Held : That the judgment in C. R., Galle 22031 did not operate as *res judicata* between the plaintiff and the defendants as—

(*a*) the defendants were not necessary parties to that action ;

(*b*) they were without legal advice ;

(*c*) they did not take an active part in the litigation besides giving evidence as a witness for the plaintiff in that case.

HINNIAPPU VS. GUNARATNE 102

Revocation

By donor of deed subject to *fidei commissum*.
See Fidei commissum 46

Revision

Does not lie when application for postponement of trial is refused.
See Trial 42

Self Defence

Exceeding right.
See Criminal Procedure 104

Servitude

Right to discharge rain water along defined channel—Deviation of channel by agreement—Right to use new channel.

Held : That when a right to discharge rain water along a defined channel over another's land has been acquired by prescription and a new channel is substituted by agreement, the benefit of possession of the old channel attaches to the new one.

SINNATHAMBY AND ANOTHER VS. KATHIRGAMU 41

Settlement Order

See under Land Settlement Ordinance.

Stamp Ordinance

Unstamped receipt—Admissibility in Evidence.
See Promissory Note 85

Statute of Frauds

Grant of equitable relief to prevent fraud.
See Trust 66

Summons

Plaintiff taking no steps on order to re-issue summons—Refusal of further process.
See Civil Procedure 105

Trade Marks

Infringement—Passing off—Anterior user—Honest concurrent user—Trade Marks Ordinance, sections 9, 19, 38 *and* 40.

The plaintiff, a manufacturer of beedies, was the proprietor of certain trade-marks registered in respect of beedi. He alleged that the defendants had infringed his trade-marks and passed off their goods as his and asked for an injunction to restrain such infringement and passing off. The defendants denied infringement and passing off and pleaded anterior user and honest concurrent user.

As there was no evidence of actual deception, the issue of infringement turned upon a comparison of the plaintiff's trade-marks with those used by the defendants. The points of similarity between these was very marked. Evidence was led by both parties on the issues relating to anterior user and honest concurrent user. On the issue relating to passing off, there was no evidence that any person who asked for beedies by the plaintiffs' trade names had been given the defendants' beedies.

Held : (1) That the defendant's marks closely resembled the plaintiff's registered trade-marks, were calculated to lead to confusion and deception and that the plaintiff was entitled to an injunction to restrain infringement of his trade-marks.

(2) On a review of the whole of the evidence, that the defendants had not discharged the burden resting on them of proving anterior user and honest concurrent user.

(3) That the evidence fell far short of showing that the description under which the plaintiff's beedies were asked for and sold had come to be regarded in Ceylon as denoting exclusively the beedies of the plaintiff, and that, therefore, the plaintiff was not entitled to an injunction to restrain passing off.

V. S. SUBBIAH NADAR VS. E. P. KUMARAVAL NADAR 32

Trial

Trial—Application for postponement on ground of absence of a material witness—Refusal by Judge—Failure to lead available evidence—Duty of party affected by such refusal—Right of appeal.

Held : (i.) That when an application for a postponement of trial, on the ground that a material witness is absent, is refused, the party affected should nevertheless proceed to call what evidence is available to him as such evidence may disclose a stronger reason to court to grant the postponement.

(ii.) That when an application for postponement is made and refused, the remedy is by way of appeal.

RAMUPILLAI VS. ZAVIER AND ANOTHER ... 42

Trust

Trust Ordinance section 98.
See Land Settlement Ordinance 19

Difference between Trust and *Fidei commissum*.
See Fidei commissum 46

Trust—Equitable doctrine of—Plaintiffs transferring property to defendant to pay off mortgage—No consideration paid to plaintiffs—Agreement to retransfer in non-notarial writing—Nature of transaction—Defendant's refusal to retransfer—

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

Conditions necessary to establish trust—Statute of Frauds—Evidence Ordinance, section 92 (2).

The plaintiffs, husband and wife were indebted to one J.F. in a sum of Rs. 650 on a mortgage bond. Being unable to pay this amount they approached the defendant for a loan. The defendant agreed to pay off the mortgage and Deed No. 4447 of 2-9-41 (P 2) was executed in his favour transferring the hypothecated property, which was worth Rs. 1,750 or Rs. 2,000. It was further proved that no money was paid by the defendant on the date of transfer, that he merely undertook to free the property from the mortgage, that the plaintiffs were reluctant to grant the transfer and only did so on an agreement to retransfer. This agreement to retransfer was on a non-notarial writing P 3.

The defendant stated in his evidence that he had no intention of retransferring the land when he gave P 3 but would do so now if he was paid Rs. 2,000 and his expenses.

Held : (i.) That the plaintiffs have established a case of fraud or one in which Equity would grant relief to prevent the defendant from taking advantage of the Statute of Frauds to keep the plaintiffs' property.

(ii.) That in the circumstances the defendant held the property in trust for the plaintiffs.

(iii.) That the agreement to retransfer did not constitute a " condition precedent " to the granting of P 2 within the meaning of the words in *proviso* (3) to section 92 of the Evidence Ordinance.

FERNANDO vs. THAMEL AND ANOTHER ... 66

Trust created by Last Will for relief to poor relations of testatrix—Liability of income to Income Tax—Is it a trust of a public character established for a charitable purpose.

See Income Tax 73

Urban Councils Ordinance

Urban Councils Ordinance, sections 131 and 231 —Action against Council for damages caused by lorry driven by employee of Councill—Lorry employed for scavenging work—Should requirements of section 231 be satisfied before filing action.

Plaintiff sued the Urban Council of Kurunegala for damages for injury caused by the negligent driving of a lorry driver employed by the Council. It was admitted by the plaintiff that the lorry was employed on scavenging work at the time of the accident. The plaintiff failed to give notice to the Council of his intention to sue them and to bring the action within six months from the date of his cause of action as required by section 231 (1) and (2) of the Urban Councils Ordinance, 1939.

Held : That the plaintiff could not maintain the action without complying with the requirements of section 231 (1) and (2) of the Urban Councils Ordinance, inasmuch as the action involved a breach of duty by the Council to supply carefully driven vehicles for the scavenging duties imposed on them by section 131 of the same Ordinance.

THE URBAN COUNCIL OF KURUNEGALA vs. BANDA AND ANOTHER 3

Use and occupation

See Agreement 5

Waste Lands

Waste Lands Ordinance, No. 1 of 1897—Claim under section 20—Is there a right of appeal from an order of the District Judge.

Held : That an appeal lies to the Supreme Court from an order of the District Judge regarding a claim under section 20 of the Waste Lands Ordinance No. 1 of 1897.

Per LORD DU PARCQ.—In their Lordships' opinion the word " trial " in this context must be read as including the decision, which it is not improper to regard as an important part of the trial, and the expression " investigation and trial " is to be understood as descriptive of the whole proceedings. It is true that in some context (*e.g.*, in the Code of Civil Procedure) the word " trial " is at times used in contradistinction to " judgment " or " appeal ", but there is nothing in the material sections of the Waste Lands Ordinance which suggests that the word is there being used with this limited meaning. On the contrary, the intention of the legislature, so far as it can be gathered from the terms of the Ordinance, seems to have been to put a person who, though his claim was made out of time, could show " good and sufficient reason " for his delay, in the same position as one who had lodged his petition within the time limited by section 18.

VANDER POORTEN AND OTHERS vs. THE SETTLEMENT OFFICER 16

Will

Construction of—General rules applicable.
See Fidei commissum 46

Will creating trust for relief to poor relations of testatrix—Liability of income of trust to Income Tax.
See Income Tax 73

Witness

Opinion of as to relationship—When relevant.
See Evidence Ordinance 24

Material witness absent—Application for postponement of trial refused—Available evidence should be led.
See Trial 42

Evidence of witness recorded by Magistrate—When can such evidence be read over to witness at trial.
See Criminal Procedure Code 63

Words and Phrases

" Act."
See Defence Regulations 40

" Committed for trial."
See Courts Ordinance 16

" Dishonestly."
See Penal Code 64

" Fraudulently."
See Penal Code 64

Fraud.
See Penal Code 64

" Highway."
See Omnibus Service Licensing Ordinance ... 79

" Route."
See Omnibus Service Licensing Ordinance ... 79

" Trial."
See Waste Lands 16

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present : HOWARD, C.J.

EBERT SILVA vs. WIJESEKERA

S. C. No. 81—*C. R. Panadura No.* 9499.
Argued on : 20th February, 1946, and 1st March, 1946.
Decided on : 6th March, 1946.

Registration of Documents Ordinance sections 6, 7 *and* 8—*Prior registration of later deed*—*Decree in action under section* 247 *Civil Procedure Code*—*Is it an " instrument affecting land ".*

The plaintiff claimed a land on a chain of deeds dating from 1931. After the death of the original owner, his heirs, in 1942, transferred the land to the 2nd defendant. In an action under section 247 of the Civil Procedure Code, the plaintiff was declared entitled to the land. The plaintiff's deeds and the decree in the 247 action were not registered in the correct folio, whereas the 2nd defendant's deed was correctly registered.

Held : (i.) That the deeds in favour of the plaintiff and the 2nd defendant proceeded from the same source ;

(ii.) That the deeds in favour of the plaintiff were void against the subsequent deed in favour of the 2nd defendant by reason of prior registration ;

(iii.) That the 2nd defendant by his deed claimed an adverse interest on valuable consideration to the decree in the 247 action ;

(iv.) That such decree was a registrable document under the Registration of Documents Ordinance and lost priority by non-registration.

L. A. Rajapakse, K.C., with *K. A. P. Rajakaruna*, for the 2nd defendant-appellant.
E. B. Wickremenayake, with *A. A. Rajasingham*, for the plaintiff-respondent.

HOWARD, C.J.

In this case the 2nd defendant appeals from the decision of the Commissioner of Requests, Panadura, declaring the plaintiff entitled to 5/24th share of the land described in the plaint, awarding him also Rs. 30 as damages and continuing damages at the rate of Rs. 3 a month from June 1942, till possession is restored and costs. The original owner of the land was one Appu Perera. The plaintiff claims 11/48th share of this land by virtue of three deeds P1, P2 and P3. By P1 dated the 23rd March 1931, Hendrick Perera, one of the sons of Appu Perera, transfers to the plaintiff and one other 11/48th share of the land he possessed by paternal inheritance. The transferees on P1 by P2 dated the 7th September, 1931, transferred this 11/48th share to Sumeneris Silva who by P3 dated the 7th December, 1931, transferred it to the plaintiff. The 2nd defendant, the appellant who concedes that Appu Perera was the original owner of the land, contends that half of this land was gifted by Appu Perera to his wife Podihamy by deed of gift D3 dated the 10th July, 1899. On the death of Appu Perera Podihamy became entitled to a further 1/4th share whilst the 6 children of Appu Perera became entitled to 1/24th share each. By deed of gift D7 dated the 1st December, 1900, Podihamy transferred a ½ share to Hendrick and three other children. She subsequently died whereby Hendrick became entitled to a 5/24th share of the land made up as follows :—1/24th by succession to Appu Perera, 1/8th by deed of gift from Podihamy and 1/24th by succession to Podihamy. It is further contended that on the death of Hendrick his three children Podi Nona, Cecilia and Alpi became entitled to Hendrick's 5/24th share. By deed D12 of 3rd May, 1942, this 5/24th share was transferred to the 2nd defendant by these three children of Hendrick. The Commissioner has accepted the evidence of the appellant supported as it is by deeds that Hendrick became entitled to 5/24th share of the land. The plaintiff who relied on P1, P2 and P3 filed a 247 action case No. 17639 in the District Court of Kalutara. The daughters of Hendrick Perera were made defendants in this action which resulted in the plaintiff being declared entitled to a 11/48th share. But it would appear, that neither P1, P2, P3 nor the decree in D. C. Kalutara No. 17639 have been registered in the correct folio, whereas D12, the conveyance by the heirs of Hendrick to the appellant, has been properly registered. In these circumstances it is contended on behalf of the appellant that the older registration of D12 must prevail and that the appellant has priority of registration. The Commissioner held against this contention on the ground that Alpi, Cecilia and Podinona inherited nothing from their father Hendrick and had no title when they executed D12. Registration will be of no avail if the transferor had no title. The Commissioner further held that as the decree in D. C. Case No. 17639 was merely declaratory and did not confer title on the plaintiff, it was not a decree affecting land within the meaning of section 8 of the ordinance and therefore did not require registration. In consequence it acted as *res judicata*.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

An exhaustive examination of the questions relating to the priority of deeds is to be found in Jayewardene on the Registration of Deed in Ceylon at pp. 63-66. At page 63, it is stated that the subsequent instrument in addition to being registered must possess certain other requirements before it can successfully claim the priority conferred by section 7 of the Registration of Documents Ordinance (Cap. 101). The subsequent instrument

(*a*) must be derived from the same source,

(*b*) must convey some adverse or inconsistent interest,

(*c*) must be for valuable consideration.

It is conceded by the respondent that (*b*) and (*c*) exist. The only point for consideration is whether the subsequent instrument is derived from the same source. In my opinion the position in this case is the same as in *James vs. Carolis* (17 N.L.R. 76). In that case A conveyed his land to B. After A's death C, who was A's intestate heir, conveyed the same land to D. The deed in favour of D was registered before the deed in favour of B. It was held that the deed in favour of B was void against the subsequent deed in favour of D by reason of prior registration, as the two conveyances proceeded from the same source. It was contended in *James vs. Carolis* as in the present case that the heir of A has no title and hence his transferee could obtain no title by prior registration. With regard to this contention Lascelles, C.J. stated that the scope and object of the Ceylon Registration Ordinance is the protection of the purchaser for valuable consideration. If an intending purchaser finds on the register no adverse deed affecting the property he is placed in the same position, as regards his title to the land, as if no such deed existed. On the other hand the grantee under the prior unregistered deed is penalised for his failure to put his deed on the register. He is taken to have given out to the world at large that his deed did not exist and is prohibited from setting it up against the registered deed of the subsequent purchaser for valuable consideration. The learned Chief Justice dealt with the argument that the transferee to D could not be regarded as the heiress of A because the latter had alienated her share in the estate by deed D8. The fallacy of this argument was that it assumed the validity of D8 which under section 14 of the Land Registration Ordinance declares shall be deemed invalid as against the plaintiff's deed. At page 78 in his judgement Lascelles, C.J. also states as follows :—

> " If, as is unquestionably the case, a deed by an heir to a purchaser transmits to the purchaser the title which the heir derived from his intestate, it follows that the deed is a sound link in the chain of the title. It is not less effective for the purpose of transmitting title than a deed from one purchaser to another purchaser. In *Punchirala vs. Appuhamy* (1900) (7 N.L.R. 102) this court overruled the contention that, where there is a conveyance from an intestate and a subsequent conveyance from his administrator, these two conveyances do not proceed from the same source, and that therefore the Registration Ordinance does not apply. It was there held that an administrator represents, and his estate is in law identical with that of his intestate.
>
> Now that it is settled that the heir can pass title without the concurrence of the administrator, I think it follows that the estate of the heir must be regarded as that of his intestate."

In the same case Pereira, J. at p. 79 stated as follows :—

> " The policy and effect of our law of registration are such that the mere fact that a person who has conveyed property had no title to it is sufficient to deprive the conveyance of priority by reason of prior registration."

The only remaining question for consideration is the effect of the decree in D. C. Case No. 17639. In *Mohamed Ali vs. Weerasooriya* (17 N.L.R. 417) the facts were as follows :—By a decree in D. C. Kurunegala 3204, E and G were each declared entitled to an undivided half share of certain lands. The decree was not registered. Plaintiff was successor in title to E and defendant purchased the whole land from G. Defendant's deed was registered. It was held (per Lascelles, C.J., and Ennis, J., Pereira, J. dissenting) that the defendant was bound by the decree in D. C. Kurunegala 3204, though the decree was not registered. The majority of the Court held that the decree in the Kurunegala case was not a judgment "affecting land" and therefore not a registrable document. This case was, however, decided under section 16 of Ordinance No. 14 of 1891. The position is different under section 8(*b*) of Cap. 101. The material words under this provision are " decrees and orders of any Court or authority, and awards which purport or operate to create, confer, declare......any right, title or interest......in or over land." The matter was considered in the case of *Sockalingam Chetty vs. Kalimuttu Chetty* (44 N.L.R. 330). At pp. 335-336 in the judgment of Soertsz, J. there is the following passage :—

> " Counsel's next line of attack was that the decree entered in the old case dismissing the plaintiffs' action, although it was entered in the circumstances already indicated, was a registrable document.
>
> The question then is whether that decree was such an instrument.

According to section 6 of the Ordinance " instrument " means an " instrument affecting land." It will be observed that this section reproduces the phrase of section 16 of the old Ordinance No. 14 of 1891, namely " affecting land," but, probably in view of the ruling in *Mohamed Ali vs. Weerasuriya* (1914) (17 N.L.R.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

417) section 8(*b*) of the new Ordinance goes on to enumerate the instruments which shall in future be deemed to " affect land as......all instruments including wills, decrees and orders of any Court or authority and awards, which purport or operate to create, confer, declare, limit, assign, transfer, charge, incumber, release, or extinguish, any right, title or interest, whether vested or contingent, past, present, or future, to, in or over land, or which create or record or are evidence of any contract for effecting any such object, and also a notice of seizure issued under section 237 of the Civil Procedure Code." The resulting position is that, today, " decrees and orders of any court or authority " are registrable instruments if they *purport or operate* to create, confer, &c., any right, title or interest......to, in, or over land.

In the case of *Mohamed Ali vs. Weerasuriya*, two of the three Judges held that a decree declaring parties entitled to land in an action *rei vindicatio* is not a judgment or order affecting land, and, therefore, not under the requirement of registration for the purpose of anticipating any priority that may be claimed for a subsequent instrument for a valuable consideration. That was a ruling given as far back as in the year 1913, and it has been consistently followed without question. But, it is argued that its authority has been impaired by section 8(*b*) of the new Ordinance inasmuch as in virtue of it a decree or order which purports even if it does not operate to declare any right, title or interest, to, in, or over land, is a registrable instrument and that the ruling given in the case I have mentioned cannot be given on the law as it stands now. I agree. This case was decided on the ground that the decree in question which was one of dismissal did not purport to declare any right, title or interest in the plaintiffs or in the defendant. The passage I have cited from the judgment of Soertsz, J. was, therefore, *obiter*. Nevertheless I agree with the view taken by him.

Mr. Wickremenayake on behalf of the respondent maintains, however, that even if the decree in this case is a registrable document, it does not by non-registration lose its priority inasmuch as the subsequent instrument registered by the appellant is not one by which the latter claims " an adverse interest " within the meaning of section 7 of the Registration of Documents Ordinance (Cap. 101). In support of this contention Mr. Wickremenayake calls in aid the penultimate paragraph in the judgment of Lascelles, C.J. in *Mohamed Ali vs. Weerasuriya* (supra). In this paragraph the learned Chief Justice says that the defendant is not relieved of the bar created by the judgment merely because his deed is unregistered and the judgment is unregistered. The plaintiff does not claim " an adverse interest " to the defendant in virtue of the judgment. He claims no interest at all under the judgment. That he merely says to the defendant that he claims the benefit of the rule of law which forbids him from again putting the matter in question. This paragraph of the judgment in *Mohamed Ali vs. Weerasuriya* was merely *obiter* and I do not find myself bound by it. The right gained by the plaintiff in D. C. Case No. 17639 was a right to prevent the children of Hendrick from advancing a claim to the land in question. A claim by Hendrick's children was, therefore, adverse to that right, and it is no more than such a claim that the appellant now sets up on the strength of the conveyance from Hendrick's children. It seems to me, therefore, that the appellant by his deed claimed an adverse interest on valuable consideration to the decree in D. C. Case No. 17639. To hold that such a decree does not lose priority by being unregistered because it acts as *res judicata* would nullify the effect of the Ordinance, which is intended as stated by Lascelles, C.J. in *James vs. Carolis* (supra) to protect *bona fide* purchasers for value. Such a decree is invalid.

For the reasons I have given, the judgment of the Commissioner is set aside and judgment must be entered for the appellant, the 2nd defendant, with costs in this Court and the Court below.

Appeal allowed.

Present : CANNON & DE SILVA, J.J.

THE URBAN COUNCIL OF KURUNEGALA vs. BANDA & ANOTHER

S. C. No. 59—*D. C. Kurunegala No.* 2017.
Argued on : 1st March, 1946.
Delivered on : 8th March, 1946.

Urban Councils Ordinance, sections 131 *and* 231—*Action against Council for damages caused by lorry driven by employee of Council—Lorry employed for scavenging work—Should requirements of section* 231 *be satisfied before filing action.*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Plaintiff sued the Urban Council of Kurunegala for damages for injury caused by the negligent driving of a lorry driver employed by the Council. It was admitted by the plaintiff that the lorry was employed on scavenging work at the time of the accident. The plaintiff failed to give notice to the Council of his intention to sue them and to bring the action within six months from the date of his cause of action as required by section 231 (1) and (2) of the Urban Councils Ordinance, 1939.

Held : That the plaintiff could not maintain the action without complying with the requirements of section 231 (1) and (2) of the Urban Councils Ordinance, inasmuch as the action involved a breach of duty by the Council to supply carefully driven vehicles for the scavenging duties imposed on them by section 131 of the same Ordinance.

E. B. Wickremenayake, for defendant-appellant.

E. A. P. Wijeratne, with *G. T. Samarawickreme,* for plaintiff-respondent.

CANNON, J.

This was an action against the Kurunegala Urban Council for damages for injury caused by the negligent driving of a lorry driver employed by the Council. A preliminary objection was taken that the plaintiff had not complied with the Urban Councils Ordinance of 1939, s. 231 (1) and (2), which requires notice to be given to the Council of intention to sue them and impose a time limit for the commencement of the action of six months from the date of the cause of action. It was admitted that no such notice was given to the Council and that the time limit had been exceeded. The District Judge did not uphold the objection, apparently on the ground that s. 231 had no application to cases of negligent driving. The appeal is against that decision.

The requirements of s. 231 apply to any action against the Council " for anything done or intended to be done under the powers conferred by this Ordinance." Section 131 of the Ordinance makes it the duty of the Council to take all measures necessary for scavenging; and it was admitted for the plaintiff that the lorry was employed on scavenging work at the time of the accident.

But while conceding that the driver was acting within the scope of his employment, Mr. Wijeratne contended that the accident happened while he was doing something collateral to the act intended to be done. *Whatman vs. Pearson* (Law Rep. 3 C.P. 422) was cited for this proposition. That case was relied upon in *Edward vs. Vestry of St. Mary, Islington* 22 Q.B.D. (1889) 338, in which the plaintiff was a driver employed by contractors, who had contracted with the Vestry to provide them with horses and drivers for their carts used in watering the streets under Statutory powers. The defendant Vestry negligently supplied a cart with a defective axle, in consequence of which the plaintiff, while driving the cart to water the streets, was thrown off and injured. In an action for damages sustained through the defendants' negligence, the Judge left to the Jury the question whether the defendants were guilty of such negligence as would entitle the plaintiff to recover. The Judge found a verdict for the plaintiff, damages £100. The Judge entered judgment for the defendants on the ground that no notice of action had been given to them, nor had the action been commenced within six months next after the accrual of the cause of action, so as to satisfy the requirements of s. 106 of 25 & 26 vict., c. 102. This action makes provision for notice and a time limit similar to s. 231 in the Ceylon Ordinance abovementioned, as regards any action against a Vestry " for anything done or intended to be done under the powers," etc. On appeal the Court of Appeal held that the defendants were entitled to notice of action under 25 & 26 Vict., c. 102, s. 106, because the supply of the water-cart to the plaintiff for the purpose of watering the streets was a thing " done or intended to be done " under the powers of the Vestry under the Act empowering them to water the streets. Bowen, L.J., at page 342, referring to *Whatman vs. Pearson* (supra) said :—

> That case is entirely distinguishable. The action was against the contractor, not against the Board. The negligence was the negligence of one of the servants employed by the contractor to cart away the soil. Contrary to his instructions, the servant went home, taking his horse with him, and leaving it in the street outside his house whilst he had dinner. The horse ran away and damaged the plaintiff's railings. The jury found, and the Court upheld the finding, that the servant was acting within the scope of his employment by the contractor. The contractor, therefore, in order to escape liability, had to prove that what was done was under the powers of the Board under the Statute. The Court held that he was not so acting, but that what he did was wholly collateral, and not within the scope of any authority conferred by the statute.

In the present case the question is whether this accident, which, but for the provisions of s. 231 with regard to notice and time limit, would give an ordinary right of action to the plaintiff, happened in consequence of something done or intended to be done under the powers of the Council. In order to collect refuse the Council must obviously supply vehicles, and, in my

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

opinion, this action must be treated as one founded on the breach of a duty by the Council to supply carefully-driven vehicles for the scavenging duties and powers which s. 131 imposes on them. Notice was, therefore, required under s. 231 and the time limit also applied.

I allow the appeal and set aside the order of the District Judge and dismiss the plaintiff's action. In the special circumstances, however, there will be no order as to costs.

DE SILVA, J.

I agree.

Appeal allowed.

Present : DE SILVA, J.

ELIYATHAMBY vs. KANDIAH

S. C. No. 296—*C. R. Jaffna No.* 247/*A.*
Argued on : 5th March, 1946.
Decided on : 8th March, 1946.

Informal agreement relating to land—Defendant placed in possession by plaintiff—Plaintiff not the owner of the land—Action for use and occupation—Can action be maintained.

The plaintiff placed the defendant in possession of a land under an informal agreement to which the defendant was a party. The defendant received benefit from his possession. The plaintiff was not the owner of the land.

Held : (1) That as the defendant received the benefit of his possession, he was bound to pay a reasonable amount for use and occupation of the land ;

(2) That such amount can be recovered by action ;

(3) That the action was available to the plaintiff, although he was not the owner of the land, as he had placed the defendant in possession.

Cases referred to :—*Perera vs. Fernando* (reported in Ramanathan Reports, 1863, p. 83); *de Silva vs. Thelenis and others* (3, Ceylon Weekly Reporter, 3); *Charles vs. Baba* (22 N. L. R., 189), and *Subramaniam vs. Viswanathan* (8 C. L. W. 137); *Sinno Appu vs. Appu Sinno* (6 Ceylon Law Recorder, 171); *Nanayakkara and others vs. Andris and others* (23, N. L. R , 193); *Kanagaratna vs. Banda* (25 N. L. R , 129)

H. W. Thambiah, for the 1st defendant-appellant.

C. Renganathan, for the plaintiff-respondent.

DE SILVA, J.

The 1st defendant, against whom judgment has been entered for a sum of Rs. 280 for the use and occupation of a field at Murasamoddai, appeals from this judgment on questions of law. He has also made an application for leave to appeal on the facts.

The plaintiff, who claimed to be the owner of an extent of 21 acres of land called Murasamoddai Field, alleged that on or about the 13th December, 1941, he entered into an informal agreement with the 1st and 2nd defendants (P1) by which they agreed to cultivate the field and give him 80 bushels of paddy out of the Sirupogam and 50 bushels of paddy out of the Kala Bogam cultivations and a cartload of straw, and that the 1st and 2nd defendants entered into possession and cultivated the land for the Sirupogam cultivation of 1942 but failed to give the 80 bushels of paddy, which are reasonably worth Rs. 280. The plaintiff also claimed Rs. 14.70 in respect of certain gunny bags and Rs. 32 for a cartload of straw, amounting in all to Rs. 326.70. He restricted his claim to Rs. 300 for the purpose of bringing the action in the Court of Requests.

Summons could not be served on the 2nd defendant and the plaintiff waived his claim against him. The 1st defendant who was served with summons, filed answer denying that the plaintiff was the owner of the land. He alleged that he and the other defendant entered into the agreement D1, which was for a term of 5 years and contained certain terms which were not in P1, and that they cultivated 8 acres of the field but that owing to the default of the plaintiff in not keeping the fences in good repair cattle damaged the crops and he realised only 29 bushels of paddy. He further stated that they spent Rs. 250 in improving the land, the benefit of which they could not obtain as they were prevented from cultivating for the Kala Bogam by Mr. Cumarasooriyar, the owner of the land. He accordingly claimed Rs. 125 as the share of the compensation due to him. He also pleaded that as a matter of law the agreement was unenforceable.

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

The parties went to trial on the following issues :—

(1) Did the defendant cultivate plaintiff's land at Murusamoddai, Paranthan ?

(2) Did defendant agree to deliver 80 bushels of paddy to plaintiff ?

(3) Did defendant use and occupy plaintiff's land ?

(4) What amount is due to plaintiff for such use and occupation ?

(5) Is the agreement referred to in the plaint enforceable in law ?

(6) Did plaintiff agree to have the fences of the land referred to in paragraph 2 of the plaint to be kept in good order ?

(7) Were the crops damaged by reason of plaintiff's failure to keep the fences in good repair ?

(8) Have the defendants improved the lands ?

(9) If so what compensation are defendants entitled to ?

(10) Is the plaintiff the owner of the land referred to in the plaint ?

(11) If not, is the action maintainable ?

After trial the learned Commissioner of Requests answered issues (1), (2) and (3) in the affirmative, and (5), (6), (8) and (10) in the negative. On issue (4) he fixed the amount due for use and occupation at Rs. 280. On issue (7) he found that the crops were damaged but not owing to any default on the part of the plaintiff. He did not answer issue (9) in view of his finding on issue (8). He also found that the land belonged to Mr. Coomarasuriar and not to the plaintiff.

In appeal it was urged that the action, which was based on an informal agreement, could not be maintained in view of the provisions of section 2 of Chapter 57. It was further urged that even if the action could be maintained for use and occupation, it was not available to the plaintiff as he was not the owner of the land, In support of these contentions the Counsel for the appellant cited the cases of *Perera vs. Fernando* (reported in Ramanathan Reports, 1863, p. 83) ; *de Silva vs. Thelenis and others* (3, Ceylon Weekly Reporter, 3) ; *Charles vs. Baba* (22 N. L. R., 189) , and *Subramaniam vs. Viswanathan* (8 C. L. W. 137). On the other hand the Counsel for the respondent relied on the case of *Sinno Appu vs. Appu Sinno* (6 Ceylon Law Recorder, 171); *Nanayakkara and others vs. Andris and others* (23, N. L. R., 193) and *Kanagaratna vs. Banda* (25 N. L. R., 129).

A consideration of these authorities shows (1) that an informal agreement with regard to land does not become enforceable in law in its entirety though it has been partly performed by one of the parties ; (2) that where a person has entered into possession of a land under an informal agreement and has received the benefit of such possession for a definite period he is bound to pay a reasonable amount for such use and occupation as he may have had and that such amount can be recovered by action ; and (3) that this action is available to the person who placed him in possession though he may not be the true owner of the property.

The only case which seems to be in conflict with the above conclusions is the case of *Charles vs. Baba* (supra). In that case the action is said to have been based on the use and occupation of a paddy field. Only one issue seems to have been framed, that is, " Can plaintiff maintain this action ? " Schneider, J., who dealt with the case, stated that it was entirely within the *ratio decidendi* of the case of *De Silva vs. Thelenis* (supra). He appears to have taken the view that the agreement was attempted to be enforced on the basis that it fell within the provisions of section 1 of Ordinance 21 of 1887, which made provision for *ande* cultivation. This view is supported by the only issue which had been framed. If that was the case, the judgment would be consistent with the other authorities.

Where a person enters into occupation of a land under an unenforceable agreement, to which he himself is a party, he is not entitled to enrich himself by enjoying the land at the expense of the other. In my opinion the appeal on the law fails. There is no reason why leave should be granted to appeal on the facts.

A certain amount of confusion has arisen in this case by the evidence of title of Mr. Cumarasuriar. He is no party to the action and whatever rights he may have as against the plaintiff or the defendants will not affect the rights of the plaintiff as against the defendant who entered into possession under the plaintiff.

No issue was framed with regard to the liability of the 1st defendant alone for the full sum due to the plaintiff and this point need not be discussed. The 1st defendant may have a right of contribution from the 2nd defendant.

The appeal and the application are both dismissed with costs.

Appeal dismissed.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Coram : WIJEYEWARDENE, J. & ROSE, J.

JOHN ROBERT FARBRIDGE vs. THE REGISTRAR OF PATENTS

S. C. No. 74—*D. C.* (*Inty.*) *Colombo No.* 82 *Special.*
In the matter of an application under section 28 (1) *of the Patents Ordinance.*
Argued on : 17th January and 4th April, 1946.
Decided on : 8th April, 1946.

Patents Ordinance—Sections 28 *and* 36—*Petition under section* 28 *for extension of patent when will such extension be granted—Does appeal lie from decision of District Court.*

Held : (1) That an appeal lies to the Supreme Court from the decision of a District Court under section 28 of the Patents Ordinance ;

(2) That an extension of a patent will not be granted unless there is proof that the invention is one of more than ordinary utility ;

(3) That an extension will not be granted unless the patentee's accounts show clearly and precisely how he has been remunerated in respect of his patent ;

(4) That the absence of proof that the corresponding patents outside Ceylon are in force is a circumstance unfavourable to the grant of an extension.

Cases referred to :—*The County Council of Kent and the Councils of the Boroughs of Dover and Sandwich* (1891) 1 Queen's Bench Division (Court of Appeal) 725 *and In re an Arbitration between Knight and the Tabernacle Permanent Building Society* (1892) 2 Queen's Bench Division (Court of Appeal) 613.

H. V. Perera, K.C., with *D. W. Fernando*, for the petitioner-appellant.

H. H. Basnayake, Acting Attorney-General, with *H. W. R. Weerasooriya, Crown Counsel*, for the Crown.

WIJEYEWARDENE, J.

The appellant is the patentee of the Ceylon Patent No. 2479 relating to " Multiflu " tea drier. The patent was granted for fourteen years terminating in June, 1943. In December, 1942, the appellant presented a petition to His Excellency the Governor under section 28 (1) of the Patents Ordinance praying that the patent may be extended for a further period of fourteen years. That petition was referred by the Governor under section 28 (3) of the Ordinance to the District Court of Colombo.

The District Judge found that the invention was not one of more than ordinary utility. He accepted with some hesitation the statement that the appellant did not make any profits during the term of the patent and held that the failure to get adequate remuneration was not due to any fault of the appellant. The present appeal is preferred against the judgment of the District Judge.

A preliminary objection was taken at the hearing of the appeal on the ground that no appeal lay from the finding of the District Judge. In support of this contention the Acting Attorney-General relied mainly on the following authorities :—*The County Council of Kent and the Councils of the Boroughs of Dover and Sandwich* (1891) 1 Queen's Bench Division (Court of Appeal) 725 and *In re an Arbitration between Knight and the Tabernacle Permanent Building Society* (1892) 2 Queen's Bench Division (Court of Appeal) 613.

In the former case the County Council of Kent appealed from a decision of the Queen's Bench Division upon certain questions submitted to the High Court of Justice under section 29 of the Local Government Act, 1888, by the County Council of Kent and the Councils of the Boroughs of Dover and Sandwich. As the Act itself did not give a right of appeal either expressly or by implication the Court of Appeal proceeded to consider whether the " decision " given under the Act " filled the character of a judgment or order or decree or rule " which was appealable under the Judicature Act of 1873. It was held that, as the proceedings in question were " purely of a consultative character ", the provisions of the Judicature Act would not give a right of appeal from a finding in those proceedings.

In a later case a dispute between the Building Society and Knight, a member, was referred to arbitration. During the arbitration Knight requested the arbitrators to state a special case for the opinion of the Court upon the question of law whether the society had the power to make certain alterations in the rules so as to bind Knight who had not consented to such alterations. On the refusal of the arbitrators to state a case, they were directed to do so by an order of Court under section 19 of the Arbitration Act 1889. A case was then stated by the arbitrators and the Queen's Bench Division expressed an opinion in favour of Knight on the question of law. It was held that

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

no appeal lay from that opinion. In the course of his judgment Lord Esher, M.R., said :—

"The enactment now in question (Section 19 of the Arbitration Act 1889) provides that "any referee, arbitrator or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference." The words are not "for the determination" or "decision of the Court", so that there is not the *prima facie* difficulty which existed in the case (viz.: The County Council of Kent and the Councils of the Boroughs of Dover and Sandwich (1891) 1 Queen's Bench Division (Court of Appeal) 725) where the statute spoke of "the decision of the Court". It appears to me that what the statute in terms provides for is an "opinion" of the Court to be given to the arbitrator or umpire: and that there is not to be any determination or decision which amounts to a judgment or order."

Both these cases appear to me to be clearly distinguishable from the present case, as section 36 of the Patents Ordinance states in express terms that "all decisions and orders of the Court made under the authority of the Ordinance shall be subject to an appeal to the Supreme Court". The only provision of this Ordinance which refers to a "decision" of the Court is section 28 (4) where the Legislature has described as a "decision" the finding of the District Judge on a reference made to the Court by the Governor under that section.

It is, no doubt true, that section 28 (6) does not make it obligatory for the Governor to act entirely in conformity with the finding of the Court. But that does not appear to be a good reason for ignoring the clear provisions of section 36.

I would, therefore, hold against the respondent on the preliminary objection.

The Ordinance requires the District Judge to consider the following matters in coming to a decision under section 28 (4) :—

(*a*) the nature and merits of the invention in relation to the public ;

(*b*) the profits made by the patentee ; and

(*c*) "the other circumstances of the case."

The merit which has been shown is that the invention is one of great practical utility. On an application for an extension of the term of a patent the petitioner must establish the existence of a greater degree of merit than is sufficient to support the grant of the patent itself.

One of the tests to be applied in deciding this question of merit is the extent to which the invention has been used (see Terrell on Patents, Eighth Edition p. 297). Now this invention has been patented not only in Ceylon but in the United Kingdom, India, Straits Settlement, Canada, the United States, Holland and Germany. The total sales for the period 1931-1943 were 152. There is no evidence to show how many of these sales were in Ceylon. The sales may, no doubt, have been reduced by the trade depression affecting the tea market in certain places during a part of this period. There is also the fact that the invention is of such a nature that its adoption necessitates to some extent, at least, the displacement of existing machinery and the erection of new machinery. But after making due allowance on these grounds I am unable to say on the evidence before me that the recorded sales tend to show that the invention is one of more than ordinary utility. The letters from the customers which the petitioner has annexed to his application do not help the petitioner much. I do not see any good reason for disturbing the finding of the learned District Judge that the petitioner has failed to prove that his invention is of great practical utility.

It is well settled law that the patentee's account should show clearly and precisely how he has been remunerated in respect of his patent.

The accounts filed by the petitioner with the petition are very unsatisfactory. The statement shows only the accounts with regard to sales in Ceylon for the year ending September 30, 1939. During the pendency of the proceedings before the District Court an accountant prepared a statement of account from the books of Hoare & Co., a firm of Engineers to whom the petitioner had assigned the sole and exclusive right to sell and manufacture the heaters in Ceylon. That account shows that Hoare & Co., have suffered a loss. That result is, however, reached by calculating on an arbitrary basis the cost of labour, establishment charges and other expenses incurred by Hoare & Co., in respect of the invention. I find it difficult to form a correct idea as to the profits, if any, made by the patentee. I think the Distrist Judge has taken a view somewhat too favourable to the patentee on this question of remuneration.

As regards the "other circumstances of the case" I may say that there is no evidence whatever to show that the corresponding patents are in force outside Ceylon. The patentee's witnesses could not give any evidence on this point. That too is a circumstance unfavourable to the grant of an extension.

For the reasons given by me I would dismiss the appeal with costs.

Appeal dismissed.

ROSE, J.

I agree.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present: HOWARD, C.J. & DE SILVA, J.

DAVID vs. SENEVIRATNE & TWO OTHERS

S. C. No. 217—*D. C.* (*F*) *Negombo No.* 13031
Argued on: 12th February, 1946.
Decided on: 21st February, 1946.

Damages—Breach of contract—Principle on which damages for loss in special circumstances are recoverable—Is it the same as in actions for tort.

Held: (i.) That in an action for breach of contract no damages for special loss are recoverable unless the defendant had been informed of the special circumstances in which the loss would be incurred and had entered into contract subject to them.

(ii.) That the rule as to the remoteness of damages is the same whether the damages are claimed in actions of tort or of contract.

L. A. Rajapakse, K.C., with *J. M. Jayamanne* and *T. B. Dissanayake*, for the plaintiff-appellant.

N. Nadarajah, K.C., with *S. E. J. Fernando*, for the defendants-respondents.

HOWARD, C.J.

In this case the plaintiff claimed a sum of Rs. 750, the cost of certain repairs to an oil engine belonging to the defendants. The defendants in reconvention claimed sums of Rs. 129 and Rs. 1,500. The District Court dismissed the plaintiff's action and entered judgment for the defendants in a sum of Rs. 1,530·69 with costs. So far as this appeal is concerned the only question that arises is whether the learned District Judge was right in awarding a sum of Rs. 1,500 as damages, because owing to plaintiff's bad work and delay they could not work their mills. It would appear that certain parts of the oil engine at the defendants' mills had become wasted and so they consulted Mr. Dronan, an Engineer and Manager of the Hunupitiya Mills. Mr. Dronan was unable to do the work and recommended the plaintiff. In a letter dated the 24th February, 1943, (P1), the plaintiff agreed to do the repairs specified therein. By letter of the 26th February, 1943, (P2), Rs. 375 was paid by the defendants in advance for these repairs. On the 31st March, 1943, the plaintiff informed the defendants (D2) that owing to a breakdown in their workshop he could not yet finish the repairs to the engine. In reply to this by D3 dated the 14th April, 1943, the defendants asked the plaintiff to hurry up with the repairs as the engine was required for the working of the factory on the 1st May, 1943. All the parts handed over to the plaintiff to be repaired had been returned and the plaintiff's workmen remained on the defendants' premises from the 24th May to the 2nd June, 1943, trying to get the machine to work. The workmen failed as also did the plaintiff who tried on the 28th May, 1943. On the 10th June, 1943, the defendants by D9 informed the plaintiff that the repairs had not been completed and they had entrusted the work to Mr. Dronan. They also stated that cost of these repairs would be debited to the plaintiff and they were put to further loss by the non-completion of the work.

In paragraph (12) of their answer the defendants state that in consequence of delay in getting the engine into working order and in obtaining the completed parts of the engine and in the loss of use of the said engine through the breach of contract of the plaintiff a loss of Rs. 2,500 has accrued to the defendants, but they restricted their claim to Rs. 1,500. The learned Judge held that the defendants are entitled to this sum as damages in view of the fact that the 2nd defendant had stated in evidence that the engine can make 4 tons of oil a day and that the profit would be Rs. 100 a day. It has been contended by counsel for the plaintiff—the appellant—that the learned Judge was wrong in awarding this sum as damages as they are too remote. The principle on which damages are awarded for breach of contract is stated in Halsbury's Laws of England Vol. 10, p. 97 as follows :—

> " Upon a breach of contract such damages are to be awarded as may reasonably be supposed to have been in the contemplation of both parties when they made the contract as the probable result of the breach of it. Therefore, where there are special circumstances and these circumstances are communicated at the time of the contract to the party from whom it is afterwards sought to recover damages and accepted by him as the basis on which the contract is made, the damages reasonably contemplated are such as would ordinarily follow from a breach of contract in these special

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

circumstances. If the special circumstances were unknown to the party breaking the contract, he can only be taken to contemplate the amount of injury which would arise generally from the breach in cases not affected by special circumstances. It is not enough that the party whom it is subsequently sought to make liable should be informed that a breach will result in particular loss. He must be informed of the special circumstances in which the loss will be incurred, and must enter into the contract subject to them. The information given at a later date, whether of circumstances which were contemplated by the party giving such information at the date of the contract or of circumstances which arose at a later date will not suffice."

The leading case on the subject is *Hadley vs. Baxendale* (1854) 9 Exch. 341. In that case the plaintiffs, the owners of a flour mill, sent a broken iron shaft to the office of the defendants, who were common carriers, to be conveyed by them and the defendants' clerk was told that the mill was stopped, that the shaft must be delivered immediately and that a special entry, if necessary, must be made to hasten its delivery. And the delivery of the broken shaft to the consignee, to whom it had been sent by the plaintiffs as a pattern, by which to make a new shaft, was delayed for an unreasonable time in consequence of which the plaintiffs did not receive the new shaft for some days after the time they ought to have received it and they were consequently unable to work their mill for want of the new shaft and thereby incurred a loss of profit. It was held that these circumstances not having been communicated by the plaintiff to the defendants such loss could not be recovered in an action against the defendants as common carriers.

Applying the principle formulated in *Hadley vs. Baxendale*, which is also the Roman Dutch Law *vide* Nathan's Law of Damage in South Africa pp. 21 and 22, to the facts in the present case, it would appear from the letters exchanged between the parties that certain parts of the oil engine were entrusted to the plaintiff to effect repairs. The plaintiff was not at the time informed whether these parts were part of an engine in use. Nor was any date given for the completion of the work although later on the 14th April he was informed that the engine was required for working on the 1st May. Nor was the plaintiff informed of any special contracts what would be lost if the engine was not repaired by a particular date. The circumstances do not show that the profits of the mill must be stopped by an unreasonable delay in the completion of the repairs. Another engine might have been working at the time. The special circumstances were not communicated to the plaintiff by the defendants.

It has been argued by counsel for the respondents that the plaintiff had not only been guilty of breach of contract, but has also been negligent and committed a tortious act. In such circumstances it is maintained that the measure of damages that may be awarded is calculated on a different principle to that laid down in *Hadley vs. Baxendale.*

With regard to this contention it is manifest from a perusal of the defendants' answer and particularly paragraph (12) that the defendants founded their claim for Rs. 1,500 on breach of contract. There was no suggestion in the answer that the plaintiff had committed a tortious act. Our attention was invited by Counsel for the respondents to *H. M. S. London* (1914) P.D. 72. But I observe that in his judgment in that case Sir Samuel Evans stated that it was settled law that the rule as to the remoteness of damages is the same whether the damages are claimed in actions of contract or tort and referred to the case of *The Notting Hill* (1884) 9 P.D. 105 at p. 113. In *H. M. S. London* damages were awarded for loss of the use of the vessel whilst she was in dry dock for repairs resulting from a collision caused by the negligence of the defendants. Sir Samuel Evans in his judgment cited with approval extracts from the judgments of the Court of Appeal and House of Lords in the case of *The Argentino* reported in 13 P.D. p. 201 and 14 A.C. 519. From those extracts it would appear that both Courts took the view that in the case of an innocent ship disabled by an accident the consequence of the offending vessel's tort is that the owner of the innocent vessel loses for a time the use which he would have otherwise had of his vessel. Such loss of use is the direct and natural consequence of the collision and therefore recoverable as damages. In my opinion, therefore, there is nothing inconsistent in the case of *H. M. S. London* and *The Argentino* which deal with damages awarded to the owners of innocent vessels damaged in collisions and the principle laid down in *Hadley vs. Baxendale.*

For the reasons I have given the damages of Rs. 1,500 awarded for loss of profits cannot be allowed to stand. This part of the judgment of the District Court is set aside and judgment must be entered for the respondents for Rs. 30·69 in place of Rs. 1,530·69. As the appellant has only partially succeeded in his appeal he will be allowed half the costs of the appeal to this Court.

DE SILVA, J.

I agree.

Set aside.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present: JAYETILEKE & CANEKERATNE, J.J.

JINARATANA THERO vs. SOMARATANA THERO & ANOTHER

S. C. No. 86—*D. C. (F) Kegalle* 2711.
Argued on: 5th April, 1946.
Decided on: 16th April, 1946.

Deed—Interpretation of—Incumbency of Buddhist temple—Deed executed by Incumbent gifting the temple property to a particular pupil and expressly giving him the right to give the said lands on a similar instrument to any one of his pupils to succeed him as chief Incumbent—Construction.

Held that: (1) To interpret a deed, the expressed intention of the parties must be discovered.
(2) The words used by the donor in the deed contain a plain intention to appoint the donee as his successor to the incumbency.

N. E. Weerasooriya, K.C., with *N. Nadarajah, K.C.* and *C. R. Gunaratne*, for the plaintiff-appellant.

H. V. Perera, K.C., with *L. A. Rajapakse, K.C.*, and *E. A. P. Wijeratne*, for the defendant-respondent.

JAYETILEKE, J.

This is an action brought by the plaintiff for a declaration that he is entitled to the incumbency of the Hunugampola Vihare and for an order that the defendants may be ejected from the vihare. The plaintiff says that he is the rightful incumbent by right of succession as the senior pupil of the last incumbent Guneratne Thero according to the law of succession called *Sisiyanu Sisya Paramparawa.* The 1st defendant who is also a pupil of Guneratne Thero, claims to be the incumbent by right of appointment by his tutor. Guneratne Thero was ill for a period of about 3 months and he died on August 25, 1942. He had 4 pupils the plaintiff, the 2nd defendant, Seelaratne Thero, and the 1st defendant. The plaintiff as the senior pupil would be entitled to the incumbency, if Guneratne Thero died without appointing a successor. The District Judge held that Guneratne Thero appointed the 1st defendant as his successor both orally and by a notarially attested document bearing No. 20708 dated June 30, 1942 (D1). It is unnecessary for us to go into the claim of the 1st defendant based on the oral appointment by Guneratne Thero because it was not insisted on at the argument before us. D1 purports to be a gift of the temporalities to the 1st defendant but the evidence shows that one of the lands donated was the personal property of the donor. The plaintiff admitted that the vihare, preaching hall, the school and the sacred Bo-Tree stand on the lands dealt with by D1. In D1 Guneratne Thero is described as the Vihare Adipathy of Hunugampola Temple, and the properties gifted are described as those that came to him from his tutor Sumana Thero by pupillary succession. D1 provides *inter alia* as follows :—

(1) That the second defendant shall have the right to live at Hunugampola Vihare during his life time and to be maintained out of the income of the lands donated to the 1st defendant.

(2) That the first defendant should attend on Gunaratne Thero and look after him during his life time, cremate his body after his death, and perform the necessary religious rites ceremonies and charities for the purpose of his soul.

(3) That the first defendant shall, subject to the aforesaid conditions, possess the lands and improve them......and he shall have the right to give the said lands on a similar instrument to any one of his pupils to succeed him as Vihare Adipathy (Chief Incumbent) if he so desires.

(4) After the death of the 1st defendant the said lands shall devolve on his pupils in pupillary succession.

Mr. Nadarajah contended that by D1 Guneratne Thero has not appointed the first defendant his successor.

In *Saranankara Unnanse vs. Indajoti* (20 N.L.R. page 385) a deed similar to D1 was relied on by one of the claimants to the incumbency and in the course of his judgment de Sampayo, J said :

> " The case thus turns upon the rights of the third and fourth plaintiffs and with regard to them, the questions for determination are (1) whether they are the pupils of Sri Sumana Unnanse, and (2) whether Sri Sumana Unnanse, to whom Ratnapala Unnanse gave a deed of gift, was a pupil of the latter. These deeds take the form of a transfer of the property belonging to the temple and not of nomination of the grantor's pupil or pupils as his successor or successors. But no dispute has been raised on that score. Such deeds are not uncommon, as witness the deed of gift put forward by the defendants themselves. In most cases the defect is due to want of appreciation of the nature of the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

transaction or of professional skill on the part of the notary and I think that the deeds pleaded by the plaintiffs may be taken as being intended to gift the right of succession."

De Sampayo, J was a Judge of great experience and eminence and though these observations are obiter they are entitled to great weight.

In an unnamed case from the D. C. Kurunegala Vanderstraaten's reports Appendix F. and in *Sumangala Unnanse vs. Sobita Unnanse* (5 S.C.C. 235) the right of an incumbent to appoint his successor by transferring the temple and lands to him has been recognised. It is, however, unnecessary for us to go into this question because the language of D1 seems to us to indicate that Gunaratne Thero meant to appoint the first defendant as his successor.

To interpret a deed, the expressed intention of the parties must be discovered.

In *Moneypenny vs. Moneypenny* (1861 9 H.L.C. 114 at p. 146) Lord Wensleydale said :

> "The question is not what the parties intended to do by entering into the deed, but what is the meaning of the words used in the deed : a most important distinction in all cases of construction and the disregard of which often leads to erroneous conclusions."

In *Clayton vs. Glengall* (1841, 1 Dr. and W 1.) Lord Denman, C.J. said :

> "It is quite true I am not to conjecture or guess what might have been the intention of the parties but I am to consider the whole instrument. If there is a plain intention to give interest, then, though there should be no express words to that effect, and this is the case of a deed, yet I am bound to give that construction."

In D1 there is a reference to the successor of the first defendant as the chief incumbent and a provision that the lands gifted shall devolve on the pupil of the first defendant in pupillary succession unless the first defendant gifts them to one of his pupils. I am unable to comprehend how the successor of the first defendant can become the chief incumbent unless the first defendant himself is the chief incumbent. In my view the words made use of by Guneratne Thero in D1 contain a plain intention to appoint the 1st defendant as his successor to the incumbency.

The learned District Judge has, in my opinion, come to a correct conclusion in this case. The appeal is accordingly dismissed with costs.

CANEKERATNE, J.

I agree.

Appeal dismissed.

DIAS, COMMISSIONER OF ASSIZE.

REX vs. MUDALIHAMY

S. C. No. 21—*M. C. Ratnapura No.* 43874.

2 *Western Circuit* 1946.

Decided on: 29th March, 1946

Evidence—Statement by deceased person re *circumstance resulting in his death—Admissibility—Evidence Ordinance, section* 32 (1).

M (accused) was charged with the murder of W, who lived with his mistress Mary Nona in the same estate lines as M. On the day of murder M went off to obtain bees' honey in the jungle. In his absence W is alleged to have come to his lines and after the midday meal left the place with some scrap rubber and a box of matches. When Mary Nona questioned W as to where he was going, W is alleged to have said " Mudalihamy (accused) wanted me to go and collect honey and I am going to meet him ".

W was not heard of since. Twelve days later his body was found wedged in between two rocks in the middle of a stream.

Objection was taken to the admissibility of the statement made by W to Mary Nona.

Held : That the statement was admissible under section 32 (1) of the Evidence Ordinance.

Followed : *Pakala Narayana Swami vs. Emperor* (A. I. R. 1939 P. C. 47).

Not followed : *King vs. Arnolis Perera* (28 N. L. R., p. 481).

F. B. P. Jayasuriya, Crown Counsel, for the Crown.

K. S. Rajah, for the accused.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

DIAS, Commissioner of Assize.

At the close of the argument I decided to admit the evidence tendered by the prosecution and objected to by the defence. I intimated that I would give my reasons later.

The accused, W. K. Mudalihamy, is charged with committing the murder of one R. K. William Singho on March 30, 1945.

The case for the prosecution is that the accused and William Singho were friends and that the latter lived in the same estate lines with William Singho and his mistress, Mary Nona. It is the case for the prosecution that on the day in question the accused went off to obtain bees' honey in the jungle. In his absence William Singho is alleged to have come to his lines and after his mid-day meal left the place with some scrap rubber and a box of matches.

When Mary Nona questioned him as to where he was going, William Singho is alleged to have said " Mudalihamy (the accused) wanted me to go and collect honey and I am going to meet him."

William Singho has not been heard of since. Twelve days later an unrecognisable and decomposed body of a man was found wedged in between two rocks in the middle of a stream.

Mary Nona identified the body by certain tatoo marks and the doctor found seven stab wounds and one incised wound on the body.

The question for decision is whether the statement of William Singho made to Mary Nona is admissible under section 32 sub-section (1) of the Ceylon Evidence Ordinance ?

The decision in *The King vs. Arnolis Perera* (1927) 28 N. L. R. p. 481, is exactly in point. If that decision is followed the evidence is clearly inadmissible. When Crown Counsel opened the case, acting under this authority, I desired him not to open to the jury the alleged statement of William Singho.

Crown Counsel, however, has subsequently brought to my notice the decision of the Privy Council in the case of *Pakala Narayana Swami vs. Emperor* (1939) A. I. R. p. 47 at page 50.

Crown Counsel has argued that in the light of this decision the case of *The King vs. Arnolis Perera*, (supra) can no longer be considered as a binding authority.

In the absence of the jury the question has been argued and I am of opinion that the Privy Council judgment is in point.

In the local case similar evidence was rejected on the ground that section 32 (1) of the Evidence Ordinance is limited to statements made by a person *after the event*, which resulted in his death.

The Privy Council has dissented from this view. Lord Atkin in delivering judgment said :—

" A variety of questions has been mooted in the Indian Courts as to the effect of this section. It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the " circumstances " can only include the act done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction : general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. " Circumstances of the transaction " is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in " circumstantial evidence " which includes evidence of all relevant facts. It is on the other hand narrower than " res gestae ". " Circumstances must have some proximate relation to the actual occurrence : though, for instance, in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of the actual fatal dose. It will be observed that " the circumstances " are of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that " the cause of (the declarant's) death comes into question." In the present case the cause of the deceased's death comes into question. The transaction is one in which the deceased was murdered on 21st March or 22nd March : and his body was found in a trunk proved to be bought on behalf of the accused. The statement made by the deceased on 20th or 21st March that he was setting to the place where the accused lived, and to meet a person, the wife of the accused, who lived in the accused's house, appears clearly to be a statement as to some of the circumstances of the transaction which resulted in his death. The statement was rightly admitted........."

I decided to follow the Privy Council judgment and admitted the evidence.

Objection overruled.

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

Present : De Silva, J.

MUDIYANSE & ANOTHER vs. ANCHAPILLAI.

No. 310/1945—*C. R. Teldeniya Case No.* 724.

Argued and Decided on : 4th March, 1946.

Oath—Agreement of parties to decide case by—Date fixed by Judge without appointing Commissioner to administer oath—Failure to take oath owing to illness of defendant's proctor on the date fixed—Should judgment be entered for plaintiff as agreed.

The plaintiff agreed to his action being dismissed if the defendant took an oath at the 'Maligawa' on a date to be fixed by the Court. The defendant agreed that, on his failure to take the oath, judgment should be entered for the plaintiff. The Court fixed a certain date for the oath, but the name of the Commissioner before whom the oath was to be administered was not named. The defendant did not take the oath on the date fixed owing to the illness of his Proctor, and thereupon judgment was entered for plaintiff.

Held : That judgment should not have been entered for the plaintiff as the Court had failed to appoint a commissioner to administer the oath.

S. R. Wijetilleke, for defendant-appellants.

S. A. Marikar, for plaintiff-respondent.

De Silva, J.

The plaintiff in this case sued the defendants for damages incurred by him owing to the action of the defendants in taking possession of a field which had been given to the plaintiff for cultivation on *ande* basis. The defendants denied the claim of the plaintiff. On 5th September five issues were framed and at that stage the plaintiff challenged the defendants to take an oath that the field was given to the plaintiff only for one year on *ande* and the plaintiff did not repair the field and manure for the *maha* season of 1944. The defendants accepted the challenge to take the oath in the Maligawa. It was, moreover, agreed between the parties that if the oath was taken, the plaintiff's action was to be dismissed with costs, and if the oath was not taken, plaintiff to have judgment with costs. After this was agreed to, an order was made that the oath fees should be deposited by the plaintiff on 12th September. It was also provided that if the fees were not deposited, the plaintiff's action was to be dismissed with costs. On 12th September, the oath fees were paid and the Commissioner ordered the oath to be taken on 17th September. The oath was not taken on the 17th and on the 26th Mr. Mudannayake stated that he was ill on the 12th and was not present in Court and that the defendants were unaware of the date for taking the oath and asked for a further date to have the oath taken. The learned Commissioner refused this application and entered judgment for the plaintiff as prayed for with costs. The defendants appeal from this order and urge that the order of the Commissioner that the oath should be taken on the 17th September did not give sufficient details and did not appoint a Commissioner for the purpose of administering the oath. They urge that if a Commissioner had been appointed he would have probably communicated with them and they would have been in a position to arrange the time on which the oath was to be taken. There seems to be some substance in this contention. The Commissioner should have, in fixing the date for taking the oath, given directions with regard to the person by whom the oath was to be administered and the time and place where it should be administered. In the circumstances, I set aside the decree of the Court of Requests and send the case back for trial in due course. If the parties are still willing to abide by their agreement to take the oath, the Commissioner should fix a date for the purpose and give proper directions for the administering of the oath. The appellant is entitled to the costs of appeal, all other costs would be costs in the cause.

Set aside and sent back.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present : De Silva, J.

ELIYATHAMBY vs. MIRCANDO & OTHERS

S. C. No. 198—*C. R. Kalmunai Case No.* 1848.

Argued and Decided on : 8th March, 1946.

Contract—Impossibility of performance owing to outbreak of war, and alteration of normal conditions by Defence Regulations—Exorbitant sum claimed as interest on loan.

Held : (1) That where parties had entered into a contract on the assumption that normal conditions would prevail, and such contract became impossible of performance owing to the outbreak of war, and consequent emergency legislation, it was open to the Court to do what seems to be equitable between the parties.

(2) That at no time can a creditor sustain a claim to recover more than double the principal which has been lent.

S. Nadesan, for defendant-appellant.

Cyril E. S. Perera with *E. A. G. de Silva,* for plaintiff-respondent.

De Silva, J.

The plaintiffs in this case had borrowed 16 *avanams* of paddy of the value of Rs. 160 and had undertaken to repay the amount with interest at the rate of 10 *marcals* for one *avanam* of paddy per annum. They brought this action to redeem the mortgage bond and undertook to pay the principal, Rs. 160, and interest at the rate of 20 per centum on the basis that it was impossible for them to pay the interest by way of paddy. They also apparently urged that the value at which paddy was sold at Puliantivu at the time of suing cannot be determined because there is no sale of paddy at the present time owing to the various Defence Regulations and other laws regarding the sale of paddy.

The learned Commissioner of Requests apparently took the view that paddy was a commodity which was extra-commersium and that therefore it had become impossible to perform the contract in view of the Defence Regulations. In the circumstanees he decreed that the plaintiffs should pay the principal and interest at the rate of 18 per centum on the principal for the time for which interest was due.

In appeal it is urged that as paddy is purchased by the Government at the rate of Rs. 45 per *avanam,* there was a market for paddy and that the defendant was entitled to get at the rate of Rs. 45 for the paddy due in terms of the mortgage bond, and in support of this the judgment in Case No. 530 D. C. Batticaloa has been cited. On the other hand the Counsel for the respondent has referred me to Case No. 573 D. C., Batticaloa, decided on 21st January, 1946, in which a different view was taken by this Court.

In the circumstances, I am free to decide the matter adopting either view which has been taken by this Court. It seems to me in law, the defendant will not be at any time able to recover more than double the principal which has been lent. His claim at present comes to nine times the principal which has been lent. In the circumstances, I think the defendant's claim as it is made at present cannot be sustained. The real position is that the parties contemplated at the time they entered into this contract that normal conditions would prevail and they had not in view the possibility of war breaking out or paddy being regulated by Defence Regulations. It has, therefore, really become impossible to perform the contract as contemplated by the parties. Under such circumstances, I think, it is open to the Court to do what seems to be equitable as between the parties and to provide that a reasonable interest should be given for the principal lent. I think, that, in all the circumstances, the learned Commissioner has arrived at a correct conclusion and dismiss the appeal without costs.

Appeal dismissed.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present : Rose, J.

REX vs. JINASEKERA

Application for discharge of accused or for bail in M. C. Gampaha No. 23673. (143).

Argued on : 3rd April, 1946.

Decided on : 10th April, 1946.

Courts Ordinance section 31—*Applicability of, to case where re-trial is ordered by Court of Criminal Appeal.*

Held : That section 31 of the Courts Ordinance does not apply where a re-trial is ordered by the Court of Criminal Appeal.

Per Rose, J.......“ the words ‘ committed for trial ’ should be limited in their application to persons committed for trial by a Magistrate.”

F. W. Obeyesekere, for the petitioner.

M. F. S. Pulle, Acting Solicitor-General, with *J. G. T. Weeraratne, Crown Counsel,* for the Attorney-General.

Rose, J.

This is an application under section 31 of the Courts Ordinance that the applicant should be discharged under the second part of the section or alternatively should be granted bail under the first part. It appears that the applicant was convicted of murder but on appeal the conviction was quashed and a re-trial ordered. The date of the judgment of the Court of Criminal Appeal was the 11th of June, 1945. More than two Criminal Sessions of the Supreme Court have been terminated since that date. The question to be considered therefore is whether section 31 applies to a case in which the Court of Criminal Appeal orders a person to be re-tried.

Surprisingly, this point does not seem to be covered by authority. It seems to me, however, that the more reasonable interpretation is that contended for by the Solicitor-General that the words “ committed for trial ” should be limited in their application to persons committed for trial by a Magistrate. It is to be noted that neither in the Courts Ordinance nor in the Interpretation Ordinance is there any definition of the words “ committal ” or “ committed for trial ”. No assistance therefore can be derived from the definition of “ committed for trial ” contained in section 27 of the (English) Interpretation Act of 1889.

That being so, I am of opinion that no application under section 31 can be entertained in this case. This section being inapplicable, there would seem in the present matter to be no good grounds for departing from the normal practice of refusing to grant bail to a person who is detained on a charge of murder.

For these reasons the application is refused.

Application refused.

IN THE PRIVY COUNCIL

Present: Lord Macmillan, Lord Du Parcq, Sir John Beaumont.

VANDER POORTEN & OTHERS (Appellants) vs. THE SETTLEMENT OFFICER (Respondent)

Privy Council Appeal No. 78 *of* 1944.

Decided on : 13*th March,* 1946.

Waste Lands Ordinance, No. 1 *of* 1897—*Claim under section* 20—*Is there a right of appeal from an order of the District Judge.*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Held : That an appeal lies to the Supreme Court from an order of the District Judge regarding a claim under section 20 of the Waste Lands Ordinance No. 1 of 1897.

Per LORD DU PARCQ.—In their Lordships' opinion the word " trial " in this context must be read as including the decision, which it is not improper to regard as an important part of the trial, and the expression " investigation and trial " is to be understood as descriptive of the whole proceedings. It is true that in some context (*e.g.* in the Code of Civil Procedure) the word " trial " is at times used in contradistinction to " judgment " or " appeal," but there is nothing in the material sections of the Waste Lands Ordinance which suggests that the word is there being used with this limited meaning. On the contrary, the intention of the legislature, so far as it can be gathered from the terms of the Ordinance, seems to have been to put a person who, though his claim was made out of time, could show " good and sufficient reason ;' for his delay, in the same position as one who had lodged his petition within the time limited by section 18.

LORD DU PARCQ.

The only question for determination in this appeal is whether the Supreme Court of Ceylon was right in holding that no appeal lay to that Court against the dismissal by a District Judge of a petition which, for the purpose of dealing with the preliminary objection that the appeal could not be entertained, the Court treated as a " claim " made under section 20 of the Waste Lands Ordinance, No. 1 of 1897.

The facts relevant to this single question are few, and may be shortly stated. The Ordinance of 1897 empowered the Government Agent to declare by a notice duly published that any lands which appeared to him to be waste lands should be deemed the property of the Crown unless a claim was made to them within three months from a date specified in the notice and further enacted that if no such claim were made the lands should be declared to be the property of the Crown. On the 21st September, 1928, such a notice was published in respect of the lands which are the subject of the present suit. No claim was made within the period of three months, which began to run on the date of the notice, but before the lands had been declared to be Crown lands the Ordinance of 1897 had been repealed by the Land Settlement Ordinance of 1931 which provided for the appointment of Settlement Officers, and in terms authorised any such officer " to continue or to complete any action or proceeding taken or commenced under Ordinance No. 1 of 1897." On the 5th April, 1940, an Assistant Settlement Officer published a notice under the Land Settlement Ordinance by which he ordered that the lands in question should be settled as therein specified, thus dealing with them as Crown property.

Meanwhile one A. J. Vander Poorten, since deceased, whose executors are the present appellants, had written to the Land Settlement Officer on the 30th January, 1931, saying that he held the lands in question " in trust for " one Meedeniya and that the same might be settled on him in spite of the writer " " being nominal owner," and, later, namely on the 26th February, 1937, by which date Meedeniya had died, he is said by the appellants to have intimated to the Settlement Officer that he withdrew the earlier letter, and to have set up his own claim to the lands. A. J. Vander Poorten died on or about the 28th December, 1937.

On the 5th December, 1940, the appellants, purporting to proceed under the Land Settlement Ordinance, presented a petition to the District Court of Ratnapura praying that the lands now in question should be transferred to them as executors of A. J. Vander Poorten. It was conceded by counsel for the appellants before the Supreme Court that, by reason of the terms of section 6 (3) (*c*) of the Interpretation Ordinance (Chapter 2), they had erred in proceeding under the Land Settlement Ordinance, and that any claim which they may have should have been brought under the Waste Lands Ordinance of 1897. The learned District Judge dismissed the petition on the ground that the petitioners were not entitled to relief under the Land Settlement Ordinance. In the course of his judgment he said : " Even if it could be said that the remedy provided for by section 20 of the Waste Lands Ordinance was available to the petitioners in spite of this Ordinance having been repealed the petitioners seem to be out of time now."

Section 20 of the Waste Lands Ordinance of 1897 is as follows :—

> " No claim to any land or to compensation or damages in respect of any land declared to be the property of the Crown under the provisions of this Ordinance shall be received after the expiration of one year from the date on which such declaration shall have been made. If within such year any claimant shall prefer a claim to such land or to compensation or damages in respect thereof before the commissioner appointed under this Ordinance for the province in which such land is situated, or in the event of no commissioner being appointed, before the District Judge of the district in which such land is situated, and shall show good and sufficient reason for not having preferred his claim to the Government Agent or Assistant Government Agent as aforesaid within the period limited under section 1 of this Ordinance, such commissioner or judge shall file the claim, making the claimant plaintiff and the Government Agent or Assistant Government Agent as aforesaid defendant on behalf of the Crown in the action, and the foregoing provisions of this Ordinance shall be applicable to the investigation and trial thereof."

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The petitioners appealed to the Supreme Court, who dismissed their appeal without going into the merits of the case. Keuneman, J. with whose judgment Hearne, J. concurred, after holding that the appellants (as their counsel had admitted) could not avail themselves of the Land Settlement Ordinance, stated the question which now arises for decision as follows :—

"Counsel for the appellants, however, contends that this petition constitutes a good and sufficient claim under section 20 of the Waste Lands Ordinance, and that the District Judge should have so treated it. He is met by the objection that no appeal lies from an order made under this section, but counters this by arguing that the words in section 20 'the foregoing provisions of this Ordinance shall be applicable to the investigation and trial thereof' bring in the right of appeal under section 18."

The learned judge rejected this interpretation of section 20 and the Court adjudged that the appeal should be dismissed by reason of the preliminary objection, and decreed accordingly. The present appeal is brought against this decree by leave of His Majesty in Council. The question now in issue ultimately depends on the construction of the words "the investigation and trial thereof" in section 20. The provisions of section 18, which give a right of appeal to a person who has lodged a petition within thirty days from the date of the order of a Commissioner or District Judge, are among "the foregoing provisions" of the Ordinance. If the words "investigation and trial" are to be read as including the decision which is the end and object of the trial, it must follow that the decision, to which the provisions of section 18 are thus made applicable, is rendered appealable. In their Lordships' opinion the word "trial" in this context must be read as including the decision, which it is not improper to regard as an important part of the trial, and the expression "investigation and trial" is to be understood as descriptive of the whole proceedings. It is true that in some contexts (*e.g.* in the Code of Civil Procedure) the word "trial" is at times used in contradistinction to "judgment" or "appeal," but there is nothing in the material sections of the Waste Lands Ordinance which suggests that the word is there being used with this limited meaning. On the contrary, the intention of the legislature, so far as it can be gathered from the terms of the Ordinance, seems to have been to put a person who, though his claim was made out of time, could show "good and sufficient reason" for his delay, in the same position as one who had lodged his petition within the time limited by section 18. It was submitted by counsel for the respondents that it was reasonable to attribute to the legislature an intention to grant only a qualified indulgence to those persons whose claims were made at a late date, and that the right of appeal had been withheld from them deliberately. As to this submission their Lordships would observe, first, that if it had been the intention of the legislature to penalise those whose claims were made at a late date, it is difficult to believe that the draftsman of the Ordinance would not have expressed that intention in plain words, and, secondly, that, inasmuch as a claimant whose delay is due to some "good and sufficient reason" is no less meritorious than one who has been able to act promptly, there is no ground for imputing the suggested intention to the legislature.

For these reasons their Lordships are of opinion that the learned judges of the Supreme Court were wrong in holding that the words "investigation and trial" had "a limiting effect," and referred only to the inquiry before the Commissioner or District Judge in the narrower sense of that word.

It was submitted by counsel for the appellants that, even if there were no right of appeal under section 20 of the Waste Lands Ordinance, an appeal was competent by reason of the provisions of section 73 of the Courts Ordinance. In consequence of the view which their Lordships have formed as to the construction of the former section it is unnecessary that they should express any opinion with regard to this submission, and they refrain from doing so.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and that the case should be remitted to the Supreme Court with a direction that an appeal lies to that Court under section 20 of the Ordinance No. 1 of 1897 from the order of the District Judge dated the 30th October, 1941. Their Lordships have designedly abstained from expressing any opinion as to any of the other questions raised by the appeal, which it will be for the Supreme Court to determine. The respondent should pay the appellants' costs of this appeal, and also their costs of the hearing before the Supreme Court which has proved abortive. It will be for the Supreme Court to make such order as it may think right both as to the costs of the proceedings before the District Judge and as to any of the costs hitherto incurred in respect of the appeal to the Supreme Court which have not been thrown away.

Appeal allowed.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present: HOWARD, C.J. & SOERTSZ, S.P.J.

PERIYACARUPPEN CHETTIAR vs. PROPRIETORS AGENTS LTD.

S. C. No. 59-60—*D. C.* (*F*) *Colombo No.* 1513
Argued on: 26th and 27th February, 1946.
Decided on: 11th March, 1946.

Land Settlement—Claimant declared purchaser of property—Sale of property pending settlement proceedings by claimant—Improvements made by purchasers—Settlement order made subsequently in claimant's favour—Sale of title under settlement Order to third party—Due Registration—Plea of exceptio rei Venditæ et Traditæ—*Is it available against a party claiming title under settlement order—Trust—Compensation for improvements*—Jus retentionis—*Land Settlement Ordinance, section* 8 (*Cap.* 319)—*Effect of—Trust Ordinance, Section* 98 (*Cap.* 72).

By Deed 3 D4 of 1928 one G, who was declared the purchaser of the property in question under the Waste Lands Ordinance, No. 1 of 1897 transferred it to the 1st defendant, who in turn conveyed the same to the 3rd defendant.

By a final order dated 27-10-33 made under section 8 of the Land Settlement Ordinance (Cap. 319) and duly registered, G was declared entitled to the property. G's rights were sold in execution against him subsequently and they devolved on plaintiff whose title deeds were registered on the same folio as the Settlement Order. 3 D4 was not registered. No evidence was led to show that plaintiff was not a *bona fide* purchaser. The defendants planted and improved the property for which they claimed compensation and a *jus retentionis*.

Held: (i.) That the Settlement Order vested the property in G and wiped out all previous titles.

(ii.) That in the circumstances the plea of *exceptio rei venditae et traditae* was not available to the defendant against the plaintiff.

(iii.) That as the plaintiff is a *bona fide* purchaser he cannot be said to hold the property in trust for the defendants.

(iv.) That the defendants were entitled to compensation for improvements and to a *jus retentionis* until compensation is paid.

Cases referred to:—*Manchenayake vs. Perera* (46 N.L.R. 457); *Gunatileke vs. Fernando* (22 N.L.R. pp. 390-391); *Rajapakse vs. Fernando* (1920) A.C. p. 192); *Appuhamy vs. Appuhamy* (3 S.C.C. 61); *Rajapakse vs. Fernando* (21 N.L.R. 495); *Mudalihamy vs. Dingiri Menika* (28 N.L.R. 412); *Hethuhamy vs. Boteju* (43 N.L.R. 83); *Tikiri Banda vs. Gamagedera Banda* (3 Supreme Court Circular 31).

H. V. Perera, K.C., with *H. W. Thambiah*, for the plaintiff-appellant in No. 59 and the plaintiff-respondent in No. 60.

N. Nadarajah, K.C., with *Ivor Misso*, for the 3rd defendant-respondent in No. 59 and the 3rd defendant-appellant in No. 60.

Cyril E. S. Perera with *T. B. Dissanayake*, for the 1st and 2nd defendants-respondents in No. 50 and the 2nd and 3rd Respondents in No. 60.

HOWARD, C.J.

This case involes an appeal by the plaintiff from a judgment of the District Court of Colombo dismissing his action with costs on the ground that the defendants are entitled to retain possession of the land in question until compensated for improvements, whilst there is a cross appeal by the 3rd defendant asking that the judgment of the District Judge be varied and the 3rd defendant be declared entitled to the land in question. The facts of the case are as follows: By deed No. 486 dated the 21st December, 1928, (3 D4) the land in question was sold by one H. A. Gunasekera, to the 1st defendant. 3 D4 recited that Gunasekera, on a claim before the Commissioner appointed under the Waste Lands Ordinance, was declared the purchaser of the land in question and that Gunasekera had been granted permission to sell the premises by the Government Agent, Sabaragamuwa Province. In the operative part of 3 D4 Gunasekera (1) sold, assigned and transferred the premises to the 1st defendant, (2) warranted title to the same, (3) covenanted to execute all such further deeds and assurances required for more effectually conveying and assuring the property to the 1st defendant, (4) covenanted, soon after the publication of the final orders of settlement under the Waste Lands Ordinance by the Special Officer, to execute a confirmation and ratification of the sale by a

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

duly constituted notarial deed and also to hand over to the 1st defendant all title deeds, grants and settlements relating to the title to the said premises. By an order made under the Land Settlement Ordinance (Cap. 319) dated the 27th October, 1933, duly registered in Folio 42/120 Ratnapura, Gunasekera was declared entitled to the property. On a decree entered against Gunasekera in Case No. 18808 D. C. Kalutara the premises were sold on the 13th January, 1935, and purchased by the judgment creditor Don Andiris. Don Andiris by deed No. 935 dated 14th May, 1935 (P9) sold the premises to Gendy Singho, who by deed 1900 dated 11th April, 1938, (P8) transferred to John Singho. On the same day John Singho by deeds (P1, P3, P23) executed in favour of the plaintiff a lease, a usufructuary mortgage and an agreement. All these deeds apart from 3 D4 are registered in the same folio as the settlement order. It was by virtue of these deeds that the plaintiff claimed to be entitled to the property in dispute. The 1st defendant went into liquidation after case was instituted. The liquidator was added as the 2nd defendant and the 3rd defendant is the purchaser of the property from the 1st defendant.

In the District Court and in this Court it has been contended on behalf of the defendants that the settlement order made in favour of Gunasekera enured to the benefit of the 1st defendant by virtue of 3 D4 and that the 3rd defendant has now a good and valid title to the land in dispute. Alternatively the defendants claim a *jus retentionis* on the ground of improvements to the land. The District Judge dismissed the plaintiff's action on the ground that the defendants are entitled to retain possession until compensation is paid for improvements.

It will be convenient first of all to consider the contention put forward by Counsel for the defendants that the settlement order made in favour of Gunasekera enured for the benefit of the 1st defendant. Mr. Nadarajah maintains :—

(*a*) 3 D4 conveys the property to the 1st defendant ;

(*b*) 3 D4 creates a trust in favour of the 1st defendant. Gunasekera must be deemed when he obtained the settlement order to have held the property on trust for the 1st defendant ;

(*c*) the principle *exceptio rei venditae et traditae* applies.

With regard to (*a*) the first point that requires consideration is the precise effect of an order under the Land Settlement Ordinance. Section 8 is worded as follows :—

"Subject to the provisions of section 5 (6), every settlement order shall be published in the Gazette, and every settlement order so published shall be judicially noticed and shall be conclusive proof, so far as the Crown or any person is thereby declared to be entitled to any land or to any share of or interest in any land, that the Crown or such person is entitled to such land or to such share of or interest in the land free of all encumbrances whatsoever other than those specified in such order and that subject to the encumbrances specified in such order such land or share or interest vests absolutely in the Crown or in such person to the exclusion of all unspecified interests of whatsoever nature and, so far as it is thereby declared that any land is not claimed by the Crown or that some person unascertained is entitled to a particular share of or interest in any land, that the Crown has no title to such land or that some person unascertained is entitled to such share of the land or that such interest in the land exists and that some person unascertained is entitled thereto, as the case may be :

"Provided that nothing in this section contained shall affect the right of any person prejudiced by fraud or the wilful suppression of facts of any claimant under the notice from proceeding against such claimant either for the recovery of damages or for the recovery of the land awarded to such claimant by the order :

"Provided further that nothing in this section shall affect the rights of *fidei commisarii* whose interests have been prejudiced by an order published under this section."

In my opinion the order of the 27th October, 1933, is conclusive proof of the title of Gunasekera. The order vests the title in Gunasekera subject to any encumbrance specified in the order. All unspecified interests are excluded. The two provisos to the section are not material to the questions which arise for decision in this case. The rights of *fidei commissarii* do not arise. The first proviso in my opinion refers to some fraud or wilful suppression of facts by a claimant anterior to the making of the settlement order. There is no such suggestion in the present case. The settlement order, therefore, wiped out and destroyed all previous titles to the property and vested it in Gunasekera. Mr. Nadarajah, however, maintains that the exclusive title of Gunasekera acquired by the settlement order passed by virtue of 3 D4 to the 1st defendant. In support of this argument he cited the case of *Manchenayake vs. Perera* (46 N.L.R. 457). In this case it was held that a conveyance executed after the institution 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 into in the said case from and out of all that land (*i.e.* the subject of the partition suit) is valid and not obnoxious to section 17 of Partition Ordinance. It passes an immediate interest in the property and is not merely an agreement to convey in the future. At p. 460 the following passage occurs in the judgment of Soertsz, J. :—

"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

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

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 rete ementur, ut cum editus esset partus, jam tunc, cum contractum esset negotium, venditio facta intellegitur.' "

We were also referred to the English case of *In re Lind* (1915) (2 Ch. 345). The headnote in this case is as follows :—

" In 1905 L., who as one of the next of kin of his mother was presumptively entitled to a share of her personal estate, assigned his expectant share to the N. Society by way of mortgage. In May, 1908, he assigned the same share to A. by way of mortgage subject to the mortgage of 1905. In August, 1908, he was adjudicated a bankrupt and in 1910 he received his discharge. Neither the N. Society nor A, proved in the bankruptcy. In 1911 L. assigned his expectant share to the L. Syndicate. In 1914 L's mother died. and the share thereupon fell into possession :—

" *Held*—by the Court of Appeal, affirming the decision of Warrington, J., that, notwithstanding L's bankruptcy the assignments of 1905 and 1908 remained in force and operated so as to transfer his share on the death of his mother and did not merely impose upon him a personal liability which could be affected by his bankruptcy.

" *Held*, therefore, that the N. Society and A. were entitled in priority to the L. Syndicate."

The question as to whether 3 D4 is an out and out conveyance of the interest Gunasekera was to obtain under the settlement order or merely an agreement to sell is not a matter of real relevance for reasons which I shall give later. But in my opinion on the strict wording of 3 D4 it was a transfer of the interest Gunasekera was to receive. Such a transfer was not in my opinion in any way obnoxious to the provisions of the Land Settlement Ordinance. But although a suggestion was made in the District Court by the defendants that the deeds P8, P9, P1, P3 and P23 were tainted with fraud, no evidence was forthcoming in support of such a suggestion. The plaintiff, therefore, appears before the Court as a *bona fide* purchaser for value. His deeds are registered whereas 3 D4 is not. It may be that the 1st defendant has a good case against Gunasekera on the ground that the latter was holding the property for the 1st defendant as a trustee. But this fact is not sufficient to displace the title of the plaintiff.

In regard to (*b*) I am of opinion that for similar reasons the defendant cannot succeed by calling in aid the provisions of the Trusts Ordinance (Cap. 72). Chapter IX of this Ordinance deals with constructive trusts and Mr. Nadarajah contends that Gunasekera must be deemed to have held the property in trust for the 1st defendant. But in this connection section 98 which saves the rights of *bona fide* purchasers for value must be considered. In spite of a constructive trust in favour of the 1st defendant the rights of the plaintiff, a *bona fide* purchaser for value are in my opinion preserved.

With regard to (*c*) it is necessary to consider somewhat closely the application of the principle of the Roman-Dutch law, *exceptio rei venditae et traditae*. It is formulated by Voet in Book XXI title 3. The following extracts are from Berwick's translation pp. 531 *et seq.* :—

" Section 1. Since on the confirmation of the right of an alienator (which was defective at the time of the alienation) the originally defective right of the alienee becomes confirmed from the very moment that the vendor acquired the dominium ; and therefore the dominium, from that time annexed to the original purchaser, could not be taken away from him without his own act or consent, hence he has the right of suing his vendor or a third party possessor on account of the loss of his possession, and of defeating his opponent's plea by the replication of ownership."

" Section 2. But if the purchaser still possess the thing, and the same persons that are liable to be sued (by him) in respect of (its) eviction bring an action to evict the property from him, it is in his discretion, whether he will suffer eviction and afterwards, when it has been taken from him, sue the successful party by the action *ex stipulatio in duplum*, or by the action *exempto* for the *id quod interest*, (damages), or whether he will prefer to keep the property and repel his vendor and other like persons seeking to evict him either by the *exceptio rei venditae et traditae* or by the *exceptio doli*.

" Section 3. This plea may be opposed, not only to the original vendor, but to all those who claiming under him endeavour to evict a thing from the first purchaser ; such as those to whom the vendor has again alienated the same thing, whether by an onerous or lucrative title after he became owner (*i.e.* after he acquired the dominium which he did not have when he first sold it)."

This principle was considered and explained by Lord Phillimore in *Gunatileke vs. Fernando* (22 N.L.R. pp. 390-391) in the following terms :—

" This law admitted what was called the *exceptio rei venditae et traditae* (Dig., Lib. XXI., tit. 3). Under this exception the purchaser who had got possession from a vendor, who at the time had no title, could rely upon a title subsequently acquired by the vendor, not only against the vendor, but against any one claiming under the vendor ; and though delivery (traditio) was, as the title shows, a part of the defence, if the purchaser had

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

acquired possession without force or fraud, he could use the exception, though he had never received actual delivery from the vendor. Also, if he had once been in possession without force or fraud, and had since lost possession, he could recover it by the Publician action, using the exception as a replication to any defence set up by the vendor or those claiming title under him. (See Voet, Commentary on the Pandects, LXXI., tit. 3). The principal passages are given in translation in a note to *Rajapakse vs. Fernando* (1920) (A.C. p. 192). The principle does not rest upon estoppel by recital, and is broader in its effect than the English rule. Still the *exceptio* given by the Roman law required the double condition, not only that the property should be sold, but that it should be delivered, though the delivery might in the case mentioned be presumed by a fiction ; and here there was no delivery of the property, and the plaintiff is not and never has been in possession. This objection is that which impressed itself upon the mind of the District Judge. The Supreme Court, however, have thought that in this particular the Roman-Dutch law as administered in Ceylon has made a further stride.

" The early Roman law, with its simpler methods of business, might be expected to receive modification under a system according to which conveyance of land is no longer effected by mere delivery, *traditio*, the place of which is supplied or which is itself supplemented by writings such as deeds or notarial instruments, particularly if in addition to these there is a public registration of such documents. Accordingly the Supreme Court in Ceylon has held and apparently in conformity with earlier authority that what took place in this case is equivalent to *traditio*. The Chief Justice in his judgment thus expresses himself....... '......*Traditio*, whether actual or symbolic, is no longer necessary for the consummation of a sale of immovable property, and has been replaced by the delivery of the deed. See *Appuhamy vs. Appuhamy* (3 S.C.C. 61), where the whole subject is lucidly explained. The same protection, therefore, which the Roman law gave to a person who had completed his title by possession, our own law will give to a person who has completed his title by securing the delivery of a deed.'

" Perhaps the matter may be put in this way. A sale made by a vendor without title cannot be relied upon as against a purchaser from that vendor after he had acquired title, if and so long as the earlier sale remains in contract only ; but if the earlier sale is accompanied, followed, or evidenced by certain acts which may be deemed equivalent to the Roman *traditio*, that sale will prevail.

" The deed of 1893 was attested by witnesses and a notary so as to satisfy the conditions required by the Ceylon Ordinance for effectual transfer of land, and it was registered as another Ceylon Ordinance directs. In *Rajapakse vs. Fernando* (1920) (A.C. p. 192) their Lordships laid stress upon the fact that the conveyance on which reliance was placed had been duly registered, though it should be added that in that case the successful party was in possession."

The principle of *exceptio rei venditae et traditae* was successfully pleaded not only in *Gunatileke vs. Fernando*, but also in another Privy Council case of *Rajapakse vs. Fernando* (21 N.L.R. 495). Mr. Perera has, however, contended that these cases do not apply so far as the present case is concerned inasmuch as the settlement order extinguished all former title. He relies on the case of *Mudalihamy vs. Dingiri Menika* (28 N.L.R. 412). The learned District Judge in holding that *exceptio rei venditae et traditae* did not apply also relied on *Mudalihamy vs. Dingiri Menika*. In the latter case a person sold his undivided interests in a land and was subsequently allotted, in lieu of such undivided interests, a share in a partition action to which the purchaser was no party. It was held that the decree in the partition action barred any claim by the purchaser to the land that the plea of *exceptio rei venditae et traditae* was not available to him. It was sought by the unsuccessful plaintiff to bring the case within the principle of *Gunatileke vs. Fernando*. He admitted there was a valid and subsisting decree under the Partition Ordinance, but he claimed the decree in so far as it declared his vendor entitled to the western half share of the land had enured for his benefit and that he was, therefore, entitled to rely upon the partition decree as part of his title. With regard to this plea Garvin, J. said that he was aware of no case in which it has been held that the *exceptio rei venditae et traditae* is available to a purchaser who is seeking to resist his vendor or a person claiming through him upon a title declared by the final decree in a partition action. At pp. 414-415 the learned Judge stated as follows :—

" In a sense, it is correct to say that the parties who by a final decree in a partition action are allotted shares in severalty have acquired a new title, but that is only the indirect effect of the decree and proceed from the fact that it is good and conclusive against all persons whomsoever. So far as the plaintiff is concerned the title derived by the first defendant under this decree necessarily involves the extinguishment of any claim of title which he may have had prior to the passing of that decree.

" He is effectively barred by the decree from asserting a claim to any interest in the land, and is not therefore in a position to establish that interest which he must show before he can stop his vendor or those claiming under them by the *exceptio rei venditae et traditae*.

" In any other view of the law it will be competent even for a person through whose negligent omission to assert his title to an interest in the land a final decree for partition had been entered allotting that interest in severalty to his vendor, to maintain successfully against his vendor and those claiming through him upon a title based on that decree that he is still the owner. It is a view which, in my opinion, is unsound. The exception must, I think, be limited to cases in which the new title which the purchaser asserts has enured to his benefit is obtained by his vendor by the usual means by which title is derived, such as purchase, gift, or inheritance.

" A decree which bars a title cannot be relied on by a person who is stopped by that decree to support and confirm the very title which it bars."

If the exceptio is limited to the cases mentioned by Garvin, J. and the same principle applies to land subject to a settlement order as to land subject to a partition decree, the argument of Mr. Perera must prevail and the exceptio is of no avail in the present case. In *Rajapakse vs. Fer-*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

nando the facts were as follows : C, when he had no title in 1909, sold a piece of land to M and S through whom the defendant acquired title in 1915 and went into possession. The deed of 1909 was registered in Folio 68/253. C obtained a Crown grant in 1912 and the property was sold in execution against him and purchased in 1916 by plaintiff's predecessor in title. The Crown grant was registered in a different folio without reference to the previous title. It was held by the Supreme Court and the Privy Council that the defendant's title was superior. *Rajapakse vs. Fernando* differs from the present case as the defendant's original deed was registered and the subsequent title acquired by his vendor was by Crown grant. Again in *Gunatileke vs. Fernando* Lord Phillimore in his judgment at pp. 391-392 states as follows :—

> "Their Lordships think that the view of the Chief Justice, in which the other learned Judges concurred, was right, at any rate, as applied to the circumstances of the present case. The learned Chief Justice reserved his opinion as to what might be the case if the other party was, as he expressed it, 'a *bona fide* purchaser for value without notice.' As he truly said, the defendant was a donee and not a purchaser, and he unquestionably had notice in 1913 of the transaction in 1895. Whether the idea expressed in the words 'a *bona fide* purchaser for value without notice' is one which is exactly appropriate to the system of Roman-Dutch law may be a question. Whether the point can ever arise as regards the land where the previous transfer has been duly registered may also be a question. Their Lordships make no pronouncement on these points. They are content to say that in the circumstances of this case and as against this defendant there was a sufficiency of material to satisfy the requirements of *traditio* under the Roman Law."

As compared with the present case the defendant was a donee and not a purchaser and he also had notice in 1913 of the transaction in 1895 on which the plaintiff based his claim. For the reasons I have given I do not think the principles laid down in *Gunatileke vs. Fernando* and *Rajapakse vs. Fernando* apply. The exceptio cannot, therefore, be called in aid by the defendant.

The only matter now remaining for consideration is the plaintiff's appeal against the finding of the District Judge that the defendants had a *jus retentionis* until compensation was paid. The law with regard to this matter is stated in Wille's Principles of South African Law at pp. 353-354 as follows :—

> "A person who expends money or labour in improving property, intending to do so for his own benefit, thinking either that the property belongs to himself, or that he has a right to occupy it for some substantial period, whereas in fact he has no such right or title to the property and in consequence the improvements are acquired by the owner of the property, is entitled to claim from the latter the amount by which the property has been enhanced in value. Even a person who has made improvements on another person's property *mala fide*, that is, knowing that he had no title to the property, is entitled to claim the same measure of compensation if the owner stood by and allowed him to make the improvements without objection. The owner of the improved property is not bound to accept the improvements and so become liable to pay compensation ; if he refuses acceptance, the person who made the improvements may remove them if this can be done without injury to the property. But if the owner does accept the improvements he becomes liable for compensation, and consequently the claim for compensation arises only upon the acceptance, which takes place as a rule when the owner claims possession of the property together with the improvements or benefits."

The same principle is formulated in Book II of the 1938 edition of Maasdorp's Institutes of South African Law at pp. 52 and 53. Mr. Perera has contended that the right to a *jus retentionis* and to compensation only exists where a person improves someone else's property thinking that it belongs to him and not when he improves what at the time of such improvement was his own property. By the deed of the 21st December, 1928, (3 D4) the Gamikande Estates, Ltd. became entitled to the property and entered into possession. It was during this occupation that the improvements compensation for which is now claimed were made. The improvements were, therefore, effected on land of which at the time they were the owners and not on land which they thought belonged to them. In these circumstances Mr. Perera contends compensation is not payable. He was unable to cite any authority in support of the limitation he puts on the principle I have cited. In fact the authorities to which our attention has been invited point the other way. No such limitation is to be found from a perusal of the judgment of Nihill, J. in *Hethuhamy vs. Boteju* (43 N.L.R. 83).* Moreover the case of *Tikiri Banda vs. Gamagedera Banda* (3 Supreme Court Circular 31) is an authority which, in my opinion, favours the contention of the defendants on this particular point. The headnote in this case is as follows :—

> "Where the plaintiffs were put into possession of a portion of land, in the Kandyan Provinces, by the owner under a deed of gift, and whilst in possession they brought it into cultivation and permanently improved it and increased its value, and subsequently the original owner revoked the deed of gift and ejected the plaintiffs from the said land.
>
> "*Held*, by Cayley, C.J. and Dias, J. that (1) the plaintiffs, the donees under the revoked deed, were entitled to compensation for the permanent improvements made by them ; and that as no objection was taken to the form of action, either in the answer or in the Court below, they were entitled to recover this compensation by the present proceedings, which were in the form of an *actio in personam*.
>
> "*Held* also by the Collective Court that they were entitled to this compensation without any deduction for profits received by them during their occupation.
>
> "*Held*, by Berwick, J. that they were entitled to this compensation, and to recover it by a personal

* 21 C. L. W. p. 133.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

action both under the Roman-Dutch Common Law and also by the Kandyan Law.

" *Held* further, by Berwick, J. that under the Roman-Dutch law every possessor without title is entitled, when ejected by the true owner, to compensation for useful improvements made by him, and may recover this not only by retention of the land until he has recouped himself for this from the rents and profits, but also by a personal action. And further, that if the possession has been parted with or lawfully lost, his only means of recovering compensation for improvements is by action."

Mr Perera has sought to distinguish this case on the ground that the plaintiffs had only a defeasible title, whereas in the present case their title was absolute. I do not think that such a distinction can be drawn. Both Cayley, C.J. and Berwick, J. in their judgments pointed out that the plaintiffs, so long as their deed of gift remained unrevoked, must be treated as owners of the land with a good though a defeasible title. So in this case the improvers had a good title. In my opinion Mr. Perera's contention fails.

For the reasons I have given both appeals fail. The judgment of the learned District Judge is affirmed. There will be no order with regard to the costs of appeal.

SOERTSZ, S.P.J.
I agree.

Appeals dismissed.

Present: CANEKERATNE, J.

ANTHONIPPILLAI vs. THYIRAINETHAN & OTHERS

S. C. No. 322—*C. R. Chavakachcheri* 32774.
Argued on: 27th March and 12th April, 1946.
Delivered on: 17th April, 1946.

Evidence Ordinance, section 50—Proof of pedigree—When is opinion of a witness as to relationship relevant.

Held : (i.) That in proving pedigrees referring to matters which occurred in times gone by and among persons who have passed away, courts are obliged to allow derivative evidence to be given in certain circumstances.

(ii.) That the opinion of a witness as to the relationship of one person to another is relevant provided such opinion is expressed by conduct, and the witness has a special means of knowledge on the subject.

H. W. Thambiah, for defendant-appellant.
S. J. V. Chelvanayagam, for plaintiff-respondent.

CANEKERATNE, J.

The appellant contends that one Marsalin, a descendant of a man called Avuran, who was a son of Thukuniyar, was entitled to the undivided 1/8th share of the land called Chempadu which he seized in execution of his judgment against this person. The respondents deny the right of the judgment debtor to any share and alleged that Mathesu, a son of Thukuniyar, was the owner of the entire land.

The appellant produced a copy from the *thombu* extract of 1822 and stated that he has acquired knowledge of the pedigree, apparently relating to the descendants of Thukuniyar " by inquiries and document." The learned Commissioner refused to allow the witness to give any evidence relating to the pedigree as he was not a descendant of Thukuniyar.

Counsel for the appellant attacks this order of the learned Commissioner and has referred me to section 50 of the Evidence Ordinance and to page 446 of Ameer Ali's Commentary (8th edn).

Courts are obliged in cases of pedigree which refer to matters which have occurred in times gone by, and among persons who have passed away, to allow derivative evidence to be given in certain circumstances. The opinion of a witness as to the relationship of A to B is relevant provided such opinion is expressed by conduct and the witness has a special means of knowledge on the subject. (sec. 50).

I think the learned Commissioner should not have stopped the witness at that stage. He can consider the qualifications of the declarant " as a member of the family or otherwise." There is a great difference between the competency of evidence and the credit to which it is entitled.

The judgment is set aside and the case sent back for re-trial. Costs of appeal will be costs in the cause.

Set aside and sent back.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present: Soertsz, A.C.J.

PIYASENA (ASST. ASSESSOR, DEPT. OF INCOME TAX) vs. VAZ

S. C. No. 589—*M. C. Colombo No.* 34380.
Argued on: 24th, 25th and 26th October, 1945.
Decided on: 16th November, 1945.

Income Tax Ordinance, Cap. 188—*Prosecution under section* 87 (1) (*b*) *and* 87 (1) (*d*) *for making false statement in return and signing statement or return without reasonable ground for believing same to be true—Can person making and signing such return deny knowledge of contents thereof—Criminal Procedure Code, sections* 172 *and* 193—*Distinction between addition and alteration of a charge.*

Held : (i.) That, when a return, statement or form required under the Income Tax Ordinance is furnished by a person or by his authority, it is not open to such person, in the absence of proof to the contrary, to say that although he signed the return, statement or form, he was not cognisant of its contents.

(ii.) That, in view of section 172 and 193 of the Criminal Procedure Code, it is open to a Magistrate to add a charge without producing the result that thereby the charge is altered. It is only the substitution of one charge for another that amounts to an alteration of a charge in the Magistrate's Court.

H. H. Basnayake, Acting Solicitor-General with *H. A. Wijemanne, Crown Counsel* for the complainant-appellant.

H. V. Perera, K.C. with *S. Nadesan,* for the accused-respondent.

Soertsz, A.C.J.

This is an appeal by an Assessor of the Department of Income Tax, with the sanction of the Attorney-General, against an order of an Additional Magistrate of the Magistrate's Court of Colombo, acquitting the accused-respondent of three charges preferred against him under the Income Tax Ordinance (Cap. 188). Two of the charges were laid under section 87 (1) (*b*) of that Ordinance, and the other under section 87 (1) (*d*). It would appear that, originally, there were only two charges against the accused, one under 87 (1) (*b*) alleging that he had made a false statement to the effect that sales for the year ending December, 1942 amounted to Rs. 50,248·03 whereas, in fact, they amounted to more, and the other that he made his Income Tax return without reasonable ground for believing that it was a true return. But, on the 18th of August, 1944, another charge was added under 87 (1) (*b*), alleging that the accused wilfully made a false statement, namely, that his income from his business for the relevant period was Rs. 7,502·17 whereas, in fact, it was more. Section 87 of the Ordinance says that " no prosecution in respect of an offence under section 85 or section 87 may be commenced except at the instance of or with the sanction of the Commissioner." Counsel for the accused-respondent, contended that the addition of a charge made on the 18th August, 1944, was obnoxious to section 172 of the Criminal Procedure Code ; or if it was not, then that it lacked the sanction required under section 89 of the Income Tax Ordinance read with section 175 of the Criminal Procedure Code. It seems to me that in view of sections 172 and 193 of the Criminal Procedure Code it is open to a Magistrate to add a charge without producing the result that thereby the charge is altered. It is only the substitution of one charge for another that amounts to an alteration of a charge in the Magistrate's Court. Besides, even if the addition of the charge is regarded as an alteration it is sufficiently clear that that was done at the instance of the Commissioner of Income Tax. I am, therefore, of opinion that all three charges were rightly tried and that the appeal of the appellant must be considered with reference to all three charges.

The corner-stone of those charges is the allegation that in doing the acts imputed to him, the accused-respondent intended to evade tax. The onus is on the prosecutor to establish that intention beyond reasonable doubt. Now, intention in a case of this kind as, indeed, in most cases, is a matter for deduction from all the relevant evidence and matters that a tribunal accepts as satisfactory. Section 54 of the Income Tax Ordinance provides in sub-section (5) that " a return, statement, or form purporting to be furnished under this Ordinance by or on behalf of any person shall for all purposes be deemed to have been furnished by that person or by his authority, as the case may be, unless the contrary is proved, and any person signing any such return, statement or form shall be deemed to be cognizant

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

of all matters therein." In this case, it was not disputed that the return, statement or form in question was furnished by the accused-respondent or by his authority, and, in consequence, it is not open to the accused-respondent to say that although he signed the return, statement or form he was not cognizant of its contents. He must be deemed to have been cognizant of everything that appeared in the return, in the statement of particulars, and in the form regarded as one thing. I cannot accede to the argument that a taxpayer's culpability under section 87 has to be determined only with reference to the matters contained in what purports to be the *return* and that false or inaccurate statements or forms are irrelevant for that purpose. It seems to me, therefore, that assuming that the accused was cognizant of everything stated in his return with the statement of particulars and with the statements in the form in which the return has substantially to be made, the prosecution must show from all the other relevant facts and matters that the only reasonable intention that a prudent man ought to draw is that the accused intended to evade the tax. After a very careful examination of all the evidence and matters in this case, I am unable to endorse the views taken by the Magistrate. In my opinion, an intention to evade tax has been amply established. Having regard to the common course of human conduct and the course of business, I cannot bring myself to believe that the accused who, since 1935, has carried on a successful business in a very competitive line is the "innocent abroad" that his Counsel sought to depict him to be, a man of simple faith, and a kind heart, almost completely dependent on a lazy and unscrupulous peripatetic clerk, a manager conspicuous by his absence as a witness for the accused, and, in the event, of his getting into trouble, an astute Income Tax Expert who knew the seasons when to take occasion by the hand and make the necessary delay for the purpose of preparing a new Cash Book. If the accused had been as helpless as all that his business would long since have been in other hands. But, in point of fact, admittedly, the accused's brother-in-law appears to have had such a high opinion of the accused's business acumen that he sent his money to the accused for investment. I mention that just as a clue to real capacity of the accused. I am not at all impressed by the reasoning by which the Magistrate reached the conclusion that he doubted not "that it was the clerk, Rajan, who dealt with the accused's Income Tax from *year to year* and that the Income Tax Returns were prepared by Rajan." The principal reasons given by the Magistrate for the finding are (*a*) that he gave his evidence in Tamil (*b*) that he could not express himself properly in English and that his knowledge of the English language is very limited (*c*) that he struck the Magistrate as of a very average intelligence. These are very poor reasons indeed and, for I may say so, have more the sound of apologies or excuses for taking a certain view. I would invite attention to the case of *Yuill vs. Yuill* (1945) (1 A.E.R. 183) and to what Lord Greene, M.R. had to say about Judges and the demeanour of witnesses. Indeed, I am quite satisfied that Rajan far from being the villain of the piece is a very shadowy personage almost bordering on the mystical. This clerk who according to the Magistrate prepared the accused's Income Tax return "year after year" figures on the accused's pay-roll only twice and that only to draw paltry sums as his yearly salary, Rs. 95 in one year and Rs. 125 in another year. It is not surprising that he was as lazy and dilatory, as the accused complains he was, in order to make him bear this load of bad book-keeping. Rajan has now disappeared, conveniently or inconveniently for the accused and has left not a track behind. Another matter that tells very strongly against the accused is the fact that whereas he admitted to the assessor that he had a proper set of books including a ledger, he subsequently denied that. There is a multitude of other facts and features in this case that cannot reasonably be explained on a hypothesis that the accused was only a victim, misguided and misinformed, and that he did not intend to evade tax. It would be tedious to enumerate them and I would content myself with the observation that I have carefully considered the answers and explanations sought to be given by accused's Counsel, to the facts relied upon in the petition of appeal and amplified during the argument as indicative of the accused's guilty knowledge and of an intention on his part to evade tax, and I have come to the conclusion that those explanations and answers are far from satisfactory. The cumulative effect of the facts that Rajan stood to gain nothing by suppressing or destroying relevant documents as, it is said, he did ; that the accused's explanation that his business was almost entirely a cash business when it is abundantly clear that it was not ; that to account for the non-disclosure of a very large number of transactions on the large vouchers, many of them initialled by the accused himself, purchases to the extent of Rs. 20,000 were excluded ; that payments made by the accused by cheque for insurance of goods that were imported by him were not disclosed ; the delay in producing books and documents when called upon to do so ; the subsequent disclosure of expenditure of Rs. 21,000 when the accused found the credit side of his

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

transactions mounting under the assessor's investigation; the naive exclamation of his expert Kandavanam "what books for such a small business"; when questioned about the accused's books—the cumulative effect of all these facts—to mention only a few—is overwhelmingly eloquent of the accused's guilt.

The Magistrate appears to have misdirected himself in several ways. He makes a point of the fact that the assessor fixed Rs. 110,000 as the accused's taxable income whereas, on appeal, the Commissioner reduced it to Rs. 38,000. Ergo, it may well be that Rs. 7,500 as shown by the accused was, in reality, the taxable income. But, it must be remembered that they had convincing evidence that the accused had robbed them of what was due to them and were, more or less, acting on the principle "omnia praesumuntur contra spoliatorem." They could only make rough guesses. It is not a conclusive point, but still not entirely devoid of significance that the accused paid on a Rs. 38,000 basis. Again, the Magistrate finds that it is a point in favour of the accused that he was, at a late stage able to show that he had not only omitted items on the income side, but also as much as Rs. 21,000 on the expenditure side. But obviously that disclosure was made in pursuance of the instinct of self-preservation. Another point made by the Magistrate as telling in favour of the accused is that when properties of large value bought by the accused during the relevant period were seized by the Commissioner, the accused's brother-in-law claimed them as property held in trust for him, and, thereupon, the Commissioner did not pursue the matter further, but the accused, in impressive acknowledgement of his obligation, transferred the property to his brother-in-law. In regard to the Commissioner not pursuing the seizure further all I would say is that he was acting prudently not to be involved in protracted litigation. As for the trust and the transfer that, of course, had to come to justify the ways of the defaulting man to the Commissioner. It is refreshing to encounter the child-like simplicity implied in the acceptance of the accused's story about these purchases. I cannot share that view.

Yet another point made by the Magistrate is that the previous returns of the accused showed an income of about Rs. 5,000, and those were not challenged by the Department of Income Tax and therefore Rs. 7,500 shown as the profit for the year in question must be correct. But, surely the fact that a statement is not challenged does not mean that that statement is true any more than that a challenged statement must be necessarily false. It may well mean that, on previous occasions, the accused was more fortunate.

The more one examines this case in all its bearings the more convinced one feels that a case beyond reasonable doubt has been made out against the accused on the charges preferred against him and, in the interests of Justice and of public confidence in it, it is necessary to depart from the ordinary rule and to set aside an order of acquittal.

I set is aside and convict the accused and convict him on all three charges.

In regard to punishment, this is a bad case but, in view of the fact that nothing has been proved against him before this case, I will not send him to prison. I sentence him to pay a fine of Rs. 750 on each charge. In default of payment of the fine, two months' rigorous imprisonment on each count. I would invite attention to the ambiguous language in section 87 "shall be guilty of an offence and shall for *each such* offence be liable...... to a fine not exceeding the total of Rs. 5,000."

Order of acquittal set aside and accused convicted.

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

NOOR MOHAMED vs. UMMA

S. C. No. 108—*D. C. Galle No.* 1312
Argued on: 8th February, 1946.
Decided on: 13th February, 1946.

Summary Procedure—Inquiry—Oral evidence permitted to petitioner—Can the court prevent respondent giving oral evidence or cross-examining petitioner—Civil Procedure Code, section 384.

Held: That where at an inquiry under summary procedure the court allows the petitioner to give oral evidence, it could not properly refuse the respondent the same privilege or the cross-examination of the petitioner.

N. K. Choksy with *Isadeen Ismail*, for the appellant.

N. Nadarajah, K.C., with *H. W. Jayawardene*, for the 1st respondent.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

CANNON, J.

The petitioner applied to be appointed curator of the estate of his minor brothers and sisters, for first four respondents; and for the 5th respondent, their sister, to be appointed guardian of the minors. The 6th respondent, who is the widowed mother of them all, opposed the application, alleging that the petitioner was not a suitable person to be appointed curator. Affidavit evidence was tendered by both sides, and the petitioner gave oral evidence. In granting the petitioner's application the acting District Judge said :

> "The 6th respondent opposed this application but all the others are in favour of the petitioner being appointed curator. The 6th respondent appeared to me to be a very domineering sort of lady, devoid of all tactfulness and far from conciliatory in her manner towards the children."

The 6th respondent, however, was not permitted by the acting District Judge to cross-examine the petitioner about certain documents relevant to the petitioner's elegibility. The reason for this ruling by the acting District Judge is not clear; it was not suggested that the documents were irrelevant. The acting District Judge, commenting on this part of the proceedings, says :

> "At this stage (during the cross-examination of the petitioner by the 6th respondent's counsel) I have heard from counsel on both sides a good many of the things that have got to be urged in favour of each party and there are also affidavits before me. I will, therefore, make my order with regard to the appointment of a curator and of the guardian of these minors.
>
> "Mr. Abeyewardene states that the cross-examination of this witness is not yet finished and that he has a number of other documents to put forward to the petitioner to show that he is not a fit and proper person to be appointed curator.
>
> "Mr. Abeyewardene wants to call the 6th respondent in support of the case. The court does not think it necessary that she should be called.
>
> "All the minor respondents are present in court and all express their willingness to live with the eldest brother the petitioner, on being questioned by Court."

This departure from the rules of procedure forms the basis of an appeal by the 6th respondent. The Judge has the undoubted right and duty to stop cross-examination which is prolix or unduly prolonged or unfair or irrelevant. It does not, however, appear from the record that the acting District Judge stopped the cross-examination by the 6th respondent's counsel for these or any other sufficient reason. Section 384 of the Civil Procedure Code, which is referred to in *Dassanaike vs. Dassanaike* (Ceylon Law Recorder, Vol. 22, page 31, 31 C.L.W. 80) does not avail the respondents to this appeal, because the acting District Judge, having allowed the petitioner to give oral evidence "in order that I may know something more of their difficulties and to ascertain the kind of person he is," could not properly refuse the 6th respondent the same privilege. This failure to exercise his discretion judicially becomes more evident when one reads that without hearing the 6th respondent in the witness-box the acting District Judge formed a personal opinion adverse to her. It cannot be said that the 6th respondent has had a fair opportunity of putting her case.

I would, therefore, allow the appeal and direct that the matter be reheard before another Judge, the costs of all the proceedings to be costs in the cause.

SOERTSZ, S.P.J.

I agree.

Appeal allowed.

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

WIJEMANNE vs. FERNANDO

S. C. No. 223—*D. C.* (*F*) *Colombo* 15540

Argued on: 18th and 19th February, 1946.

Decided on: 25th February, 1946.

Rent Restriction Ordinance—Premises required for landlord's occupation—Written agreement by tenant to pay rental above standard rent—Can landlord accept such rent under section 17 *of the Ordinance—Calculation of standard rent where landlord paid rates—Rent overpaid in landlord's hands—Does it reduce tenant's liability.*

Held : (i.) That section 17 of the Rent Restriction Ordinance does not permit a landlord to accept a rental above the standard rent, on the ground that such rental was in accordance with a written agreement between him and the tenant.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Held : (ii.) That where the landlord paid the rates, the standard rent has to be determined in the manner provided by section 5 (1) (*b*), that is to say, by adding the annual value and the amount of rates leviable for the year and dividing the result by twelve.

(iii.) That the overpaid amounts in the hands of a landlord overpaid as rent, and not for any other purpose, extinguished *pro tanto* by operation of law the rent as it fell due.

Per SOERTSZ, S.P.J.—" This question of reasonableness has to be considered and determined in view of the relative difficulties of the landlord and of the tenant in regard to the acute disproportion between supply and demand in the matter of housing accommodation today and for that reason, suitable alternative accommodation is a question of importance and has to be taken into account.

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

L. A. Rajapakse, K.C., with *E. B. Wickremenayake*, for the respondent.

SOERTSZ, S.P.J.

The respondent to this appeal sued the appellant to recover rent for the month of March, 1944 in respect of the premises bearing assessment No. 26, Bagatelle Road, which he had let to the appellant on a contract of monthly tenancy, and he also asked for ejectment, and for damages on the ground that the appellant was overholding the premises after the tenancy had been duly determined by notice. In view of the Rent Restriction Ordinance No. 60 of 1942, he pleaded that he required these premises as a residence for himself and that the rent had been in arrear for one month after it had become due. The appellant filed answer admitting that he had received notice to quit, alleging that there had been no demand made by the respondent for the rent for the month of March implying that, in the absence of such a demand, his failure to pay the rent for that month was not legally imputable to him. He prayed that the respondent's action be dismissed. But, when the case came up for trial, issues were framed raising not only the questions involved in the pleadings, but other questions as well, for instance the questions—what the standard rent for these premises is ; whether the respondent had been in receipt of a rental in excess of the standard rent ; and whether, taking the overpayment into account, the appellant could be said to have been in arrear with the rent for March, 1944. In the course of the final address made by the respondent's counsel, he appears to have made a further submission in which he contended that because the rent charged was charged in accordance with a written agreement between his client and the appellant, his client was protected by section 17 of the Ordinance.

In the judgment delivered by the learned trial Judge, he said that if he had to answer the question whether, in all the circumstances of the case, the respondent " reasonably required " the premises for occupation as a residence for himself, on the evidence before him he would have held in favour of the appellant as " his necessity was perhaps greater than that of the plaintiff." Counsel for the respondent asked us to reverse that finding and to hold that, in all the circumstances, the appellant " reasonably required " the premises. I do not think we ought to accede to that request. This question of reasonableness has to be considered and determined in view of the relative difficulties of the landlord and of the tenant in regard to the acute disproportion between supply and demand in the matter of housing accommodation today and for that reason, suitable alternative accommodation is a question of importance and has to be taken into account. The evidence in this case shows that these premises were taken on rent by the appellant for conducting a tutorial academy, and for that purpose laboratories for scientific work were installed at a fairly high cost. It would be very difficult indeed, under the conditions prevailing at the date of this action for the appellant to find suitable alternative accommodation. I am, therefore, of the opinion that the trial Judge was right when he said that the appellant's necessity was greater than the respondent's and we should not disturb that finding, although it may be said to have been made *obiter*.

The grounds on which the trial Judge found for the respondent were : (*a*) that in view of the written agreement (P4) by which the appellant undertook to pay a rental above the standard rental, the respondent was entitled in virtue of section 17 to recover that rental ; (*b*) that, on that basis, the appellant was in arrear with his rent for the month of March. In regard to (*a*), the view taken by the trial Judge appears to me to be quite untenable. Section 17 enacts that " Nothing in this Ordinance shall be deemed to authorise any increase of the rent of any premises otherwise than in accordance with the terms of any lawful agreement relating to the tenancy of those premises or with the provisions of any law applied in that behalf." The reasoning by which the trial Judge reached his conclusion is clearly fallacious inasmuch as it ignores the fact that it is not merely a *voluntary* agreement to pay an

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

increased rent that justifies the payment of such a rent by one party and the receipt of it by the other, but a *voluntary* as well as *lawful* agreement. But section 3 provides that " It shall not be lawful for the landlord......to demand, receive, or recover.....any amount in excess of the authorised rent," and section 14 penalises the breach of that requirement. If I may say so, the view taken by the Judge, if given effect to, would result, as he himself appears to have appreciated, in a *reductio ad adsurdum* of the whole Ordinance. It is not in dispute between the parties that the rent received and recovered is in excess of the authorised rent.

In regard to (*b*), the learned Judge has found that assuming overpayments during the relevant period, the total sum resulting from those overpayments, was not sufficient to make good the rent due for March, 1944, and that, therefore, the appellant must be held to have been in arrear with his rent and, in that way, liable to be ejected in accordance with section 8 of the Ordinance. Here again there is a fallacy in the reasoning of the learned Judge. In this case, the tenancy was one in which the landlord paid the rates, and for that reason, the standard rent has to be determined in the manner provided by section 5 (1) (*b*), that is to say by adding the annual value and the amount of rates leviable for the year and dividing the result by 12. The learned Judge, however, appears to have divided the result by 10 evidently misled by the fact that the annual value represents the monthly rental multiplied by ten. If he had addressed himself to the calculation in the manner provided by section 5 (*b*) (1) he could not but have found that there was in the hands of the respondent, by way of payments in excess of the authorised rent, an amount larger than the recoverable rent for March. In other words, he would have found that it could not be said, having regard to the provisions of the Rent Restriction Ordinance that the appellant was in arrear with his rent for March at the date of the institution of this action. Counsel for the respondent, however, if I may say so without intending any offence at all, sought to surmount this difficulty by juggling with words. He submitted that the appellant had not pleaded a set off or a counterclaim and was, consequently, debarred from asking that the overpaid amount be applied in payment of the rent for March. But, the answer to that is that the overpaid amount in the hands of the respondent overpaid *as rent*, and not for any other purpose, extinguished *pro tanto* by operation of law, the rent as it fell due. In other words, the law secured for the appellant what, in other circumstances, the appellant would have had to achieve for himself.

For these reasons the appeal must be allowed and the plaintiff's action dismissed. Ordinarily, costs follow the event, but in the special circumstances of this case, I am of the opinion that we should depart from that rule and make no order for costs either here or below.

CANNON, J.
I agree.

Appeal allowed.

Present: CANNON, J. & CANEKERATNE, J.

IYISHAMMAH & OTHERS vs. RATNASINGHAM

S. C. No. 351—*D. C. Batticaloa No.* 184.
Argued on: 29th March, 1946.
Decided on: 1st April, 1946.

Fidei commissum—*Gift subject to condition that after donee's death property should vest in donor's daughters—Death of one of donor's daughters before donee—Are her heirs entitled to rights in the property gifted—Interpretation.*

A deed of gift contained the following condition :

That the donee " shall possess and take the produce thereof from the date of my death until his lifetime without usufructing, mortgaging or transferring them, that after his death the said properties shall devolve on my daughters only, that I the donor and my heirs will have no right whatever to the said properties."

At the time of the gift seven daughters were living. One of them predeceased the donee leaving as her heirs her children.

Held : That the donor's deceased daughter obtained a *spes successionis* when the deed of gift was executed and therefore on her death her rights passed to her heirs.

M. I. M. Haniffa with *Abdulla*, for plaintiffs-appellants.

Cyril E. S. Perera with *S. A. Marikar*, for defendant-respondent.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

CANNON, J.

This appeal relates to a question of a *fidei commissum.* By a deed of gift one P. P. Marikar transferred paddy land to his younger son, subject to certain conditions, namely, that the donee "shall possess and take the produce thereof from the date of my death until his lifetime without usufructing, mortgaging or transferring them, that after his death the said properties shall devolve on my daughters only, that I the donor and my heirs will have no right whatever to the said properties."

There were seven daughters then living, but one of them Maimoonathummah predeceased the donee. The six surviving daughters sold the land in its entirety to the defendant, against whom this action was brought by the appellants, one of whom the 1st, 2nd, 3rd and 5th are the children of Maimoonathuammah, and the 4th a nominal party, he being the husband of the 3rd appellant. The appellants claimed a declaration of title that all of them, except the 4th were entitled to an undivided 1/7th share of the land jointly. The District Judge held that only the surviving daughters were entitled to it because P1 does not say "my daughters or their heirs."

This interpretation does not seem to me to be capable of support. The matter must, as the District Judge says, be governed by the terms of the deed, but when the donor executed the deed and made provision for his daughters, he obviously had in mind the daughters who were then living, and by using the word "only" he was not excluding the heirs of the daughters but merely his sons. To introduce the word "surviving" is to restrict the meaning of the word "daughters" to an extent justified by neither the paragraph in question nor the context of the deed. In my opinion, Maimoonathummah obtained a *spes successionis* when the deed of gift was executed, and, therefore, on her death her right passed to her heirs, namely, the 1st, 2nd, 3rd and 5th appellants—vide *Mohamed Bhai et al vs. Silva et al* (14 N.L.R. 193).

The order of the District Judge must be set aside. The appeal is allowed with costs, and the respondent will also pay the costs of the action and damages Rs. 75, which sum was agreed upon at the trial.

Set aside.

CANEKERATNE, J.

I agree.

Present: DE SILVA, J.

PERERA & ANOTHER *vs.* DHARMARATNE, EXCISE INSPECTOR

S. C. No. 490-1—*M. C. Colombo, No.* 4803

Argued and Decided on : 23rd May, 1946

Criminal Procedure Code Section 406—Analyst's Report—Application by accused on trial date for summons on Analyst—Should it be allowed. Accused's right to summon Analyst.

Held : (i.) That an accused person has the right to have the Analyst present in Court to testify to the contents of his report made by him.

(ii.) That an application to summon the Analyst should be treated in the same manner as one for a summons on any other witness for the prosecution.

L. A. Rajapakse, K.C,. with *N. Nadarajah, K.C.*, for accused-appellants.

E. P. Wijetunga, C.C., for the *Attorney-General.*

DE SILVA, J.

In this case the two accused were charged with having manufactured an excisable article, to wit., "Tea Cider" in breach of Section 19 (*a*) of Chapter 42 of the Legislative Enactments read with Excise Notification No. 396 published in "Government Gazette" 9,431 of 13-7-45. (2) With having bottled 'Tea Cider' for sale without a licence in breach of Section 14 (*b*) of Chapter 42 of the Legislative Enactments. (3) With having in possession material, utensils and implements, for the purpose of manufacturing 'Tea Cider' in breach of section 14 (*e*) of Chapter 42 of the Legislative Enactments, and thereby committed an offence punishable under section 14 (*a*) of Chapter 42 of the Legislative Enactments.

After trial the accused were convicted and the 1st accused was sentenced to pay a fine of Rs. 500 and the 2nd accused to pay a fine of Rs. 1,500.

In the course of the proceedings the Counsel, who appeared for the accused, made an application that the Analyst should be summoned to

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

give evidence with regard to his report. On this day the Magistrate made the following order :—

> As regards the Analyst, I do not consider that his presence is necessary in this case, If accused or his counsel desired to inspect the report the application should have been made earlier. This case was called on 18-6-46 for Analyst's report. It was called again on 8-2-46 and when it was found that report was filed the case was fixed for trial. I do not think this application should in any event be made on the date of trial. The application for a summons on the Analyst today is disallowed. The trial will proceed.

Thereafter owing to the absence of a material witness, the trial was postponed, and Counsel renewed his application for summons on the Analyst. This application was also refused by the Magistrate.

Now, Section 406 of the Criminal Procedure Code, which makes the report of the Analyst admissible without the Analyst being called, provides that, if either party to the case, requests that the Analyst should be present to give evidence at any particular trial to which the deposition or report may refer, such Analyst shall be summoned as a witness for the purpose of giving evidence in the same manner as the other witnesses for the prosecution.

In this case there was no doubt that the accused person had the right to have the Analyst present in Court to testify to the contents of his report. They made an application to exercise that right. I think it was the duty of the Magistrate to allow the application. I think it is necessary that the Magistrate should remember that not only must justice be done but it must also appear to be done.

In the circumstances, I set aside the conviction and sentence and send the case down for trial before another Magistrate.

Set aside and sent back.

IN THE PRIVY COUNCIL

Present : Lord Porter, Lord du Parcq, Sir John Beaumont

V. S. SUBBIAH NADAR (Administrator of Estate of T. P. Sokkalal Ram Sait), Appellant) vs. E. P. KUMARAVAL NADAR (Deceased and others Respondents)

PRIVY COUNCIL APPEAL No. 29 *of* 1940.

Decided on : 11th April, 1946.

Trade Marks—Infringement—Passing off—Anterior user—Honest concurrent user—Trade Marks Ordinance, Sections 9, 19, 38 *and* 40.

The plaintiff, a manufacturer of beedies, was the proprietor of certain trade-marks registered in respect of beedi. He alleged that the defendants had infringed his trade-marks and passed off their goods as his and asked for an injunction to restrain such infringement and passing off. The defendants denied infringement and passing off and pleaded anterior user and honest concurrent user.

As there was no evidence of actual deception, the issue of infringement turned upon a comparison of the plaintiff's trade-marks with those used by the defendants. The points of similarity between these was very marked. Evidence was led by both parties on the issues relating to anterior user and honest concurrent user. On the issue relating to passing off, there was no evidence that any person who asked for beedies by the plaintiffs' trade names had been given the defendants' beedies.

Held : (1) That the defendant's marks closely resembled the plaintiff's registered trade-marks, were calculated to lead to confusion and deception, and that plaintiff was entitled to an injunction to restrain infringement of his trade-marks.

(2) On a review of the whole of the evidence, that the defendants had not discharged the burden resting on them of proving anterior user and honest concurrent user.

(3) That the evidence fell far short of showing that the description under which the plaintiff's beedies even asked for and sold had come to be regarded in Ceylon as denoting exclusively the beedies of the plaintiff, and that, therefore, the plaintiff was not entitled to an injunction to restrain passing off.

D. N. Pritt, K.C. with *L. M. D. de Silva, K.C.* and *Stephen Chapman* for the appellant.

James Mould, for the respondent.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Sir John Beaumont.

This is an appeal by special leave from a judgment and decree dated 19th June, 1939, of the Supreme Court of the Island of Ceylon, which reversed a judgment and decree dated 17th June, 1938, of the District Court of Colombo.

The suit out of which this appeal arises was brought on the 11th November, 1936, in the District Court of Colombo by T. P. Sokkalal Ram Sait (who is hereinafter called the plaintiff) against E. P. Kumaraval Nadar, who was defendant No. 1, his partners the respondents Nos. 2-4, who were defendants 2-4, and respondent No. 5, who was defendant No. 5, and was the manager in Ceylon of the other defendants. The plaintiff died pending the appeal to His Majesty in Council, and the appellant, as administrator of his estate, has been brought on record as appellant. The said E. P. Kumaraval Nadar also died pending the appeal, and his widow and children have been substituted for him as respondent No. 1.

By his plaint, the plaintiff alleged that he was the manufacturer of beedies (a small and cheap type of cigarette) and carried on business in Colombo; that in connection with such business he was the proprietor of a trade-mark consisting of the device of a portrait of the plaintiff in a turban surrounded by rays of light and other distinctive features, and that the trade-mark was registered in the Register of Trade-marks in Ceylon under No. 4,919 in class 45 in respect of beedi on the 15th June, 1930; that the plaintiff was also the proprietor of a trade-mark consisting of the device of a circle containing the portrait of the plaintiff in a turban and that the said trade-mark was registered in the said Register of Trade-marks under No. 5929 in the said class on the 26th September, 1934; that the plaintiff had extensively used the said trade-marks on packets of beedies manufactured and sold by him since the years 1926 and 1934 respectively; that by reason of the said user the plaintiff's beedies marked with the said trade-mark and figures had become known to purchasers and intending purchasers as "Photo Mark beedies," "Ram Sait beedies," and "Sokkalal beedies," and that in the beedie trade, "Photo Mark beedies," "Ram Sait beedies" and "Sokkalal beedies" meant the beedies made and sold by the plaintiff; that the defendants had infringed the plaintiff's said trade-mark and had advertised and sold at Colombo beedies not of the plaintiff's manufacture as "photomark beedies." The plaintiff claimed an injunction to restrain such infringement and passing-off.

The defendants in their answers denied infringement and passing-off, and further pleaded that they had used the marks complained of by the plaintiff in connection with their trade in beedies from a date anterior to either the date of user or the date of registration of the marks Nos. 4919 and 5929 by the plaintiff.

On the 8th February, 1937, the plaintiff with the leave of the Court amended his plaint by alleging user of the trade-mark No. 4919 from the year 1915 in place of the year 1926, and on the 30th June, 1937, the plaint was further amended by leave by substituting the year 1912 for the year 1915. In view of these amendments which put back from 1926 to 1912 the alleged date of the first user by the plaintiff of his trade-mark No. 4919, the defendants on the 1st July, 1937, obtained leave to amend their answer by praying that the first four defendants be declared entitled to have their trade-marks registered in the Register of Trade-marks and that the Registrar of Trade-marks be directed to register the same in the Register of Trade-marks. This amendment enabled the defendants to raise the issue of honest concurrent user, which will be dealt with later in this judgment.

At the commencement of the trial, the position with regard to registration as found by the trial Judge, whose finding on this point has not been challenged, was as follows:—The plaintiff had registered in Ceylon his trade-mark No. 4919 on the 18th January, 1930, and his trade-mark No. 5929 on the 2nd March, 1934. (These were in fact the dates of application for registration.) On the 6th February, 1934, the defendants made an application No. 5903 to register a trade-mark containing a portrait of E. P. Kumaraval Nadar in a dress very similar to that worn by the plaintiff in the portraits on his trade-marks, surrounded by features closely resembling those surrounding the plaintiff's portrait in Trade-mark No. 4919. The Registrar refused registration on the ground that the mark so closely resembled the plaintiff's mark, as to be calculated to deceive, and the application was withdrawn by the defendants without prejudice to their rights on the 29th June, 1936. Subsequently, the defendants made application to register a label in connection with their "Falcon" brand, which contained a portrait said to be a portrait of one of the defendants. On objection being taken by the plaintiff, the defendants undertook to delete the portion of the mark which contained a portrait in a round label, and to pay any costs, which might be directed by the Registrar-General to be paid to the plaintiff. A further application was made by the defendants on the 11th January, 1936, to register another

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

trade-mark, but on opposition from the plaintiff the matter was not proceeded with. On 1st July, 1937, during the pendency of this action the defendants made applications No. 6778 (Ex. D. 69) (Ex. D. 70) and 6780 (Ex. D. 71) for registration of marks containing portraits and other features alleged to resemble those in the trade marks of the plaintiff. These are the marks which are alleged to be an infringement of the plaintiff's two trade-marks. In 1915 the defendants registered their trade-mark with the Chamber of Commerce in Madras, and in 1917 the plaintiff registered his trade-mark with the same Chamber of Commerce. In 1925 the defendants registered their trade mark with the Chamber of Commerce in Calcutta.

At the trial the learned Judge raised twenty issues, many of which were sub-divided, but only a few of such issues are relevant on this appeal, Shortly summarised, the relevant issues are: (1) Whether the plaintiff's trade-marks Nos. 4919 and 5929 have been infringed by the defendants; (2) Whether the plaintiff is entitled to restrain the defendants from selling their beedies under the designation of "Photo Mark beedies"; (3) Whether the defendants used their marks from a date anterior to either the date of user by the plaintiff or the registration of the marks 4919 and 5929, so as to entitle them to the use of their said marks; (4) Whether there has been an honest concurrent user by the defendants of their said marks so as to entitle the first four defendants to procure such marks to be registered in Ceylon. The learned Judge also raised an issue as to whether registration of the plaintiff's said trade-marks entitled them to prevent the user by the defendants of the features and devices surrounding the portraits of the plaintiff, and he answered that issue in the affirmative. In their Lordships' view, this issue raised a purely hypothetical question which the learned Judge ought not to have raised or attempted to answer. The question of infringement must be answered in relation to the plaintiff's trade-marks as a whole, and not to particular parts of them. There is no evidence that the defendants have made use of a mark containing the features surrounding the plaintiff's portrait either without any portrait, or with a portrait in no way resembling that of the plaintiff, and the question whether such a mark if and when adopted by the defendants will involve infringement of the plaintiff's marks does not arise.

The learned Judge held that the defendants had infringed the plaintiff's trade-marks, that there had been no anterior user as alleged by the defendants and no honest concurrent user, and that the defendants had passed off beedies not of the plaintiff's manufacture under the description of "Photo Mark beedies," and he granted the injunctions asked for, On appeal the Supreme Court, whilst not disputing that the defendants' marks so closely resembled the plaintiff's registered trade-marks as to be calculated to deceive, considered that the defendants had proved anterior user as alleged by them and that they had also proved honest concurrent user, though it was unnecessary to rely upon that. The Court therefore allowed the appeal, dismissed the plaintiff's action, awarded the defendants Rs. 300 damages in respect of an interim injunction which had been granted to the plaintiff, and directed the Registrar to proceed with the applications to register the defendants' marks regardless of the opposition of the plaintiff.

There being no evidence of actual deception the issue of infringement, which is the first issue to be decided, turns primarily upon a comparison of the trade-marks registered by the plaintiff with those used and sought to be registered by the defendants as aforesaid. The similarities between the rival marks were summarised by Mr. Justice Wijeyewardene in his judgment in the Supreme Court in these terms: "The trade-mark No. 4919 . . . contains in the centre a portrait of the plaintiff, who is a man of South India, wearing a North Indian turban and an open coat without a tie. There is a halo serving as a background. On either side of the figure is a pillar above which is draped a curtain. At each of the four corners of the coloured design surrounding the portrait, the pillars and the curtain, is a plane, and between each set of planes is a figure like an elongated dumb-bell. The outstanding colours used to complete the picture are black and yellow. On all sides of the portrait there are legends in Marathi and Tamil.

"The trade-mark No. 5929 . . . consists of the device of a circle containing a portrait as depicted in trade-mark 4919.

"The trade-mark No. 5903 of the defendants contains in the centre a portrait of the 1st defendant, who is himself a man of South India, wearing a North Indian turban and an open coat without a tie. There are also the halo serving as a background, the pillars, the drapery, the planes and the elongated dumb-bells placed in the same position as in the plaintiff's trade-mark 4919. There are also some legends on all sides of the portrait in Marathi and Tamil. The predominating colours are black and yellow."

The learned trial Judge had also noted another point of similarity, namely, that the defendants' mark contained in Tamil characters words importing that E. P. Kumaraval was the true or

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

original Sait, whilst on the plaintiff's mark No. 5929 were the words " Ram Sait Beedie " both in English and Tamil characters. Their Lordships do not attach significance to the similarity in colours between the marks of the plaintiff and the defendants since they understand that the labels were issued in a large variety of colours. But the other points of similarity are very marked. There are, of course, minor points of difference in the devices or features surrounding the portraits, but the only substantial difference between the marks is that the plaintiff's marks contain a portrait of the plaintiff, whilst the defendants' marks contain a portrait of E. P. Kumaraval Nadar. It is not disputed that the plaintiff has no monopoly in the right to display a portrait as part of a trade-mark. The defendants have a perfect right to display a portrait of one of themselves on their own mark so long as their portrait itself or their portrait together with the surrounding devices does not so closely resemble the plaintiff's portrait and devices as to lead to confusion. The defendants' portrait is of E. P. Kumaraval Nadar in a Marathi dress and head-dress similar to the dress and head-dress in the plaintiff's photo and surrounded by a series of almost identical features. It is in evidence that most of the people who purchase beedies are illiterate and are unlikely to make a close examination of labels on the beedies which they purchase. Their Lordships have no hesitation in holding that the general effect on the mind of anybody dealing in beedies would be to confuse the beedies sold under the marks and labels of the defendants with those sold under the plaintiff's trade-mark, and both Courts in Ceylon appear to have been of that view. In their Lordships' opinion the marks are plainly calculated to lead to confusion and deception and the similarities are so close as to make it impossible to suppose that such marks were devised independently of each other. In the absence of any evidence of a common origin, the conclusion must be that one party copied the mark of the other. The evidence on record shows that the plaintiff's case was that he left his native place of Mukkudal in the Tinnevelly District in the Madras Presidency in his 14th year and went to Bombay to learn the manufacture of beedies with an uncle. He remained in Bombay for six years and then returned to Mukkudal where he commenced the manufacture of beedies. He first adopted the labels with photograph in 1913, the design being made by a man in Madras and the labels being printed in Bombay. On his return from Bombay he adopted the names of Sokkadal Ram Sait, and he adopted the dress and head-dress shown in his registered trade-marks as a result of his sojourn in Bombay. On the other hand the defendants, who also manufacture beedies in Mukkudal, have offered no explanation of the circumstances in which they adopted their device, and particularly why, though E. P. Kumaraval Nadar was a man of South India, he chose to display a portrait of himself in Marathi dress and head-dress closely resembling that in the plaintiff's photos ; nor why he referred to himself as the only original Sait, when Sait was not his name, though it was a name adopted by the plaintiff.

The only conclusion their Lordships can come to on the evidence is that the defendants copied the design of the plaintiff.

The issues which next arise for consideration are those of anterior user, and honest concurrent user, by the defendants, and on these issues the burden is upon the defendants.

In considering these issues it is necessary to notice the relevant provisions of the Trade-marks Ordinance dated 1st January, 1927, being Chapter 121 of the Legislative Enactments of Ceylon. Section 9 of the said Ordinance provides: " It shall not be lawful to register as a trade-mark or part of a trade-mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a Court of Justice." Section 19 provides : " In case of honest concurrent user or of other special circumstances which in the opinion of the Court or Registrar make it proper so to do, the Court or Registrar may permit the registration of the same trade-mark, or of nearly identical trade-marks, for the same goods or description of goods by more than one proprietor, subject to such conditions and limitations, if any, as to mode or place of user or otherwise as the Court or Registrar may think it right to impose." Section 38 provides : " Subject to the provisions of Section 40 of this Ordinance, and to any limitations and conditions entered upon the register, the registration of a person as proprietor of a trade-mark shall, if valid, give to such person the exclusive right to the use of such trade-mark upon or in connection with the goods in respect of which it is registered." Section 40 provides : " In all legal proceedings relating to a registered trade-mark . . . the original registration of such trade-mark shall, after the expiration of 7 years from the date of such original registration . . . be taken to be valid in all respects unless such original registration was obtained by fraud, or unless the trade-mark offends against the provisions of Section 9 of this Ordinance : Provided that nothing in this Ordinance shall entitle the proprietor of a registered trade-mark to interfere with or restrain the user by any person of a

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

similar trade-mark upon or in connection with goods upon or in connection with which such person has, by himself or by his predecessors in business, continually used such trade-mark from a date anterior to the user or registration, whichever is the earlier, of the first-mentioned trade-mark, by the proprietor thereof or his predecessors in business or to object (on such user being proved) to such person being put upon the register for such similar trade-mark in respect of such goods under the provisions of Section 19 of this Ordinance."

Upon these issues a large number of witnesses were called on behalf both of the plaintiff and the defendants, and on the whole the learned trial Judge accepted the evidence on behalf of the plaintiff and disbelieved that given on behalf of the defendants. The Supreme Court differed from the learned Judge on his appreciation of the evidence, and the conclusion which it reached on the issue of anterior user was that the defendants had used continuously in Ceylon the device on their trade-mark from January, 1916, and that the plaintiff had made no user of the device on his trade-marks prior to that date. The learned Judges of the Supreme Court recognised the danger of differing from the trial Judge who had seen the witnesses on questions of fact, but they considered that the trial Judge had overlooked, or at any rate failed to give due effect to, the fact that the defendants had registered their mark in Madras in the year 1915. At the material time, and indeed down to the trial of this suit, there was no statutory law in India relating to the registration of trade-marks. But parties desirous of registering a trade-mark could do so in the Chambers of Commerce in certain towns including Madras. It is not disputed that the defendants had registered in the Chamber of Commerce in Madras a mark very similar to the one in dispute in this suit in the year 1915. Such registration conferred no legal right on the defendants, but the Supreme Court thought it a clear inference to draw therefrom that the mark had been used by the defendants from about the time of such registration. Their Lordships are not prepared to attach to such registration the importance assigned to it by the Judges of the Supreme Court. The registration no doubt proves that the defendants' mark was in existence in the year 1915, but it does not prove user of the mark even in India, and much less in Ceylon, which is the only place in which user is relevant. The document on which the Supreme Court relied for its finding that the defendants' mark had been used continuously in Ceylon from January, 1916, is Exhibit D. 2 which is an extract from the defendants' account books and which shows that from the 3rd January, 1916, for the rest of that year a considerable number of beedies were sent by the defendants to a dealer named T. M. K. Mohamed Kasim in Colombo. This Exhibit, however, does not mention the brands of beedies sent. The oral evidence given on behalf of the defendants was to the effect that the only brand of beedies which they imported into Ceylon between 1916 and 1930 was the Kumaraval brand, though at the time they dealt in other brands in India, and that the Kumaraval brand was always sold under a label with a portrait of E. P. Kumaraval Nadar in the form used on the mark which they were seeking to register. This evidence was contradicted by evidence given on behalf of the plaintiff, was rejected by the learned District Judge, and was supported by no documentary evidence. The first document relating to Ceylon which mentions Kumaraval beedies is Exhibit D. 180, a postcard from Kandy, dated 27th September, 1926, addressed to the defenants' firm at Mukkudal ordering one parcel of Kumaraval beedies, but there is no evidence that this was supplied under the disputed marks. There is no document on record which shows that before about 1930 any beedies of the defendants were sold under the disputed mark, and it is very difficult to suppose that no such documentary evidence exists, if in fact this mark was in constant use from 1916 onwards. The labels with the portrait of E. P. Kumaraval Nadar must have been printed somewhere, but no orders, invoices or receipts relating to such printing are produced, nor any old copies of the labels. The defendants' evidence was that considerable sums were spent by them in advertisement, but no advertisement was put in evidence. It is strange too if the defendants had been selling their beedies under this trade-mark since 1916 that they took no step to oppose the registration by the plaintiff in 1930 and 1934 of his very similar marks. It is to be noticed also that when on the 17th December, 1935, the plaintiff by his proctor wrote to the defendants' firm a letter, Exhibit D. 204, complaining that they were infringing the plaintiff's trade marks, Nos. 4919 and 5929, the defendants in their reply of the 27th December, 1935, Exhibit D. 205, denied that they were selling beedies under any mark which resembled any of the plaintiff's marks, but did not suggest that for many years past they had been using the mark complained of. Moreover, even if the defendants' mark was first used in Ceylon in 1916 there is no evidence of continuous user between that date and about 1930. On a careful review of the whole of the evidence, their Lordships agree with the finding of the trial Judge that the defendants

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

have not proved user of their mark prior to the user of the plaintiff's mark.

On the issue of honest concurrent user the evidence is to a great extent the same as that in relation to the issue of anterior user. It is not disputed that from about 1928 or 1930, not only the defendants but other traders in Ceylon have been using marks resembling in a greater or less degree the trade-marks of the plaintiff, and the evidence shows that the plaintiff in a good many instances took steps to prevent such user. The opposition of the plaintiff to the efforts of the defendants to register their marks has already been noticed. The finding of their Lordships that the defendants originally copied the trade-mark of the plaintiff casts a heavy burden on the defendants to show that any concurrent user on their part was honest. Evidence of long concurrent user to the knowledge of the plaintiff in such circumstances that the plaintiff must be deemed to have acquiesced in such user and waived any right to object to it might suffice, but there is no such evidence.

That leaves only the issue whether the defendants have sold or dealt in their beedies by the description of "Photo" or "Photo Mark" beedies, and whether the plaintiff can restrain such action. On this issue their Lordships agree with the Supreme Court in thinking that the plaintiff failed. There is a certain amount of evidence that the plaintiff's beedies are asked for as "Photo" or "Photo Mark" beedies, though they are also asked for as "Sokkalal" or "Ram Sait" beedies, descriptions which it is not suggested are applied to the defendants' goods. There is no evidence whatever that any person asking for "Photo" or "Photo Mark" beedies has been given the defendants' beedies and has subsequently complained because he did not get the beedies of the plaintiff. The evidence falls far short of showing that the description "Photo" or "Photo Mark" beedies has come to be regarded in Ceylon as denoting exclusively the beedies of the plaintiff.

In the result their Lordships think that the appellant is entitled to an injunction to restrain infringement of his two trade-marks, but is not entitled to an injunction to restrain passing off. With regard to costs, the correct order would have been to give the plaintiff the general costs of the action, and to give the defendants the costs of the issues on which they succeeded. The costs would seem not to have been greatly increased by the issue on which the defendants succeeded, since the same witnesses dealt with all the issues, but no doubt the proceedings have been somewhat prolonged by the raising of such issues. Their Lordships think it impracticable to re-open the taxation of costs and they propose therefore to allow the defendants some relief against the general costs of the action.

Their Lordships therefore will humbly advise His Majesty that this appeal be allowed and that the order of the Supreme Court dated 19th June, 1939, and the order of the District Judge dated 17th June, 1938,be set aside; that the appellant is entitled to an injunction to restrain the respondents, their servants and agents from infringing the appellant's trade-marks Nos. 4919 and 5929 by the marks of the respondents sought to be registered under applications Nos. 6778, 6779 and 6780 dated 1st July, 1937, being Exhibits D. 69, D. 70, D. 71 or by the use of any other mark or device being a colourable imitation of the appellant's said trade-marks or either of them and that the respondents be ordered to deliver to the appellant upon oath or affirmation all labels, bills, invoices, letters, forms or other documents in the possession or under the control of the respondents bearing the said marks sought to be registered by the respondents or any of them for erasure or cancellation.

The respondents must pay to the appellant two-thirds of the costs of the appellant and the plaintiff of the trial, of the appeal to the Supreme Court and of the appeal to His Majesty in Council.

Appeal allowed.

Present : HOWARD, C.J.

WALDRON, SUPDT. OF POLICE vs. JAMES PERERA.

S. C. No. 344—*M. C., Colombo, No.* 11019

Argued on : 24th May, 1946.

Decided on : 29th May, 1946.

Defence Regulations (*Miscellaneous*)—*Charge under Regulation* 17 (1) *for having addressed persons engaged in the performance of essential services—Act likely to prevent or interfere with performance of their*

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

duties.—Failure to set out in the charge the actual words used in the language spoken—Can Conviction be maintained.

Cases referred to :—*Zenobio vs. Axtell* (6 Term Reparts 162): *Khare vs. Massani* (43 Criminal Law Journal of India, 856).

Held : That in a prosecution under Regulation 17 (1) of the Defence Regulations (Miscellaneous) for addressing persons engaged in the performance of essential services, having reasonable cause to believe that such act will be likely to prevent or interfere with the carrying on of their work, the failure to set out the actual words of the speaker in the language in which the speech was made is fatal to a conviction.

H. V. Perera, K.C., with *Walter Jayawardene, C. C. Rasa Ratnam* and *C. E. L. Wickremesinghe*, for the accused-appellant.

E. P. Wijetunga (Jr.), C.C., for the *Attorney-General.*

HOWARD, C.J.

The appellant was convicted under Regulation 17 (1) of the Defence (Miscellaneous) Regulations on a charge that, at Colombo on the 21st November, 1945, he did an act, to wit., address a large number of persons engaged in the performance of essential services thus : " From the 1st of this month lightermen have worked only an 8-hour day. From the 13th May struck work. We welcome the motor workers who have joined in the strike and I hope many others would join too "—having reasonable cause to believe that such act will be likely to prevent or interfere with the carrying on of their work by persons engaged in the performance of essential services. Against this conviction the appellant appeals.

The evidence against the appellant was that of the Police officers, Sub-Inspector Goonetilleke and Sergt. Chandrasekera, who attended the meeting at which about 300 persons were present consisting of lightermen from Colombo harbour and motor workers. There was a strike in progress. The appellant, according to the two Police officers, made a speech in Sinhalese. After the meeting the two officers went to the Pettah Police Station and made a note in English of the speech made by the appellant. These notes were made ten minutes after the meeting. The prosecution was based on the words set out in the charge which were taken from these notes. The Inspector stated that he did not take down all that the appellant said and only noted down what he considered important. Mr. Perera has contended *inter alia* that the conviction cannot be maintained inasmuch as the charge does not contain the actual words used by the appellant who spoke in Sinhalese and not English. Moreover the whole of the appellant's speech was not recorded, and the appellant was charged on what amounted to a *precis* made by the Inspector of what had actually been said. In my opinion there is considerable substance in Mr. Perera's contention. So far as the proof of what the appellant actually said is concerned I am of opinion that the same principles must apply as in a case of seditious libel. In the 31st Edition of Archbold p. 1117 it is stated that the seditious parts of the publication relied on should be set out in the indictment correctly. If the libel is in a foreign language, it shoudl be set out in such language *verbatim* together with a correct translation. In this connection I would refer to *Zenobio vs. Axtell* (6 Term Reports 162). In the present case the words set out in the charge were not the actual words used, but an English translation of the words used made from memory by the Police officers. The actual words used should have been set out in the charge. The appellant did not go into the witness box and say what words he actually used. In that connection Crown Counsel has referred me to the case of *Khare vs. Massani* (43 Criminal Law Journal of India, 856). In that case the complainant, Dr. Khare, brought criminal proceedings for defamation against the defendant on the ground that the latter in a paper known as the " Nagpur Times " published defamatory matter in relation to words used by the complainant on a certain occasion. The complainant was not able to give the actual words he used and in those circumstances the Court held that it could only gather their import from the impression left on the mind of those present. It was agreed that, as the appellant in this case failed to give evidence as to the words he used, the Court was entitled to gather their import from the impressions left in the minds of the Police officers. I am of opinion that this case has no relevance in a criminal charge such as this where a burden rests on the prosecution to prove what words were actually employed.

On this ground alone, I allow the appeal and set aside the conviction.

Conviction set aside.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present: CANEKERATNE, J.

THAMOTHERAMPILLAI vs. GOVINDASAMY

S. C. No. 307—C. R. Trincomalee No. 7395.

Argued on: 27-3-46

Decided on: 4-4-46

Nuisance—Basis of action for ejectment—Tenant, a repairer of radio sets turning-in wireless sets in the course of repairs till late at night—Interference with comfort and convenience of persons occupying adjoining premises—Rent Restriction Ordinance, Section 8 proviso C.

The plaintiff sued the defendant for ejectment from a room which the former had let to the latter. The basis of the action was that the defendant caused damage to the premises and annoyance to plaintiff. The room adjoined the premises in which the plaintiff was living. It was in evidence that the defendant was a radio mechanic, who brought home radio sets for repair at night when he was off-duty; and that in the course of effecting such repairs the defendant created noise practically every night by turning-in wireless sets till late in the night.

Held: That the noise complained of did cause substantial interference with the plaintiff's comfort and convenience and that it amounted to a nuisance within the meaning of Section 8 proviso (c) of Ordinance No. 60 of 1942.

S. J. V. Chelvanayagam for plaintiff-appellant.

No appearance for defendant-respondent.

CANEKERATNE, J.

This is an appeal from the order of the Commissioner dismissing with costs the action of the plaintiff, the landlord of certain premises, the northern room in the tiled house on the land situate in No. 3 Division. The claim of the plaintiff was for an order of possession of the premises which were, and are, in occupation of the defendant and for consequential relief. The basis of the claim was that the defendant had caused damage to the house and premises of the plaintiff and annoyance to him. The premises were and are within the protection of the Rent Restriction Ordinance. The house consists of two rooms, the other room being occupied by the plaintiff and his wife, a sickly woman who has some trouble in her eyes.

Plaintiff testified that as the defendant was causing trouble, he asked him on the 25th May, 1945, to vacate the room: that night the defendant caused great damage to the premises. Next day, fearing that the plaintiff might prosecute him, the defendant sent for one Jubar and one Hussein, requested them to dissuade the plaintiff from taking any steps against him and promised to vacate the room by the end of June. These two persons saw plaintiff and communicated the defendant's promise to him.

The defendant is a radio mechanic and brings home radio sets for repair. Since the end of May, the defendant was creating trouble and was using a radio set till late in the night, so plaintiff gave him notice on 28th July to leave the premises by the end of August: as defendant failed to comply with the notice this action was instituted on 11th October.

The learned Commissioner appears to take the view that the defendant has caused annoyance to the plaintiff but that is not conduct which is a nuisance to adjoining occupiers, no other occupier had made a complaint against the defendant. Complaint, in his view, should be made by more than one person; as defendant is a repairer of radio sets " he must do the repairing only when he is off-duty, so putting the radio on late at nights is not a nuisance."

Proceedings for ejectment can be taken against a statutory tenant by the landlord if he can satisfy the Court that the tenant has been guilty of conduct which is a nuisance to adjoining occupiers. (See 8 proviso C. of Ord. No. 60 of 1942).

The conduct of a person may be a nuisance to one person or to a number of persons; it depends on the nature of the act done by the wrongdoer; if a tenant grossly misuses the premises let to him it is clear that the landlord can complain that the conduct of the tenant is a nuisance within the meaning of the section. (See *Ferguson vs. Butler* (Blundell's Cases, page 71).

In the case of a nuisance by smell or noise, the fact that only one person complains is a circumstance to be taken into consideration by the tribunal, it may not infrequently turn the scales against the landlord; it is, however, not decisive of his rights. (See Section 2 of Ch. 2 of the Legislative Enactments).

The defendant has turned the premises let to him to a workshop where he attends to repairs of radio sets at night. Any substantial interference with the comfort or convenience of persons occupying or using the premises is a sufficient interference with the beneficial use of premises.

Persons living in a locality may have to bear with patience the noise ordinarily found there but the addition of a fresh noise caused by a person

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

working every night may be so substantial as to create a nuisance. The plaintiff complains of the noise made practically every night by the defendant in the course of effecting repairs to radio sets; he complains of the noise made by turning-in the wireless-sets till late in the night. The existence of the noise in this case is clear; such noise does cause a substantial interference with the enjoyment of the adjoining room by the plaintiff during the night; it would be injurious to the physical comfort of the plaintiff and his wife. (See *Forrest vs. Leefe*, 1910; 13 N. L. R. page 119).

The appeal is allowed with costs in both courts.

Appeal allowed.

Present: DE SILVA, J.

PERERA, ASST. SUPDT. OF POLICE vs. DR. N. M. PERERA

S. C. No. 223—*M. C., Colombo, No.* 4588.
Argued and Decided on: 17th May, 1946.

Defence Regulations (Miscellaneous), Regulation 17 (1)—*Charge under, for addressing persons engaged in Essential Services—Act likely to prevent or interfere with performance of duties of such persons—Meaning of the word* " *act* " *in Regulation* 17 (1).

Held: That the " act " specified in Regulation 17 (1) of the Defence Regulations (Miscellaneous) is some action which by itself would interfere with the work of persons engaged in essential services and not an argument which leaves the option to the person addressed to follow it or ignore it.

H. V. Perera, K.C., with *Nadesan* and *C. E. L. Wickremesinghe*, for accused-appellant.
T. S. Fernando, C.C., for *Attorney-General.*

DE SILVA, J.

The charge against the accused in this case was that on the 21st day of November, 1945, at Ratmalana within the jurisdiction of this Court in contravention of Regulation 17 (1) of the Defence (Miscellaneous) Regulations he did an act, to wit, address a large number of persons engaged in the performance of essential services thus :—

> " Brothers, the other bus companies have stopped work today to get their legitimate dues. You all like one body must fight shoulder to shoulder until you attain final victory."

having reasonable cause to believe that such act will be likely to prevent or interfere with the carrying on with their work by persons engaged in the performance of essential services, and that he thereby committed an offence under Regulation 17 (1) punishable under Regulation 52 (3) of the said Defence (Miscellaneous) Regulations. He was convicted of this charge and was sentenced to a term of three months rigorous imprisonment.

In appeal Mr. Perera, on his behalf contends that the speech alleged to have been made by the accused does not amount to an act which would prevent or interfere with the carrying on of the essential services as provided in Regulation 17. He also contends that the charge set out is that the accused used certain terms in English, whereas the evidence is that the accused addressed the employees of the bus company in the Sinhalese language, so that the evidence does not support the charge made against the accused.

It is difficult to contend that where an argument or speech is addressed to a person engaged in an essential service the fact that the person addressed has the option of accepting that advice would make the argument or speech an act which would prevent or interfere with the carrying out of the duties of that person. The act specified in the regulation appears to be some action which by itself would interfere with the work of persons engaged in essential services, not an argument which leaves the option to the person addressed either to follow it or to ignore it.

There is separate provision in the Defence Regulations for dealing with persons who strike or encourage strikes in essential services. So that it is to be presumed that Regulasion 17 (1) was intended to meet offences other than encouraging strikes.

The witnesses have given the Sinhalese terms which were alleged to have been used by the accused, but he was not charged with having used such terms. Even if the charge had been regularly framed by setting out the terms used by the accused, Mr. Fernando for the Crown concedes that the words do not necessarily mean that the accused urged the employees to strike or to stop work.

In the circumstances, I find that the charge made against the accused has not been established. I set aside the conviction and acquit the accused.

Accused acquitted.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present : CANNON, J. & JAYETILEKE, J.

SINNATHAMBY & ANOTHER vs. KATHIRGAMU

S. C. No. 34—*D. C. (F) Point Pedro No.* 1710
Argued on : 16th April, 1946.
Decided on : 24th May, 1946.

Servitude—Right to discharge rain water along defined channel—Deviation of channel by agreement—Right to use new channel.

Held : That when a right to discharge rain water along a defined channel over another's land has been acquired by prescription and a new channel is substituted by agreement, the benefit of possession of the old channel attaches to the new one.

Cases referred to :—*Costa vs. Livera* (2 C.A.C. 28, 16 N.L.R. 26); *Young vs. Kinlock* (1910 A.C. 169).

[Note—See also *Hendrick et al vs. Sarnelis et al*—41 N.L.R. 519; *17 C.L.W. 87* Edd].

H. V. Perera, K.C., with *Navaratnarajah*, for the 1st and 2nd defendants-appellants.

N. Nadarajah, K.C., with *H. W. Thambiah*, for the plaintiff-respondent.

JAYETILEKE, J.

One Muttupillai and three others instituted action No. 24,539 of the Court of Requests of Point Pedro against the 1st, 3rd, 4th, 5th and 6th defendants and another to be declared entitled to discharge the surplus rain water from lot 6 in plan Z along the channel marked RST by me in red. They alleged that the surplus rain water had been discharged along that channel " from time immemorial " and that the first defendant obstructed the said channel by erecting a stone wall at U on the southern boundary of his field (lot 2). The other defendants were made parties to the action as they were the owners of lots 3, 4 and 5. The first defendant alone contested the plaintiff's claim. The case was settled on October 17th, 1935, on the following terms :—

> " We the above-named plaintiffs and defendants do hereby agree to settle the case, that the new water channel which is marked on the eastern side of the wall in plan No. 1030 of the 8th of December, 1930, prepared by surveyor, Mr. K. Vale Muruku will be cut and used by us in future."

The parties are agreed that the settlement was that the channel RST should be deviated and that the plaintiff should have the right to discharge the surplus rain water along the channel shaded blue in the plan Z. It must be noted that a section of the channel is on the property of Kathiran Alvan, who was not a party to the action. At the same time it must be noted that the plaintiffs alleged in their plaint that the surplus rain water used to flow through Kathiran Alvan's field along the channel RST. In settling the case the 1st defendant has accepted the position that the plaintiffs have acquired by prescription the right to discharge their surplus rain water from lot 6 along the channel RST. The evidence shows that lot 6 is higher than lots 2, 3, 4 and 5. It is well settled law that lower grounds must serve upper grounds by receiving the water which comes naturally from them. The first defendant did not in his answer allege that Kathiran Alvan raised any objection to the water running down his field to the pond on the north. The plaintiff in this action who is the successor in title of Muttupillai alleged that in the years 1940 and 1941 the 1st defendant and his son the 2nd defendant, obstructed the new channel by erecting a dam along the Eastern boundary of lot 2. He claimed the right to discharge the surplus rain water from lot 6 to the pond along the channel shaded blue in the plan Z.

The main point taken by the 1st and the 2nd defendant was that a new channel was not, in fact, constructed in terms of that settlement. At the trial the following issues were framed :

1. Was the water channel marked BCE in the plan used as an outlet by the plaintiff to lead surplus rain water from his field lot 6 after the settlement in case No. 24,539 C. R., Point Pedro.
2. Did the defendants 1st and 2nd in or about October, 1940, obstruct the flow of surplus rain water from lot 6 along the portion of the channel within lot 2 shown in plan 1030.
3. If so, what damages is the plaintiff entitled to.
4. Did the defendant or his predecessor in title obstruct the entire water channel BCE as depicted in plan 1030.
5. If not, are the defendants liable in damages to the plaintiff for any obstruction.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

6. Is there, in fact, a water channel leading from lot 6 to the pond known as Kavodi-kirai tank shown in the plan.

7. If not, can the plaintiff maintain this action.

11. Did the plaintiff cut and remove a portion of the eastern dam in lot 2 wrongfully in November, 1940.

12. If so, what damages are the defendants 1st and 2nd entitled to from the plaintiff.

After a careful consideration of the evidence the trial Judge found against the 1st and 2nd defendants on issues 1, 2, 4, 6, 11 and 12. On the material before us we are unable to say that the findings are wrong.

Mr. Perera urged that the consent decree did not become effective as Kathiran Alvan, who was not bound by it, objected to a channel being cut on his land. The evidence of Mr. Sivagnanasundram, which has been accepted by the trial Judge, shows that the channel shaded in blue in plan Z, has been in existence from the year 1936. The inference to be drawn from that evidence is that Kathiran Alvan consented to the channel being deviated from its old course. The following passage in the 2nd defendant's evidence shows indubitably that the old course existed :

"*To Court.*—From 1927 till now the surplus rain water from plaintiff's land did not discharge itself into my land.

Q.—Did the surplus rain water from plaintiff's land empty itself into the pond without going over your land ?

A.—It flowed through my land as well as the adjoining land and emptied itself into the pond."

It has been held in the case of *Costa vs. Livera* (2 C. A. C. 28 ; 16 N. L. R. 26) that when a right of way has been acquired by prescription and a new route has been substituted by agreement for the old route the benefit of the old possession would attach to the new route. This decision has the support of the judgment of the House of Lords in *Young vs. Kinloch* (1910 A. C. 169).

The substitution of the new channel for the old one seems to have been made under such circumstances that it is reasonable to infer that there was an intention to abandon the old channel. Moreover, the new channel has been in use for a period of over five years.

The judgment of the trial Judge is, in our opinion, correct and we would accordingly dismiss the appeal with costs.

CANNON, J.

I agree.

Appeal dismissed.

Present: CANNON, J.

RAMUPILLAI vs. ZAVIER & ANOTHER

S. C. No. 114—*Application for revision in C. R. Jaffna No.* 16674.
Argued and Decided on: 17th May, 1946.

Postponement—Trial—Application on ground of absence of a material witness—Refusal by judge—Failure to lead available evidence—Duty of party affected by such refusal—Right of appeal.

Held : (i.) That when an application for a postponement of trial, on the ground that a material witness is absent, is refused, the party affected should nevertheless proceed to call what evidence is available to him as such evidence may disclose a stronger reason to court to grant the postponement.

(ii.) That when an application for postponement is made and refused, the remedy is by way of appeal.

Cases referred to :—*Fernando vs. Andiris* (2 A.C.R. p. 141), *Gunawardene vs. Orr* 2 A. C. R.

V. K. Kandasamy, for the plaintiff-petitioner.
G. Thomas, for the defendants-respondents.

CANNON, J.

This was an action for Rs. 300 brokerage, and paragraph 2 of the plaint stated that the defendants made a contract with the plaintiff through their agent, S. M. Aboobucker, Proctor of Jaffna. On the 17th of December, 1945 the trial was fixed to take place on the 28th of January, 1946. On the latter date Counsel for the plaintiff asked for an adjournment because a material witness for the plaintiff had not been served with summons to attend. The Commissioner refused the application which was opposed. Counsel for the plaintiff thereupon stated that it was not possible for him to conduct his case without the evidence of Mr. Aboobucker, whom he described as his chief witness and that he was not calling any evidence. The Commissioner, thereupon, dismissed the action with costs and in his reasons stated that the defendant had come to Jaffna all the way from Colombo and that the plaintiff

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

had not applied for a summons on Mr. Aboobucker until the 19th January, 1946. On the 25th of January, 1946, the Fiscal reported that the summons could not be served. The Commissioner proceeded " Constant postponements on grounds like these only mean that the civil administration of the court cannot be effectively carried out. I, therefore, refuse the date asked for which the proctor for the plaintiff appeared to think he was entitled to get if he paid costs. If I accede to that position a case can be indefinitely postponed from coming to trial. The burden is on the plaintiff to prove his case, he has refused to call evidence. I have, therefore, no alternative but to dismiss his action with costs."

For the petitioner it is submitted that the Commissioner should have granted the application for a postponement on terms. The matter comes before this court by way of revision. Now, it is a fact that in the interval between the 17th of December and the 28th of January, the Courts Christmas Vacation took place. It is also a fact that Mr. Aboobucker lives and practises at Jaffna, and Mr. Kandasamy urged that those facts should have moved the Commissioner to grant the application for a postponement. It is to be noted, however, that Counsel for the plaintiff declined to call any evidence and it has been said in this Court on a number of occasions that when an application for a postponement is refused the party affected should nevertheless proceed to call what evidence is available to him, one reason being that after this evidence is recorded it may emerge in a stronger way to the tribunal that a postponement should be granted. In this case the record does not satisfy me that Mr. Aboobucker was the plaintiff's chief witness or that the case could not have been proved without his presence, for I notice in the list of documents and witnesses filed by the plaintiff the following: " Plaintiff to produce letters, post-cards and telegrams sent by defendant."

I would adopt in deciding this case the language of Layard, C.J. in *Fernando vs. Andiris* (2 A.C.R. p. 141): " There was no material before the District Court, neither is there any material before this court, to show that the evidence of the plaintiff was essentially necessary for the purpose of the plaintiff continuing this action. It may be that the plaintiff was not in a position to establish his case by other evidence than that of the plaintiff. After the District Judge had refused to grant a postponement, the plaintiff's proctor should have called such evidence as was available on behalf of the plaintiff and should not have declined to call any evidence. There being no evidence, the order of the District Judge dismissing the plaintiff's claim is right. It would never do for this court to encourage parties in the court below to decline to proceed with a case simply on the ground that the District Judge had refused to grant a postponement. I am not satisfied that the plaintiff's evidence was material for the successful conduct of the case by his legal adviser." But apart from this question, as to whether the Commissioner exercised his discretion properly, the fact remains that this case should have been brought before this court by way of appeal and again the above-mentioned volume of the Appeal Court Reports comes to the assistance of the respondent, for in the case of *Gunawardene vs. Orr* at page 172 Hutchinson, C.J. says " I see no expression of opinion by Acting Justices Pereira and Grenier in 2 Bal. p. 86, which I think I should follow. The effect of it is that the practice is not to exercise the power of revision under section 753 where the remedy of appeal is open." This practice is subject to the qualification that the court would nevertheless deal with the matter in revision in an exceptional case. The case which is now being considered does not appear to me to have any matter of such exceptional merit as to warrant a departure from the practice of the Court.

For both the above reasons the application is dismissed with costs.

Dismissed.

Present: Howard, C.J. & de Silva, J.

COORAY & ANOTHER vs. SAMARANAYAKE

S. C. No. 318—*D. C.* (*F*) *Colombo No.* 2786.
Argued on: 7th June, 1946.
Decided on: 20th June, 1946.

Possessory action for plantation—Can it be maintained by one co-owner against another.

Held : That a possessory action for a plantation can be maintained by one co-owner against another.

Cases referred to :—*Abeyaratne vs. Seneviratne* (3 Balasingham 22), *Silva vs. Sinno Appu* (7 N.L.R. 5), *Fernando vs. Fernando* (13 N.L.R. 164), *Rowel Appuhamy vs. Moises Appu* (4 N.L.R. 225), *Heenhami vs. Mohotihami* (19 N.L.R. 235), *Kathonis vs. Silva* (21 N.L.R. 452), *Girihagama vs. Appuhamy* (14 C.L.W. 11).

N. Nadarajah, K.C., with *J. M. Jayamanne*, for the defendants-appellants.
N. E. Weerasooriya, K.C., with *E. A. G. de Silva*, for the plaintiff-respondent.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

HOWARD, C.J.

The defendants in this case appeal from an order of the District Court, Colombo, giving judgment for the plaintiff and declaring that she is entitled to be restored to the possession of the rubber plantation on the land referred to in the schedule to the plaint together with damages calculated at Rs. 70 a month from the 17th March, 1943. The plaintiff's case was that her husband Don Peter Wijesekera, Vidane Aratchi, was the owner of the plantation and on his death it passed to her and her children. Since the death of the Vidane Aratchi the plaintiff states that she and her children have had exclusive and uninterrupted possession of the plantation and taken the produce thereof up to 17th March, 1943, on which day the defendants wrongfully and unlawfully ousted the plaintiff therefrom. The defendants admit that they took possession of the plantation on the 17th March, 1943, but maintain that they were entitled to do so as they are co-owners with the plaintiff and others of the plantation. The learned Judge has found that the plaintiff was in possession of the entire rubber plantation for a year and a day prior to the 17th March, 1943, that the plaintiff's possession of the plantation was *ut dominus*, and that the plaintiff was entitled to damages calculated at Rs. 70 a month from the 17th March, 1943. On these findings the learned Judge gave judgment for the plaintiff as already stated.

I do not think that the District Judge's findings of fact can be questioned. In these circumstances the only question that arises for determination is whether he was right in holding that the plaintiff, who was a co-owner with the defendants could maintain a possessory action for the plantation. In *Abeyaratne vs. Seneviratne* (3 Balasingham 22) it was held by Lascelles, C.J., that a possessory action can be maintained by one co-owner against the others. In his judgment in this case the Chief Justice referred to the cases of *Silva vs. Sinno Appu* (7 N.L.R. 5) and *Fernando vs. Fernando* (13 N.L.R. 164) where it was held that an owner of an undivided share of land can maintain a possessory action in respect of such share if he joins the other co-owners as parties. *Rowel Appuhamy vs. Moises Appu* (4 N.L.R. 225) is also an authority for the proposition that, when exclusive possession for the whole of the planter's share for some years prior to the assertion of title and forcible ouster has been established, a co-owner is entitled to a decree against the co-owner who has ousted him. The question as to whether a co-owner can maintain an action against another co-owner without joining all the other co-owners of the land was considered by a Full Bench in *Heenhami vs. Mohotihami* (19 N.L.R. 235). It was held as follows :—

> " There is no rule of law that a co-owner cannot maintain an action against another co-owner without joining all the other co-owners of the land.
>
> " No doubt in many cases they are proper parties, and would be joined on an application being made for the purpose. In some cases they may even be parties, whose presence before the court may be necessary in order to enable the court to effectually and completely adjudicate upon all the questions involved in the action, in which case the court may add them of its own motion under section 18, but if they are not added, the court should, in accordance with the provisions of section 17, deal with the matter in contraversy so far as regards the rights of the parties actually before it."

The right to maintain a possessory action by a co-owner against another co-owner who attempts to occupy a house built by the former was considered in *Kathonis vs. Silva* (21 N.L.R. 452), the head-note of which is as follows :—

> " A co-owner has the right to build and live on the common land. If a co-owner exercises his right and builds a house for his private use on the land, he may eject any other co-owner who attempts to occupy that house without his permission.
>
> " It is possible that a co-owner may have the right to enter the house built by another co-owner for certain purposes, but not to claim one of the rooms for his personal residence."

Kathonis vs. Silva was cited and followed in the judgment of Soertsz, J. in *Girihagama vs. Appuhamy* (14 C.L.W. 11).

In my opinion the learned Judge was right in holding that the plaintiff could maintain this action. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

DE SILVA, J.

I agree.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

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

DON HENDRICK & ANOTHER vs. GIMARAHAMINE & OTHERS

S. C. No. 72—*D. C.* (*Inty.*) *Matara No.* 14800

Argued on: 31st October, 1945.

Decided on: 7th November, 1945.

Partition—Rival schemes by the Commissioner appointed by Court and another surveyor—Acceptance of scheme by the surveyor appointed by court—How it should be adopted.

Held: That where a court accepts a scheme of partition prepared by a Surveyor other than the Commissioner appointed by court, the proper course is to remit the case to the Commissioner with directions for him to modify his scheme on the lines, more or less of the scheme so accepted.

N. E. Weerasooriya, K.C. with *C. J. Ranatunga,* for plaintiff and 18th defendant-appellant.

L. A. Rajapakse, K.C. with *H. W. Jayawardene,* for 17th, 19th and 20th defendants-respondents.

SOERTSZ, A.C.J.

The question on this appeal, is whether the trial Judge preferred a scheme of partition that was not satisfactory in comparison with the scheme the appellants desired to have adopted.

We have examined the two schemes and the distribution of the plantations and buildings, and we find that in respect of the distribution of buildings and plantations the scheme that commended itself to the trial Judge is the better scheme. As he points out that scheme breaks up the land into more satisfactory blocks than does the scheme of the Commissioner.

It is not correct to say that the lots given to the appellants consist of entirely owita land. But as I observed in case S. C.* 27 D. C. (Inty.) Matara No. 154/13628 in which judgment was delivered today, the proper course for the District Judge to follow is to remit the case to the Commissioner appointed under section 5 with directions for him to modify his scheme on the lines, more or less, of the scheme prepared by Surveyor Amarasekera and to submit it with a schedule of appraisement. It is undesirable and indeed irregular to substitute another Surveyor for the Commissioner appointed by Court. I fix costs payable to the 17th, 19th and 20th defendants in respect of this inquiry in the two courts at Rs. 52·50.

CANEKERATNE, J.

I agree.

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

THEADORIS APPUHAMY vs. WEERATUNGA

* *S. C. No.* 27—*D. C.* (*Inty.*) *Matara No.* 154/13628.

Argued on: 1st and 2nd November, 1945.

Decided on: 7th November, 1945.

L. A. Rajapakse, K.C., with *S. W. Jayasuriya,* for the plaintiff-appellant.

H. W. Jayawardene, for the 1st defendant-respondent.

SOERTSZ, A.C.J.

Section 5 of the Partition Ordinance empowers the court to issue a commission to a commissioner or to commissioners agreed upon by all the parties to the suit or, in the event of the parties not agreeing in that respect, to some fit person named by the court. In this instance, there being no opposition forthcoming from any of the parties to the appointment, the court appointed the surveyor who had made the preliminary plan, to carry out the partition. He duly effected the partition, and made his return to the court showing on plan No. 3166 the division he proposed, and he also filed the schedule required by section 5.

The 1st defendant objected to the proposed partition principally on the ground that, according to this partition which gave the plaintiff lot A, the defendant would lose a part of the plantation made by him. He submitted another scheme of partition made by a surveyor chosen by him, and asked that that return be adopted. No schedule was filed with it. The court, after examining the two plans and hearing the parties made this order: "I find that plan 1522 (*i.e.* the plan made by the non-commissioner surveyor) more equitable. Remit plan to Mr. de Niese (*i.e.* not the commissioner) for demarcation and appraisement at the expense of the 1st defendant in the first instance." This is, clearly quite irregular procedure.

When the Court appoints a commissioner that commissioner assumes, in a sense, as pointed out in several judgments of this court, the responsible position of an officer of the court. His functions are quasi-judicial and he is expected to act fairly and impartially. Sec. 5 provides that on an appointed day, the court after summary inquiry, and if need be, after making such further

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

reference as the court shall deem necessary, shall either confirm or modify the partition proposed by the commissioner. It will be observed that there is no provision whatever for supplanting the commissioner by a surveyor retained by a party and for adopting, as was done in this instance, a scheme made *ex parte*, and unaccompanied by a schedule. But, it is said, that this practice has been long in vogue. All I would say to that is, that it is an irregular and mischievous practice and that the sooner it is discontinued the better for all parties. It is not open to Judges by disregarding a requirement of procedure to establish a *cursus curiae* of their own.

There can be no objection, however, to a party calling a surveyor as a witness in order to support his opposition to the scheme proposed by the commissioner and to the court, if it thinks fit, referring his plan to the commissioner for such modification as the court may deem necessary, but it must be the commissioner's scheme as proposed by him or modified on the directions of the Court, that is confirmed for the purpose of entering the decree.

Now in regard to the partition proposed by the commissioner, it has been repeatedly held that a partition will not be rejected on light grounds or for mere inequality of value of the allotments, if in making it, the commissioner has honestly exercised his judgment (see e.g. *Peers vs. Needham* (5) (19 Beav. 316). Examined in that way, the scheme proposed by the commissioner commends itself to my brother and me as a fair partition of the land although it would be possible to put forward as good alternative schemes. But there must be an end to a case, particularly to a partition case which is generally of a protracted nature and which prevents parties to it from dealing with the land as freely as they would wish to in the interval. I would allow the appeal. The 1st respondent will pay the costs of the plaintiff-appellant which I would fix at Rs. 73.50 in respect of this inquiry here and below.

Appeal allowed.

CANEKERATNE, J.
I agree.

IN THE PRIVY COUNCIL

Present: VISCOUNT SIMON, LORD THANKERTON, SIR JOHN BEAUMONT.

ABDUL HAMEED SITTI KADIJA AND ANOTHER (APPELLANTS) vs. FREDERICK JOHN DE SARAM AND OTHERS (RESPONDENTS).

PRIVY COUNCIL APPEAL No. 39 *OF* 1945.

Decided on: 21*st January*, 1946.

Fidei commissum—*Will, Construction of—General rules applicable—Difference between fidei commissum and trust.*

The last Will of a Muslim testator was in the following terms:—

"I do hereby will and desire that my wife Assenia Natchia, daughter of Seka Marikar, and my children Mohamadoe Noordeen, Mohamadoe Mohideen, Slema Lebbe, Abdul Ryhiman, Mohamadoe Usboe, Amsa Natchia and Savia Umma, and my father Uduma Lebbe Usboe Lebbe, who are the lawful heirs and heiresses of my estate shall be entitled to and take their respective shares according to my religion and Shafie sect—to which I belong, but they, nor their heirs shall not sell, mortgage or alienate any of the lands, houses estates or gardens belonging to me at present or which I might acquire hereafter, and they shall be held in trust for the grandchildren of my children and the grandchildren of my heirs and heiresses only that they may receive the rents income and produce of the said lands, houses, gardens and estates without encumbering them in any way or the same may be liable to be seized attached or taken for any of their debts or liabilities, and out of such income, produce and rents, after defraying expense for their subsistence, and maintenance of their families the rest shall be placed or deposited in a safe place by each of the party, and out of such surplus lands should be purchased by them for the benefit and use of their children and grandchildren as hereinbefore stated, but neither the executors herein named or any Court of Justice shall require to receive them or ask for accounts at any time or under any circumstances, except at times of their minority or lunacy.

"I further desire and request that after my death the said heirs and heiresses or major part of them shall appoint along with the executors herein named three competent and respectable persons of my class and get the moveable and immoveable properties of my estate divided and apportioned to each of the heirs and heiresses according to their respective shares, and get deeds executed by the executors at the expense of my estate in the name of each of them subject to the aforesaid conditions."

Held: (i.) That the language used in the Will made it sufficiently clear that the intention of the testator was to create a separate *fidei commissum* in the case of each devisee.

(ii.) That the language point clearly to a devise of the "plenum proprietas" of the estate to the devisees, subject to the restrictions so far as binding under the Law of Ceylon, and hence, it is inconsistent with the creation of a trust as known to the English Law.

Per LORD THANKERTON.—"It is suggested that the succeeding clause as to the rents, income and produce of the immoveable property makes it difficult to uphold the creation of a valid *fidei commissum*, but their Lordships are of opinion that it is not legally binding on the fiduciaries, to whom alone it relates, and is therefore, of a precatory nature; in this they agree with the views expressed by Keuneman and Wijeyewardene, J.J. As regards the construction of the clause, their Lordships are of opinion (*a*) that it applies to the devisees and their heirs, who are referred to in the clause which prohibits alienation, (*b*) that it relates only to surplus rents income and produce, and to their incumbrance, and (*c*) that the purchase of the surplus lands "for the benefit and use of their children and grandchildren as hereinbefore stated,"

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

sufficiently clearly expresses the desire that the surplus lands should be held on the same terms as the original shares of the testator's immoveable property were to be held. It is clear on the whole terms of the Will that each of the fiduciaries was only to take an interest in his share during his life. The next clause as to a demand for accounts, whether effective or not, cannot affect the valid creation of a *fidei commissum*.

D. N. Pritt, K.C., with *Stephen Chapman*, for the appellants.

C. T. Le Quesne, with *R. K. Handoo*, for the respondents.

Lord Thankerton.

This appeal arises out of an action of ejection by the first two respondents against the appellants and the other four respondents. The action was dismissed by a judgment and decree of the District Court of Colombo, dated the 23rd March, 1942, which were set aside by a judgment and decree of the Supreme Court of the Island of Ceylon, dated the 26th May, 1944, whereby decree of ejection and for damages were granted in favour of the first two respondents, by a majority of three Judges to two.

The question at issue arises on the proper construction of the will, dated the 12th December, 1872, of one Isboe Lebbe Idroos Marikar, who died on the 8th May, 1876, and whose said Will was admitted to probate on the 29th May, 1876. The relevant portions of the Will are as follows :—

" I do hereby will and desire that my wife Assenia Natchia, daughter of Seka Marikar, and my children Mohamadoe Noordeen, Mohamadoe Mohideen, Slema Lebbe, Abdul Ryhiman, Mohamadoe Usboe, Amsa Natchia and Savia Umma, and my father Uduma Lebbe Usboe Lebbe, who are the lawful heirs and heiresses of my estate shall be entitled to and take their respective shares according to my religion and Shafie sect—to which I belong, but they nor their heirs shall not sell, mortgage or alienate any of the lands, houses estates or gardens belonging to me at present or which I might acquire hereafter, and they shall be held in trust for the grandchildren of my children and the grandchildren of my heirs and heiresses only that they may receive the rents income and produce of the said lands, houses, gardens and estates without encumbering them in any way or the same may be liable to be seized attached or taken for any of their debts or liabilities, and out of such income, produce and rents, after defraying expense for their subsistence, and maintenance of their families the rest shall be placed or deposited in a safe place by each of the party, and out of such surplus lands should be purchased by them for the benefit and use of their children and grandchildren as hereinbefore stated, but neither the executors herein named or any Court of Justice shall require to receive them or ask for accounts at any time or under any circumstances, except at times of their minority or lunacy.

" I further desire and request that after my death the said heirs and heiresses or major part of them shall appoint along with the executors herein named three competent and respectable persons of my class and get the moveable and immoveable properties of my estate divided and apportioned to each of the heirs and heiresses according to their respective shares, and get deeds executed by the executors at the expense of my estate in the name of each of them subject to the aforesaid conditions."

The testator was survived by his widow and the seven children named in the Will ; his father had predeceased him, but an eighth son, Abdul Hameed, had been born after the date of the Will, and also survived the testator. The parties are agreed that the case should proceed on the footing that the Will applied to Abdul Hameed, as if he had been named by the testator along with his other children in the Will.

The moveable and immoveable estates of the testator were duly divided as directed in the last clause of the Will, and by deed dated the 19th February, 1878, the then surviving executor conveyed to Abdul Hameed, subject to the trusts and conditions of the Will, which were repeated *verbatim* in the deed, the properties which are the subject matter of the present suit, as Abdul Hameed's share of the immoveable properties of the testator. Abdul Hameed died on the 20th July, 1931, and the appellants are the only two of his children who survive. The 3rd, 4th, 5th and 6th respondents are grandchildren of Abdul Hameed, children of a deceased sister of the appellants.

On the 15th May, 1931, Abdul Hameed had executed a mortgage of the properties now in suit in favour of one Peter de Saram in consideration of a loan of Rs. 30,000. Peter de Saram subsequently brought an action on the mortgage in the District Court of Colombo against the legal representative of Abdul Hameed, and, on Peter de Saram's death on or about 23rd April, 1937, the present first two respondents continued the action as substituted plaintiffs, and, on the 26th November, 1937, the Court entered a hypothecary decree in their favour. At the sale pursuant thereto the property was bought by the first two respondents, and a conveyance was executed in their favour by the Secretary of the District Court on

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

the 7th July, 1938. Their right to possession of the property having been disputed by the descendants of Abdul Hameed on the ground that it was the subject of a *fidei commissum* under the Will of the testator, and that Abdul Hameed had no interest in the property which he was capable of mortgaging except an interest which terminated on his death, the first two respondents instituted the present action on the 30th January, 1931 for a declaration that they were entitled to the property in suit, for decree of ejection and for damages.

The main question in the appeal is whether under the Will a valid *fidei commissum* of the property in suit was created, which disabled Abdul Hameed from mortgaging any interest in the property after his death, or whether Abdul Hameed had an absolute interest in the property, which has become vested in the first two respondents by sale. The appellants maintain that a valid *fidei commissum* was created by the Will, which the first two respondents deny, maintaining (*a*) that the terms of the Will do not suffice to create a valid *fidei commissum*, (*b*) that the terms of the Will, at best, rather contemplate the creation of a trust, which would contravene the rule against perpetuities, than the creation of a *fidei commissum*, and (*c*) in any event, that uncertainty as to ascertainment of the beneficiaries and the time of the vesting of their interests renders it impossible to give effect to any *fidei commissum*.

This particular Will has already been the subject of judicial construction in four cases, in the first three of which it was held that it created a valid *fidei commissum*; in the fourth case, though it was decided on a different point, Soertsz,J., on a review of the previous decisions, found difficulty in agreeing with them, and, if it had been necessary, would have asked for reconsideration of them by a full bench. In the present case, the District Judge, though he appears to have favoured a different view, felt bound by the previous decisions to decide in favour of a *fidei commissum*. On appeal by the first two respondents, an order was made for a hearing before five judges, and on the 26th May, 1944, the appeal was allowed by a majority of three judges (Howard, C.J., Soertsz, J. and Hearne, J.) to two (Keuneman, J. and Wijeyewardene, J.), and judgment was entered for the first two respondents. In view of that diversity of opinion, their Lordships find unnecessary to refer to the four earlier cases, as Wijeyewardene, J. was a party to the decision in the third case, and Soertsz, J., as already stated, was the judge in the fourth case, and also because it appears that the terms of the Will, as they were submitted to the Court in at least the first three cases, included the words "issues or heirs" in the clause prohibiting alienation, and there is no mention of issue in the Will as submitted in the present appeal.

Howard, C.J. held (*a*) that there was a doubt whether there was or was not a prohibition in perpetuity against alienation, (*b*) that there was no certainty with regard to the beneficiaries, the class being too wide for ascertainment and too vaguely described, for which reason alone the learned Judge held that it had not been established that the testator intended to create a *fidei commissum*, and (*c*) that he agreed with the opinion of Soertsz, J. that there was a further difficulty with regard to the time of vesting. Soertsz, J. held (*a*) that there was a failure to designate or indicate sufficiently the recipients of the testator's bounty, and that the attempted *fidei commissum* failed *in limine*, (*b*) that the time of vesting was also wrapped in similar doubt, and (*c*) that the language of the Will rather contemplated a perpetual trust, which would fail because of the rule against perpetuities and also because of the uncertainty as to the beneficiaries and the time of vesting. Hearne, J. arrived at the conclusions (*a*) that it was impossible to hold from the language of the Will that the testator intended to create a *fidei commissum*, (*b*) that, if he did, he failed to achieve his object, the requisites of a valid *fidei commissum* not having been satisfactorily set out, (*c*) that the wording of the Will, and the effect of its provisions strongly suggested an attempt to create a trust, in which attempt, if it was consciously made, the testator failed.

Of the two learned judges who formed the minority, Keuneman, J. held (*a*) that the intention of the testator to create a *fidei commissum* had been expressed with sufficient clearness, (*b*) that the Will showed an intention to benefit three classes of beneficiaries, viz., the devisees, their children and their grandchildren, that the testator devised the immoveable property to the devisees, burdened with a *fidei commissum* in favour of their children and grand-children in successive generations; and that the *fidei commissum* was to become operative on death in each case, and (*c*) that the interest given to the devisees more closely resembled the interest of a fiduciary as known to the Roman-Dutch law than the interest of a trustee as known in England, the occurrence of the word "trust" in the will being inconclusive, and that he was not disposed to accept the argument that the Will created a trust as known in England. Lastly, Wijeyewardene, J. held that by the opening clauses of the Will the *plena proprietas* was given to the immediate devisees, a prohibition against alienation being then imposed, such burden being in favour of their heir or heirs

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

and grandchildren, the grandchildren being the ultimate beneficiaries, the clause as to the rents income and produce being merely explanatory of the preceding clauses, and that by these clauses a valid *fidei commissum* was created, there being nothing in the subsequent clauses to prevent the Court from holding in favour of a *fidei commissum* —in particular, the clause as to disposal of the surplus rents, produce and income not being legally binding on the devisees ; the learned Judge further held that the testator should not be taken to have intended to create an English trust.

The authorities as to the rules of construction which apply to the present question are fully quoted by the learned Judges of the Supreme Court, and their Lordships do not find it necessary to repeat them, but the following general principles may be derived from them. In the first place, where there is doubt whether a *fidei commissum* has been created, that construction should be preferred which will pass the property unburdened, but, if the language of the Will is such as to show clearly an intention to create a *fidei commissum*, mere difficulty of construction will not prevent its being upheld. Doubt as to whether a valid *fidei commissum* has been created includes such doubt as to the identity of the beneficiaries as will prevent their ascertainment by a court of law. However difficult their application may be in a particular case, these general rules of construction appear to be well established.

In the first place, their Lordships will dispose of the suggestion that the Will suggests an attempt on the testator's part to create a trust as known in England. Their Lordships agree with Wijeyewardene, J. that the use of the word " trust " in the Will is quite inconclusive, as it is as commonly used by writers in relation to *fidei commissa*, as to the English type of trust. In the opinion of their Lordships the leading clauses of this Will are typical of a *fidei commissum*, and are inconsistent with the structure of an English trust. The main differences between *fidei commissa* and English trusts are correctly set out, in the opinion of their Lordships, in Professor R. W. Lee's Introduction to Roman-Dutch Law (3rd ed. 1931) at page 372, viz., " (1) the distinction between the legal and the equitable estate is of the essence of the trust ; the idea is foreign to the fidei commissum. (2) In the trust, the legal ownership of the trustee and the equitable ownership of the beneficiary are concurrent, and often co-extensive ; in the fidei commissum the ownership of the fidei commissary begins when the ownership of the fiduciary ends. (3) In the trust, the interest of the beneficiary, though described as an equitable ownership, is properly ' jus neque in re neque ad rem," against the *bona fide* alienee of the legal estate it is paralysed and ineffectual ; in the fidei commissum the fidei commissary, once his interest has vested, has a right which he can make good against all the world, a right which the fiduciary cannot destroy or burden by alienation or by charge." Professor Lee adds a fourth difference, which is not material here.

In the opinion of their Lordships the learned Judges, who formed the majority, have not given sufficient weight to the language of the leading clause, under which the testator's heirs and heiresses according to the Mahomedan law are to be entitled to and to take their respective shares under the law. In the opinion of their Lordships, the terms of the clause, along with the inclusion of the moveable estate in the devise, which the devisees take absolutely, point clearly to a devise of the *Plenum dominium* of the immoveable estate to the devisees, subject to the restrictions so far as binding under the law of Ceylon, and make clear that there is not any attempt to constitute a trust as known to the law of England, but that there is an attempt to constitute *fidei commissa*, and the last clause which directs the separate ascertainment, after the death of the testator, of the shares to which the heirs and heiresses are entitled, points to a separate *fidei commissum* in the case of each devisee. The present case relates to the share of Abdul Hameed, which was so ascertained, and conveyed to him.

In order to ascertain, if possible, who are the fiduciaries and who are the fidei commissaries, it is convenient to read the next two clauses together :—" but they nor their heirs shall not sell, mortgage or alienate any of the lands, houses, estates or gardens belonging to me at present, or which I might acquire, and they shall be held in trust for the grandchildren of my children and the grandchildren of my heirs and heiresses only........." One of the learned Judges relates the final word " only " to the succeeding clause, but, while their Lordships do not think that it matters very much, they take the view that it more naturally qualifies the antecedent clause. Bearing in mind that the Mohamodan law only includes the nearest generation when referring to heirs, their Lordships are clearly of opinion that the words " they nor their heirs " in the clause prohibiting alienation cover two generations only, viz., the devisees and their heirs, and that there is no room for the suggestion that the probibition may be construed as a perpetual one. In the next clause, the word " they " clearly relates to the immoveable property, and the beneficiaries, in the opinion of their Lordships, relate to the third generation in the case of all the devisees, the testator's wife, as well as his children; the fact that the first words " grandchildren of

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

my children " might have been satisfied by the words which follow—" grandchildren of my heirs and heiresses "—does not materially affect the construction of the clause as stated by their Lordships. So far, their Lordships find language in the Will apt for the constitution of a valid *fidei commissum*, and a sufficient statement of the beneficiaries and the benefits to be taken by them.

It is suggested that the succeeding clause as to the rents, income and produce of the immoveable property makes it difficult to uphold the creation of a valid *fidei commissum*, but their Lordships are of opinion that it is not legally binding on the fiduciaries, to whom alone it relates, and is therefore of a precatory nature ; in this they agree with the views expressed by Keuneman and Wijeyewardene, J.J. As regards the construction of the clause, their Lordships are of opinion (*a*) that it applies to the devisees and their heirs, who are referred to in the clause which prohibits alienation, (*b*) that it relates only to surplus rents income and produce, and to their incumbrance, and (*c*) that the purchase of the surplus lands " for the benefit and use of their children and grandchildren as hereinbefore stated," sufficiently clearly expresses the desire that the surplus lands should be held on the same terms as the original shares of the testator's immoveable property were to be held. It is clear on the whole terms of the Will that each of the fiduciaries was only to take an interest in his share during his life. The next clause as to a demand for accounts, whether effective or not, cannot affect the valid creation of a *fidei commissum*.

Finally, their Lordships agree with Wijeyewardene, J. that such questions as whether the share held by Abdul Hameed as fiduciary would pass on his death to his heirs as a joint *fidei commissum* or as separate *fidei commissa*, are not destructive of the creation of a valid *fidei commissum* by the Will, but are questions as to devolution of the property which commonly arise for settlement by the Court on the proper construction of the Will. Their Lordships agree with the reasoning of the learned Judge on this point.

It follows that in the opinion of their Lordships Abdul Hameed took his share of the immoveable property subject to a valid *fidei commissum*, and that, accordingly, Abdul Hameed could not mortgage any interest in the property after his death, and that the first and second respondents' suit fails and should be dismissed.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, that the judgment and decree of the Supreme Court should be set aside, and that the judgment and decree of the District Court should be restored. The first and second respondents will pay the appellants' cost of the appeal and their costs before the Supreme Court.

Appeal allowed.

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

BILINDI & OTHERS vs. ATTADASSI THERO

S. C. No. 97—*D. C.* (*Final*) *Kurunegala No.* 43.

Argued on: 11th June, 1946.

Decided on: 28th June, 1946.

Compensation for Improvements—Bona fide *possessor—Rights and liabilities of—Improvements made during action—Can value of such improvement be claimed—How long can an improver continue to take fruits of improvements—Amount of expenditure recoverable by improver.*

Held : (i.) That where a *bona fide* improver is sued by an owner, the former is not required to pay compensation for the fruits which he has gathered in good faith, whether they have been consumed or are still in existence, but is only bound to restore the principal thing together with such fruits as were extant at the moment when *litis contestatio* took place.

(ii.) That from the moment of *litis contestatio* he is bound to apply the utmost care in the cultivation of the fruits.

(iii.) That if the owner succeeds in proving his ownership, he can require the possessor to hand over all the fruits gathered by him during the action, or pay compensation, and can further claim damages for such fruits as he could have gathered by the exercise of due care.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(iv.) That a *bona fide* possessor is not entitled to claim any sum for improvements effected after the institution of an action against him by the owner.

(v.) That the amount of expenditure which an improver is entitled to recover is restricted to its value at the time he restores the property.

Cases referred to—*Banda vs. Cader* (1913) 16 N.L.R. 79; *Nicholas de Silva vs. Shaik Ali* 1 N.L.R. 228; *Silva vs. Fernando* 3 Bal. Rep. 61; *Fernando vs. Rodrigo* (1919) 21 N.L.R. 415; *Appuhamy vs. Appuhamy et al* (1926) 28 N.L.R. 400; *Beebee vs. Majid* (1929) 30 N.L.R. 361,

L. A. Rajapakse, K.C., with *H. W. Jayawardene*, for the defendants and added-defendants-appellants.

H. V. Perera, K.C., with *N. E. Weerasooriya, K.C.*, and *S. R. Wijetileke*, for the plaintiff-respondent.

CANEKERATNE, J.

On the 25th March, 1927, the Trustees of Ginikarawa Temple instituted an action (D.C. 12182) against one Poola Louis (5th defendant) and three others for declaration of title to certain lands. after a survey made on 12th August, 1927, (Plan P2 or Q) it became clear that there was no dispute as regards Lots A, B2, B3 and C3; the defendants' title to Lot A and the plaintiff's to the other lots were accepted.

The defendants claimed Lots A, A1 and A2 as part of the land called Ehelegollewatte, Lots C, C1 and C2 as part of Moragehewatte, Lots A3, A4, A5, B and B1 as part of Nagahadalupotha. They alleged that they were in possession of these lands since the year 1921 and had improved the same.

After hearing evidence the learned trial Judge held that Lots A and A1 (Ehelegollewatte) belonging to the defendants and that Lots A2 and A3 (Kurundugollehena), Lots A4 and B1 (Kandehena), Lot A5 (Diggalagawahena), Lot B (Dansalapitiyehena) and Lots C, C1, C2 (Muruthugollehena) belong to the plaintiff.

The land claimed by the temple was apparently in jungle in 1921 except a portion which was cleared and planted on behalf of the temple by one Aruma some years before. The defendants, according to the learned Judge, after the execution of deed D11 in 1921, took possession of this land in the belief that it was their property, cleared and planted it.

The learned Judge held that the plaintiff is entitled to all the land depicted in the plan except Lots A and A1, that the defendants were entitled to compensation for improvements in respect of the houses on the land, one of which is the tiled house that was renovated, and the plantations on the land except the plantation that was raised by Aruma (apparently on Lots C1 and C2). As the learned Judge was unable to assess the compensation he referred the parties to a separate action.

The defendants appealed to the Supreme Court and the appeal was dismissed after argument on the 15th February, 1938. According to the judgment the finding of the learned trial judge as regards the title to Lots C, C1 and C2, to Lots A4 and B1, to Lots A2, A3 and A5 was right and the learned Judge was justified in holding that the defendants were entitled to compensation.

The Trustee filed the present action on 7th March, 1939. He alleged that he estimated the value of the plantations on the three Lots A2, A3 and A5 at Rs. 900 and the house on Lot A5 at Rs. 75. His prayer for relief against the defendants included the ejectment of the defendants from Lots A2, A3, A5, B, C1, C2, A4 and B1 (an extent of 34 acres) and damages at the rate of Rs. 750 a month. The defendants in their answer claimed that they were entitled to compensation for improvements in respect of these lots and the buildings on Lot A5: they claimed a sum of Rs. 20,000 *i.e.* Rs. 15,000 in respect of the plantations and Rs. 5,000 in respect of the buildings and a *jus retentionis* until the sum claimed was paid.

At the trial a surveyor gave testimony on behalf of the plaintiff regarding the valuation of the improvements and on the other side a planter with considerable experience of cocoanut estates was called; he furnished two valuations, one regarding improvements as they stood at 1927 and the other, the values as at the time of action. On the basis of the 1927 values he valued 7½ acres at Rs. 800 an acre, 19 acres at Rs. 600 an acre, 8 acres at Rs. 300 an acre and an acre of jungle land at Rs. 150. On the basis of values at the time of action he valued the 34 acres at Rs. 350 an acre and an acre of jungle land at Rs. 50. The learned Judge accepted the valuation of the premises as at 1927 and assessed the compensation at Rs. 6481.56 in respect of the plantations, Rs. 1,000 for the tank, Rs. 75.—for the thatched house on A5, Rs. 50 for the two "bissas," and Rs. 125 for the bathing well, *i.e.* a total sum of Rs. 7,806.56; it is urged in appeal that there are certain arithmetical errors in this computation. As the defendants had been in possession of the lands all throughout they were

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

ordered to pay damages to the plaintiff at the rate of Rs. 60 a month from the 10th October, 1938, till he is restored to possession.

The defendants preferred an appeal from this judgment: the plaintiff has filed objections to the decree.

The main appeal falls into two parts: the one is concerned with the question of compensation, the other relates to the claim for an account of the profits. The former resolves itself into two questions: (*a*) what are the premises in respect of which compensation is payable? (*b*) should the assessed amount be interfered with as contended by the plaintiff?

It is not disputed that the defendants are entitled to compensation. By entering the property, clearing and planting it the defendants thought they were doing so as owners: they were, however, mistaken; the lots were not covered by their deeds and they are now sued by the owner for ejectment.

If one had only to construe the judgment of the learned trial Judge in action No. 12182 there may be some material for the defendants' contention in respect of the lots referred to. The Judge seemed to accept the view of the plaintiff's witness that Aruma was the only person who made any plantation on behalf of the temple and that the rest of the estate was planted by the defendants.

The learned Judge declined to read the judgment of the Supreme Court, though invited to do so, in the light of the earlier judgment of the court and came to the conclusion that the defendants were entitled to claim compensation in respect of Lots A3, A4 and A5 only. The Supreme Court judgment, he said, made it clear that compensation was only to be paid in respect of these lots. The defendants have failed to show that the view of the learned Judge was wrong.

The plaintiff contends that the learned trial Judge has wrongly adopted the valuation of 1927. The defendants do not seriously maintain the contrary. It is clear that the amount of the expenditure which an improver is enabled to recover is restricted to its value at the time he restores the property.

The extent of the three lots is 11 acres 2 roods and 37 perches. As a plantation it would be worth Rs. 4,105.50 but as jungle only Rs. 586.50. The sum payable as compensation would be Rs. 3,519. There can be no doubt that the learned trial Judge in case No. 12182 was of opinion that the defendants were entitled to compensation in respect of the tiled house. There was only one tiled house at the time of the hearing of that action and that was the tiled house on Lot A5. The reference in the antepenultimate paragraph of the judgment of the Supreme Court to the house on Lot A5 is clearly to the tiled house mentioned by the learned District Judge. The defendants are entitled to recover the value of the improvements to this house. The evidence of the 6th defendant is that the house was worth Rs. 4,000. He said that he improved the house by placing Calicut tiles on the roof, lime-plastering the walls and cementing the floor and that these improvements cost him Rs. 1,500. It was in evidence that the roof was tiled towards the end of 1935. The surveyor called by the plaintiff valued the tiled house at Rs. 3,800. The defendants are not entitled to claim any sum for improvements effected after the institution of action No. 12182 (*i.e.* March, 1927) and the sum of Rs. 1,500 might be taken as the cost of these improvements. The defendants should be declared entitled to recover the sum of Rs. 2,300 in respect of the tiled house. The order of the learned Judge allowing compensation in respect of the tank at Rs. 1,000, the two " bissas " at Rs. 50, the well and bathing system at Rs. 200 will stand.

A person who possesses another man's property in good faith acquires ownership in the fruits, though he is only *bona fide* possessor of the property itself: and if subsequently the owner brings an action against him, he (the possessor) is not required to pay compensation for the fruits which he has gathered in good faith whether they have already been consumed or are still in existence but is only bound to restore the principal things, together with such fruits as were extant at the moment when *litis contestatio* took place. But as soon as this happens he must know that, possibly, he is in possession of another man's property. From the moment of *litis contestatio* therefore he is bound to apply the utmost care in the cultivation of the fruits. If the owner succeeds in proving his ownership he can require the possessor to hand over all the fruits gathered by him during the action or pay compensation and can further claim damages for such fruits as he could have gathered by the exercise of due care.

A *bona fide* possessor has the right of retaining the property improved by him until payment of compensation: he need not give up possession until he has been compensated for the expenditure incurred by him or the value of the improvements whichever is less. He can, if he so wishes, bring an action against the owner for the compensation.

Though the improver profits by the fruits, his expenses for improvements must nevertheless be reckoned against him. The rents and profits which have been received are to be set off against

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

the expenses incurred in producing those profits as well as in the improvement of the property itself. For although a *bona fide* possessor may have acquired an absolute right in the fruits which have been actually consumed by him, yet there is no reason for not setting them off against his claim for the expenditure. Voet 6-1-38.

The Law of Holland went further: it did not make the *bona fide* possessor accountable for the profits which he had received before, and which were in existence at the time of the *litis contestatio*, but only for those received by him after the *litis contestatio* Voet 41-1-33, 3 Burbe 35. The case of (1913) *Banda vs. Cader* 16 N.L.R. 79 quoted by counsel for the plaintiff is an illustration of this rule.

Now this is not the case of a possessor appropriating the ordinary fruits of the land belonging to another. The nuts taken from the trees were the produce of the improvement made by the defendants, for unless the trees had been planted by them there would have been no produce to be obtained. These were the fruits of the improvement itself and not of the property generally. It was the direct result of the work done by the defendants.

The view of some, especially Sande, Frisian Decisions 3-15-3, 3 Burge 34, was that there was no difference between the fruits received by a *bona fide* possessor in consequence of his improvements and the fruits of the property generally; this doctrine, however, was opposed by others. It tends to deprive a *bona fide* possessor of the protection which the Law intended to give him and as the amount of the expenditure which he is enabled to recover is restricted to its value at the time he restores the property, there would be great injustice in subjecting him to the whole risk of that expenditure, since it might happen that at the time of the restitution of the value of the improvements had from various causes been diminished, Voet 6-1-39, 3 Burge 34.

Though the *bona fide* possessor must reduce his claim by the value of the fruits received by him he cannot be made to include the fruits of the fruits or the advantage derived from his improvements (1895) *Nicholas de Silva vs. Shaik Ali*, 1 N.L.R. 228; *Silva vs. Fernando*, 3 Bal. Rep. 61. The question is how long is he entitled to take such fruits? It is argued for the defendants that as the improver has a *jus retentionis* he need not bring into account such fruits till he is paid. The authorities do not appear to make the position very clear. The view adopted in *Fernando vs. Rodrigo* (1919) 21 N.L.R. 415, was that no deduction should be made for fruits consumed before the date of assessment; the case of *Appuhamy vs. Appuhamy et al* (1926) 28 N.L.R. 400, seems to take the same view. The decision in *Beebee vs. Majid* (1929) 30 N.L.R. 361, can hardly be said to decide the contrary, though it negatives the right of the owner to claim a deduction in respect of fruits received after *litis contestatio*. In these circumstances a safe guide appears to be furnished by the first of these cases. (*Fernando vs. Rodrigo*).

The learned Judge made his decision on the 3rd November, 1941. The defendants therefore need not deduct the fruits of the fruits obtained by them before this date. They failed to prove their contention that they were entitled to claim compensation in respect of Lots A4, B, B1, C, C1 and C2; they ceased to be *bona fide* possessors of these lots on the 10th October, 1938, according to the judgment of the learned District Judge. The fruits gathered by them thereafter should be applied in reduction of the amount awarded for compensation. The extent of these lots is about two-thirds of the whole area in dispute: the learned Judge assessed the profits at Rs. 60 a month. A sum of Rs. 40 may be fairly taken as the profits for these lots. The defendants ought to account to the plaintiff at the rate of Rs. 40 a month from the 10th October, 1938, till the date of the decree (3rd November, 1941).

The defendants are entitled to recover as compensation the sums of Rs. 3,519.50, Rs. 2,300, Rs. 1,000, Rs. 50 and Rs. 200 amounting in all to Rs. 7,069.50. The plaintiff must pay the defendants this sum less the sum that should be deducted as mense profits, namely, at the rate of Rs. 40 a month from the 10th October, 1938, to the 3rd November, 1941, and at the rate of Rs. 60 a month from the 3rd November, 1941, till the date when the plaintiff obtained possession of the property.

There now remains the question of costs. Instead of tendering such adequate and reasonable amount as the circumstances showed to be due, the plaintiff alleged that a sum of Rs. 975 was due as compensation. The defendants disputed the right of the plaintiff to obtain an order of ejectment as no tender was made and claimed Rs. 20,000 as compensation for improvements and a right of retention till this sum was paid.

The plaintiff has succeeded in his claim to an account and the defendants, in obtaining as compensation a considerable sum in comparison with the sum pleaded by the plaintiff. The fair order seems to be that each party should bear its own costs in the District Court and in appeal.

Defendants declared entitled to compensation.

Decree for damages varied.

HOWARD, C.J.

I agree.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present: HOWARD, C.J.

BANDARA vs. SINAPPU & OTHERS

S. C. No. 171—*C. R. Ratnapura No.* 1244.
Argued on: 12th June, 1946.
Decided on: 20th June, 1946.

Prescription—Co-owner of Panguwa—Exclusive possession of lot in lieu of shares without inter-ference by others for over twenty years—Is such possession sufficient to confer prescriptive title to such lot.

Where, in lieu of his interests, a co-owner of a "panguwa", possessed a separate portion of land out of the panguwa, exclusively for a period of over twenty years without any interference by the other co-owners, who similarly possessed other lots of the "panguwa",

Held: That such co-owner acquired a prescriptive title to such lot possessed exclusively by him.

Cases referred to: *Ummu Ham vs. Koch* (47 N. L. R. 107).
Sedris vs. Simon (46 N. L. R. 273).
Fernando vs. Fernando (27 C. L. W. 71).
Beebee Ammal vs. Ibrahim Saibo (40 N. L. R. at p. 296).
Corea vs. Appuhamy (1912 A. C. 230).
Podi Singho vs. Alwis (28 N. L. R. 401).
De Mel vs. De Alwis (13 C. L. R. 207).
Mailvagnam vs. Kandaiah (1 C. W. R. 175).
Subramaniam vs. Sivaraja (46 N. L. R. 540).

H. V. Perera, K.C., with *G. P. J. Kurukulasuriya*, for plaintiff-appellant.
N. E. Weerasooriya, K.C., with *H. Deheragoda*, for the defendants-respondents.

HOWARD, C.J.

The appellant in this case appeals from a judgment of the Commissioner of Requests, Ratnapura, dismissing his action with costs. The appellant sought to be declared entitled to 1/24th share of a field called Wereney Cumbura Ihala Asweddumdeka which was described in the schedule to the plaint. The Commissioner held that the plaintiff is entitled to 1/24th share of the lands specified in the plaint, but the defendants have acquired title to Lot 1. by prescription. The evidence established that three brothers by name W. A. Vidane, W. A. Maddumappu and W. A. Punchirala were entitled to a 1/2 share of the field in question. W. A. Vidane who was thus entitled to 1/6th died, leaving two children Naidehamy and Dingirihamy. Naidehamy's 1/12th share devolved on his two children Dantahamy and Kaluhamy. Dantahamy's 1/24th share devolved on his sole child Menikhamy who died leaving Siriwardenehamy who by deed No. 5500 of 7th February, 1914 (P1) sold his 1/24th share together with other lands to Punchimahatmaya. The latter sold this 1/24th share with other lands by deed 1171 of 16th June, 1937 (P2), to the plaintiff. The defendants traced their title to Kaluhamy who died leaving the 1st defendant and three others. The 1st defendant maintained that, in lieu of a part of his undivided interest in the Weerasinghe Arachillage Gan Panguwa, he entered into possession of Wereney Cumbura Deniya, which is lot 1 about 20 years ago, asweddumised it and has been in exclusive possession of it ever since. By deed No. 15124 of 30th November, 1931, (D1), the 1st defendant sold Lot 1, known as Pambeyakumbura after it was asweddumised, to his son-in-law and daughter the 2nd and 3rd defendants who have been in possession ever since. The plaintiff not only claimed the land in question by virtue of his paper title, but also maintained that he and his predecessors in title had been in possession of Lot 1. This contention was rejected and in my opinion rightly rejected by the Commissioner. The latter has accepted the evidence of the 1st defendant that he entered into possession of Lot 1 as co-owner of Weerasinghe Aratchillage Gan Panguwa, that he started asweddumising it little by little without any interference by any other shareholders of the Gan Panguwa that certain co-owners of chenas and fields of this Gan Panguwa had been in the habit of possessing certain lands exclusively in lieu of their shares in all the lands, that Lot 1 was possessed by him in that manner, and that he has been in exclusive possession of this lot for over 20 years without any interference by any one else. There is, no doubt, ample evidence to support the Commissioner's findings of fact in regard to the previous history of Lot 1. Thus Punchimahatmaya, the plaintiff's predecessor in title states on p. 15 as follows:—

"This panguwa is in extent about 300 acres. I am a Kandyan. If there are deniyas the various co-owners asweddumise them and possess separately. Similarly

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

they possess chenas also. I do not know who asweddumised these lots but when I bought they were fields. There were Vel Vidanes at that time also. They used to make a list of fields and the cultivator."

Again at pp. 13 and 14 Bandara, another of the plaintiff's witnesses states as follows :—

"Weerasinghe Aratchige Gam Panguwa consisted of gardens and deniyas and chenas. The whole panguwa is about 200 to 300 acres."

The 1st defendant on p. 17 states :—

"The land in dispute was a chena when I first entered it, was overgrown with pamba and weraniya sticks. Because of the pamba jungle it was called Pambagahakumbura. When the Land Commissioner came I gave Pambakumbura to this field. I entered this land about 40 years ago and started asweddumising it. I have not completed asweddumising it. There are about one laha yet to be asweddumised. For the last 40 years I am asweddumising. After I started asweddumising I did not allow any co-owners to possess it.

....

When that was put about 12 lahas had been asweddumised and after that I asweddumised the rest. My brothers have asweddumised. Dodampe Mudalihamy has asweddumised. His mother is Lokuetana. Lokuetana is Punchirala's daughter or Naidehamy's daughter. She is not a descendant of Vidane, Madduma Appu or Punchirala. Mudalihamy has asweddumised Suduwelikandedeniya. He has also planted ½ acre of Gonamaladeniya pahalakella and adjoining these he has asweddumised 5 lahas. The two portions of high land and the field of Suduwelikadegodella is 1½ acres high land and 3 pelas paddy, that Mudalihamy did not allow any other co-owner to possess."

and again at p. 18 :—

"It is not correct to say that I entered this land 20 years ago as stated in my answer. The other share holders had other lands to asweddumise. I have asweddumised the entirety of this chena and deniya. There is one laha more to be asweddumised."

On pp. 22 and 23 Thomas Singho states as follows :—

"I know this land in dispute for the last 30 years. When I came to know it first this land was in deniya. This 1st defendant. asweddumised this deniya. He may have taken 10 or 15 years to asweddumise the whole field. He used to asweddumise it year after year. No one else possessed this field for the last 30 years besides 1st defendant and his son-in-law. Plaintiff never possessed. In 1942 plaintiff claimed this field for the first time. This land belongs to Weerasinghe Aratchilage Panguwa. This Panguwa may be about 100 acres both high and low. There are other co-owners of this Panguwa. They asweddumise different portions and possess them. Wastuhamy is possessing 'Gode Deniya Kumbura which he asweddumised. It is about 6 lahas in extent. Menikrala also has asweddumised in two places and he is possessing them. 1st defendant is possessing the land called Godedeniyewatte in its entirety. Appuhamy is possessing the land called Godedeniye Udahakella.' The chenas are also worked by different co-owners in different blocks. I live within ½ mile of this field in question. I have worked this field also for 2 years as cultivator under 1st defendant. Those years 1st defendant took the landowner's share."

It has, therefore, been established that (*a*) the lot in dispute was part of a panguwa of 200 to 300 acres consisting of gardens, deniyas and chenas, (*b*) that these deniyas were asweddumised by the various co-owners and possessed separately by them without interference by the other co-owners for a period of over twenty years. The question, therefore, arises as to whether this possession is sufficient in law to confer on the 2nd and 3rd defendants a title by prescription. Mr. Perera has contended that it does not, inasmuch as there has been no ouster and the possession of the defendants is that of their co-owners. In support of this contention Mr. Perera has relied on the cases of *Ummu Ham vs. Koch* (47 N.L.R. 107), *Sedris vs. Simon* (46 N.L.R. 273), *Fernando vs. Fernando* (27 C.L.W. 71) and *Beebee Ammal vs. Ibrahim Saibo* (40 N.L.R. at p. 296). All these cases followed the well known Privy Council case of *Corea vs. Appuhamy* (1912 A.C. 230). Mr. Perera, however, concedes that on the principle established in *Podi Singho vs. Alwis* (28 N.L.R. 401) that the defendants as improving co-owners would be entitled to a partition action to the fruits of the improvements effected by them. In spite of Mr. Perera's contention I am of opinion that it is impossible to distinguish the facts in this case from those in *De Mel vs. De Alwis* (13 C.L.R. 207) the headnote of which is as follows :—

"Each of two co-owners of two contiguous lands was entitled to an undivided half share of the first land, and an undivided third of the second land. One of them allocated to himself the entirety of the first land and a portion of the second adjoining the first. The remaining portion of the second land passed into the exclusive possession of the other co-owners. The portions thus allocated were roughly the equivalents of their respective fractional interests in the two lands. Each of the areas thus separated was incorporated with certain interests of which each co-owner was sole owner. These consolidated areas were possessed as distinct and separate lands for well over ten years. In the action between the representative in interest of one co-owner and the successors in title, by purchase, of the other, the trial Judge rejected the plea of prescription on which the defendant relied. In appeal this judgment was reversed.

Held : "That, where co-owners enter into possession of a specific portion of a land and remain in exclusive and adverse possession thereof for a period of ten years, each co-owner acquires a title by prescription to the specific portion in his possession."

The dictum of De Sampayo, J. in *Mailvagnam vs. Kandaiah* (1 Ceylon Weekly Reporter 175) is also very much in point so far as the facts of this case are concerned. This dictum is as follows :—

"The Commissioner has found that possession has all along been with the plaintiff and his predecessors in

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

title and that Sabapathy from whom the 1st defendant derives title never had any possession, but he has not given effect to that finding on the ground that there was no ouster of Sabapathy, who was a co-owner. It seems to me that the Commissioner has misunderstood the nature of ouster required for the purpose of prescription among co-owners and of the evidence necessary to prove such ouster. There is no physical disturbance of possession necessary—it is sufficient if one co-owner has to the knowledge of the others taken the land for himself and begun to possess it as his own exclusively. This sole possession is often attributable to an express or tacit division of family property among the heirs, and the adverse character of exclusive possession may be inferred from the circumstances."

The judgment of Canekeratne, J. in *Subramaniam vs. Sivaraja* (46 N.L.R. 540) which deals with the circumstances in which an ouster may be presumed is another decision that supports the principle which Mr. Weerasooriya contends is applicable to the facts of this case.

For the reasons I have given, I have come to the conclusion that the Commissioner came to the right decision and the appeal is dismissed with costs.

Appeal dismissed.

Present: DE SILVA, J.

ASIA UMMA & 4 OTHERS vs. CADER LEBBE

S. C. No. 236—*C. R. Colombo No.* 95122.
Argued and Decided on: 22nd May, 1946.

Lessor and lessee—Is the lessee protected by the provisions of the Rent Restriction Ordinance after expiry of lease.

Held : That where a person enters into a lease for a definite term, the relationship of landlord and tenant expires at the end of the term and, therefore, he is not entitled to protection under the Rent Restriction Ordinance.

J. Fernandopulle, for plaintiffs-appellants.
M. I. M. Haniffa with *Abdulla*, for defendants-respondents.

DE SILVA, J.

The plaintiffs in this case had by bond No. 1116 in May, 1941 leased certain premises situated at Kuruwe Street, Colombo, for a term of three years commencing on 1st May, 1941 for a consideration of Rs. 216 paid in advance. The lease expired on 30th April, 1944 but the defendant continued in occupation. The plaintiffs, therefore, instituted this action for ejectment of the defendant and for damages at Rs. 7.50 per mensem commencing from 1st May, 1944, till he took delivery of possession. The defendant in his answer made certain claims in respect of repairs made by him, and also in respect of the occupation of part of the premises by one Cader, and also relied on the Rent Restriction Ordinance to continue the tenancy. The learned Commissioner of Requests, after trial rejected the claim of the defendant for repairs and in respect of the occupation of part of the premises by Cader but refused to make order for ejectment on the ground that the premises was not reasonably required by the plaintiff for her own use.

In appeal Mr. Fernandopulle for the plaintiffs-appellants has raised the point that the relationship of landlord and tenant expired with the expiry of the term of the lease and that thereafter the parties were in the position of owner and trespasser, and therefore, the Rent Restriction Ordinance had no application.

The provisions of the Rent Restriction Ordinance seems to contemplate the case of a tenancy which is terminable by notice, and though there is reference to the rent provided in a lease in section 5 of the Ordinance, that reference is to the rent payable during the term of the lease. Where a person enters into a lease for a definite term it seems to me that the relationship of landlord and tenant expires at the end of the term, and it cannot therefore be said that there is any longer a tenancy as between the parties. I am, therefore, of the opinion that the Rent Restriction Ordinance has no application in this case. I allow the appeal and enter judgment in favour of the plaintiffs as prayed for with costs in the Court of Requests and of appeal.

Appeal allowed.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present : Howard, C.J. & de Silva, J.

WIJAYANARAYANA vs THE GENERAL INSURANCE Co. Ltd.

S. C. No. 198/*M*—*D. C.* (*F*) *Colombo No.* 15283.
Argued on : 3rd June, 1946.
Decided on : 26th June, 1946.

Arbitration—Contract of Insurance—Clause that all differences between the parties arising out of the contract shall be referred to arbitration—Mere denial of liability by one party—Institution of action—Is reference to arbitration a condition precedent to such action—Failure of defendant to specify grounds on which liability is repudiated—Can it be said that differences which could be referred to arbitration existed—Arbitration Ordinance, section 7.

Held : (i.) That where parties to a contract agreed that all differences arising out of the contract shall be referred to the decision of an arbitrator, a reference to such arbitration is a condition precedent to the institution of an action by one of the parties.

(ii.) That, where one of the parties failed, though requested by the other, to specify the grounds on which liability was denied, and an action was instituted against the party in default, the Court had jurisdiction to entertain the action, as it cannot be said that any differences, which could be referred to arbitration, existed between the parties before action was brought.

(iii.) That in view of Section 7 of the Arbitration Ordinance the party sued is entitled to have an order staying the action until the matters in difference between the parties have been referred to arbitration.

Cases referred to : *Scott vs. Avery* (10 E.R. 1121).
Thompson vs. Charnock (8 T.R. 139).
Trainer vs. The Phœnix Fire Assurance Company (65 Law Times 825).
London and North Western and Great Western Joint Railway Companies vs. J. H. Billington (1899) (A.C. 79).

H. V. Perera, K.C., with *Walter Jayawardene*, for the plaintiff-appellant.
N. Nadarajah, K.C., with *D. W. Fernando*, for the defendant-respondent.

Howard, C.J.

The plaintiff who appeals from a decision of the District Judge, Colombo, bases his action on a policy of Insurance with respect to his motor car effected with the defendant company. The plaintiff's motor car collided with a rickshaw puller who received damages against the plaintiff. On being called upon to indemnify the plaintiff the defendant company refused to do so. In their defence the defendant company pleaded that it was under no liability to indemnify the plaintiff by reason of the fact that the latter had violated the terms and conditions of the Policy by instituting the present action without reference to arbitration. The learned Judge in dismissing the plaintiff's claim has held that the matters in dispute between the plaintiff and the defendant company were not referred to arbitration and in such circumstances the plaintiff cannot maintain this action.

Clause 7 of the Conditions of the Policy which relates to arbitration is worded as follows :—

"All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an Award shall be a condition precedent to any right of action against the Company. If the Company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

It was held by the learned Judge and has been contended by Mr. Nadarajah, on behalf of the respondent company in this Court that clause 7 of the conditions in the Policy provides that a reference to arbitration is made a condition precedent to the defendants' liability in a court of law. Mr. H. V. Perera on the other hand maintains that section 7 of the Arbitration Ordinance (Cap. 83) applies and that the plaintiff having, in spite of the arbitration clause in the policy, sought his remedy in Court, the remedy of the defendant company was to move that court proceedings be stayed and the matter referred to arbitration. Section 7 of the Arbitration Ordinance is worded as follows :—

"Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

them, shall agree that any existing or future differences between them shall be referred to arbitration, and any one or more of the said parties, or any person claiming through or under them, shall nevertheless commence any action against the other party, or against any person claiming through or under them, in respect of the matters so agreed to be referred, it shall be lawful for the court in which the action is brought, on application by the defendants, or any of them, upon being satisfied that no sufficient reason exists why such matters cannot be referred to arbitration according to such agreement as aforesaid, and that the defendants or any of them were, at the time of the bringing of such action, and still are, ready and willing to join and concur in all acts necessary and proper for causing such matters to be decided by arbitration, to make an order staying all proceedings in such action, and compelling reference to arbitration on such terms as to costs and otherwise as to such court may seem fit;

"Provided always that any such rule or order may, at any time afterwards, be discharged or varied as justice may require."

In support of his contention Mr. Nadarajah has cited the case of *Scott vs. Avery* (10 E.R. 1121). This case was decided in 1856, and the law in force when the case was under consideration by the English Courts contained a provision similar to section 7 of the Arbitration Ordinance, namely section 11 of the Common Law Procedure Act, 1854. This provision was subsequently re-enacted in section 4 of the Arbitration Act 1889 (52 and 53 Vict. c. 49). In *Scott vs. Avery* a policy of insurance was effected in a mutual insurance company on a ship, one of the conditions of which was that the sum to be paid to any insurer for loss should in the first instance be ascertained by the Committee; but if a difference should arise between the insurer and the committee relative to the settling of any loss or a claim for average, or any other matter relating to the insurance the difference was to be referred to arbitration in a way pointed out in the conditions: provided always that no insurer who refuses to accept the amount settled by the Committee shall be entitled to maintain any action at law until the matter has been decided by the arbitrators, and then only for such sum as the arbitrators shall award and the obtaining of the decision of the arbitrators was declared a condition precedent to the maintaining of the action. The Court of Exchequer gave judgment for the plaintiff in error. On error being brought the Court of Exchequer Chamber reversed that judgment, and gave judgment for the defendant in error. A further writ of error was brought and the Judges were summoned: Eleven Judges attended. By a majority of one the Judges were of opinion that judgment should be given for the defendant in error. With that opinion the Lord Chancellor, Lord Campbell and Lord Brougham agreed. In the judgment of the Lord Chancellor at p. 1136-1137 the following passage occurs:—

"And that, I take it, is what was alluded to by Lord Hardwicke, in the case of *Wellington vs. Mackintosh* (2 Atk. 569), which was this: The articles of partnership in that case contained a covenant that any dispute should be referred. A bill was filed by one of the partners, and a plea set up that covenant to refer as a bar to the bill. Lord Hardwicke overruled the plea, but said that the parties might have so framed the deed as to oust the jurisdiction of the court. I take it, that what Lord Hardwicke meant was, that the parties might have so framed the stipulations amongst themselves, that no right of action or right of suit should arise until a reference had been previously made to arbitration. I think it may be illustrated thus: If I covenant with A to do particular acts, and it is also covenanted between us that any question that may arise as to the breach of the covenants shall be referred to arbitration, that latter covenant does not prevent the covenantee from bringing an action. A right of action has accrued, and it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals. But if I covenant with A, B, that if I do or omit to do a certain act, then I will pay to him such a sum as J. S. shall award as the amount of damage sustained by him, then, until J. S. has made his award and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action arises. The policy of the law does not prevent parties from so contracting. And the question is here, what is the contract? Does any right of action exist until the amount of damages has been ascertained in the specific mode? I think clearly not. The stipulation here is, that the sum to be paid to the suffering member shall be settled by the committee. Certain proceedings are provided to obtain the decision of arbitrators, and there is this express stipulation, that "the obtaining the decision of such arbitrators on the matters and claims in dispute, is hereby declared to be a condition precedent to the right of any member to maintain any action or suit."

"That the meaning of the parties therefore was, that the sum to be recovered should be only such a sum as, if not agreed upon in the first instance between the committee and the suffering member, should be decided by arbitration, and no other, should be the sum to be recovered, appears to me to be clear beyond all possibility of controversy. And if that was their meaning, the circumstances that they have not stated that meaning in the clearest terms, or in the most artistic form, is a matter utterly unimportant. What the court below had to do, was to ascertain what was the meaning of the parties as deduced from the language they have used. It appears to me perfectly clear, that the language used indicates this to have been their intention, that, supposing there was a difference between the person who had suffered loss or damage and the committee as to what amount he should recover, that was to be ascertained in a particular mode, and that until that had been adopted, and the amount ascertained according to that mode, no right of action should exist. In other words, that the right of action should be, not for what a jury should say was the amount of the loss, but for what the person designated in that particular form of agreement should so say."

The basis of the judgment was that until the award was made no right of action accrued.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Lord Campbell in his judgment stated that it was clear that no action should be brought against the insurer until the arbitrators had disposed of any dispute that might arise between them. It was declared to be a condition precedent to the bringing of any action. Lord Campbell then proceeded to discuss the legality of such a contract and held that there was nothing illegal in it. Unless there was some illegality, the courts were bound to give it effect.

His Lordship then proceeded to differentiate the case from that of *Thompson vs. Charnock* (8 T.R. 139), where it was held that if the contract between the parties simply contains a clause or covenant to refer to arbitration and goes no further, then an action may be brought in spite of that clause, although there has been no arbitration. In this connection Lord Campbell at p. 1139 stated as follows :—

> " Therefore, without overturning the case of *Thompson vs. Charnock*, and the other cases to the same effect, Your Lordships may hold that, in this case, where it is expressly, directly, and unequivocally agreed upon between the parties that there shall be no right of action whatever till the arbitrators have decided, it is a bar to the action that there has been no such arbitration."

It would appear that in *Scott vs. Avery* before the action was brought a difference and dispute arose between the Committee and the plaintiff relating to the insurance, to wit, as to the extent of the said loss and as to the repairs done to the ship and as to the sum to be paid by the Association to the plaintiff in respect of such loss. In *Scott vs. Avery* there was a difference or dispute between the parties which was clearly defined and could be referred to arbitration under the terms of the policy. No such defined difference exists in the present case. In their letter of the 8th May, 1943, the defendants state that they propose to repudiate liability because the plaintiff has violated policy conditions. The particular act of violation is not stated. In a letter of the 5th June, 1943, the plaintiff's proctor asks on what specific grounds the defendants deny liability. On the 17th June, 1943, the defendants replied to this letter by stating that when a claim is made, it would be the occasion for informing the plaintiff of the grounds on which liability is repudiated. On the 6th July, 1943, the plaintiff's proctor informed the defendants that his client proposed to institute an action against them. On the 12th July, 1943, the defendants repudiated liability. The correspondence between the parties indicates merely a general repudiation of liability by the defendants. In these circumstances does the case come within the principle decided in *Scott vs. Avery*? The latter case was comprehensively reviewed in *Trainer vs. The Phœnix Fire Assurance Company* (65 Law Times 825). At p. 827 Lord Coleridge, C.J. stated that the case was exactly within the decision of *Scott vs. Avery* as interpreted by Lord Cranworth and Lord Campbell and it is a clause agreeing to refer all matters in difference between the assured and the insurer, as a condition precedent to the assured maintaining any action against the insurer. The Lord Chief Justice further stated that if there was a clause stating that " we agree that no cause of action under any circumstances shall arise upon this policy with which the courts shall deal " or " under no circumstances shall the courts of law have anything to do with disputes arising under this clause," such a clause would be invalid as an attempt to take away altogether from the courts disputes between particular parties and to close the doors under all circumstances and under every conceivable state of the case. The Lord Chief Justice then proceeded to state that this is not what had been done. What had been done was to say that before the courts can try a case certain conditions precedent shall be fulfilled and the judgment in *Scott vs. Avery* had already determined that it matters not whether it is liability or the amount of liability if it is limited to being a condition precedent to the maintenance of an action. It will be observed, however, that in the case of *Trainer vs. The Phœnix Fire Assurance Co.*, the action was not dismissed, but the proceedings were stayed. The defendants in that case very rightly stated that they were ready and willing to have the matter settled by arbitration as provided by the policy.

In my opinion, the matter in issue is governed by the House of Lords case of *London and North Western and Great Western Joint Railway Companies vs. J. H. Billington* (1899) (A.C. 79). The headnote of this case is as follows :—

> " A Railway Act confirming a Provisional Order, after empowering the railway company to charge a reasonable sum for certain services rendered to a trader, by way of addition to the tonnage rate, enacted that " any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." The Company having sued the respondents for services under this section, the respondents objected to the jurisdiction of the court on the ground that the matter was one for the arbitrator to determine :—
>
> Held : " that as there had been no difference existing between the parties before action was brought the arbitrator had not and the court had jurisdiction.
>
> " The decision of the Court of Appeal, (1898) 2 Q.B. 7, reversed and the decision of Wright and Darling, JJ. restored upon the above ground."

The facts of this case are as follows :—

> " The appellants having brought an action in the County Court at Chester against the respondents to

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

recover £38.7*s.* for siding rents for coal wagons, the respondents gave notice to defend and defended the action on the ground that the county court had no jurisdiction to decide the matters in issue in the action, such jurisdiction being ousted by the London and North Western Railway Company (Rates and Charges) Order Confirmation Act 1891 (54 & 55 Vict. c. ccxxi.) Sched. s. 5. That section empowers the company to charge a reasonable sum, by way of addition to the tonnage rate, for certain services rendered to a trader, and proceeds thus : " Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." The siding rents were for 6*d.* a day for every wagon not released and remaining on the company's premises after four days allowed to the respondents for unloading. The county court judge found as a fact that no difference had arisen before action brought as to the question whether the charge of 6*d.* was a reasonable one, or whether the four days was a reasonable time for unloading. The learned judge added : " The defendants knew of the charge being made against them : they accepted the services with such knowledge, though protesting against the right of the plaintiffs to make any charge ; they made no complaint that the amount of the charge was unreasonable, or the period of four days, so as to enable the plaintiffs to apply to have such question settled by arbitration, nor do they take any step themselves to have the question so settled. When action is brought they say, and apparently for the first time, the question between us is as to the reasonableness of the charge of 6*d.* and therefore for another tribunal." The judge therefore gave judgment for the plaintiffs. The defendants having appealed, the Queen's Bench Division (Wright and Darling, JJ.) dismissed the appeal with costs. The Court of Appeal (A. L. Smith and Chitty, L.JJ.) reversed this decision and entered judgment for the defendants."

In his judgment Lord Halsbury, L.C. stated at p. 81 as follows :—

" That a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen : and I think that must mean a difference of opinion before the action is launched either by formal plaint in the county court or by writ in the superior courts. Any contention that the parties could, when they are sued for any price of the services, arises then for the first time the question whether or not the charges were reasonable and that therefore they have a right to go to an arbitrator, seems to me to be absolutely untenable. If, in the ordinary course of things, some question had arisen between the parties which they wanted to arbitrate upon, and a submission to arbitration were agreed upon in this form—which very commonly is the form—" that all matters in difference shall be submitted to A. B.," it would be a condition precedent to the arbitrator entering upon any form of inquiry there that the person who insisted that there was a difference should shew that the difference had arisen before the submission to arbitration was made. That is a matter which has been repeatedly decided, and I should think that no lawyer would hesitate to say that that is the true condition of the law."

Lord Ludlow in his judgment at pp. 82-83 also stated :—

" There is, however, one matter about which I do desire to say a word, and that is this—because I entirely concur with my noble and learned friend on the Woolsack that this difference is a difference which ought to have arisen before action was brought, and that it is too late afterwards to raise a difference which can be brought within the meaning of this section. It is sufficient for the purpose of this case to say that it is concluded by the finding of the county court Judge. As I understand that finding (and it is final), it is that there was no difference existing between the parties at the time the action was brought. I think this appeal should be allowed."

In the present case the defendants in their letter of the 8th May, 1943, stated that they proposed to repudiate liability because the plaintiff had violated policy conditions. The particular act of violation was not stated. They were asked by letter of the 5th June, 1943, on what specific grounds they denied liability. On the 17th June, 1943, by letter the defendants informed the plaintiff that, when the latter made his claim, it would be the occasion for informing the plaintiff on what ground liability was repudiated. In these circumstances I am of opinion that, as in *London and North Western and Great Western Joint Railway Companies vs. J. H. Billington*, when action was brought there was no difference or dispute which could be referred to arbitration. The order of the learned Judge is, therefore, set aside. Although the conduct of the defendants has been tortuous and evasive in the extreme I think they are entitled to have an order staying the action until the matters in difference between the parties have been referred to arbitration. I so order and direct further that the costs of appeal be paid by the defendants. The costs so far incurred in the lower court will abide the final result of this action.

Set aside.

Proceedings stayed till matters in dispute are referred to arbitration.

DE SILVA, J.

I agree.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present: HOWARD, C.J.

PERERA vs. PODI SINGHO & ANOTHER

S. C. No. 132—*C. R. Panadura No.* 9881.
Argued on: 24th June, 1946.
Decided on: 3rd July, 1946.

Co-owners—Rights of—Co-owner erecting building on co-owned property without consent of other co-owners—Action for an order for demolition—Can such action be maintained without joining other co-owners.

Held: That all co-owners need not be joined in an action in which the plaintiff seeks for a mandatory order to demolish a building put up by a co-owner on co-owned property without the consent of other co-owners.

Cases referred to: *de Silva vs. Siyadoris* (14 N. L. R. 268).
Silva vs. Silva (1903, 6 N. L. R. 22).
Heenhami vs. Mohottihami (19 N. L. R. 235).
Muthaliph vs. Mansoor (39 N. L. R. 316).
De Silva vs. Karenaris (1 C. L. R. 28).

H. V. Perera, K.C., with *U. A. Jayasundere* and *L. G. Weeramantry*, for defendant-appellant.
G. P. J. Kurukulasuriya with *Conrad Dias*, for plaintiffs-respondents.

HOWARD, C.J.

The defendant in this case appeals from an order of the Commissioner of Requests, Panadura, entering judgment in favour of the plaintiffs as claimed together with costs. The plaintiffs who are husband and wife sued the defendant for a declaration of title to a 37/82nd share of the land in question and for a mandatory order directing the defendant to demolish the building which he had erected on the land without the consent of the plaintiffs. The Commissioner found that the plaintiffs were entitled to a 37/82nd share in the property and an order was made compelling the defendant to demolish the house. Mr. H. V. Perera on behalf of the defendant has not questioned the finding in favour of the plaintiffs with regard to their title to a 37/82nd share in the land. He maintains, however, that the order for demolition was not in accordance with the law. It would appear that after the writ of summons had been issued the plaintiffs applied for an interim injunction to prevent any further building of the house which was not completed. This injunction which had been granted was dissolved on the 9th June, 1943, on the defendant giving an undertaking that neither in the present action nor in any other action would he claim any preferential right to the site on which the building is by reason of the fact that he has put up the building on the site before other co-owners.

The Commissioner was satisfied on the evidence that the defendant had built a house on the common land without the plaintiffs' consent and that the house had deprived them of their right to put up a building on the road frontage. It was contended that in view of the terms of the order cancelling the order for the injunction the plaintiffs had impliedly consented to the erection of the house. I am of opinion that the Commissioner was right in rejecting this contention.

The only question that remains for consideration is whether the Commissioner was right in making an order compelling the defendant to pull down the house. In Vol. 1 of the 2nd edition of Nathan's Common Law of South Africa at p. 427 the general principle with regard to the alteration by one co-owner on the form of the common property is stated as follows:—

> "No alteration in the form of the common property (such as a building) can be made by one co-owner if the other objected. In such a case, the person who objects is in a superior legal position, and he can compel the person making the alteration to restore the property to its former condition. But if one of the joint co-owners has knowingly permitted (but not authorised) a stranger, not having a share in the property, to make an alteration, such joint-owner is liable to pay damages for such alteration, but is not compellable to restore the property to its former condition (10, 3 s. 7)."
>
> "See Van der Keessel (s. 777), who agrees with this, but adds that a part owner, who has the smaller share in a house, may, without the other part-owner's consent, cause the same to be repaired: a view which is in accordance with equity, repairs coming under the head of necessary expenses."

Mr. Perera has cited the case of *de Silva vs. Siyadoris* (14 N.L.R. 268). In his judgment in this case Lascelles, C.J. at p. 270 states as follows:—

> "But the co-owner who puts up a building on the common property is in a totally different position from a person who, under agreement with the owner, builds on the land of another. The co-owner in such a case

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

acquires no title in severalty as against the other owners. One co-owner could prevent him from building on the common property without the consent of the other co-owners *Silva vs. Silva* (1903, 6 N.L.R. 22), but the building once erected accedes to the soil and becomes part of the common property. The right of the builder is limited to a claim for compensation, which he could enforce in a partition action under section 2 and 3 of Ordinance No. 10 of 1863. The claim of the plaintiff, therefore, rests on no legal foundation, and should have been dismissed. There is, of course, nothing in this decision to prevent any of the co-owners from claiming a partition, in a properly constituted partition suit, of the whole of the property, and in such an action the right of the builders of the houses now in dispute could be adjusted."

The plaintiff in *De Silva vs. Siyadoris* claimed a share in the building which had been erected by his predecessor in title as against other co-owners, and it was held that there was no foundation in law for such a claim inasmuch as the building enured for the benefit and was the property of all the co-owners whose rights could be adjusted in a partition action. Mr. Perera also cited the case of *Heenhami vs. Mohottihami* (19 N.L.R. 235) the headnote of which is as follows :—

"There is no rule of law that a co-owner cannot maintain an action against another co-owner without joining all the other co-owners of the land.

"No doubt in many cases they are proper parties, and would be joined on an application being made for the purpose. In some cases they may even be parties, whose presence before the Court may be necessary in order to enable the court to effectually and completely adjudicate upon all the questions involved in the action, in which the Court may add them of its own motion under section 18, but if they are not added, the court should, in accordance with the provisions of section 17, deal with the matter in controversy so far as regards the rights of the parties actually before it."

Mr. Perera maintains that as the house put up by the defendant in the present case is the property of all the co-owners an order for its demolition cannot be made without joining them all as parties. I do not think that this proposition follows from *Heenhami vs. Mohottihami*. In fact it would appear to be contrary to the decisions in *Muthaliph vs. Mansoor* (39 N.L.R. 316) in which it was held that a co-owner is not entitled to build a house on a land held in common without the consent of the others and an injunction may be issued against the offending co-owner to remove the building without proof of irreparable damage to the party complaining. It would appear from the judgment of Fernando, A.J. in this case that the plaintiffs were only some of the co-owners and others had not been joined in the case. In *Muthaliph vs. Mansoor* the case of *De Silva vs. Karenaris* (1 C.L.R. 28) was cited with approval. The headnote of *De Silva vs. Kareneris* is as follows :—

"One co-owner has no right to build on the common land without the consent of the other co-owners. If they object his proper remedy is to bring a partition suit. So long as the land remains in common each co-owner is entitled to the use of every portion of the land and one co-owner has no right to prevent the others from going on any particular portion of the land by building upon it.

"When one co-owner erects a building without the consent of the others he can be restrained by injunction from doing so or if he has completed the building in spite of the protest of the others he may be ordered to pull down the same.

"The decision of the Full Bench in the case of *Heenhamy vs. Mohottihami* (19 N.L.R. 235) (1916) regarding the joinder co-owners in an action by one co-owner, followed."

In his Judgment Shaw, J. states :—

"With regard to the other part of his claim namely, the claim for an injunction, I have although somewhat reluctantly come to the conclusion that he is entitled to succeed. It is clear law that one co-owner has no right to build on the common land without the consent of his co-owners. If he desires to build on the land and they object his proper method is to apply for a partition of the land when he would be able to do whatever with the portion allotted to him (but so long as the land remains the common property of all the co-owners they are each entitled to the use in common with one another to every portion of the common land, and, therefore, no owner had a right against his co-owners' wishes to prevent them from going on any particular portion of the land by building a house upon it)."

I find it impossible to distinguish the facts in the present case from those in *De Silva vs. Kareneris* which was cited with approval in *Muthaliph vs. Mansoor*. In these circumstances, I am of opinion that the Commissioner came to a right conclusion and the appeal is dismissed with costs.

Appeal dismissed.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present: CANEKERATNE, J.

DHANAPALA vs. SABAPATHYPILLAI, D.R.O.

S. C. No. 531—*M. C. Vavuniya No.* 20103.
Argued: on: 27th June, 1946.
Decided on: 4th July, 1946.

Criminal Procedure Code—Sections 148 (1) (*d*), 151 (2) *and* 297—*Evidence of witness recorded in the presence of accused produced in court before charged—Can such evidence be read over to witness at the trial or should evidence be recorded afresh.*

Held: That when proceedings against an accused person were instituted under paragraph (*d*) of section 148 (1) of the Criminal Procedure Code, any evidence given by a witness recorded by the Magistrate before charging the accused could be read over to such witness at the trial.

Cases referred to: *Wilfred vs. Inspector of Police, Panadure* (46 N.L.R. 553).
Herath vs. Jabbar (41 N.L.R. 217).

F. W. Obeysekera, for Accused-appellant.
E. P. Wijetunge (Jr.), C.C., for Attorney-General.

CANEKERATNE, J.

The appellant and one Dingiri Banda were convicted of committing theft of three articles. The main ground urged by counsel for the appellant is that evidence, improperly recorded, is to be found in this case and that the conviction is vitiated thereby.

The record shows that the accused were produced in Court on 1st January, 1946; they were on remand till the 7th January, on which date they were produced on remand and a plaint was filed. A portion on page 2 of the record reads thus:

7-1-46. Complainant—D. R. O. V. S.
Accused: 1. H. Dhanapala—present.
2. H. Dingiri Banda—present.
Mr. Pasupathy for accused.

After the examination of K. V. Ausadhahamy, the village headman, the learned Magistrate framed a charge against the accused, recorded their pleas and fixed the date of trial. When the case came on for hearing on 6th March the first witness called was Ansadhahamy and after his previous evidence had been read over he was cross-examined by the proctor for the accused.

The general rule is that all evidence taken at an inquiry or trial shall be taken in the presence of the accused (Section 297 of Cap. 16 of Legislative Enactments of Ceylon); this rule is subject to the following exceptions:—

(1) Where express provision has been made in the Code.

(2) Where the personal attendance of the accused has been dispensed with and the evidence is taken in the presence of his pleader. A Court is empowered by Section 154 to dispense with the personal attendance of an accused person and to permit a pleader to appear on his behalf.

The evidence of a witness taken in the absence of an accused person must be read over to the accused in the presence of such witness and the accused must be given a full opportunity of cross-examining such witness; this provision need not be followed where the Court has dispensed with the personal attendance of the accused. One of the cases for which special provision is made by the Code is that referred to in Section 151 (2).

The proceedings in this case were instituted under paragraph (*d*) of Section 148 (1) of the Code. The learned Magistrate, in terms of Section 151(2), examined the headman who was able to speak to the facts of the case, as he was of opinion that there was ground for presuming that the accused had committed an offence triable by him, he framed a charge against them, read the same to each of them and asked each of them whether he pleads guilty or has any defence to make. The trial then commenced against the accused. On the date of hearing he properly read over the evidence previously given by the headman. The case quoted by counsel for the appellant, *Wilfred vs. Inspector of Police, Panadura* (1945-46 N.L.R. page 553),* deals with the general rule: it has no application to this case. The view which I have taken in regard to Section 297 is supported by that of Hearne, J., in *Herath vs. Jabbar* (1940, 41 N.L.R. page 217—a judgment of a Divisional Bench).

Appeal dismissed.

* 31 C. L. W. 57.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

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

THE KING vs. PEIRIS

S. C. No. 43—*D. C. Colombo No. N* 826.

Argued on: 18th June, 1946.

Decided on: 4th July, 1946.

Forgery—Alteration of date in birth certificate using it as genuine document by employee of Municipality to obtain longer period of service than otherwise entitled to—Penal Code Sections 455 *and* 459.

On the accused entering permanent service under the Municipality he was required to submit a birth certificate. Accused whose birth was registered to have taken place on 24/12/1906 sent a copy of a birth certificate (P3) with the figures of the year altered from 1906 to 1912. He was charged on two counts, viz.: (i.) of forgery, (ii.) of using as genuine a forged document. After trial he was acquitted on the grounds (*a*) that the prosecution had not proved that the alteration was made by the accused and (*b*) that the ultimate gain or loss to the Municipality by the circumstance that accused may remain in its service for longer period (viz. six years) than he would otherwise be, and may obtain a larger pension than he would otherwise receive was too remote.

The Attorney-General appealed.

Held: That in the circumstances, the accused was guilty of the 2nd count, viz. of using as genuine a forged document.

PER CANEKERATNE, J.

"Though P 3 had been issued on the application of the accused himself he offered no explanation at the trial. On the question of alteration all the facts taken by themselves could clearly afford sufficient proof had the learned Judge chosen to draw an inference adverse to the accused, but when he said that in the " circumstances of this case the prosecution has not proved that the alteration was made by the accused " I do not feel, sitting here on appeal from an acquittal that I am entitled to say that the learned Judge ought necessarily to have drawn that inference."

T. K. Curtis, C.C., for the Crown-appellant.

H. W. Jayawardene, for the accused-respondent.

CANEKERATNE, J.

The accused was charged on two counts, the one of forgery (Section 455 of the Penal Code), the other of using as genuine a forged document (Section 459); after trial he was acquitted by the learned Judge.

According to the copy of the birth certificate (P4), the accused was born on the 24th December, 1906. He had obtained a copy of it (P3) about the 5th April, 1935, and he became a daily paid employee of the Colombo Municipality about the 5th July, 1937, shortly after this, at the request of the employer, he filled a form containing certain particulars (P1), wherein he stated that he was 26 years of age. He entered the permanent service of the Municipality about the 29th October, 1942. The Engineer's Department of the Municipality which had supervision over his work called upon him on the 23rd March, 1944, to send a birth certificate as he was a permanent employee; purporting to comply with the request he sent a letter (P2) on the 31st March, 1944, which reads thus—" Herewith forwarded certificate." The despatch clerk, Junoos, drew his attention to the absence of a certificate and on the following day the accused sent the certificate P3 (with P2): Junoos sent these to the financial clerk who passed them on to clerk Weerasinghe on the 3rd April; the latter observed that in two columns of P3 the year had been altered. As the learned Judge remarks the figures 12 in 1912 in P3 in columns 1 and 10 have been written over and it is apparent to the naked eye that before the "1" that now appears as the third figure in the year of birth a "0" had been written. An officer in the department then communicated with the Registrar-General and obtained P4.

The learned Judge held that P3 was the identical document tendered by the accused with the covering letter (P2) and that the alterations now to be seen on it appeared thereon at that time but he was not convinced that the alterations were made by the accused.

Though P3 had been issued on the application of the accused himself he offered no explanation at the trial. On the question of alteration all the facts taken by themselves could clearly afford sufficient proof had the learned Judge chosen to draw an inference adverse to the accused, but when he said that in the " circumstances of this case the prosecution has not proved that the alteration was made by the accused " I do not feel, sitting here on appeal from an acquittal that I am entitled to say that the learned Judge ought necessarily to have drawn that inference.

There can be no question, according to the learned Judge, that P3 was a false document and that the accused used it for some purpose or other,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The accused, if he did not know at the time he tendered P3 that it was a false document, had sufficient reason to believe it to be a false document for he certainly had sufficient cause for such belief. But he came to the conclusion that the accused by the alteration of the year of birth did not cause wrongful gain to himself or to anybody else or wrongful loss to another.

What had to be considered, in the learned Judge's view, was the immediate consequential fraud or consequential wrongful gain or loss ; the ultimate gain or ultimate loss to the Muncipality by reason of the circumstance that the accused may remain in service for a longer period (namely six years more) than he otherwise would be and may obtain a larger pension than he would otherwise receive were, in his view, too remote.

A person who fraudulently or dishonestly uses a forged document commits an offence (Section 459). The terms " dishonestly " and " fraudulently " are used to denote two different things. The word " dishonestly " which is the narrower word is defined in Section 22, and the word " fraudulently " in Section 23. A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise. What is an intent to defraud is not defined in the Code : " fraud " is also not defined. The Roman *Jurist Labeo* defined fraud (Dolus) as every kind of craft, fraud or covin used for the purpose of circumventing or deceiving another (Dig. 4, 3, 1-2) : a definition which has been described as one that is neither very precise nor very accurate (Dr. Hunter—Roman Law, page 596). The term fraud is a concept of the utmost possible generality and comprehensiveness ; it may be described in wide and unrestricted terms.

Sir James Stephen in his History of the Criminal Law of England suggested the following :—(Vol. II—page 121.

" There is little danger in saying that whenever the words " fraud " or " intent " to " defraud " or " fraudulently " occur in the definition of a crime two elements at least are essential to the commission of the crime : namely, first deceit or an intention to deceive or in some cases mere secrecy ; and secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy. This intent, I may add, is very seldom the only or the principal intention entertained by the fraudulent person whose principal object in nearly every case is his own advantage. The injurious deception is merely intended only as a means to an end, though this, as I have already explained, does not prevent it from being intentional. A practically conclusive test is this : did the author of the deceit derive any advantage from it which he could not have had if the truth had been known ? If so, it is hardly possible that that advantage should not have had an equivalent in loss or risk of loss to some one else ; and if so, there was fraud. In practice people hardly ever intentionally deceive each other in matters of business for a purpose which is not fraudulent."

The accused entered into a contract of service with the Municipality about October, 1943 ; the corporation had power to enter into such a contract (Cap. 193 Section 58 ; Cap. 194 Section 72). The terms of the contract would be those that are usually found in such contracts of service entered into with the Municipality. He agreed to serve the employer as an overseer, the duration of the contract would be fixed by the agreement of the parties or by usage : the evidence shows that there is a prescribed period which terminates with the attainment of a particular age by the employee. What that age is has not been specified, but this does not seem to be very material, it may be 50, 55 or 60 years. The employee had a right to be allowed to perform the service which he has agreed to render under the contract (*i.e.* to serve as an overseer) till he arrived at the specified age, a right to receive salary at a fixed rate each month, a right to receive increments, if any, as and when they become due, perhaps a right to receive a gratuity or a pension. The Municipality agreed to employ the accused as an overseer from the 29th October, 1942, till he arrived at the specified age so long as there was continued good conduct by the servant. It agreed to pay him remuneration at the rate specified, to grant the increments, if any, as and when they became due and to dispense with his services on his reaching the retiring age. If a person who entered the service of the Municipality at the age of 25 was entitled to get an increase of Rs. 100 a year after five years service or if he was entitled to be employed till he reached the age of 55, it means that he had a right under the contract to get the additional sum of Rs. 100 in the sixth and following years or to be employed for a period of 30 years as the case may be. The fact that these rights may become extinguished by a supervening event as death or by a voluntary act, as by giving notice, does not negative the existence of the right.

If the accused was entitled to be employed till he reached the age of 55, he had a right to serve only till the 24th December, 1961 but if P3 was a genuine document his period of service would expire only on the 24th December, 1967. The accused acquired a valuable advantage by his act of tendering P3. If the employer wrongfully dispensed with the services of the employee before the end of the period of the contract, he would be liable to pay damages to the other for breach of the contract. If P3 is genuine the Municipality cannot lawfully prevent the accused from offering his service after the 24th December, 1961. It is true that there could be no actual breach of contract so long as the time for termination (i

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

terms of the contract read with P4) had not yet arrived. One party to a contract, however, has an inchoate right to the performance of the bargain by the other party. Its unimpaired and unimpeached efficacy is essential to the interests of the other party.

Even if the view expounded by the learned Judges in *Sanjiv Ratanappa Ronad and another vs. Emperor* (1932—56 Bombay page 488), (where the view of the majority comprising the Full Bench of the Court that decided *Kotamraju Venkatrayadu vs. Emperor* (1905—28 Madras page 90) were treated as *obiter*) quoted by counsel for the accused is accepted, risk of loss was incurred at least by the Municipality and that is sufficient. The other case quoted by counsel for the accused *Aparti Charan Ray vs. Emperor* (1929—31 Cr. L.J. page 1,126) does not carry the case any further there the accused, the husband of S. K. Dei who had given a general permission to him to file papers in Court on her behalf signed the plaint on her behalf to save the suit from becoming barred by limitation and filed it in Court: the conviction was set aside in appeal. " There was no fraud on the plaintiff because the plaint was filed in her interest and as she says in her evidence under her authority."

The accused is clearly guilty on the second count. I find the accused guilty under Section 459 and sentence him to six months rigorous imprisonment.

Acquittal set aside.

HOWARD, C.J.
I agree.

Present: HOWARD, C.J. & DE SILVA, J.

FERNANDO vs. THAMEL & ANOTHER

S. C. No. 213—*D. C. Chilaw No.* 12024

Argued on: 5th and 6th June, 1946.

Decided on: 21st June, 1946.

Trust—Equitable doctrine of—Plaintiffs transferring property to defendant to pay off mortgage—No consideration paid to plaintiffs—Agreement to retransfer in non-notarial writing—Nature of transaction—Defendant's refusal to retransfer—Conditions necessary to establish trust—Statute of Frauds—Evidence Ordinance, Section 92 (2).

The plaintiffs, husband and wife were indebted to one J. F. in a sum of Rs. 650 on a mortgage Bond. Being unable to pay this amount they approached the defendant for a loan. The defendant agreed to pay off the mortgage and Deed No. 4447 of 2-9-41 (P2) was executed in his favour transferring the hypothecated property, which was worth Rs. 1,750 or Rs. 2,000. It was further proved that no money was paid by the defendant on the date of transfer, that he merely undertook to free the property from the mortgage, that the plaintiffs were reluctant to grant the transfer and only did so on an agreement to retransfer. This agreement to retransfer was on a non-notarial writing P3.

The defendant stated in his evidence that he had no intention of retransferring the land when he gave P3 but would do so now if he was paid Rs. 2,000 and his expenses.

Held: (i.) That the plaintiffs have established a case of fraud or one in which Equity would grant relief to prevent the defendant from taking advantage of the Statute of Frauds to keep the plaintiffs' property.

(ii.) That in the circumstances the defendant held the property in trust for the plaintiffs.

(iii.) That the agreement to retransfer did not constitute a " condition precedent " to the granting of P2 within the meaning of the words in *proviso* (3) to section 92 of the Evidence Ordinance.

Cases referred to: *Nanayakkara vs. Andris* (23 N.L.R 193).
Lendsay vs. Lynch (2 Sch. & Lefr.).
In re Duke of Marlbourough (1894) (2 Ch. 133).
Theevanapillai vs. Sinnapillai (22 N.L.R. 316).
Sanmugapillai vs. Aniappa Kone (45 N.L.R. 465).
Carthelis Appuhamy vs. Saiya Nona (46 N.L.R. 313).
Mohamadu vs. Pathumah (11 C.L.R. 48).

H. V. Perera, K.C., with *L. A. Rajapakse, K.C.* and *S. R. Wijetileke*, for the defendant-appellant.
N. Nadarajah, K.C., with *H. W. Thambiah*, for the plaintiffs-respondents.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

HOWARD, C.J.

This is an appeal by the defendant from a judgment of the District Judge of Chilaw entering judgment for the plaintiffs as claimed and declaring that the defendant holds the land in dispute in trust for the plaintiffs.

By Deed No. 4447 of the 2nd September, 1941 (P2) the plaintiffs who are husband and wife transferred to the defendant for a sum of Rs. 650 the land subject to this action. This deed on the face of it is an out and out transfer. The plaintiffs, however, claimed that the defendant held the property in trust for the plaintiffs by reason of the circumstances in which P2 was made. The plaintiffs at the time were indebted to one James Fernando in a sum of Rs. 650 on a mortgage bond. Being unable to pay this amount they approached the defendant for a loan. The defendant agreed to pay off the mortgage and it was in these circumstances that P2 which the plaintiffs now seek to set aside was executed. On the same day that P2 was executed the defendant gave the plaintiffs the document P3. This is an informal document by which the defendant undertook to give a retransfer of the land in question within a period of 3 years if the plaintiffs paid him Rs. 671 within the said period and asked him to execute a deed of transfer at their expense. Before filing their action the plaintiffs offered Rs. 671 but the defendant asked for more money as the land had gone up in price. On the defendant refusing to retransfer the property the plaintiffs instituted this action asking for a declaration that the defendant held the land in trust for the plaintiffs and deposited the sum of Rs. 671 in Court. The District Judge held that P3 being an informal document subsequently made cannot be used to vary P2 which is an outright transfer. He, however, admitted P3 to prove that the defendant held the property in trust for the plaintiffs. The only question that arises for consideration is whether the District Judge was right in so admitting P3. It is contended by Mr. Nadarajah on behalf of the plaintiffs that P3 was admissible under *proviso* (3) to section 92 of the Evidence Ordinance (Cap. 11) as being a separate oral agreement constituting a condition precedent to the transfer of the property.

For proof that the agreement to retransfer constituted a condition precedent, Mr. Nadarajah emphasised the evidence of the second plaintiff. The latter stated that the defendant came to know that James Fernando had demanded the money due on the mortgage. He offered to pay off James Fernando's mortgage and take the property on mortgage himself. The second plaintiff says she told the defendant she would think it over but would not sell the property. Eventually, according to the 2nd plaintiff the defendant said he would give an undertaking to retransfer the land. It was after these preliminaries that the parties went to the Notary's office. The defendant had not brought the money, but he agreed to settle James Fernando's debt. The document P2 and P3 were then made. The 2nd plaintiff states that if the defendant had not agreed to retransfer, she would not have given him a transfer. I do not think that P3 and the oral agreement referred to by the 2nd plaintiff constitute a " condition precedent " to the granting of P2 within the meaning of those words in *proviso* (3) to section 92 of the Evidence Ordinance. These words mean that a written agreement shall not be of any force or validity until some condition precedent has been performed or that the written agreement was conditional on some event which has never occurred. No such condition has been proved in this case. Hence oral evidence or evidence supplied by a non-notarial document was not admissible under this *proviso*. In this connection I would refer to the 9th edition of Woodroff's Law of Evidence pp. 666-668. Mr. Nadarajah also maintains that there was an express trust. And alternatively that there was a constructive trust under section 83 of the Trusts Ordinance (Cap. 72) inasmuch as it cannot reasonably be inferred from the attendant circumstances that the plaintiffs intended to dispose of the beneficial interest. It is also argued that there was a constructive trust under section 96 of the Trusts Ordinance (Cap. 72) as the defendant has not the whole beneficial interest.

Our attention has been invited to a number of authorities. Mr. Nadarajah in particular has relied on the case of *Nanayakkara vs. Andris* (23 N.L.R. 193). At p. 197 Bertram, C.J. after referring to a dictum of Lord Redesdale in *Lendsay vs. Lynch* (2 Sch. & Lefr.) in regard to the equitable doctrine that " Courts of Equity will not permit the Statute of Frauds to be made an instrument of fraud " stated that the application of the doctrine is confined to two classes of cases of which the first is :

> " Cases where the defendant has obtained possession of the plaintiffs' property, subject to a trust or condition, and claims to hold it free from such trust or condition."

This equitable doctrine was comprehensively explained in the judgment of Stirling, J. in the case of *In* re *Duke of Marlbourough* (1894) (2 Ch. 133). The head-note of this case is as follows :—

> " By an indenture dated in 1890 the Duchess of M. in consideration of natural love and affection, assigned

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

to her husband the Duke a leasehold house belonging to her. The deed was in form an absolute assignment. The Duke subsequently mortgaged the house for the purpose of raising money to pay his debts. The Duchess joined with the Duke in covenanting to pay the mortgage debt, but the equity of redemption was reserved to the Duke alone. Upon the death of the Duke in 1892, the Duchess claimed to be entitled to the house subject to the mortgage. There was evidence that she had assigned the house to the Duke solely to enable him to mortgage it in his own name, and that it was part of the arrangement between them that he should re-assign to her, which, if he had lived, he would have done :—

Held : " that the case fell within the authorities which forbid the Statute of Frauds to be used to cover what would amount to a fraud, and consequently that the statute could not be successfully pleaded in opposition to the claim of the Duchess."

This equitable doctrine has also been recognised by the Ceylon Courts in the case of *Theevanapillai vs. Sinnapillai* (22 N.L.R. 316) at pp. 317-318 Ennis, A.C.J. stated as follows :—

" It was contended on appeal that the plaintiff respondents should not have been allowed to lead evidence in proof of the trust in the Court below. This was the substance of the contention. It was also urged that prior to the Trusts Ordinance, No. 9 of 1917, there was no case of a trust on all fours with the present case. It is, however, unnecessary to consider whether there were any previous cases, because this matter has now to be dealt with on the basis of the Trusts Ordinance, 1917, and on the basis of the Evidence Ordinance. The respondents urge, and I think rightly, that this case is not a case of a constructive trust within the meaning of Chapter IX of the Trusts Ordinance, and if that be so, it can only be an express trust. But it was urged for the appellant that such would not be valid unless in writing as required by section 5 of the Trusts Ordinance. This contention was met by Mr. Pereira, for the respondents, by pointing out that section 118 of the Trusts Ordinance allowed of the application of English Law where there was no specific provision in the Ordinance, and he pointed out that by the English Law of secret trust that is an express trust which has not been clothed in the legal formalities required by law of failure to perform the trust is itself an act of fraud, and Mr. Pereira urged that the *proviso* at the end of section 5 covered the present case in consequence. In my opinion this contention is right."

It is to be observed that with regard to the facts in this case it was not evidence of fraud preceding the agreement that was sought to be proved. It was subsequent conduct of the defendant in failing to convey the property that constituted fraud. Mr. Perera has cited various cases in support of this appeal. In *Sanmugapillai vs. Aniappa Kone* (45 N.L.R. 465) Soertsz, J. at p. 467 stated that it was not possible for the appellants to succeed since there is no evidence to establish their case of a trust. But in this case there is the evidence of the 2nd plaintiff with regard to the circumstances in which P2 was given. In *Carthelis Appuhamy vs. Saiya Nona* (46 N.L.R. 313) it was held that a non-notarial document containing an agreement to retransfer and signed by the defendant the same day as the deed of transfer was of no force or avail at law as it was not contained in a notarial document. Further that there were no circumstances that could bring the case within the section of the Trusts Ordinance relating to constructive trusts. I am of opinion that this case is distinguishable. In the present case there are circumstances tending to show that the transfer was to be in trust. The evidence of the 2nd plaintiff that no money was paid by the defendant on the day of transfer, that he merely undertook to free the property from the mortgage, that she was reluctant to grant the transfer and only did so on an agreement to retransfer are circumstances indicative of a trust. Moreover there is a gross disparity in the price under P2 namely Rs. 650 and the value of the property at the time of the transfer which is put by the 2nd plaintiff at Rs. 1,750 or Rs. 2,000. Mr. Perera also relied on the judgment of *Mohamadu vs. Pathumah* (11 C.L.R. 48). In that case, however, fraud was not established and hence the equitable doctrine to which I have referred was not applicable. Fraud was not even alleged in the plaint. In the present case the issue of fraud has been determined in favour of the plaintiffs. Nor can that determination be questioned. In this connection one has to bear in mind not only the evidence of the 2nd plaintiff with regard to the real nature of the transaction and the circumstances in which P2 was granted but also the evidence of the defendant himself. The latter admits the agreement to retransfer the property and also that he had no money at the time of the transfer. He also says that when he gave P3 he had no intention of retransferring the land, but would do so now if he was paid Rs. 2,000, and his expenses. It is difficult to conceive a clearer case of fraud or one in which Equity would grant relief to prevent the defendant from taking advantage of the Statute of Frauds to keep the plaintiff's property.

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

Appeal dismissed.

DE SILVA, J.

I agree.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present : HOWARD, C.J.

CHRISTINAHAMY & ANOTHER vs. CONDERLAG, INSPECTOR OF POLICE.

S. C. No. 195-6—*M. C. Colombo South No.* 3847.
Argued on : 9th July, 1946.
Decided on : 12th July, 1946.

Cheating by personation—Penal Code, sections 398, 399 *and* 402.

The accused, pretending to be the mother of a girl of seventeen, induced a Magistrate to make order for the delivery of the girl to her. The accused was charged and convicted with having cheated the Magistrate by personation and thereby induced him to deliver the girl to her. She was not charged with having induced the Magistrate to make the order of delivery.

Held : That the conviction was bad and must be set aside.

Cases referred to : *Moiey vs. Queen Empress* (1889) (Indian Decisions 17 Calcutta 606).

H. Wanigatunga for the 1st accused-appellant.

H. V. Perera, K.C., with *U. A. Jayasundera* and *H. W. Jayawardene*, for the 2nd accused-appellant.

T. S. Fernando, Crown Counsel, for the *Attorney-General.*

HOWARD, C.J.

The first accused appeals from her conviction by the Magistrate, Colombo South, on a charge framed under section 402 of the Penal Code. The wording of this charge was as follows :—

"That you did, within the jurisdiction of this Court at Wellawatte on 6th September, 1945, you the 1st accused cheat by personating Mr. Ivor de Saram, Magistrate, Colombo South, by pretending to him that she was one Galkadujayasinghe Dewage Yasona of Pannala the lawful mother of the girl named Suduhakuru Dewage Podiensina *alias* Jossie Podi Amma and thereby dishonestly induced the said Magistrate to deliver her the abovesaid girl who is a minor aged 17 years 10 months, and thereby committed an offence punishable under section 402 of the Penal Code (Chapter 15)."

The second accused was charged with aiding and abeting the first appellant in the commission of this offence.

The facts, as put forward by the Crown, were as follows :—On the 4th September, 1945, Inspector Conderlag produced a girl called Jossie Podi Amma before Mr. de Saram, Magistrate, Colombo South, and moved for an order that she be kept in the Jayasekera Home till her parents come and take her over. Purporting to act under section 22 of the Criminal Procedure Code Mr. de Saram remanded the girl to the Jayasekera Home till the parents arrived and took charge of her. On the 6th September, 1945, the first accused, giving the name of Christinahamy, appeared before Mr. de Saram and said she was the mother of Jossie Podi Amma. Acting on this statement Mr. de Saram made an order that the first accused should be given a letter of authority to remove her daughter from the Jayasekera Home. On the 10th September, 1945, the first accused appeared at the Jayasekera Home with the order and removed the girl. It was subsequently discovered that the first accused was not the mother of the girl and these proceedings were instituted.

Section 402 of the Penal Code is worded as follows :—

"Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

"Cheating by personation" is defined in section 399 as follows :—

"A person is said to 'cheat by personation' if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is."

In order to discover what is meant by "cheating" recourse must be had to section 398, which is worded as follows :—

"Whoever by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to damage or harm to that person in body, mind, reputation, or property, or damage or loss to the Government, is said 'to cheat'"

The section, therefore, contemplates two types of offence. The first an act of deceit where a person is fraudulently or dishonestly induced to deliver any property to any person or to consent that any person shall retain any property. The second type contemplates deceit where a person is intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. The Magistrate has treated the charge against the accused as if the offence of cheating was under the second half of section 398 and in convicting the accused has held that "the very fact that the Magistrate made order handing over the girl to an utter stranger who pretended to be the mother of the girl might certainly reflect on the reputation of a Magistrate in the eyes of the public, if not of his superiors". Mr. Fernando is not prepared to support the conviction on the grounds put forward by the Magistrate. In fact it is quite impossible to support the Magistrate's reasoning.

The accused were not charged with an act of cheating under the second part of section 398. They were charged with dishonestly inducing the Magistrate "to deliver". On the assumption that the charge had been framed under this part of the section, it must be proved that it was the "act" or "omission" that caused or was likely to cause damage. The "act" which the Magistrate has performed was the giving of the order for delivery to the first accused. I am of opinion that damage to the reputation of the Magistrate is not the necessary consequence of such an act. In this connection I would refer to *Moiey vs. Queen Empress* (1889) (Indian Decisions 17 Calcutta 606). If the proposition on which the Magistrate's order is based is sound, the making by a judicial officer of any wrong order on information or evidence that may not be accurate can be said to cause damage or harm to the reputation of the judicial officer concerned and form the basis of a charge under this section. It is impossible to support such a proposition.

Although Mr. Fernando is unable to subscribe to the reasons put forward by the Magistrate, he maintains that the conviction is good under the first part of section 398. In other words he contends that there was an act of deceit which induced Mr. de Saram to deliver the order for the handing over of the girl by Mrs. Jayasekera to the first accused. Unfortunately for this contention the charge against the accused was framed on the basis of the delivery not of an order but of the girl. For this reason alone I am unable to accept Mr. Fernando's contention.

For the reasons I have given the convictions of both accused are set aside.

Appeal allowed.
Convictions set aside.

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

NUGAWELA & 3 OTHERS vs. MOHOTTALA & OTHERS

S. C. No. 50—*D. C.* (*F*) *Kandy No.* 1444.
Argued on : 10th and 11th December, 1945.
Decided on : 19th December, 1945.

Dewala—Succession to office of Kapurala—Is it by hereditary right.

Held : That the right of succession to the office of Kapurala of a dewale is a hereditary right.

H. V. Perera, K.C., with *N. E. Weerasooriya, K.C.*, and *H. W. Jayawardene*, for the 1st defendant-appellant.

N. Nadarajah, K.C., with *L. A. Rajapakse, K.C.*, and *E. A. G. de Silva*, for the plaintiffs-respondents.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

SOERTSZ, A.C.J.

This case was very fully tried and carefully considered in the Court below, and the learned trial Judge came to the conclusion that the plaintiffs and 2nd, 3rd and 4th defendants have been performing the functions of Kapuralas of the Alutnuwara Dewale by hereditary right. Counsel for the 1st defendant-appellant who, as Basnayake Nilame has the general management and control of the Chief Dewales, maintained that although these parties and their ascendants had always filled the office of Kapurala, they had done so not in virtue of any hereditary right but because the Basnayake Nilames had thought fit on grounds of expediency and convenience *quieta non movere*, and it was open to them at any time to appoint anyone to the office provided he was a Buddhist of the Goigama caste.

I have examined the evidence carefully, and on that evidence, this claim on the part of the appellant is quite untenable. The defendant himself is unable to adduce a single instance in respect of any dewale in which a stranger has been appointed Kapurala. He says that in regard to the dewale concerned in this action " I was under the impression that these people were hereditary Kapuralas as in the other dewales ", but he appears to have taken a different view when for the first time, he " found out that there were no kapu pangus attached to the Alutnuwara Dewale" Neither the appellant nor his Counsel was able to show that the hereditary quality of a Kapurala's office was dependent on whether or not a " panguwa " was attached to the office. The dictum in Dr. Hayley's book on Sinhalese Laws and Customs at page 532 indicates that this hereditary quality of the office applied without any discrimination to all Kapuralaships. He says " The priests called Kapuwas, Kapuralas, or Pattinihamis.........appointed by the villagers of lay managers do not belong to any order, but conduct the ceremonies of each temple according to custom usually learned from relations whom they succeed in office ". I am unable to subscribe to Mr. H. V. Perera's contention that the word " whom they succeed in office " mean nothing more than a fortuitous succession of instances and do not mean that such is the established custom. I find it impossible myself to resist the conclusion to which the trial Judge came when he held that the office is hereditary, it being left to the Kapurala family to make such arrangements for the performance of the services as expediency and convenience dictated subject to the approval of the Basnayake Nilame who, clearly, enjoys the control and management of the Dewales and could, therefore, impose reasonable terms and conditions which, in the long course of time, have become themselves more or less well established.

In the social order of today and in the light of modern legal conceptions, the rights and obligations of an office such as this cannot be rigidly defined, and it must be left to the sense of fairplay on the part of so high an official as the Basnayake Nilame on the one hand, and to the sense of service and discipline of the Kapuralas on the other hand to ensure that the interests of the Dewales and of the devotees who resort to them are maintained with dignity and efficiency, and that personal motives are repressed.

According to the system of tenure of this office which has obtained, for some time, it was the plaintiffs' turn to officiate at the time they sought to and, in my opinion, they were entitled to the relief the trial Judge gave them. I would dismiss the appeal with costs.

Appeal dismissed.

ROSE, J.
I agree.

Present: HOWARD, C.J.

SALY vs. LIYANAGE, (MUNICIPAL SANITARY INSPECTOR)

S. C. No. 550—*M. M. C. Colombo No.* 29753.
Argued and Decided on: 12th June, 1946.

Quarantine and Prevention of Diseases Ordinance, Chapter 173—*Offences under—Jurisdiction of Municipal Magistrate to try.*

Held: That the Municipal Magistrate has no jurisdiction to try an offence committed under the Quarantine and Prevention of Diseases Ordinance, chap. 173.

H. V. Perera, K.C., with *H. W. Jayawardene*, for the accused-appellant.
No appearance for the complainant-respondent.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

HOWARD, C.J.

In this case the appellant was charged with committing an offence in breach of Regulation 46 of the Rules and Regulations made under the Quarantine and Prevention of Diseases Ordinance, Chapter 173, an offence punishable under section 5 (1) of the said Ordinance. He was tried by the Municipal Magistrate. It would appear, however, that the Municipal Magistrate had no jurisdiction to try an offence committed under Chapter 173. The jurisdiction of the Municipal Magistrate was limited by section 52 of the Municipal Councils Ordinance (Cap. 193) and the offences which he is empowered to hear, try and determine are offences committed within the Municipality in breach of any Municipal by-laws or under Chapter 193 or under any of the Ordinances specified in a tabular statement annexed to this section. The Quarantine and Prevention of Diseases Ordinance does not appear in that tabular statement, nor has it been added by any subsequent order of the Governor made under sub-section 2 of that section. The appeal is, therefore, allowed and the conviction set aside.

Set aside.

Present: DE SILVA, J.

WILLIAM SINGHO vs. SELVADURAI, S. I. POLICE

S. C. No. 405—*M. C. Gampaha No.* 30739

Argued and Decided on: 28th May, 1946.

Defence (War Equipment) (Purchase by Civilians) Regulations, 1944—*Applicability of to property intended for Admiralty Civilian Personnel.*

Held : That the Defence (War Equipment) (Purchase by Civilians) Regulations, 1944, do not apply to property intended for the use of Admiralty Civilian Personnel.

C. S. Barr Kumarakulasingham, for the accused-appellant.

J. G. T. Weeraratne, Crown Counsel, for the Attorney-General respondent.

DE SILVA, J.

In this case the accused has been convicted of having had in his possession two rolls of mosquito netting valued at Rs. 324, property belonging to the War Department, to wit, the Navy, in breach of Regulation 3 of the Defence (War Equipment) (Purchase by Civilians) Regulations, 1944, and has been sentenced to a term of three months' rigorous imprisonment.

The evidence shows that the house of the accused was searched and in the almirah two rolls of mosquito netting were found. These rolls were identified by the witness Graham as mosquito netting belonging to the Naval Store Department; but, in the course of his evidence this witness stated that this netting was made up into mosquito nets and issued to Admirality Civilian Personnel.

The Defence Regulation dealing with (War Equipment) (Purchase by Civilians) provides that the property should not only belong to His Majesty but also should be intended for the use of the fighting forces.

> "'Fighting forces' means the forces of His Majesty, or of any Power allied for the time being with His Majesty, or of any foreign authority recognised by His Majesty as competent to maintain such forces for service in association with the forces of His Majesty."

Now, the evidence of Graham shows that the 2nd part of the Defence Regulation has not been satisfied since this property is intended for the use of Admiralty Civilian Personnel.

There is no doubt that this netting has been stolen, and it was open to the Police to charge the accused with being in possession of stolen property; but, the charge made against the accused cannot be supported on the evidence. I therefore set aside the conviction and acquit the accused.

Appeal allowed.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

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

THE TRUSTEES OF THE WIJEWARDENE CHARITABLE TRUST vs. THE COMMISSIONER OF INCOME TAX

S. C. No. 29 (*Inty.*)—*Income Tax No.* 93/175
Argued on : 1st and 2nd June, 1946.
Decided on : 19th July, 1946.

Income Tax—Last Will—Trust for relief to poor relations of testatrix—Is it a trust of a public character established for a charitable purpose within the meaning of section 7 (1) (*c*) *of the Income Tax Ordinance.*

A testatrix devised certain properties to the appellants who were to hold the same in trust and to use the net income thereof for three purposes one of which was as follows :—" To aid either occasionally or regularly my relations who are or may become poor including members of my own family and who, in the judgment of my Trustees are in need of such aid in consequence of illness, financial difficulties and the like or on the occasion of marriage, deaths and the like ".

The assessor held that the income derived from the said properties was liable to income tax as the trust created by the above terms was not for a charitable purpose within the meaning of section 7 (1) (*c*) of the Income Tax Ordinance.

The Commissioner and the Board affirmed the assessment and a case was stated for the opinion of the Supreme Court whether the trust in question for the relief of poor relations of the settlor constituted a valid charitable trust and therefore is exempt from taxation.

Held : That the trust created by the testatrix for the benefit of her poor relations is a trust of a public character established for a charitable purpose within the meaning of section 7 (1) (*c*) of the Income Tax Ordinance.

Per CANEKERATNE, J.—" There is a public element in a gift to the poor, *i.e.* where a person must be poor to get relief from a fund, the receipients of the bounty then may be even a limited class of persons provided the individuals are not ascertained : if there is a public element in the gift, the trust dealing with that gift can be described as being one for the benefit of a section of the public, *Spiller vs. Maude* 1946, 2 A. E. R., page 508."

Cases referred to :—

Com. of Income Tax vs. Mohamed Sahib, A. I. R. 1941, Madras 535
D. V. Arur vs. I. T. Commissioner 1946, A. I. R., Bom. 49
Tribune Press case 1939, A. I. R. (P.C.) 208
Spinners' Association vs. I. T. Commr. 1944, A. I. R., P.C. 28
Commissioner of Income Tax vs. Aga Abbas Ali 1944, A.I.R., Madras 292
Commissioner of Income Tax vs. M. J. Mohamed Sahib A. I. R., 1941, Madras 535
Saibo vs. Oriental Bank Corporation (1874) 3 N.L.R. 148
Saltash's case, 38 Ch. D. 532
Pemsel vs. Commissioner of Income Tax 1891, A. C. 531
Bristow vs. Bristow 1842, 5 Beav. 289
A. G. vs. Vint 1850, 3 De G. & S. 704
A. G. vs. Comber 1824, 2 S. & S. 93
Reeve vs. A. G. 1843 : 3 Hare 191
A. G. vs. Pearce 1740, 2 A. I. R. 87
Waldo vs. Caley 1808, 16 Ves 206
Isaac vs. Defriez (1754), Amb. 595
Attorney-General vs. Price 1810, 17 Ves 371
Spiller vs. Maude 1946, 2 A. E. R., 508
In Re Compton 1945. 1 A. E. R., 201.
Re Hoburn Aero Co., Ltd., 1946 1. A. E. R. 501
Keren K. I. J. Ltd. vs. Inland Revenue 1932 A. C. 650

H. V. Perera, K.C., with *C. E. L. Wickremesinghe*, for the Assessee-appellants.

H. H. Basnayake, Acting Solicitor-General, with *T. S. Fernando, C. C.*, for the Commissioner of Income Tax, respondent.

CANEKERATNE, J.

This appeal arises out of an assessment to income tax made on the appellants for the years 1940-41, 1941-42, 1942-43 and 1943-44 on the sums of Rs. 3,838, Rs. 10,732, Rs. 9,716 and Rs. 11,972 respectively.

These sums represent the income received by the appellants from certain properties devised to them by the testatrix, they were to hold the same in trust and to use the net income thereof for three purposes, one of which (*b*) is—

> " To aid either occasionally or regularly my relations who are or may become poor including members of my own family and who in the judgment of my Trustees are in need of such aid in consequence of illness, financial difficulties and the like or on the occasion of marriage, deaths and the like."

The assessor held that these sums were liable to income tax as clause " b " was not a charitable

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

purpose: this assessment was confirmed by the Commissioner of Income Tax. On appeal the Board of Review came to the conclusion that there was no material difference between a charitable trust as defined in section 99 (i.) of the Trust Ordinance (Cap. 72 of the Legislative Enactments of Ceylon) and a trust such as would satisfy the requirements of the Income Tax Ordinance but as the trust established by this Will was not "for the benefit of the public or any section of the public" it was not of a public character. The Board affirmed the assessment and, on the requisition of the Trustees, stated a case for the opinion of the Court.

The main contention of counsel for the appellants was that a trust for the relief of the poor relations of a settler constitutes a valid charitable trust and that the income received during each of the years in question is exempt from taxation.

The Acting Solicitor-General contended that such a settlement is a private trust and is not saved from taxation under section 7 (1) (*c*) of the Income Tax Ordinance, that the construction of this section must be based on the actual words used therein and that it is not permissible to resort to the provisions contained in section 99 of the Trust Ordinance to construe the language of the sub-section. To exemplify his contention that the limits fixed by this section must be strictly observed, reference was made to a series of Indian decisions on Income Tax—*Com. of Income Tax vs. Mohamed Sahib* A. I. R. 1941 Madras 535; *D. V. Arur vs. I. T. Commissioner* 1946 A. I. R. Bom. 49, *Tribune Press case* 1939 A. I. R. (P. C.) 208, (supplying a province with an organ of educated public opinion); *Spinners' Association vs. I. T. Commr.* 1944, A. I. R. P. C. 28; *Commissioner of Income Tax vs. Aga Abbas Ali* 1944 A. I. R., Madras 292; *Commissioner of Income Tax vs. M. J. Mohamed Sahib* A. I. R. 1941, Madras 535.

It is not disputed that the Will creates a trust nor is it denied that had the Will contained only the purposes specified in clause "a" and clause "c", the income would be exempt from taxation.

Some of the principles of the English Law of trusts found their way in the course of years to the Law of Ceylon: thus by 1874 our law had been greatly influenced by English rules, *Saibo vs. Oriental Bank Corporation* (1874) 3 N. L. R. 148, the media of influence being the citation by advocates of English text-books and decisions, sometimes the process of assimilation was also helped by legislation (see Ordinance No. 7 of 1871). Perhaps the Courts in Ceylon have evolved similar rules by applying the principles of the Roman-Dutch Law, notably those relating to *fidei commissa*, to the circumstances of modern life. The law relating to Trusts is now to be found in Cap. 72 of the Legislative Enactments of Ceylon which contains the text of an Ordinance passed in 1917 (Ordinance No. 9 of 1917). By section 110 (5) the rule against perpetuities is not applicable to charitable trusts as defined by section 99.

By the Income Tax Ordinance, the income of any institution solely for charitable purposes is exempt from tax (section 7 (1) (*c*). The explanation to sub-section (2) provides that charitable purposes includes relief of the poor, education and medical relief: thus the income of any institution or trust of a public character established solely for the relief of the poor, education and medical relief is freed.

Neither the word "trust" nor the words "public character" are defined in the Ordinance. A person may settle property for the benefit of certain specific individuals, this would generally be recognised as a private trust. There may also be a settlement of property for the benefit of the public at large as the inhabitants of a particular tenement: such a grant would create that which is called a charitable, that is to say a public, trust or interest for the benefit of the free inhabitants of an ancient tenement: a trust of that kind would not in any way infringe the Law or rule against perpetuities for a trust for the benefit of private individuals or a fluctuating body of private individuals would if it creates a charitable, that is to say a public, interest be free from anything obnoxious to the rule with regard to perpetuities (L. Cairns, in Saltash's case—from 38 Ch. D. 532).

A charitable trust is sometimes referred to as a charitable institution or as a legal charity or as a charity. Mere kindness, generosity or benevolence on the settlor's part is not enough to constitute a charitable purpose. A charity should be unselfish, *i.e.* for the benefit of other persons than the settler. If it is the settler's intention to benefit certain specific individuals there is no public purpose and the gift is, therefore, not charitable. If the persons to be benefitted from a class worthy, in numbers or importance, of consideration as a public object of generosity the trust would be a public trust. A legal charity must be public.

"In the first place it may be laid down as a universal rule that the Law recognises no purpose as charitable unless it is of a public character. That is to say, a purpose must, in order to be charitable, be directed to the benefit of the community or a section of the community." Tudor on Charities, 5th Edn., page 11). Gavan Duffy, J.: "Courts of Equity have been consistently

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

insistence on the public character of a legal charity. Importing a benefit to the community or a section of the community ". (1945, 1 A. E. R. page 204). No gift can be charitable unless it is of the necessary public character (Greene, M. R., in *re* Compton) 1945, 1 A. E. R., p. 201. The public character of a trust is ascertained from the object of the trust : the trust must be for the benefit of the community or a section of the community.

The preamble of the Statute of 1601 gave a list of charitable objects, the enumeration contained therein is not exhaustive. This Statute was repealed by the Mortmain and Charitable Uses Act of 1888 but the enumeration of charitable objects contained in the preamble was reproduced by the Act of 1888. Charity in its legal sense, according to Lord Macnaghten, comprises four principal divisions :

(*a*) trusts for the relief of poverty ;

(*b*) trusts for the advancement of education ;

(*c*) trusts for the advancement of religion ;

(*d*) trusts for other purposes beneficial to the community not falling under any of the preceding heads.

Lord Macnaghten's " fourth heading does not contain the word " poor ". He does not say beneficial to the poorer members of the community : he says beneficial to the community. Did he mean his words to be read as confined to the poor ? Education and religion, two of the heads which he has just mentioned do not require any qualification of property to be introduced to give them validity. He goes on to say that the trusts referred to (*i.e.* the fourth class) are not less charitable in the eye of the Law, because incidentally they benefit the rich as well as the poor ". Lewin : Trusts (1928 Ed.) page 58.

There must be the element of poverty or need on the part of the object or else the gift must be dedicated to some purpose, such as education, religion or the like, which the Law regards as charitable. Charities may conveniently be grouped under two heads. The essential qualification of one group is poverty, the persons whom the settlor means to benefit are poor persons, no such qualification is required in the other group but the purpose of charity must be one of those referred to in the list *i.e.* education, religion or the like. Thus a gift to the free inhabitants of ancient tenements (in Saltash, 7 A. C. 633), a gift for a particular type of education (1891, A. C. 531, Pemsel's case), gifts for the benefit of ministers of religion in a particular place (6 Hare 453), a gift to the incumbent of a church for the time being (Amb. 201), are good charitable gifts—so is a trust for the occupiers of certain cottages, a comparatively small and tolerably well defined class (*re* Christchurch Inclosure Act, 1888, 38 Ch. D. 520). The education of the descendants of a named person is not one for the benefit of a section of the community (*re* Compton), nor is a trust to pay the holiday expenses of certain of one's work-people (*re* Drummond). Similarly a fund for the relief of air-raid distress among employees of a particular company is not a charitable trust (*re* Hoburn Aero Co., Ltd., 1946, 1 A. E. R. 501).

Attempts are sometimes made to show that trusts falling within class " b " or " c " or " d " above are trusts for the relief of poverty and are therefore valid trusts. In *re* Drummond, *re* Compton, in *re* Hoburn Aero Co., Ltd., and in Keren K. I. J. Ltd. *vs.* Inland Revenue (1932, A. C. 650) such attempts were made but as poverty did not seem to be a necessary qualification these attempts did not succeed.

Trusts for the relief of poverty stand on a different footing. The persons to be benefitted are poor and because they are poor they form a class worthy of consideration as an object of generosity. Besides gifts to the poor generally, gifts to particular classes of poor persons are also charitable *e.g.* the poor of a specified place or parish. So in *Bristow vs. Bristow* (1842) 5 Beav. 289, the relief of the poor " on my little estate of Suffolk ". Gifts to the inmates of a work-house, *A. G. vs. Vint* 1850, 3 De G. & S. 704, to widows and orphans (whether generally or of a specified class or place), *A. G. vs. Comber* 1824, 2 S. & S. 93 ; *Waldo vs. Caley* 1808, 16 Ves 206, to servants, *Reeve vs. A. G.* 1843, 3 Hare 191, poor housekeepers *A. G. vs Pearce* 1740, 2 A. I. R. 87, are all charitable : trusts to poor relations, whether generally, or of particular classes, such as descendants have been regarded as charities, *A. G. vs. Price* 1810, 17 Ves 371, and so also have gifts for the poor, with a preference for the testator's poor relations *Waldo vs. Caley* 1808, 16 Ves 206.

In *Isaac vs. Defriez* (1754), Amb. 595 there was a gift of two annuities to the poorest relations of the testator and of his wife, a gift of income to one poor relation of the testator and a similar gift of income to one poor relation of his wife. These gifts were upheld as good charitable gifts. This case was followed in *Attorney-General vs. Price* (1810, 17 Ves 371). Greene, M.R., reviews the cases decided since 1810 and continues " It will be seen that they are really all derived from *Isaac vs. Defriez* and *Attorney-General vs. Price*. We are invited to over-rule them. I agree that they are far from satisfactory and the original decisions were given at a time when the public character of a charitable gift had not been as

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

clearly laid down as it has been in more modern authorities...... But it is in my view quite impossible for this court to over-rule these cases...... There may perhaps be some special quality in gifts for the relief of poverty which placed them in a class by themselves. It may, for instance, be that the relief of poverty is to be regarded as in itself so beneficial to the community that the fact that the gift is confined to a specified family can be disregarded ", *re* Compton : see also H. Aero Co., Ltd., 1946, 1 A. E. R., page 508. Where there is a fund directed to the relief of poverty, there is a public element sufficient to give it the character of charity : there is a charitable gift even though those who are to participate in the liberality of the settlor are the poor of a particular town in which he lived or his poor kinsmen and kinswomen dwelling in his county or his descendants or poor relations.

A trust established for giving relief to certain persons would be a charitable trust if poverty is an essential qualification for the receipt of relief : if its purpose is not the relief of poverty it would be a private trust and would not fall within the class of charitable trusts (see Tudor on Charities) quoted at p. 507 and p. 508 of 1946, 1 A. E. R.). Thus a friendly society established to provide allowances to members would be a good charitable institution if poverty is an ingredient in the qualification of members who were to receive the benefits (*I. R. Comrs. vs. Medical Men*, 42, T. L. R. 612). If poverty is not required as a requisite for relief it would not be a charitable trust (*re* Clarke, 1875, 1 Ch. D. 497 ; *Brown vs. Dale*, 1879, 9 Ch. D. 78).

There is a public element in a gift to the poor, *i.e.* where a person must be poor to get relief from a fund, the receipients of the bounty then may be even a limited class of persons provided the individuals are not ascertained : if there is a public element in the gift, the trust dealing with that gift can be described as being one for the benefit of a section of the public *Spiller vs. Maude* 1946, 2 A. E. R., page 508.

The trust constituted by the testatrix is for the benefit of her poor relations : if the question arose in England, it would be difficult to come to any other conclusion than that this trust is a valid charitable trust. The authorities show that where a trust benefits the public or a section of the public, there is a trust of a public character (see Tudor on Charities, p. 11, 1945, 1 A. E. R. 204).

It is convenient to discuss the Indian decisions. The Charitable Endowments Act VI. of 1890 of India uses the words " charitable purposes " : the expression is defined as including relief of the poor, education, medical relief and the advancement of any other object of general public utility but not a purpose which relates exclusively to religious teaching or worship. It was passed one year before the case of *The Commissioner of Income Tax vs. Pemsel* was decided. The words of the section are for the advancement of any other object of general public utility whereas Lord Macnaghten's words were other purposes beneficial to the community. The rule against perpetuities is contained in section 14 of the Transfer of Properties Act of 1882. The exception in respect of charity is provided by section 18 which is in these terms : " The restrictions in section 14...... shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind ".

Section 4 (3) (1) of the Indian Income Tax Act (Act XI. of 1922) provides that the income derived from property held under trust or other legal obligation wholly for religious or charitable purposes and in the case of property so held in part only for such purposes the income applied or finally set apart for application thereto shall not be liable to income tax. The expression charitable includes " relief of the poor, education, medical relief and the advancement of any other object of general public utility " : the definition is the same as that contained in the Charitable Endowments Act of 1890. By an amendment made in 1939 a proviso was added—" but nothing contained in clause 1, clause (1a) or clause (11) shall operate to exempt from the provisions of the Act that part of the income of a private religious trust which does not ensure for the benefit of the public ".

The difference in language between Lord Macnaghten's words and those used in the Act particularly the inclusion of the words " public utility " is of importance.

It was stated in one of the cases *Com. of Income Tax vs. Mohamed Sahib* A. I. R. 1941, Madras 535 that the test of general public utility is the test so far as the income tax is concerned and that it is not necessary to consider whether a trust would be deemed to be charitable in England. It is suggested that though the words " general public" *prima facie* mean the public at large and not merely a section, if the object of a charity is to benefit a fairly large number of the public it would be sufficient *D. V. Arur vs I. T. Commissioner* 1946 A. I. R. Bom. 49 ; Tribune Press case 1939 A. I. R. (P. C.) 208 (supplying a province with an organ of educated public opinion).

The Indian Courts have excluded settlements made for poor relations of the family of the settler from the class of settlements saved from taxation under the Income Tax Act. The exemption in section 4 (1) only applies to a trust, the object of which is public utility

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Spinners' Association vs. I. T. Commr. 1944, A. I. R., P.C. 28 ; *Commissioner of Income Tax vs. Aga Abbas Ali*, A. I. R. Madras 292 ; *Commissioner of Income Tax vs. M. J. Mohamed Sahib*, A. I. R. 1941, Madras 535. Great importance has been attached to the presence of the words " general public utility ". Such settlements as do not benefit a large number of the public are not charitable.

The discussion of cases where a similar question has arisen on an act which is differently framed does not clarify the position. There seems to be no reason for reading into the words " public character " limitations found in a similar statute of another country. Where the two statutes happen to deal with the same subject their wording is not the same. The language used in the two sections is not even " practically identical ".

It is thus a question of interpreting the words used in the Ceylon Ordinance. There must be a public element in a charitable trust according to the Income Tax Ordinance, the same element is required for the constitution of a charity according to English Law : the public element of the latter is furnished by the presence of a benefit to the community or a section of the community. A settlement for the benefit of the poor relations of the settler is recognised by English Law as one that has a public element as it confers a benefit on at least a section of the community.

The answer to the first question in the case stated is in the affirmative. As no dispute has been raised about the other purposes of the instrument of trust, the answer to the second question is also in the affirmative.

The appeal is allowed with costs. The appellants are entitled to the refund of the sum of Rs. 50 deposited by them under section 74 (1) of the Income Tax Ordinance.

HOWARD, C.J.

I agree.

Appeal allowed.

CASE STATED

Under the provisions of Section 74 of the Income Tax Ordinance (Chapter 188) for the opinion of the Honourable the Supreme Court of the Island of Ceylon upon the application of the Trustees of the Wijewardene Charitable Trust..*Appellants.*

1. The Appellants are the Trustees appointed under the Last Will of Mrs. Helena Wijewardene, deceased, who died in the year 1940.

2. By Clause 7 of the said Last Will the deceased devised certain properties to her Trustees in trust to use the nett income thereof for the following purposes :—

(*a*) To continue gradually the restoration work now being carried on by me at the Kelaniya Temple ;

(*b*) To aid either occasionally or regularly my " relations " who are or may become poor including " members of my own family " and who in the judgment of my Trustees are in need of such aid in consequence of illness financial difficulties and the like or on the occasion of marriage, deaths and the like ;

(*c*) To support in such manner and to such extent as my Trustees may think fit such Buddhist charitable institutions and temples as my trustees may from time to time select ;

In carrying out the said Trust my Trustees may devote the income to the said purposes in such proportions as they may think fit and they shall have an absolute discretion in the administration of this Trust and no question whatever shall be raised as to the manner in which they distribute the income of the said Trust properties or as to their choice of the objects of the Trust.

3. The Assessor assessed the income tax payable on the income from the Trust property for the years of assessment 1940-41, 1941-42, 1942-43 and 1943-44 at Rs. 575.70, Rs. 1,609.80, Rs. 1,457.40 and Rs. 1,795.80 respectively, and the Appellants appealed against the said assessments to the Commissioner of Income Tax.

4. In the said years of assessment the income from the Trust property was distributed as shown in the Statement which was produced at the hearing before the Commissioner, marked A3, and which is annexed hereto marked X1.*

5. The Commissioner of Income Tax heard the appeal on the 20th of July, 1944, and confirmed the assessments. His determination and the reasons therefor are set out in the copy of the proceedings, which is annexed hereto marked X2.

6. The Appellants thereupon appealed to the Board of Review constituted under the Income Tax Ordinance on the grounds set out in the letter of their Proctor, dated 9th August, 1944, a copy of which is annexed hereto marked X3.*

7. At the hearing of the appeal by the Board of Review the Appellants contended that the whole income from the Trust property was exempt from income tax under the provisions of Section 7 (1) (*c*) of the Income Tax Ordinance for the following reasons :—

(*a*) Clause 7 (*b*) of the Last Will is directed to a charitable purpose, namely, the relief of the poor within the meaning of the definition of " charitable purpose" in Section 2 of the Income Tax Ordinance ; and

(*b*) the deceased's " relations who are or may become poor " are members of the public and the trust is, therefore, " of a public character ".

8. The Assessor contended that the income of the Trust property is not exempt from taxation because a charitable trust must be directed to the benefit not of private individuals but of the community or a section of the community and that in view of Clause 7 (*b*) of the Last Will it could not be said that this Trust was " established solely for charitable purposes ".

9. It is not disputed that the income from the Trust property would be exempt from income tax if clause 7 of the Last Will did not contain sub-clause (*b*).

10. The Board of Review dismissed the appeal of the Appellants and confirmed the assessments by its Order dated 10th January, 1945, a copy of which is annexed hereto marked X4.*

11. The annexures hereto, marked X5* and X6,* are copies respectively of a letter dated 14th April, 1944, from

* Not reproduced.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

the Appellants' Accountants to the Assessor and of the reply thereto, dated 5th June, 1944, both of which were produced at the proceedings before the Commissioner of Income Tax and marked A1* and A2* respectively.

12. The Appellants are dissatisfied with the decision of the Board of Review and have requested the Board to state a case for the opinion of the Honourable the Supreme Court on the questions of law involved on the appeal, which are as follows :—

(*a*) In view of the provisions of Clause 7 (*b*) of the Last Will of the deceased, is the Trust " of a public character " within the meaning of Section 7 (1) (*c*) of the Income Tax Ordinance ?

(*b*) In view of the provisions of the said Clause 7 (*b*) has the Trust been " established solely for charitable purposes " within the meaning of the said Section 7 (1) (*c*) ?

If the answer to either of the above questions is in the negative, then the income from the Trust property is liable to income tax and the assessments made should be confirmed.

We have accordingly stated and signed this case.

Colombo, February, 1945.

(1)

(2)

(3)

Members of the Board of Review, Income Tax.

COMMISSIONER'S FINDING

Determination and Reasons under Section 71 (2) of the Income Tax Ordinance

Appeal of the Trustees of the Wijewardene Charitable Trust against assessments made on them for the four years of assessment 1940-41, 1941-42, 1942-43 and 1943-44, heard by the Commissioner of Income Tax on 20th July, 1944.

For the Appellants : Mr. J. E. M. Obeyesekere, Advocate,
Mr. D. H. P. Munaweera, Accountant,
Mr. D. R. Wijewardene, Trustee.

Supporting the Assessment : Mr. D. G. Obeyesekere, Asst. Assessor.

	1940-41 Rs. c.	1941-42 Rs. c.	1942-43 Rs. c.	1943-44 Rs. c.
Income assessed	3,838 00	10,732 00	9,716 00	11,972 00
Tax	575 70	1,609 80	1,457 40	1,795 80
Tax in dispute	575 70	1,609 80	1,457 40	1,795 80

Witnesses : None.

Productions : A1—Accountant's letter of 14th April, 1944, to the Assessor.
A2—Assessor's reply of 5th June. 1944.
A3—Statement of distribution of income of the Trust.

Grounds of Appeal.—The trust has been created for charitable purposes and as such the income of the trust is not assessable for income tax.

Facts.—(1) The late Mrs. Helena Wijewardene, who died in the year 1940, left a Last Will dated 20th July, 1935, in respect of which probate has been granted. In clause 7 of the Will the testatrix gives certain property, namely, houses in Colombo and an estate, to her three sons in trust to use the net income thereof for the following purposes :—

" (*a*) To continue gradually the restoration work now being carried on by me at the Kelaniya Temple ;

" (*b*) To aid either occasionally or regularly my relations who are or may become poor including members of my own family and who in the judgment of my Trustees are in need of such aid in consequenc of illness financial difficulties and the like or on the occasion of marriage deaths and the like ;

" (*c*) To support in such manner and to such extent as my Trustees may think fit such Buddhist charitable institutions and temples as my Trustees may from time to time select. In carrying out the said Trust my Trustees may devote the income to the said purposes in such proportions as they may think fit and they shall have an absolute discretion in the administration of this Trust and no question whatever shall be raised as to the manner in which they distribute the income of the said Trust properties or as to their choice of the objects of the Trust."

(2) The Assessor considered that the income of the trust was liable to income tax for the reason that clause (*b*) is not a charitable purpose and therefore the trust is not one solely for charitable purposes, and made assessments for the four years above referred to. The appeal is against these assessments.

Arguments for the Appellant.—(1) The definition of " charitable purpose " in section 2 of the Income Tax Ordinance uses the word " includes " and is not exclusive of other forms of charity besides those mentioned in the definition.

(2) Section 99 (1) of the Trust Ordinance defines a charitable trust as one " for the benefit of the public or any section of the public ". The testatrix's relatives are a section of the public. See *Konstam* 1943, *pages* 249 *and* 250 ; *Finance Act* 1918, *section* 37 (1) ; *Jackson's Trustees vs. Lord Advocate*, 10 *T. C.*, 460 ; *Spiller vs. Maude* (1886) 32 *Chancery Division, page* 158 ; *Commissioners of Inland Revenue vs. Society for Relief of Widows' and Orphans of Medical Men*, 1926, *Volume* 42, *Times Law Reports, page* 612.

* Not reproduced.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Arguments of the Assessor.—(1) In order that the income of a trust may get the benefit of exemption, its objects must be solely charitable. If there is any clause giving the trustees power to devote the funds for a purpose other than charitable the whole income is liable. See in *re Probynabad Stud Farm* 1936, *I. T. R.* 114 (Sundaram, page 412), and *Rex vs. Special Commissioners of Income Tax*, 8 *T. C.* 286.

(2) A charitable purpose must be directed to the benefit of the community or a section of the community and not to the benefit of any private individuals. See passage from Tudor on Charities quoted in 5 *Indian Tax Cases*, page 410, and passage from Lord Wrenbury's judgment in *Verge vs. Somerville*, 1924 A. C. 596, quoted in Sundaram, *5th Edition, page* 410.

Commissioner's Determination.—The assessments are confirmed.

Reasons for the determination.—The provision of the Income Tax Ordinance granting exemption in respect of charities is section 7 (1) (*c*), which exempts—

> " (*c*) the income of any institution or trust of a public character established solely for charitable purposes."

The words " of a public character " indicate that a trust of a private character would not be entitled to the exemption. " Charitable purpose " is defined in section 2 as including " the relief of the poor, education, and medical relief ". The Assessor's objection is to clause (*b*) of the trust which contains provision for the relief of the testatrix's poor relations. Section 99 (1) of the Trust Ordinance defines a charitable trust as a trust " for the benefit of the public or any section of the public ". This aspect of the matter is further clarified by the authorities quoted by the Assessor. Tudor on Charities says : " In the first place it may be laid down as a universal rule that the law recognises no purpose as charitable unless it is of a public character ; that is to say, a purpose must, in order to be charitable, be directed to the benefit of the community or a section of the community ". Lord Wrenbury in the case quoted by the Assessor says : " To ascertain whether a gift constitutes a valid charitable trust a first enquiry must be held whether it is public,—whether it is for the benefit of the community or an appreciably important part of the community. The inhabitants of a Parish or town or any particular class of such inhabitants may for instance be the objects of such a gift, but private individuals or a fluctuating body of private individuals cannot."

2. Mr. J. E. M. Obeyesekere's argument was that the persons mentioned in clause (*b*) of the Last Will are a section of the public. In other words, that the relations of the late Mrs. Wijewardene are, for the purposes of applying this principle, a section of the public. I enquired from Mr. Obeyesekere whether he would go so far as to say that, even if the testatrix had narrowed the persons to be benefitted by the trust to her children only, he would still say that these children would be " a section of the public ". Mr. Obeyesekere said he would. I cannot agree with this application of the principle. It is true that every individual is in a sense a member of the public, but the distinction which Lord Wrenbury draws between " the community " or " an appreciably important part of the community ", and " private individuals ", goes to the root of the distinction between " public " and " private ". There can, to my mind, be no clearer classification to illustrate that distinction than the members of a particular family on the one hand and a section of the community in general on the other.

3. The cases quoted by counsel for the appellant do not, in my opinion support his argument. In 10 T. C., 460, the persons to be benefitted were " tea planters, their wives and families, during sickness while in India ". It was held that these persons were a section of the public. In the case decided in the Chancery Division the trust was for the benefit of members of the York Theatrical Society who happened to be in indigent circumstances. It transpired in that case that eventually there was only one such member. It was held, however, that the purpose was charitable, in that the beneficiaries were a section of the public. In the case reported in the Times Law Reports the trust was for the relief of widows and orphans of medical men. The facts of all three cases relate, in my opinion, to classes of persons of quite a different category to the members of a family. They rather illustrate the distinction between the public or a section of the public on the one hand, and private individuals, in which class one must surely include, if one includes any one at all, the members of a family.

4. Section 7 (1) (*c*) states that the trust must be one solely for charitable purposes. In other words, as the cases cited by the Assessor indicate, where there is a purpose other than charitable, the exemption fails. Hence while the purposes (*a*) and (*c*), which are religious, may be considered charitable purposes, the purpose (*b*) not being a public charity, the exemption fails.

Sgd. T. D. PERERA,
Commissioner of Income Tax.

Colombo, July 25, 1944.

IN THE PRIVY COUNCIL

Present : LORD WRIGHT, LORD DU PARCQ, SIR JOHN BEAUMONT

THE KELANI VALLEY MOTOR TRANSIT COMPANY, LIMITED vs. THE COLOMBO-RATNAPURA OMNIBUS COMPANY, LIMITED.

PRIVY COUNCIL APPEAL No. 90 *of* 1945.

Judgment of the Lords of the Judicial Committee of the Privy Council, Decided on the 7th May, 1946.

Motor Car Ordinance, No. 45 *of* 1938—*Omnibus Service Licensing Ordinance, No.* 47 *of* 1942—*Exclusive road service licence—Meaning of " route " and " highway."*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Both parties to this case applied for a road service licence for the route Colombo-Ratnapura. The respondent had the greater number of omnibus licences covering that route. The appellant had more licences if his omnibuses, licensed for the route Panadure to Badulla *via* Colombo-Ratnapura, were taken into consideration.

Held : That the two routes were not the same and that the only omnibus licenses to be reckoned for the purposes of the road service licence were those confined to the Colombo-Ratnapura route.

Per SIR JOHN BEAUMONT—In their Lordships' opinion it is impossible to say that " route " and " highway " in the two Ordinances are synonymous terms. In both Ordinances, particularly in Section 54 of the original Ordinance and Section 7 of the amending Ordinance, the two words are used, and certainly not interchangeably. A " highway " is the physical track along which an omnibus runs, whilst a " route " appears to their Lordships to be an abstract conception of a line of travel between one terminus and another, and to be something distinct from the highway traversed.

SIR JOHN BEAUMONT.

This is an appeal by special leave from the judgment of the Supreme Court of Ceylon dated the 21st June, 1943, reversing a majority decision of the Tribunal of Appeal constituted under the Motor Car Ordinance (No. 45 of 1938) which had affirmed an order of the Commissioner of Motor Transport dated 13th January, 1943, granting to the appellant and refusing the respondent an Exclusive Road Service Licence under the Omnibus Service Licensing Ordinance (No. 47 of 1942) for the route from Colombo to Ratnapura.

The question at issue is whether the appellant or the respondent at the material date held the greater number of licences authorising the use of omnibuses on the route Colombo to Ratnapura, and the answer to that question depends upon whether the only licences to be reckoned under the relevant legislation are those confined to the route Colombo to Ratnapura as the respondent contends, or whether licences covering the whole of that route and also some further distances beyond Colombo or Ratnapura or both are to be reckoned, as the appellant contends.

To determine this question it is necessary to notice the relevant provisions of the Motor Car Ordinance (No. 45 of 1938) (hereinafter referred to as " the original Ordinance ") and the Omnibus Service Licensing Ordinance (No. 47 of 1942) (hereinafter referred to as " the amending Ordinance "). In the first schedule to the latter Ordinance occur the actual words which have to be construed. The original Ordinance so far as relevant contains the following provisions. Section 29 (1) provides that no person shall possess or use a motor car for which a licence is not in force. Section 43 (2) (*a*) provides that every applicant for a licence for an omnibus shall specify in his application particulars of the route or routes on which it is proposed to provide a service under the licence. Under Section 45 (1) (*a*) every licensing authority shall forward to the Commissioner every application received by that authority for a licence for an omnibus, together with a recommendation upon the application. Under Section 47, the Commissioner in deciding whether an application for a licence for an omnibus should be granted or refused, has to consider amongst other things whether by reason of the length of the proposed route or routes or the extent of the area covered thereby, the service under the licence will be efficient and likely to provide adequately for the needs of the public. Under Section 48 (1) where, upon an application for a licence for an omnibus, the Commissioner decides that the licence should be granted, he has to determine the route or routes in respect of which licences may be issued. Section 50 provides for an appeal from a decision of the Commissioner to the Tribunal of Appeal of which the constitution and powers are defined by the Ordinance. Under Section 52 the Commissioner is required to communicate to each licensing authority his decision upon applications made to him. Section 54 (1) is important and is in the following terms : " Every licensing authority shall specify on every licence for an omnibus issued by that authority (*a*) the approved route or routes on which that omnibus may ply or stand for hire, and the number, if any, assigned to each route under Section 57 ; (*b*) the two places which shall be the termini of each such route ; and (*c*) the highway or the several highways to be followed by the omnibus in proceeding from one terminus to the other ". Under Section 57 (1) the Commissioner may classify and number, in such manner as may be convenient, the approved routes in respect of which licences for omnibuses are issued, and he is required to publish in the Gazette a list of the routes so classified and numbered. Section 116 makes it an offence for an omnibus to ply or stand for hire on any route other than an approved route specified on the licence of that omnibus or which, starting from one terminus of an approved route fails to complete a journey along that route to the other terminus, except as therein mentioned. It may be noticed also that form 12, which is the form of application for a licence for an omnibus, requires the application to state the route for which the licence is required, giving the two termini of the route and intermediate highways proposed to be followed, and the form of licence to be granted, which is form 18, states that the omnibus licence is to be used only on the specified route from one place to another.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

It will be observed that the scheme of the original Ordinance was to license particular omnibuses to be used on specified routes. It would appear that that system led to undesirable competition, and under the amending Ordinance a system was introduced of licensing particular routes and assigning each route to a particular owner.

Under Section 2 (1) of the amending Ordinance it is provided that no omnibus shall, after the date specified, be used on any highway for the conveyance of passengers for fee or reward, except under the authority of Road Service Licences issued by the Commissioner of Motor Transport under the Ordinance. Under Section 3 (1) (*a*) every application for Road Service Licences shall be made to the Commissioner in such form as he may provide and has to contain (*a*) particulars of the route or routes on which it is proposed to provide the service. Section 4 specifies the matters to be considered by the Commissioner on application for Road Service Licences, and amongst other things he is required to have regard to (1) the suitability of the route or routes on which it is proposed to provide a service under the licence, (2) the extent to which the needs of the proposed route or routes are already adequately served, and (3) the needs of the area as a whole in relation to traffic. Section 5 provides that in any case where the Commissioner decides to grant any application for a road service licence for a regular service, he shall specify in the licence the route or routes on which the service is to be provided under the licence. Section 6 deals with the conditions which the Commissioner may attach to road service licences. Condition (*e*) provides that, in a case where licences are issued to different persons in respect of the same section of a highway or where any route or part thereof lies within the administrative limits of any local authority, passengers shall not be taken up or shall not be set down except at specified points or between specified points. Section 7 (1) provides " 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 convenience 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 purpose 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." Section 13 regulates appeals from the Commissioner to the Tribunal of Appeal, and section 18 directs that the provisions set out in the first schedule to the Ordinance shall apply in relation to the consideration by the Commissioner of applications for road service licences to come into force on or before the 1st January, 1943, in relation to the issue of any such licence.

The first paragraph of the First Schedule so far as material, is in the following terms :—

> " 1. In the event of applications being made by two or more persons for road service licences to come into force on or before January 1, 1943, in respect of the same route or of routes which are substantially the same, the Commissioner shall, subject to the provisions of section 4 of the Ordinance, observe the following order of preference in deciding which application should be granted :—
>
> (i.) Firstly, an application from a company or partnership comprising the holders of all the licences for the time being in force under the Motor Car Ordinance, No. 45 of 1938, authorising the use of omnibuses on such route or on a route substantially the same as such route, or from a company or partnership which, or an individual who, has acquired the interests of the holders of all such licences.
>
> (ii.) Secondly, an application from a company or partnership comprising the holders of the majority of the licences referred to in sub-paragraph (i.), or from a company or partnership which, or an individual who, has acquired the interests of the holders of the majority of such licences."

The second paragraph deals with compensation to be paid by a successful applicant to an unsuccessful rival, and this paragraph has been amended to meet the position under the judgment of the Supreme Court that the provisions for compensation do not affect the question involved in this case, and they need not be discussed.

Both the applicant and the respondent made applications for road service licences for the route Colombo to Ratnapura, and on the 13th January, 1943, the Commissioner of Motor Transport decided that in accordance with the provisions of the First Schedule to the amending Ordinance, the appellant was entitled to the licence. It is not disputed that the respondent at the date of application had the greater number of licences confined to the route Colombo to Ratnapura, but if licences covering that route and extending beyond it were taken into account, the appellant had the greater number. On appeal to the Tri-

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

bunal of Appeal that tribunal, on the 28th February, 1943, by a majority of 2 to 1, upheld the decision of the Commissioner. On the application of the parties, a case was stated by the Tribunal of Appeal to the Supreme Court and the case was heard on the 21st June, 1943, by Mr. Justice de Kretser, who overruled the decision of the Tribunal of Appeal, and held the respondent to be entitled to the licence. From that decision this appeal is brought.

The difference of opinion between the expert authorities in Ceylon shows that the question at issue is not free from doubt, but it lies within a narrow compass and does not admit of elaborate discussion. It was agreed before the Tribunal, and in the Supreme Court, that the question really turned on whether the appellant could take into account for the purpose of the First Schedule to the Amending Ordinance, six omnibuses which had been licensed for the route Panadure to Badulla *via* Colombo and the low level road, since those omnibuses turned the scale between the parties. It appears that Panadure is some 16 miles along the coast to Colombo, thence from Colombo to Ratnapura is some 50 miles, and from Ratnapura to Badulla is a further 80 miles. It is obvious therefore that the route Panadure to Badulla is not the same or substantially the same route as the route Colombo to Ratnapura, and this has never been the appellant's case. His case is that a licence for an omnibus on the route Panadure to Badulla is a licence authorising the use of the omnibus on the route Colombo to Ratnapura since the whole of that route is covered by the licence in respect of the longer route. If " route " has the same meaning as the " highway" in the Ordinance this argument must prevail, since admittedly an omnibus running on the highway from Panadure to Badulla will pass over the whole of the highway between Colombo and Ratnapura, but in their Lordships' opinion it is impossible to say that " route " and " highway " in the two Ordinances are synonymous terms. In both Ordinances, particularly in Section 54 of the original Ordinance and Section 7 of the Amending Ordinance, the two words are used, and certainly not interchangeably. A " highway " is the physical track along which an omnibus runs, whilst a " route " appears to their Lordships to be an abstract conception of a line of travel between one terminus and another, and to be something distinct from the highway traversed. If the Commissioner of Transport numbers routes, as he may do under Section 57, he is hardly likely to assign the same number to the route Colombo to Ratnapura as to the route Panadure to Badulla. The Commissioner has to work out the routes on which a public transport service is to be provided, and in so doing he may have to specify the highway to be followed by the route since there may be alternative roads leading from one terminus to another, but that does not make the route and highway the same. In their Lordships' view it is of the essence of a route for which a licence is granted that it should run from one terminus to another. That will ensure a service between the two termini, and may also provide, though with less certainty, a service for the use of intermediate places. But as Mr. Justice de Kretser pointed out, theoretically, at any rate, an omnibus running from Panadure to Badulla may be full when it reaches Colombo or Ratnapura, and will not necessarily provide a service for either of those places. As counsel on both sides admitted, it is possible for a person of ingenuity to suggest anomalies, and even hardships, which may arise whichever construction is placed upon the First Schedule to the Amending Ordinance, but such considerations cannot govern the question of construction if the words are clear.

For these reasons, which are substantially those which appealed to Mr. Justice de Kretser, their Lordships think that the decision of the Supreme Court was right.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed with costs.

Appeal dismissed.

Present : Howard, C.J.

AGRIS APPUHAMY & ANOTHER vs. RAJASURIYA, INSPECTOR OF POLICE

S. C. No. 690-91—*M. C. Colombo No.* 14738.

Argued and decided on : 9th July, 1946.

Evidence—Admissibility—Confession to person in authority—Made under threat and inducement—Evidence Ordinance, Section 24.

The first and second accused were convicted solely on the statements made by the second accused to the Chief Storekeeper of the Co-operative Wholesale Establishment, who was acting under orders of the Deputy Commissioner when threatened by the latter to take them to the police.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The second accused also made a statement in the presence of the Storekeeper acting on an inducement by a third person.

Held : (1) First statement was made under a threat to a person in authority, and therefore is inadmissible.
(2) The second statement is also inadmissible because of the inducement under which it was made.

No appearance for the 1st accused-appellant.

H. V. Perera, K.C., with *Stanley Alles*, for the 2nd accused-appellant.

HOWARD, C.J.

In this case the Magistrate permitted certain statements made by the two accused to Mr. Canagasooriyam, Chief Storekeeper, Co-operative Wholesale Establishment, to be admitted in evidence. Without these statements, there was no evidence on which either of the accused could have been convicted. The 2nd accused's statements, which are embodied in the exhibit P5, were made to Mr. Canagasooriyam after the latter had told the two accused that he would hand them over to the Police if they did not make statements. It was after this threat that they made their statements. In my opinion, Mr. Canagasooriyam was a person in authority over the accused. In his evidence, he says he reported the matter to the Deputy Commissioner and that, on the instructions of the Deputy Commissioner, he asked the accused to make statements to him. It is, therefore, clear that, whatever his own authority over the two accused was in this matter, he was acting as the agent of the Deputy Commissioner. This statement, like the statements made by the 2nd accused which are embodied in P5, was clearly inadmissible in evidence. In these circumstances, there was no evidence at all against the 1st accused, and the conviction against him is set aside.

As regards the 2nd accused, it would appear that previously he had made another statement to Mr. Canagasooriyam. This statement was made after a suggestion had been made by a man called Edirisinghe who, according to the evidence of Mr. Canagasooriyam, made the following remark to the accused :—" There is the big boss, you go and tell him the truth ". In my opinion, this amounts also to an inducement to the 2nd accused to go and make a statement to Mr. Canagasooriyam. I think this statement was also inadmissible and, in these circumstances, there is no evidence against the 2nd accused and his conviction too is set aside.

Convictions of both accused set aside.

Present : JAYETILEKE, J.

RAPHIEL APPUHAMY vs. ALAGIAH, S. I. POLICE

S. C. No. 278—*M. C. Gampaha No.* 29921.
Argued on : 11th July, 1946.
Decided on : 19th July, 1946.

Criminal Procedure—Conviction set aside due to irregularity in proceedings—Retrial—When it may not be ordered.

The conviction was quashed on the ground that the proceedings were irregular, and the Supreme Court refused to direct further proceedings to be taken against the accused as it was satisfied that it was not safe to act on the evidence for the prosecution.

N. E. Weerasooriya, K.C., with *Fernandopulle*, for the accused-appellant.

Weeraratne, C. C., for the Attorney-General.

JAYETILEKE, J.

The Magistrate has failed to record the evidence of Charles Appuhamy afresh after he decided to assume jurisdiction under section 152 (3) of the Criminal Procedure Code. The proceedings are therefore irregular and should be quashed. The only other question is whether the case should be sent back for fresh proceedings to be taken. I have perused the evidence in this case carefully and have come to the conclusion that the accused should not be put to the anxiety and expense of another trial. To my mind the evidence appears to be highly artificial. Besides, the accused is a person who is possessed of 25 head of cattle and it seems unlikely that he would have stolen complainant's cow. The evidence shows that the complainant was ill-disposed towards the accused and I do not think it is safe to act on his evidence. I would set aside the conviction and sentence and direct that no further proceedings be taken against the accused.

Conviction and sentence set aside.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present : JAYETILEKE, J.

SINNALEBBE & ANOTHER vs. KANDIAH, INSPECTOR OF POLICE

S. C. No. 633-4—*M. C. Kalmunai No.* 1581.
Argued on : 21st June, 1946.
Decided on : 9th July, 1946.

Forest Ordinance (*Chap.* 311)—*Transport of timber by accused on permit—Refusal of Forest Guards to allow them to proceed—Attempt to take accused to Headman to get permit read—Is such conduct legal—Does it amount to arrest.*

Held : (i.) That there is nothing in the Forest Ordinance (Chap. 311) which empowers a Forest Guard to stop a person who is transporting timber on a permit and to take him out of his way in order to get the permit read.

(ii.) That the refusal of a Forest Guard to allow such person to proceed on his journey amounted to an illegal arrest of that person.

Cases referred to : Goonesekera vs. Appuhamy. 37 N. L. R. 11
The King vs. Simon Appu. 38 N. L. R. 240

R. L. Pereira, K.C., with *C. T. Olegesegeram*, for the accused-appellants.
V. T. Thamotheram, C. C., for the Attorney-General.

JAYETILEKE, J.

On the night of September 30, 1945, the accused were transporting some timber in six carts when they were stopped by three Forest Guards and questioned whether they had a permit. The 1st accused produced the permit P1 which is written in Sinhalese. The Forest Guards could not read the permit, and in order to get it read by the headman, they requested the accused to turn the carts and go with them to the headman's house. After going some distance the accused refused to go further. The Forest Guards insisted on their going, and this led to a quarrel in the course of which the 2nd accused struck one of them on the head with a club which caused a lacerated scalp deep wound. The medical evidence shows that the injury was non-grievous. Through fear, one of the Forest Guards fired a gun, which he had with him, into the air, whereupon, the 1st accused snatched the gun out of his hands and ran away. The 1st accused was convicted of robbery of the gun and sentenced to 6 months' rigorous imprisonment, and of voluntarily causing hurt and sentenced to 3 months' rigorous imprisonment, the sentences to run concurrently. The 2nd accused was convicted of voluntarily causing hurt and sentenced to 6 months' rigorous imprisonment. On appeal it was argued that the refusal of the Forest Guards to allow the accused to proceed on their journey amounted to an arrest and that, in the absence of a warrant, the arrest was wholly illegal. At the trial the validity of the permit P1 was not questioned by the prosecution. Section 27 of the Forest Ordinance (Cap. 311) empowers a Forest Officer to stop and examine any timber during transit and to detain it if it is, in his opinion, being removed contrary to the provisions of the Ordinance, and to deal with it as provided in Chapter VII. Sections 37 and 38 which are in Chapter VII., provide that a Forest Officer may seize any timber when he has any reason to believe that a forest offence has been committed, and that, when he seizes any timber, he should place a mark on it indicating that it has been seized, and make a report of the circumstances to the Government Agent. The evidence in this case does not show that the Forest Guards exercised the powers conferred on them by sections 27, 37 and 38. On the contrary, it shows that they wanted to take the accused and the timber to the village headman's house in order to decide whether they should exercise those powers. There is nothing in the Ordinance which empowers a Forest Guard to stop a person who is transporting timber on a permit and take him several miles out of his way in order to get the permit read. Section 48 (1) gives a Forest Officer the right to arrest without a warrant any person reasonably suspected of having been concerned in any forest offence punishable with imprisonment for one month or upwards, only if such person refuses to give his name and residence or gives a name and residence which there is reason to believe to be false or if there is reason to believe that he will abscond. The Forest Guards had no warrant to

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

arrest the accused and there is no evidence that they asked the accused for their names and residences or that they had reason to believe that they would abscond. In my opinion the detention of the timber and the arrest of the accused were illegal. Learned Crown Counsel, sought to support the convictions under section 92 (1) of the Penal Code which reads :—

> "There is no right of private defence against an act which does not reasonably cause the apprehension of death or grievous hurt, if done, or attempted to be done by a public servant acting in good faith under colour of his office, though that act is not strictly justifiable in law."

In *Goonesekera vs. Appuhamy* (37 N.L.R. 11) and *The King vs. Simon Appu* (38 N. L. R. 240) it was held that the exception was available unless the act was wholly illegal.

I think that the accused were exempted by section 92 and that they are entitled to be acquitted on count 2. So far as the conviction of the 1st accused on count 1 is concerned I see no reason to interfere with it. But in the circumstances of this case, I think that the sentence imposed on the 1st accused is too severe. Mr. Pereira suggested that the 1st accused snatched the gun from the hands of the Guard and ran away through fear that he would be shot. There seems to be some force in that suggestion but there is no evidence to support it. If that is really what happened the 1st accused should have gone into the witness-box and said so and should also have returned the gun. I think the ends of justice will be served if the 1st accused is sentenced to one month's rigorous imprisonment and to pay a fine of Rs. 100 on count 1. If the fine is not paid he will suffer rigorous imprisonment for a further period of one month. The convictions and sentences on count 2 are set aside.

Convictions and sentences varied.

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

KURUKKAL vs. SARMA

S. C. No. 354—*D. C.* (*F*) *Point Pedro No. S* 2.

Argued on : 16th July, 1946.

Decided on : 26th July, 1946.

Promissory note—Action by endorsee—Defence of payment to payee—Unstamped receipt given by payee—Section 35, *proviso* (*b*) *of the Stamp Ordinance—Is such receipt admissible in evidence against the endorsee.*

Held : That an unstamped receipt given by the payee of a promissory note to its maker is not admissible in evidence against the endorsee in an action by the latter against the maker.

Cases referred to : Fletcher vs. Sands. 3 Bing. 580

A. Gnanapragasam, with *Arulambalam,* for the defendant-appellant.

S. J. V. Chelvanayagam, for the plaintiff-respondent.

JAYETILEKE, J.

This is an action on a promissory note. The plaintiff, who is the endorsee of the note, instituted this action against the defendant who is the maker, for the recovery of a sum of Rs. 650 being principal and interest due on the note.

The defendant pleaded in answer to the claim that he paid the full amount due on the note to the payee before the latter endorsed the note to the plaintiff.

At the trial the defendant sought to produce a receipt alleged to have been given to him by the payee for the alleged payment. That receipt was objected to by plaintiff's counsel on the ground that it was not stamped, and the objection was upheld by the trial judge. Mr. Arulambalam contended that the trial Judge should have admitted the document on the payment of a penalty of one rupee by the defendant under proviso (*b*) to Section 35 of the Stamp Ordinance (Chapter 189).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The proceedings do not show that the defendant's counsel had during the course of the trial, invited the trial Judge's attention to the provisions of proviso (*b*) to Section 35, or that he had shown his readiness and willingness to pay the penalty in case the Court held that the document could be admitted in evidence. However that may be, the point is now taken before us and we have to adjudicate upon it. The section reads :

No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon by any such person or by any public officer, unless such instrument is duly stamped : Provided that—

(*a*) any such instrument not being an instrument chargeable with duty of five cents only or a bill of exchange or promissory note shall, subject to all just exceptions and to the provisions of section 36, be admitted in evidence on payment of the duty with which the same is chargeable, or, in case of an instrument insufficiently stamped, of the amount required to make up the duty together with a penalty :—

	Rs. c.
(1) in cases where the duty or penalty does not exceed Rs. 2	2 50
(2) in cases where the duty or deficiency exceeds Rs. 2 but does not exceed Rs. 7.50 ...	5 00
(3) in cases where the duty or deficiency exceeds Rs. 7.50 but does not exceed Rs. 20...	10 00

(4) where the duty or deficiency exceeds Rs. 20 the amount of the penalty to be imposed shall be determined by the Commissioner of Stamps.

(*b*) where any person from whom a stamped receipt could have been demanded has given an unstamped receipt, and such receipt if stamped would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it.

Proviso (*a*) furnishes an exception to the rule enacted in the section. Proviso (*b*) takes a receipt which is not duly stamped out of the exception made by proviso (*a*). Under proviso (*b*) an unstamped receipt can be admitted in evidence against a person who ought to have stamped it on payment of a penalty of one rupee by the person tendering it. To me it seems clear that, according to the use of language which, in the absence of some compelling context, I must suppose the Legislature to have intended, the object of the proviso is to prevent the exclusion of a receipt from evidence against the person through whose fault it was not stamped. Mr. Arulambalam contended that proviso (*b*) would apply to this case as the plaintiff had derived his title to the note from a person against whom the receipt would have been admissible on payment of a penalty. I am not convinced that I ought to accept that submission in view of the very clear language of the proviso. The proviso says that the receipt is admissible, not generally, but only against the person who issued it unstamped. A proviso has to be construed strictly and the rule of strict construction requires that the language shall be so construed that no case shall be held to fall within it which do not fall both within the reasonable meaning of its terms and the spirit and scope of the enactment. (Vide *Fletcher vs. Sands* 3 Bing. 580).

The conclusion to which I have come as a matter of interpretation of the relevant words of proviso (*b*) is that the receipt is not admissible against the plaintiff. The appeal is accordingly, dismissed with costs.

WIJEYEWARDENE, S.P.J.
I agree.

Appeal dismissed

Present : HOWARD, C.J.

DIAS vs WIJETUNGA

S. C. No. 1271—*M. C. Colombo No.* 4965.
Argued on : 22nd and 24th May, 1946.
Decided on : 3rd June, 1946.

Cheating—Evidence of System—Penal Code, section 400—*Evidence Ordinance, sections* 14 *and* 15.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Held : That in a charge of cheating, evidence of one similar transaction is not sufficient to prove system.

Cases referred to : Rex vs. Seneviratne 27 N. L. R. 100
Rex vs. Wilks 10 C. A. R. 16
Rex vs. Smith 92 L. T. 208
Rex vs. Wyatt 1904. 1 K. B. 183
Makin vs. A.-G. 1894 A. C. 57

H. V. Perera, K.C., with *H. W. Jayawardene* and *C. E. L. Wickremesinghe*, for the accused-appellant.

L. A. Rajapakse, K.C., with *D. A. Jayasuriya* and *G. T. Samarawickreme*, for the complainant-respondent.

HOWARD, C.J.

The appellant appeals from his conviction by the Magistrate's Court of Colombo on a charge of cheating the complainant in respect of a sum of Rs. 1,000, contrary to the provisions of section 400 of the Penal Code. The complainant in his evidence stated that on the 27th April, 1945, the appellant undertook to deliver to him on the 6th May, 1945, the articles of furniture in his house and specified in the plaint. In consideration of that undertaking the complainant paid to the appellant Rs. 1,000, in cash Rs. 300 and by cheque Rs. 700. The complainant further stated that he had been to the appellant's house on several occasions, but he had not received either the furniture or the return of his money. It was also proved that in April, 1945, the Kotalawala Estates Co., Ltd., filed an action against the appellant. In June, 1945, the appellant was examined under section 219 of the Civil Procedure Code and during such examination stated that there were no articles of furniture belonging to him in his house. Evidence was also tendered for the prosecution that on the 12th February, 1945, the appellant offered to rent to one T. P. Balasooriya a house No. 12 Kotalawala Terrace together with the furniture for Rs. 75 a month. Balasooriya says that he paid the appellant Rs. 300 in advance, but the latter had failed to put him in possession or pay back the Rs. 300. The furniture to be hired, according to Balasooriya, consisted of the identical articles that were to be sold to the complainant in this case. Balasooriya in his cross-examination stated that he told the appellant on the 29th February, 1945, that he did not want the house, but only his money back. Balasooriya also said that the appellant held him to his contract and refused to give him back his money. Further evidence was tendered by a man called Mohideen to the effect that he advertised for a house in February, 1945. The appellant replied to the advertisement and told him that he had a house fully furnished which he would let. Mohideen and the appellant went to the house at No. 12 Kotalawala Terrace. There the appellant told Mohideen that he should buy the furniture if he was renting the house. Mohideen agreed and paid the appellant Rs. 350 as an advance out of the sum of Rs. 2,250 which he agreed to pay for the furniture. The articles of furniture seem to be identical with those that the appellant agreed to sell to the complainant. Mohideen further stated that up to date the appellant has neither given him the furniture nor returned his money.

It is contended by Mr. Perera on behalf of the appellant that the evidence of Balasooriya and Mohideen was not admissible. And without such evidence it has not been established that there was any fraudulent intention on the part of the appellant. Mr. Rajapakse on the other hand maintains that the evidence of Balasooriya and Mohideen was admissible under section 14 of the Evidence Ordinance as showing intention. Also under section 15 of the Evidence Ordinance inasmuch as there is a question as to whether the contract between the complainant and the appellant was made by the latter with the intention of defrauding the complainant. It is argued that this transaction formed part of a series of similar

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

occurrences in each of which the appellant was concerned and the fact that it did so is relevant.

In *Rex vs. Seneviratne* (27 N. L. R. 100) it was held that the proving of one isolated act apart from the act set out in the charge does not amount to a proof of the fact that there was a series of similar occurrences of which the act charged was one within the meaning of section 15 of the Evidence Ordinance. The evidence of Balasooriya is to the effect that he paid the appellant 4 months' rent in advance for the house and furniture, that on the 29th February he told the appellant he did not want the house and that the appellant held him to his contract. In my opinion this is not a similar occurrence to the contract made by the appellant with the complainant which was for the sale of furniture. Moreover Balasooriya on his own admission broke the contract. Hence this transaction does not bear the taint of fraud. Evidence of it was not admissible either as part of a series of similar occurrences under section 15 or of intention under section 14 of the Evidence Ordinance. Evidence of the appellant's transaction with Modideen is not by reason of the decision in *Rex vs. Seneviratne* in itself sufficient to prove system.

There now remains for consideration the question whether the evidence of Mohideen was admissible to prove intention. The argument put forward by Mr. Rajapakse is that the transaction between the appellant and Mohideen is a fact which shows the existence of a particular state of mind, namely the intention of the appellant to defraud the complainant. According to Mohideen the latter in February, 1945, agreed to buy from the appellant furniture consisting of a drawing-room, bedroom and dining room suites of Apothecaries' make. The articles of furniture comprised in these suites seem to be similar to those which the complainant said were sold to him by the appellant on the 27th April, 1945. With regard to this transaction Mohideen says that the appellant has neither given him possession of the furniture nor returned his money. In the case of the contract between the complainant and the appellant the former relies on a false representation that the furniture would be delivered to him on the 6th May, 1945. Only some of the furniture according to the complainant was of Apothecaries' make. In the case of the Mohideen transaction the furniture was all of Apothecaries' make. It has not been established that the appellant was in each transaction, selling the same furniture. Nor can it be said there was a similar representation made on the occasion of each transaction.

Mr. Rajapakse has cited a number of cases, but I am of opinion that none of them have any application to the facts of the present case. In *Rex vs. Wilks* (10 Criminal Appeal Reports 16) the accused in order to induce a shopkeeper to part with a fur coat on credit showed the latter a bill-head with the words " Wholesale and retail Merchant " on it. It was held that the fact that three months previously the accused obtained goods on credit from another shopkeeper by using a similar handbill was admissible in evidence to prove intent to defraud. In this case there was a false representation of an existing fact, namely that the accused was a wholesale and retail merchant. Similarly in *Rex vs. Smith* (92 Law Times 208) the evidence indicates that the accused made a false representation as to an existing fact, namely that he came from the Mercantile Syndicate Ltd. Evidence that he used the same false representation to obtain goods from another shopkeeper was held to be admissible in evidence. In *Rex vs. Wyatt* (1904) (1 K. B. 188), *Makin vs. Attorney-General* (1894) (Appeal Cases 57) evidence of other similar occurrences was admitted to prove a systematic course of conduct. As I have already pointed out evidence of one similar transaction is not sufficient to prove system. I am of opinion that the Mohideen transaction was not admissible and without such evidence there is no proof of fraud on the part of the appellant.

For the reasons I have given the appeal must be allowed and the conviction set aside.

Appeal allowed.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

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

ATTORNEY-GENERAL vs. WIJESURIYA

S. C. No. 205-*M*—*D. C.* (*F*) *Colombo No.* 15,380
Argued on : 1st March, 1946.
Decided on : 22nd August, 1946.

Lease of Crown Lands—Breach of contract—Action for damages against Crown—Power of Land Commissioner to bind Crown.

The plaintiff sued the Crown in damages in consequence of the failure of the Government Agent, Uva, who, he averred, was acting for and on behalf of the Crown, to fulfil a contract undertaking to lease to him the right to tap and take the produce of rubber trees on certain Crown lands. The Government Agent was acting as the agent of the Land Commissioner.

Held : (1) That the transaction contemplated by the contract was a lease of Crown land and was governed by the Regulations relating to sales and leases of Crown lands and approved by the Secretary of State.

(2) That under those Regulations the Land Commissioner was not competent to enter into this contract or to bind the Crown.

Cases referred to :—Collector of Masulapatam vs. Cavaly Veneata Narainapah (8 Moore's India Appeals 554).

H. H. Basnayake, Acting Attorney-General, with *H. W. R. Weerasooriya, Crown Counsel,* for the Crown-appellant.

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

SOERTSZ, A.C.J.

The plaintiff brought this action against the Attorney-General, in virtue of section 456 of the Civil Procedure Code, to recover from the Crown two sums of money Rs. 75,000 and Rs. 6,000, with interest on the latter sum. He claimed the first sum as damages the Crown was liable to pay to him in consequence of the failure of the Government Agent of Uva, who, he averred, was " acting for and on behalf of the Crown, to fulfil a contract which that officer had entered into with him on the 4th/5th of March, 1943, undertaking to lease to him, for a period of four years and two and a half months, the right to tap and take the produce of the rubber trees on certain allotments of land . . . referred to as the Keenapitiya Crown Rubber lands . . . and to place the plaintiff in possession of the said allotments of land on the 15th of March, 1943. " These allotments comprised an area of about 280 acres.

The second sum the plaintiff claimed as due to be refunded to him with interest because he had deposited the Rs. 6,000 at the request of the Government Agent, as part of the consideration for the lease, and the lease failed owing to the default of the Government Agent.

The question now is whether the Crown was so involved in all that took place between the plaintiff on the one side and the Land Commissioner and the Government Agent on the other as to be liable to make amends to the plaintiff by paying him the damages he claimed or any damages at all, and by refunding the deposit the plaintiff had made together with interest.

The Attorney-General, in the answer he filed on behalf of the Crown, repudiated the claim for damages on the ground that there was " no agreement whether oral or otherwise " as alleged in paragraph 3 of the plaint. In regard to the Rs. 6,000 claimed, his answer was that the plaintiff deposited that sum " in anticipation of his obtaining a lease of the lands referred to . . . if and when they were vacated by one Sabapathipillai, who had been given notice . . . to quit the lands on March 15, 1943," but that when that notice was cancelled and the contemplated lease fell through, the plaintiff could have withdrawn this sum at any time but did not choose to do so. The Crown was not, therefore, liable to pay interest and he accordingly brought the sum of Rs. 6,000 into Court. The Attorney-General further pleaded that, even assuming such a contract, in fact, as the plaintiff set up, the plaintiff could not maintain his action upon it, in law, by reason of the provisions of the Land Sales Regulations, and of the Frauds and Perjuries Ordinance.

In regard to the question of fact, that is to say, whether there was such an agreement as is pleaded in paragraph 3 of the plaint, with which I propose to deal first, a brief statement of the facts from which this litigation arose is necessary. In January, 1942, the Land Commissioner advertised that he would, on the 7th March, 1942, put up to

Digitized by Noolaham Foundation. noolaham.org | aavanaham.org

auction " the lease of the right to tap and take the produce of the rubber trees " on the Crown lands referred to in the advertisement for a period of five years. At the sale, the plaintiff and one Sabapathipillai were the final bidders, and the latter was declared the purchaser on his bid of Rs. 44,000 as against the plaintiff's bid of Rs. 43,950, and a " permit " was issued to him. Sabapathipillai, however, found himself in difficulties in regard to the payment of the first annual instalment of rent, and in consequence of negotiations between the Government Agent and the Land Commissioner on the one side, and the plaintiff on the other, the plaintiff offered to take the lease for Rs. 30,000 if Sabapathipillai made default. This offer did not materialise, because these Government officers came to some arrangement with Sabapathipillai in regard to the first instalment. But, Sabapathipillai was soon involved in other difficulties. He violated, or it was said that he had violated another term of his contract by entering into an agreement with a third party, one Karunatileke, concerning the subject matter of his lease, and the Land Commissioner and the Government Agent in consultation with each other, decided to cancel his permit.

The Land Commissioner wrote letter P 9 of 28-1-43 to the Government Agent saying :—

> " The conditions of the Permit dated 10-8-42 have been flagrantly violated. You should cancel the Permit forthwith and take possession of the land on behalf of the Crown. You may, thereafter, issue a Permit to Mr. H. E. Wijesuriya to take the produce of the plantations on the land for the balance period of five years at the rental approved by my letter . . . of 25-4-42."

Accordingly on the 2nd March, 1943, the Assistant Government Agent wrote P 10 informing Sabapathipillai that his lease was cancelled and requesting him " to deliver peaceful possession to the Divisional Revenue Officer on the 15th March, 1943, and to vacate the land immediately thereafter."

It was in this state of things that the plaintiff says he saw the Land Clerk, Attanayake and the Assistant Government Agent on the 4th of March, 1943. The plaintiff's version of what happened on the 4th of March, is that on that day he first saw the Land Clerk. Attanayake, who told him that if he deposited Rs. 6,000 he would be placed in possession on the 15th of March, and that he then went and saw the Assistant Government Agent in his office room and that the Assistant Government Agent repeated or confirmed what the Land Clerk had told him. The Assistant Government Agent denies that the plaintiff saw him on that day in his office room or elsewhere in regard to this matter and he denies that he told the plaintiff that if he deposited Rs. 6,000 he would be placed in possession on the 15th of March. Attanayake admits that the plaintiff saw him on that date but he says that what he told the plaintiff was that there were instructions from the Land Commissioner to issue notice of cancellation to Sabapathipillai and to offer the lease to him and that notice of cancellation had been issued to Sabapathipillai, and that if the plaintiff would agree to deposit the first year's rent he would be put in possession of the land in the event of Sabapathipillai vacating the land. He says he told the plaintiff that the money would be placed in deposit and it would be refunded to him if he is not put in possession of the land. Attanayake says that he pointed out to the plaintiff that according to a rule of the Government such a deposit is necessary before possession could be given. The plaintiff, on his part, would, I suppose agree gladly to make the deposit in order to consolidate his position. He feared for instance, that one Weerasekere who was endeavouring to get the lease as Sabapathipillai's nominee might succeed.

In this conflict of evidence the questions that arise are whether the plaintiff saw the Assistant Government Agent on that day or only Attanayake, and whether the plaintiff was given an assurance amounting to a warranty that if he deposited the full year's rent he would be given possession on the 15th of March, or only a promise dependent on the resumption of possession of these lands. I would say at once that, after careful consideration, I prefer the evidence of the Assistant Government Agent and of Attanayake to that of the plaintiff. I feel the less deterred from expressing disagreement with the trial Judge's findings on facts because, as he says, his findings are not based on matters like the demeanour and reliability of these witnesses but on their testimony, viewed in the light of the circumstances of the case. It is precisely in that way that I myself have examined their evidence and reached the conclusions to which I have come. As far as the Assistant Government Agent is concerned his denial that he met the plaintiff or spoke to him in his office on the 4th of March is, in my opinion, strongly supported by the terms of the document D 1. Attanayake after his meeting with the plaintiff put up to the Assistant Government Agent as follows :—

> " We may accept a year's rent and place it in deposit until Mr. W is put in possession of the land. When he is put in possession the money can be credited to revenue."

and the Assistant Government Agent's minute is :

" Please request Mr. W. to let me know whether he will agree." This document, I regard as clinching the point in dispute. If, as the plaintiff says, Attanayake had told him definitely that if he paid the first year's rent he would be placed in

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

possession on the 15th of March and, if again as the plaintiff says, the Assistant Government Agent repeated or confirmed what Attanayake had already told him, it is difficult to understand why the Assistant Government Agent should want to know whether the plaintiff agrees to his money being placed in deposit, the Assistant Government Agent himself having already told him if he deposited the first year's rent, he would be placed in possession on the 15th of March, and the plaintiff not having demurred to that in any way at all. If the plaintiff's version is the true one, the answer one would have expected from the Assistant Government Agent to Attanayake's query would have been either "Yes" or "the lease having now been given to Mr. W., let the deposit be credited to revenue," depending on the view the Assistant Government Agent took of the transaction, that is to say whether a lease had been warranted, or a conditional one promised. Likewise, so far as Attanayake is concerned, if, as the plaintiff states, the lease was given to him on the 4th March to take effect on the 15th of March and he was requested to pay the first year's rent, it is difficult to understand why Attanayake should suggest a temporary deposit in the Kachcheri and a crediting to revenue after possession has been given. The trial Judge says that on the 4th of March, Mr. Chandrasoma (that is the Assistant Government Agent) "believed that on 15-3-43 that land would be vacated by Sabapathipillai and his Manager, Karunatileke. The idea that Karunatileke would not leave the land had even for an instant not crossed Mr. Chandrasoma's mind," but if the Assistant Government Agent entertained such a sanguine expectation that everything would go according to plan, that would be precisely the case in which I should have thought he would have regarded the lease as good as given, and would have directed the Rs. 6,000 to be credited to revenue without being held in suspense at all. It appears to me to be abundantly clear that the Government officers were, by no means, certain that they would be able to deliver possession on the 15th of March and it was quite natural that Attanayake, fully aware as he was of the Land Commissioner's instructions in P 9 written a fortnight earlier, would have explained to the plaintiff as he says he did that the money would lie in deposit and would be credited to revenue or refunded to him according as he was put in possession or not. Attanayake's evidence receives support from the qualified terms of the receipt P 2 given to the plaintiff by the Kachcheri Shroff, acknowledging the receipt of rent "pending issue of lease." Much importance cannot be attached to the Assistant Government Agent's statement in P 13 that "the lease is now given to Mr. W. Wijesuriya," especially as that is followed by the statement, "you should put him in possession as soon as the present lessee vacates." On a proper interpretation in its true context this statement means that the Land Commissioner had *decided* to put the plaintiff in possession on Sabapathipillai vacating the land, and not that he had *agreed* unconditionally to do so. Not only do the documents bear out the Assistant Government Agent's and Attanayake's evidence but also, in my view, their evidence gives what I think is the more probable version. The plaintiff says that it was well known that Sabapathipillai and Karunatileke had fallen out and it was quite a serious question whether even if Sabapathipillai vacated the lands, Karunatileke would not create trouble, and it was most improbable that, in those circumstances, the Assistant Government Agent or Attanayake would give the plaintiff an unconditional undertaking. If these findings of mine are correct, the plaintiff's action fails for the reason that there was no contract between the Government Agent and him as alleged in paragraph 3. But, the trial Judge, for reasons which are not too clear to me, preferred the plaintiff's evidence and he held that the plaintiff saw the Assistant Government Agent and that that officer confirmed what Attanayake had told the plaintiff, according to the plaintiff's version, namely, that if he paid the first year's rent, he would be given the lease of these lands on the 15th of March. I would, therefore, examine this case to see how it stands on the finding of the trial Judge.

On that finding, we have an agreement by the Assistant Government Agent with the plaintiff, by which the Assistant Government Agent offered to give him a lease and to put him in possession on the 15th of March if he paid down a year's rent and an acceptance of that offer by the plaintiff when he paid in the year's rent. It might have been necessary to consider whether, in the circumstances of the case, this contract although apparently unconditional, should not be construed as containing an implied condition that its fulfilment would depend on the Government officers concerned being able to recover possession of the lands leased. That question might have arisen if those officers had persisted with the proposed cancellation of Sabapathipillai's lease, and found it impossible to recover possession, for in that event, the question of frustration of the contract would have arisen. But, as things turned out, before the 15th of March, the Land Commissioner decided to cancel the notice to quit given to Sabapathipillai and there was no attempt

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

made to recover possession from him and to deliver it to the plaintiff. The question of frustration does not, therefore, arise. The question that does arise in these circumstances is whether the Assistant Government Agent was competent by entering into the agreement found by the trial Judge, to bind the Crown, or perhaps I should say, to bind the Land Commissioner and through him the Crown. The plaintiff's case is that it was competent for the Land Commissioner to lease the right to take the produce of the plantations on these lands for the period for which and in the manner in which it was proposed to lease that right, and that the Land Commissioner constituted the Government Agent and Assistant Government Agent, his agents for that purpose. Assuming that to be so, P 9 shows that the scope of the authority the Land Commissioner entrusted to his agent was " to take possession of the land on behalf of the Crown " ; and " *thereafter*, issue a permit to Mr. Wijesuriya to take the produce of the plantations . . . for the balance period of 5 years " . . . It is clear from these terms that the resumption of possession on behalf of the Crown was made a condition precedent to the issue of a permit. I imagine that it would have been quite open to the Land Commissioner at any time before the permit was issued to the plaintiff to repent of the decision to issue it and to direct that no such permit shall issue, for the Land Commissioner made no promise to the plaintiff to issue a permit to him nor did he authorise his agent to make such a promise. He was only instructing his agent in regard to the course of action he should take. But it is contended that the plaintiff was not aware of this limitation of the agent's authority and that the agent who had been held out to the plaintiff as the Land Commissioner's agent bound the Land Commissioner although he acted in excess of his authority. As I have already observed, I have no doubt myself that the plaintiff was fully aware of the true state of things, but here again I will assume that, as found by the trial Judge, the plaintiff was not aware of any limitation of authority imposed on the Government Agent or Assistant Government Agent and I will examine the case on that footing. The plaintiff's case then stands at this : he is able to plead a contract between him and the Land Commissioner's agent by which the Land Commissioner was bound, in fact, to give him a lease and to put him in possession on the 15th of March and a default by the Land Commissioner in that he did not even make an attempt to fulfill the contract. The question then arises whether the Land Commissioner was himself competent to involve the Crown in liability by entering into that contract. To answer that question it is necessary to ascertain what in reality this contract amounted to in law. In my view, it was a lease of land for 4 years and 2½ months. It was in vain that the officers concerned sought by a play upon words and by describing the transaction as a " permit " or " a licence " to take the produce of the plantations on these lands or " a lease of the right " to tap and take the produce of the plantations, to pretend that the resulting transaction was what they called it and not what in essence, it was. Exhibit P 1 read with P 6 discloses a lease of land and nothing but a lease of land. Occupation of the lands is to be given along with the right to tap and take the produce of all the plantations on them for there were no plantations other than rubber. That occupation and that right are to be in force and to continue for the period of four years and two and a half months provided, of course, the other party performed his covenants. On the expiry of the period or the earlier determination of the contract, he is to surrender possession of the lands. Pending the expiry or determination of the right of occupation, any unauthorised person going on the land would undoubtedly be liable, at the instance of the occupier, as a trespasser. What does all this connote but a lease. It is true that the party who is to have occupation is prohibited from doing certain things on these lands, but prohibitions like those are very familiar features in deeds of lease. I, therefore, hold that the transaction contemplated in the contract pleaded by the plaintiff was a lease of land. If I am right, as I venture to think I am, then by Regulation 2 of the " Regulations relating to sales and leases of Crown lands approved by the Secretary of State's despatch of June 5th, 1926 " it is laid down that :

> " Every grant and every lease of land shall be under the signature of the Governor and the public seal of the Colony, except (*a*) leases of small lots leased annually, which may be signed by the Revenue Officer ; and (*b*) leases of road reservations which may be signed by the Controller of Revenue."

The transaction cannot be brought within exception (*a*) and the Revenue Officer, the Land Commissioner in this case was not competent to enter into this contract or to bind the Crown by issuing such a permit as was admittedly contemplated. The regulation I have referred to reappears in the Letters Patent dated the 22nd April, 1931, with the word " disposition " substituted for the word " lease." Paragraph 6 says :

> " The Governor in Our name or 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 within the Island " . . . .

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

But, in the Ceylon Government Manual of Procedure (1940 ed.) is published a statement of administrative procedure prescribed for transactions with which officers of State are concerned, and in that statement we find on page 12 that the grant of licences for produce is vested in the Executive Committee. It is that probably, that inspired the officers in this case to attempt to grant a lease by calling it a ' licence for produce.'

But as I have already observed this is much more than a licence. Mr. H. V. Perera for the respondent to this appeal sought to surmount this difficulty created by Regulation 2 quoted above by contending that the agreement contemplated by the parties in this instance, at most created an interest in land not amounting to a lease or a disposition of land and he went on to argue that it was only a grant or a lease or a disposition of land that required the Governor's intervention, and that it was competent for the Land Commissioner to enter into an agreement creating an interest in land other than a lease. I am unable to entertain that contention. As I have already ventured to say I find the contemplated transaction to be, in reality, a lease and as such, a disposition of land and not any lesser interest in land. But even assuming that what was being created was an " interest in land " less than a lease, even so I have not been referred to any rule or regulation empowering the Land Commissioner to create such an interest in land in the manner in which he proposed to act in this instance. The provisions of the Land Development Ordinance in my view have no application whatever here. Another difficulty in the way of the plaintiff is that the Land Commissioner had no power, in the event of a default such as was alleged on the part of Sabapathipillai rendering his permit or licence to take the produce liable to cancellation, to enter into an agreement, to give that right to the next highest bidder. He was bound in such an event by Regulation 29 of the regulations to offer the right for sale again in open competition. D 5 shows that the Land Commissioner realised that the action contemplated by him, that is to say to choose the plaintiff for the giving of the right to tap was *ultra vires*. He writes to the Government Agent " an issue of a preferential lease now to the second highest bidder at an auction held an year ago at a reduced rent does not appear to be in order. If the order of cancellation of the existing permit is not varied after consideration by me on the representations received, the proper course would be to sell the right by auction or public tender." The result is that whether the transaction be regarded as a lease or something less than a lease, the Land Commissioner had not the power to render the Crown liable by acting as he did. If he had not that power he could not, of course, delegate such power to his agent.

As was stated in the opinion delivered in the Privy Council in the case of the *Collector of Masulapatam v. Cavaly Veneata Narainapah* (8 Moore's India Appeals 554) :

> " The acts of a Government officer bind the Government only when he is acting in the discharge of a duty within the limits of his authority, or if he exceeds that authority, when the Government in fact or in law, directly or by implication, ratifies the excess."

That is not, at all, the case here.

For these reasons, I hold that the Crown is not liable and I would set aside the decree entered in the Court below and dismiss the plaintiff's action for damages. In regard to the claim for Rs. 6,000 with interest, logically, that amount having been paid to a Government officer who had no power, in the circumstances already stated, to bind the Crown, the plaintiff's proper course would have been to sue that officer, for recovery of that amount. But, in view of the fact, that in such an action too, the Attorney-General would have been the nominal defendant, I would disregard technicality and, as the Attorney-General has brought the money into Court, I would direct that judgment be entered for the plaintiff for Rs. 6,000 with legal interest from the 10th March, 1943, till the 15th of December, 1943, the former date being that on which the notice given to Sabapathipillai was ordered to be cancelled, the latter being the date on which the plaintiff could have, if he had chosen to do so, withdrawn this sum. (See P 30). The plaintiff will pay the costs of the defendant here and below.

The cross-appeal does not arise. It is dismissed but without costs.

I would add a word to express my regret that this judgment has been delayed so long, and a word of explanation to say that this delay was, mainly, due to the fact that soon after judgment had been reserved I came to be engaged on other public duties which devolved on me in pursuance of a Commission issued by His Excellency the Governor.

CANNON, J.
I agree.

Appeal allowed.
Cross-appeal dismissed.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present : JAYETILEKE, J.

SELVANAYAGAM vs. HENDERSON, A. G. A. (KEGALLE.)

S. C. No. 941/1946—*M. C. Kegalle No.* 12301

Argued on : 19th, 20th and 21st August, 1946.

Decided on : 30th August, 1946.

Criminal trespass—Labourer in occupation of line rooms in tea and rubber estate—Acquisition of estate by Crown for village expansion—Possession taken on behalf His Majesty—Superintendent placed in control of estate—Notice that services of labourer not required and that line rooms should be vacated—Refusal to vacate—Does it amount to criminal trespass—Nature of such occupation—Superintendent's right to prosecute—Meaning of occupation—Penal Code, Sections 427 *and* 433.

The accused is a labourer who worked in the factory of a tea and rubber estate in which he occupied two line rooms with his wife and children. The estate was subsequently acquired by the Crown under the Land Acquisition Ordinance for purposes of village expansion and having been taken possession on behalf of His Majesty it was placed under the control of a Superintendent, who—

(*a*) took up residence on the estate ;

(*b*) was in actual possession of the entire estate including all buildings thereon,

(*c*) allowed the labourers to continue their work without discussing with them any terms or conditions of service,

(*d*) paid all labourers including the accused without making any deduction for the rooms they occupied ;

(*e*) had the right to allot any rooms in the lines to the labourers and to change the rooms occupied by the labourers as he wished.

The Superintendent served on the accused a notice that his services would not be required and that he should vacate the rooms occupied by him before a certain date. He was paid all wages due and his certificate of discharge was tendered to him. The latter he refused to accept and failed to vacate the rooms.

The Superintendent charged him with having committed criminal trespass by unlawfully remaining in the two line rooms with intent to annoy him. The accused gave evidence and stated that he was born and bred in the estate, and that the estate was his home, and that he intended to remain in the estate till he was able to build a house to move into.

The Magistrate convicted him and he appealed.

Held : (i.) That in the circumstances the conviction was right.

(ii.) That the accused's occupation was not as tenant but was ancillary to the performance of his duties as a labourer.

(iii.) That the line rooms were in the occupation of the Superintendent within the meaning of section 427 of the Penal Code, inasmuch as the accused's occupation was that of a servant and is in law the occupation of the master

(iv.) That the accused's object in remaining in the line rooms was to annoy the Superintendent.

Cases referred to :—

(1) *Rowther vs. Mohideen*, 1 Bala, Notes of Cases, page 2.
(2) *Calcutta Corporation vs. The Province of Bengal*, 1944 A. I. R., page 42 at page 45.
(3) (1875) 10 C. P., page 285 at page 295.
(4) *Quin vs. Leatham*, (1901) House of Lords at page 506.
(5) *Dobson vs. Jones*, 5 M. & G., page 116 at page 121.
(6) *Bomford vs. South Worcestershire Area Assessment Committee and Pershore Rural District Rating Authority*, (1946) 2 A. E. R. at page 81.
(7) *Westminster Council vs. Southern Railway Co. and W. H. Smith & Son* and *Westminster Council and Kent Valuation Committee vs. Southern Railway Co. and Puleman Car Co.*, 1936 A. C. page 511 at page 530.
(8) *Wake vs. Tinkler*, 16 East, page 101.
(9) *Suppiah vs. Ponniah*, 4 Bala 157.
(10) *Anthony Appuhamy vs. Wijetunga*, 3 Ceylon Law Journal Reports, page 164.
(11) *Forbes vs. Rengasamy*, 41 N. L. R., page 294.

H. V. Perera, K.C., with *S. Nadesan* and *Barr Kumarakulasingham*, for accused-appellant.

C. Nagalingam, Attorney-General, with *H. A. Wijemanne, Crown Counsel*, for complainant-respondent.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

JAYETILEKE, J.

The accused in this case was convicted under Section 433 of the Penal Code with having committed criminal trespass by unlawfully remaining in two line rooms of Knavesmire Estate with intent to annoy Mr. Rajapakse, the Superintendent of the Estate, and sentenced to undergo three months' rigorous imprisonment. Criminal trespass is defined thus in Section 427 :—

> "Whoever enters into or upon property in the occupation of another with intent to commit an offence or to intimidate, insult or annoy any person in occupation of the said property, or having lawfully entered into or upon such property unlawfully remains there with intent thereby to intimidate, insult or annoy any such person or with intent to commit an offence is said to commit criminal trespass."

The section, as it originally stood, made it an offence for a person to enter upon property in the " possession or occupation " of another person. By Ordinance No. 16 of 1898 the section was amended by the deletion of the word " possession ". In *Rowther vs. Mohideen* (1 Bala, Notes of Cases, page 2) Wood Renton, J., said :

> " The word ' occupation ' used in section 427 was formerly used in conjunction with and preceded by the word ' possession' which was deleted by section 5 of Ordinance No. 16 of 1898, the clear intention of the Legislature being that the offence should be confined I think to a trespass committed against person in apparent occupation of premises, and not extended to a trespass against a person in the unascertained character of the rights involved in the word ' possession ' as known to the Roman-Dutch Law, to avoid the very evil which has occurred here, *i.e.* the trial of questions of title in a Criminal Court.
>
> It is true no doubt that the occupation may be constructive also as in case of a tenant absent from the house or garden of which he is a tenant when the trespass is committed ; but in my opinion the word ' occupation ' as used in the section implies the existence of a tenure entered upon either by owner or tenant or under a *bona fide* claim of right, or as a caretaker through whom also an owner or tenant might be in constructive occupation."

The occupation that is entitled to protection under the section may be by oneself or through an agent. The main point that arises for decision in this case is whether Mr. Rajapakse was in occupation of the two rooms at the date material to the prosecution. The question must be considered and answered in regard to the position and rights of the parties in respect of the premises and in regard to the purpose of the occupation.

The facts of the case may be summarized as follows :—

Knavesmire Estate belonged to one Ibrahim Lebbe. It is about 800 acres in extent of which 270 acres are planted in tea and 460 in rubber. It had a large number of line rooms within its confines which were occupied by about 500 labourers. The accused, who worked in the factory as a labourer, occupied two of the line rooms with his wife and children. Mr. Henderson, the Assistant Government Agent of Kegalle, took steps under the Land Acquisition Ordinance (Chapter 203) to acquire the Estate for the Crown for village expansion, and on December 6, 1945, Mr. Abeywardene, the Land Officer of Kegalle, took possession of the estate on behalf of His Majesty and signed a vesting certificate under section 12 (1) of the Ordinance. The regularity of the proceedings under the Ordinance was not questioned at the argument before me and I think that I am entitled to presume that all things required by the Ordinance had been properly done. Section 12 (1) of the Ordinance reads :

> 12 (1) At any time the Government Agent has made an order under section 9 or a reference under section 11 and has notified the same to the Governor* it shall be lawful to the Governor to direct that the land be taken possession of by some officer of the Crown for and on behalf of His Majesty. And the said officer shall sign a certificate substantially in Form A in the Schedule and the said land shall thereupon vest absolutely in His Majesty free from all encumbrances.
>
> * Delegated to the Executive Committee of Local Administration. Gazette No. 8060 of 22nd June, 1934.

In the first place the sub-section says that the certificate shall actually vest the property in His Majesty, and, in the second place, it declares that the vesting shall be an absolute vesting. The effect of the certificate seems to be to wipe out all claims that any person may have had to or in respect of the estate and to give the Crown a conclusive title to the Estate.

Mr. Henderson says that when the Crown took possession of the Estate there was a labour force on the estate and the Crown continued to employ the labour force. At the end of January, 1946, Mr. Rajapakse, who was appointed Superintendent, took charge of the Estate. The evidence is very scanty as to what precisely Mr. Rajapakse did after he took charge. He says that he took up his residence on the estate on February 1, that from that date he was in actual physical occupation of the entire Estate, which would include all the buildings within its confines, and that he paid all the labourers including the accused at Wages Board rates. What one can gather from this evidence is that he got the labourers to work and paid them the wages fixed by the Wages Board without making any deduction in respect of the rooms they occupied. It is true that in cross-examination he said that the accused's wages included free housing accommodation but his evidence in re-examination shows that this is a mistake. He does not seem to have discussed with the labourers any terms or conditions of service but he says that he had the right

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

to allot any rooms in the lines to the labourers and to change the rooms occupied by the labourers as he wished. It must be noted that his evidence that he had actual physical occupation of the Estate and that he had the right to allocate the line rooms as he wished has not been challenged in cross-examination or denied by the accused when he gave evidence on his own behalf.

On March 1, 1946, Mr. Henderson published a notice in the " Gazette " that he would consider applications from landless residents of certain villages named therein for working the Estate on Co-operative lines. Towards the end of March he selected 243 persons and noticed them to turn up for work on the Estate on June 1. He had to provide accommodation for them on the Estate pending the construction of houses, presumably, on the lots allotted to them. In order to provide the allottees with work and accommodation Mr. Henderson got Mr. Rajapakse to give notice in writing to the resident labourers that their services would not be required after May 31, 1946, and that they should vacate the rooms occupied by them on or before that date. The notice P7 was served by Mr. Rajapakse personally on the accused on April 30, 1946. On May 31, 1946, Mr. Rajapakse paid the accused the wages due to him and tendered to him a discharge certificate. He informed the accused that the Labour Inspector, who was present at the time, would find work for him on another estate. The accused accepted his wages but refused to accept his discharge certificate. None of the labourers vacated the rooms occupied by them and Mr. Rajapakse was unable to find accommodation for more than 12 to 15 of the allotees who turned up for work on June 1. Thereupon, Mr. Rajapakse charged the accused and the other labourers with trespass with intent to annoy him.

The accused's defence seems to be that he was born and bred on the Estate, that the estate is his home, and that he intended to remain on the estate till he is able to build a house to move into.

After a careful review of the evidence the learned Magistrate arrived at the following conclusions :—

(1) That the accused occupied the rooms in the capacity of a servant for the more satisfactory performance of his duties and not in the capacity of a tenant.

(2) That Mr. Rajapakse was in occupation of the whole estate including the building standing thereon.

(3) That the occupation of the rooms by the accused after his services were terminated was unlawful.

(4) That the accused continued to occupy the rooms with intent to annoy Mr. Rajapakse.

Mr. Perera, in a very interesting and forcible argument, submitted that the learned Magistrate had gone wrong both on the facts and on the law. He candidly admitted that there was no evidence to support a contract of tenancy. But he contended, relying on the following passage in the judgment of Lord Porter in *Calcutta Corporation vs. The Province of Bengal* (1944 A. I. R., page 42 at page 45) that the possession of the accused must be taken to be that of a tenant :

> " The general principles upon which a tenancy as opposed to an occupation as servant is created are not in dispute. The mere fact that it is convenient to both parties that a servant should occupy a particular house and that he is put in possession of it for that reason does not prevent the servant from being a tenant ; his possession is that of a tenant unless he is required to occupy the premises for the better performance of his duties though his residence is not necessary for that purpose or if his residence there be necessary for the performance of his duties though not specifically required." Per Brett, J. (1875) 10 C. P., page 285 at page 295.

The learned Attorney-General pointed out that these observations were made in a case in which the facts showed indubitably that the servant not only paid rent for the house he occupied but had also the right to sublet it. He contended that that passage must be read as applicable to the particular facts proved and relied, in support of it, on the following words of Brett, J., in the judgment referred to in that passage :—

> " The result of these three cases seems to be this, that, where a person situate like the respondent is permitted (allowed if so minded) to occupy premises by way of reward for his services or as part payment, his occupation is that of a tenant."

With reference to the observations of a general character in a judgment Lord Halsbury said in *Quin vs. Leatham* (1901) House of Lords at page 506) :

> " Now before discussing the case of *Allen vs. Flood* and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole Law, but governed and qualified by the particular facts of the case in which such expressions are found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted as a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

Under both English and Roman-Dutch Law no contract of letting and hiring is valid unless the sum to be paid as hire is fixed by the parties or

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

in accordance with custom. (*Vide Morice* English and Roman-Dutch Law, page 148). That being so, I think there is much force in the learned Attorney-General's submission that the observations of Lord Porter must be taken to apply to a case where the servant pays rent in some form or another. This view has the support of the judgment in *Dobson vs. Jones* (5 M. & G., page 116 at page 121) where Tindal, C.J., said :

> " We stated that the relation of landlord and tenant would not be created by the appropriation of a certain house to an officer or servant as his residence, where such appropriation was made with a view, not to the remuneration of the occupier, but to the interest of the employer, and to the more effectual performance of the service required from such officer or servant : upon the same principle as the coachman who is placed in rooms by his master over the stable, the gardener who is put into a house in the garden, or the porter who occupies a lodge at the parish gate, cannot be said to occupy as tenants, but as servants merely where possession and occupation is strictly and properly that of the master."

In this case there is not a tittle of evidence that the accused paid any rent for the rooms that he occupied or that he was permitted to occupy them as a reward for his services. He had no right to sublet the premises or to make any profit from his occupation. If he was a tenant one would, at least, have expected him to say so when he gave evidence on his own behalf. If the test of probability is applied to the facts of this case I think there is every reason to suppose that the accused's employer could never have intended that the accused should be a tenant, because, though the relation of master and servant may be determined at any time, yet, if the accused happened to get a tenancy, he may defy his employer and refuse to vacate the premises. It is impossible to infer the relationship of landlord and tenant from the facts of this case and I think the proper conclusion to be drawn is that the accused's occupation of the two rooms was not as tenant. Even if his occupation must be taken to be that of a tenant it seems to me that the presumption has been amply rebutted. In the case of manual labourers the character of the work which they have to perform is, in general, work which requires their presence on the employer's premises. This is particularly so in tea estates where the leaf has to be plucked and manufactured daily, and on rubber estates where the trees have to be tapped and the latex coagulated and rolled into sheets daily. The work of labourers employed on tea and rubber estates is of such a character that residence on the estate is essential for its performance. It is, presumably for this reason that the owners of tea and rubber estates expend large sums of money in constructing lines to house the labourers. In this connection I may refer to the following observations of Goddard, L.C.J., in *Bomford vs. South Worcestershire Area Assessment Committee and Pershore Rural District Rating Authority* (1946) 2 A. E. R. at page 81) :

> " When I turn to the case as counsel for the respondent invited us to do, the first fact that is stated in the case is this :
>
> The appellant is a farmer and occupies two cottages for the accommodation of agricultural workers employed by him on his land. The cottages are not let to the agricultural workers who reside therein by virtue of their employment.
>
> They are therefore what are commonly called service tenants, but, in fact, must be regarded as in the position of licencees, because if they leave the farmer's employment they have to leave the cottages and can be ejected from the cottages."

In my view the accused's occupation was ancillary to the performance of the duties which he was engaged to perform. The second point taken by Mr. Perera was that Mr. Rajapakse was not in occupation of the two rooms. In *Westminster Council vs. Southern Railway Co. & W. H. Smith & Son and Westminster Council and Kent Valuation Committee vs. Southern Railway Co. and Puleman Car Co* (1936 A. C., page 511 at page 530) Lord Russel of Killowen said :

> " The general principle applicable to the cases where persons occupy parts of a larger hereditament (being also in occupation by himself of his servants) retains to himself the general control over the occupied parts, the owner will be treated as being in rateable occupation ; if he retains to himself no control, the occupation of the various parts will be treated as in rateable occupation of those parts."

It is true that these observations were made in a case in which the Court had to consider whether the occupation was by the owner or the person in actual occupation within the meaning of the rating statutes but I cannot discover any difference in principle between that case and this. The evidence in this case shows that the previous owner had appropriated to the use of the labourers the line rooms on the estate. After the Crown acquired the estate the use to be made of the appropriated premises was subject to the general control of Mr. Rajapakse. As I said before he reserved to himself the right to allocate the rooms as he wished. The reservation of such a predominating right must necessarily prevent the occupation of the rooms by the labourers to be exclusive. The only reasonable inference to be drawn from these facts is that Mr. Rajapakse was in paramount occupation not only of the estate within whose confines the line rooms are situate but also of the line rooms. He occupied the whole estate for the purpose of his business of working it and for the purpose of that business he retained the control of the lines. The labourers had no occupancy rights over the line rooms

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

but only a licence to use them. Their occupation is merely that of servants and is in law the occupation of the master. (Vide *Dobson vs. Jones* (5 M. & G., page 116 at page 121); and *Wake vs. Tinkler* (16 East, page 101).

The third point taken by Mr. Perera was that the intention of the accused in remaining on the estate could not be said to annoy Mr. Rajapakse. On this question one is not without assistance from the reported cases. The cases are many in numbers. The effect of the cases which begin with *Suppiah vs. Ponniah* (4 Bala 157) in 1909 and continue in a stream to the present day is that if the annoyance is the natural consequence of the accused's act and if he knows that it is the natural consequence then there is an intention to annoy. It is not necessary to refer in detail to the cases. I refer to only two of them by way of example, *Anthony Appuhamy vs. Wijetunga* (3 Ceylon Law Journal Reports, page 164) and *Forbes vs. Rengasamy* (41 N. L. R., page 294) where the facts were similar to the facts of the present case. In the former case de Kretser, J., said :

> "Foreknowledge that annoyance will result is good evidence of an intention to annoy. Knowledge of the possibility of annoyance is not enough but if annoyance is the natural consequence of the act and the person who does the act knows that that is the natural consequence then there is the intention to annoy."

In the latter case Keuneman, J., said :

> "In this case there is evidence to show that the accused was warned that he must leave the estate on the expiration of the term of the notice and that about the end or the middle of December, 1939, the accused came to the Superintendent and said that he had not been able to get employment elsewhere and that he could not go on January 2. He was informed that he must leave on that date. He was on several occasions warned that he must leave the estate but he refused to accept his discharge certificate and he refused to leave the estate. The refusal to accept the discharge certificate is significant as without it the accused cannot obtain work elsewhere. This tends to show that the excuse made by the accused was not a genuine one. The accused has not given evidence in this case as to his intention in remaining on the estate. His conduct was calculated to cause annoyance, and, in fact, has done so. The Superintendent said that the accused's attitude was one of defiance. In the circumstances the Magistrate has come to the conclusion that the accused continued to remain on the estate with the intention of annoying the Superintendent, and I think the finding is justified."

In this case it would not take much to persuade me that the accused's object in remaining on the estate was to annoy Mr. Rajapakse. I may also add that in the two cases I have referred to almost all the questions I have dealt with came up for consideration and the learned Judges decided that in precisely the same way in which I have done.

Having carefully considered this case I am of opinion that the judgment delivered by the larned Magistrate was correct.

Finally, Mr. Perera urged that the sentence passed on the accused was unduly severe. On the facts of this case I am unable to say that it is. If a person deliberately and obstinately refuses to obey the law he is no martyr, but a law breaker, and he deserves no more than justice.

The appeal is, accordingly, dismissed.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL.

REX vs. S. RANESINGHE ALIAS NILAME AND ANOTHER

Present : Soertsz, A.C.J. (President), Wijeyewardene, S.P.J., & Canekeratne, J.

Appeals Nos. 28—29 *of* 1946.
Applications 100-101 *of* 1946—*S. C.* 16/*M.C. Gampaha* 26855.
Argued on : 22nd July, 1946.
Decided on : 2nd August, 1946.

Court of Criminal Appeal—Common intention and same or similar intention—Evidence of sudden and grave provocation—Failure on the part of trial Judge to direct the jury on such evidence—Verdict of murder reduced to culpable homicide not amounting to murder.

Held : (i.) That in a charge to the jury on the point of common intention the trial Judge should instruct them sufficiently to enable them to discriminate between "common intention" and "same or similar intentions."

(ii.) That where there are significant facts which in the opinion of the Court indicate that the appellants in causing the death of the deceased were acting on grave and sudden provocation, the offence should be reduced to one of culpable homicide not amounting to murder.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Per Soertsz, A.C.J.—As pointed out by Their Lordships of the Privy Council in the recent case of *Marbub Shah vs. Emperor* (A. I. R. (1945) P. C., p. 118) " Care must be taken not to confuse same or similar intention with common intention ; the partition which divides their bounds is often very thin ; nevertheless the distinction is real and substantial and if overlooked will result in the miscarriage of justice. In Their Lordships' opinion the inference of common intention within the meaning of the term in section 34 (*i.e.* section 32 Ceylon) should never be reached unless it is a necessary inference deducible from the circumstances of the case ".

Cases referred to :

Marbub Shah vs. Emperor (A. I. R. (1945) P. C., p. 118)

H. V. Perera, K.C., with *H. W. Jayawardene*, *V. Tillainathan* and *M. Ratnam*, for appellants.

T. S. Fernando, C. C., for respondent.

Soertsz, A.C.J.

The facts material for a consideration of the submissions made to us on behalf of the appellants in this case may be briefly stated thus : The deceased man owned a one-fifth share of certain fields. In the year 1938, by an informal writing, he agreed to give that share to his grand-aunt Ran Menika and her children in exchange for a high land belonging to them. After that agreement had been given effect to for a number of years, the deceased appears to have repented of the arrangement. On the 3rd of March, 1945, accompanied by four or five other men he came by car to the house of Ran Menika to ask for his share of the paddy of the fields he had given her on the informal agreement. It is said that this was a peaceful mission but it is important to bear in mind that the deceased man had been to jail for robbery and that, admittedly, he was a man of a violent temper especially when he was under the influence of liquor as he appears to have been on this day. His companions, on this occasion, were also men who bore the reputation of rowdies. When this party reached Ran Menika's house the only inmates of it were Ran Menika and another woman, the wife of the first appellant. The men of the household were out, attending to their usual work. The deceased asked for his share of the paddy and an altercation ensued. The women set up cries and in answer to those cries, the first appellant who is a son of Ran Menika and the husband of the other woman in the house, the second appellant a nephew of Ran Menika, and a third man named Raja Thomas ran up. The first appellant carried a sword, the second a club or iron rod, the third a gun. According to the version most favourable to the prosecution, it would appear that, at this stage, the " visitors " were about to drive off in their car, but that on seeing these three men, the deceased got out of the car and went up to them saying that he had not come to create a disturbance but only to get his share of the paddy. He was then attacked by the first appellant with the sword and the second appellant struck him with the club or rod that he carried. The third man fired his gun but caused no injuries. The witness Peiappu said he saw the second appellant deal only one blow, the other eye-witness for the Crown, Dareeju, said he saw the second appellant deal several blows. There was a suggestion that some of the neighbours who came up also joined in the attack and some broken rafters were produced to bear out that suggestion. Sub-Inspector Badurdeen found these pieces of rafters about twenty-five yards from the scene. But there is no direct evidence to show that any of the neighbours joined in the attack upon the deceased. The medical evidence established that the blow with the sword caused a necessarily fatal injury. The other injuries, seven in number, were injuries caused with a club or iron rod or with several clubs or rods and these injuries too, in the opinion of the doctor, taken cumulatively, would have resulted in death.

On these facts, the first submission made to us was that, there being only the evidence of one witness of doubtful character to support the case that the second appellant dealt several blows and as against that, the circumstantial evidence afforded by the broken rafters to suggest an attack with clubs by persons other than the second appellant, the jury, if properly directed, might reasonably have taken the view that it would be safer for them to go upon the assumption that the crucial injury was the fatal injury dealt by the first appellant with his sword. If they had taken that view, the complicity of the second appellant in the charge of murder would depend on whether they were satisfied that the second appellant was acting with the first appellant in furtherance of a common intention to cause death. In regard to this question, Counsel submitted that although the directions given by the learned trial Judge to the jury on the point of common intention were unexceptionable as far as they went, they were inadequate in that they did not instruct the jury sufficiently to enable them to discriminate between, " common intention " and the " same or similar " intentions. As pointed out by Their Lordships of the Privy Council in the recent case of *Marbub Shah vs. Emperor* (A.I.R. (1945) P. C., p. 118). " Care must be taken not to confuse same or similar intention with common intention ; the partition which divides their bounds is often very thin ; nevertheless the distinction is real and substantial and if overlooked will result in the miscarriage of justice. In Their Lordships' opinion, the inference of common in-

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

ention within the meaning of the term in section 34 (*i.e.* section 32 Ceylon) should never be reached nless it is a necessary inference deducible from he circumstances of the case ". In the circumstances of the case before Their Lordships, they efused to draw that inference and it appears to is that, in the circumstances of the case before is too it would be safer not to draw the inference of a common intention. There is no evidence at ll of any pre-arrangement or even of any declaraion or of any other significant fact at the time of the assault to enable one to say more than that he assailants had the same or similar intentions ntertained independently by each of them. The irst appellant said that he ran up from the Coperative Stores on hearing the women's cries. There is nothing to contradict this statement. Indeed, that is very probable. The second appellant, therefore, must have come up from elsewhere nd independently. It may, therefore, well be hat if the jury had their attention called to this istinction, they might have differentiated beween the offences of the two appellants.

The other submission made to us was that the earned Judge had not sufficiently drawn the ttention of the jury to the material facts that he deceased and his party were men of bad eputations, that they or some of them had been rinking, that they came in numbers, and had ot directed them to consider whether in view of hese facts the case for the prosecution that this was a peaceful expedition undertaken to make a request for a share of the paddy, or the case for the defence that this was an invasion by the deceased and his companions of Ran Menika's home in order to intimidate her into giving a share of the paddy was the more probable case. The manner in which the learned Judge dealt with this part of the case was calculated to create an impression in the minds of the jury that this question hardly arose for he said :

> "There is nothing to indicate that his mission (*i.e.* the deceased's mission) on that day was anything but a peaceful one."

As already observed, there were many significant facts which pointed in the opposite direction and it is a reasonable view to take that if the jury had been properly charged on this point, they would probably have found that the appellants were acting on grave and sudden provocation calculated to deprive them of their self-control, and that they were within the first exception in virtue of which their offence would be reduced to one of culpable homicide not amounting to murder.

For these reasons, we would set aside the conviction for murder, and substitute for it a conviction for culpable homicide not amounting to murder in the case of both the appellants and sentence each of them to a term of ten years' rigorous imprisonment.

Conviction for murder set aside.

Conviction for culpable homicide substituted.

Present : DIAS, A.P.J.

SANGARAM vs. RAJASURIYA, (INSPECTOR OF POLICE)

S. C. No. 502 *of* 1946—*M. C. Colombo* 11114.
Argued on : 2nd August, 1946.
Decided on : 12th August, 1946.

Penal Code, section 449—*Possessing without lawful excuse instruments of house-breaking, a chisel, a clasp knife and torch—What the prosecution should prove before accused is called upon to prove lawful excuse—Explanations consistent with the innocence of the accused—What inference should be drawn.*

Held : (i.) That in a prosecution for possessing without lawful excuse instruments of house-breaking, before the accused can be called upon to prove a lawful excuse for their possession, the prosecution must establish that the accused intended to use them for the purposes of house-breaking.

(ii.) That where there are explanations which are consistent with the innocence of the accused, the selection of those which tend to incriminate him is not justifiable.

Cases referred to :
Fernando vs. Fernando, 25 N. L. R., p. 33.
Burah vs. Subaya, 34 N. L. R., p. 30.
Punchirala Korala vs. John, 12 N. L. R., p. 198.
Police Sergent vs. Abeyhamy, 23 N. L. R., p. 156.
12 N. L. R., 198.

Accused-Appellant appears in person.
T. K. Curtis, Crown Counsel, for Crown respondent.

DIAS, A.P.J.

The facts as found by the Magistrate are that at about 1 a.m. on November 27, 1945, Police Inspector A. J. Rajasuriya and other police officers were patrolling the Hulftsdorp area in a motor car. As the vehicle turned into Ferry

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Street the appellant was observed " getting behind a tree ". The Inspector stopped the car and a constable " pulled the appellant from behind the tree ". He was searched, and the electric torch P1 was found in his hand, while in his waist were found the knife P2 and an implement P3 which the Inspector describes as " a chisel ". The Inspector, who is the only witness called for the prosecution, stated that " as the accused could not give a satisfactory explanation" he was arrested and taken to the police station along with the articles found on him.

On these facts, the appellant was charged under sec. 449 of the Penal Code with possessing without lawful excuse, instruments of house-breaking, to wit,—a chisel, a clasp knife and a torch. The appellant who was represented by counsel gave no evidence and called no witnesses. The Magistrate convicted him. He admitted thirteen previous convictions " for similar offences," and was sentenced to undergo two years' rigorous imprisonment and two years' police supervision.

The appellant who appeared in person submitted that the torch and the knife were not instruments of housebreaking. He further stated that the " chisel " was not found on his person but was subsequently introduced by the police. The latter submission I am unable to entertain. This suggestion was not made at the trial, nor was it put to the Inspector in cross-examination. It is also to be noted that the appellant gave no evidence on his own behalf. I have no hesitation in holding that these three articles were found in the possession of the appellant.

It is settled law that in the case of instruments which are commonly used for house-breaking, once the prosecution has established beyond reasonable doubt the fact that the accused was in possession of them, he must be convicted under sec. 449 unless he establishes some lawful excuse for their possession (25 N. L. R., p. 33). On the other hand, where the implement possessed is one of an ambiguous character, and is one which is ordinarily used for a lawful purpose, but may also be used for house-breaking, the burden of proof is on the prosecution to prove not only that the accused possessed it, but also that he intended to use it for the purpose of house-breaking (34 N. L. R., p. 30). Under the category of ambiguous implements come keys, a torchlight, a knife, a carpenter's gouge, a gimlet, a screwdriver, etc. See (34 N. L. R., p. 30 ; 12 N. L. R., p. 198 ; 23 N. L. R., p. 156). In the case of instruments of this kind, before the accused can be called upon to prove a lawful excuse for their possession, it is incumbent on the prosecution to establish that the accused intended to use them for the purpose of house-breaking. Thus in (12 N. L. R., 198) where the accused was found to be in possession of a carpenter's gouge, the facts that he was found at 9 p.m. at a place to which he was a stranger, that he carried the implement in a " suspicious manner " and that the accused set up a false defence—were held to show that he intended to use it for house-breaking.

I cannot hold that the electric torch or the knife are necessarily instruments of house-breaking. I have called for and inspected the " chisel." It has a round wooden handle and is $7\frac{1}{2}$ inches long. It appears to be more a screwdriver than a chisel, as the cutting edge is quite blunt. It is an unusual implement for a man to carry in his waist at 1 a.m.; but I cannot hold that it is so obviously an instrument of house-breaking as to shift the burden of proof to the defence. Like the knife and the torch it is an ambiguous implement which may be used for breaking into houses, besides being used for some lawful purpose.

Has the prosecution, then, established that the accused intended to use these things for house-breaking ? The circumstances relied on by the prosecution to establish this fact are that the accused got behind a tree when the police car turned the corner, and that he had to be pulled out from behind the tree.

Another circumstance relied on is that the head of the accused was " muffled up ". Having regard to the presumption of innocence, I cannot say that these circumstances, taken as a whole, establish anything more than a case of suspicion against the appellant. He is a reconvicted criminal and was probably well known to the police. When the appellant saw the police car, it is not improbable that he did not want the police officers to see him. The headlights of the car were on, and it is possible that he was dazzled by their lights and he got to a side. It is not unusual for a man at 1 a.m. in the month of November to muffle his head against the cold north-easterly winds prevalent at this season of the year. When there are explanations which are consistent with the innocence of the appellant, why select those which tend to incriminate him ? In my view this is a case in which the learned Magistrate should have entertained a reasonable doubt of the guilt of the appellant.

In view of these findings it is unnecessary to consider the submission made by the Crown that the sentence imposed on the appellant is irregular.

The conviction of the appellant is set aside, and he is acquitted and discharged.

Set aside.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present : Canekeratne, J.

HINNIAPPU vs. GUNARATNE

S. C. No. 119—*C. R. Galle No.* 24314
Argued on : 8th July and 2nd August, 1946.
Decided on : 28th August, 1946.

Res judicata—*Co-defendants—Action under Section 247 of the Civil Procedure Code by judgment-creditor unsuccessful at claim inquiry—Judgment-debtor made defendant but no relief claimed against him—Failure to file answer or raise issue at trial by judgment-debtor, but evidence given for plaintiff—Issue, whether judgment-debtor or claimant entitled to land—Judgment dismissing action—Does such judgment operate as* res judicata *between judgment-debtor and claimant in a subsequent action.*

An unsuccessful judgment-creditor at a claim inquiry instituted an action No. 22031 C. R. Galle under section 247 of the Civil Procedure Code in respect of a certain property against the claimant (3rd defendant) to which the judgment-debtors (1st and 2nd defendants) were made parties. In his plaint the judgment-creditor claimed no relief from the 1st and 2nd defendants but stated that they were made parties to prove their title. 1st and 2nd defendants filed no answer and no proctor represented them at the trial. The 3rd defendant filed answer and the following issues were raised by the plaintiff at the trial :—

(1) Are the 1st and 2nd defendants entitled to the land described in the plaint ?

(2) Is the said land liable to be seized under the plaintiff's writ ?

After trial, at which the 2nd defendant gave evidence and produced deeds in support of his title, the learned Commissioner answered both issues in the negative and dismissed the judgment-creditors' action on 31-3-41.

In March, 1943, the said 3rd defendant became the plaintiff in the present action for declaration of title to the same property against the said 1st and 2nd defendants alleging that they disturbed his possession thereof. These defendants filed answer claiming title on the same deeds as produced in the earlier action 22031.

At the trial an issue was raised as to whether the judgment in C. R. Galle 22031 operated as *res judicata* between the parties.

The learned Commissioner answered this issue in the affirmative and judgment was entered for plaintiff. The defendants appealed.

Held : That the judgment in C. R. Galle 22031 did not operate as *res judicata* between the plaintiff and the defendants as—

(*a*) the defendants were not necessary parties to that action ;

(*b*) they were without legal advice ;

(*c*) they did not take an active part in the litigation besides giving evidence as a witness for the plaintiff in that case.

Cases referred to :—

Kiriwatte vs. Siribaddana et al 1 S. C. D. 81.
Silva and another vs. Goonewardene (1 S. C. R. 321).
Panditha vs. Dawoodbhoy (40 N. L. R. 191).
Fernando vs. Fernando (41 N. L. R. 208).
Ramachandra Narayan vs. Narayan Mahadev & Another (11 Bombay 216).
Senaratne vs. Perera et al (26 N. L. R. 225).
Jayasundera vs. Andria et al (41 N. L. R. 569).
Madduma Banda vs Banda & Another (21 C. L. W. 72).

C. V. Ranawaka, for defendants-appellants.
G. P. J. Kurukulasuriya, with *Conrad Dias*, for plaintiff-respondent.

Canekeratne, J.

This is an action for declaration of title to a land called Lot B of Willekumbara instituted by the plaintiff against the defendants ; according to the latter one Kanattege Siman, and not Kanattege Singhoappu as the plaintiff alleged, was the original owner of the land and it passed by means of conveyances to V. Gabrinehamy, the wife of the 1st defendant. Five days before the date of trial the plaintiff amended the plaint by pleading the judgment in C. R. Case No. 22031 as *res judicata* in favour of the plaintiff.

The learned Commissioner after hearing evidence came to the conclusion that the judgment pleaded was *res judicata* as between the plaintiff and the 1st defendant and gave judgment for the plaintiff.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

One B. D. Samarasinghe (plaintiff in a partition action) appears to have obtained an order for costs against the 1st defendant and his wife, Gabrinehamy; when the right title and interest of these two persons in Lot B of Willekumbara was seized in execution of the writ at the instance of Samarasinghe, the plaintiff in the present case claimed the same. As the claim was upheld Samarasinghe instituted action No. 22031 in terms of section 247 of the Code (Cap. 86) against the claimant (the present plaintiff) who was made the 3rd defendant, the judgment-debtors, Gabrinehamy and her husband Hinniappu (1st defendant in the present action) being made the 1st and 2nd defendants. The plaintiff stated in the plaint that he claims no relief from the 1st and 2nd defendants; he pleaded that a cause of action had accrued to him to sue the defendants for a declaration that the 1st and 2nd defendants are entitled to Lot B and that Lot B is liable to be seized under the writ.

The 1st and 2nd defendants do not appear to have retained a proctor or to have filed answer. The 3rd defendant filed answer claiming that Lot B is a portion of another land called Paragahawatta; he denied that it belongs to the 1st and 2nd defendants. After trial the learned Commissioner dismissed the plaintiff's action.

It is contended by Counsel for the appellant that for the application of the rule of *res judicata* there must be a conflict of interest between the defendant and he refers to the decisions in *Fernando vs. Fernando* (1939-41 N. L. R. 208) and in *Ramachandra Narayan* (original defendant-appellant) *vs. Narayan Mahadev and another* (original plaintiff-respondents) (11 Bombay 216).

The contention of the respondent (which was supported by Counsel's reference to the cases of *Senaratne vs. Perera et al* (1924-26 N. L. R. 225); *Jayasundera vs. Andria et al* (1940-41 N. L. R. 569); and *Madduma Banda vs. Banda and another* (21 C. L. W. 72) was that action No. 22031 was a suit between the plaintiff and the 1st and 2nd defendants on one side and the 3rd defendant on the other and that there was a conflict of interest that was finally decided against the 1st and 2nd defendants. I was, at first, taken up by his argument but further reflection has shown me that the real question in this case is whether the 1st defendant and his wife, Gabrinehamy, were in point of fact parties against whom a binding judgment could be entered in that action.

A judgment-creditor can make an application for the execution of the judgment: execution is effected by means of a writ or order addressed to the Fiscal by virtue of which he seizes the property of the debtor for the purpose of bringing it to sale; a claim may, however, be preferred to the property seized. Section 241 to 244 of the Code deal with claims. The object of section 241 is to give a claimant a speedy and summary remedy. The Court may make an order releasing the property from seizure (section 244) disallowing the claim (section 245) or continuing the seizure subject to a mortgage or lien (section 246). The party against whom the order is made can bring a regular action: unless such party institutes an action to establish the right which he claims to the property in dispute within a specific time the order made against him is conclusive (section 247). The only persons who can institute an action under section 247 are the execution-creditor, the claimant and a mortgagee or holder of a lien; no such action can be brought by the judgment debtor *Kiriwatte* (plaintiff-appellant) *vs. Siribaddana et al* (defendants-respondents) 1 S. C. D. 81; *Silva and another vs. Goonewardene* (1 S. C. R. 321). The decree holder against whom the order is made (under section 244) may sue the successful claimant for a declaration of his right to seize and sell the property that had been released from seizure. To such an action the judgment-debtor is not a necessary party, this rule is subject to certain exceptions which are immaterial for the present purposes *Panditha vs. Dawoodbhoy* (1938-40 N. L. R. 191).

A party seeking to enforce a claim would know that his right is the subject of active controversy between him and his opponent and it is his duty to present to Court all the grounds relating to the cause of action upon which he expects a judgment in his favour. For the judgment in an action on any point is conclusive as to that point in every subsequent action between persons who were parties to the former action which they cannot canvas the same question again in another action, although perhaps some objection or argument might have been urged upon the first trial which would have led to a different judgment, and was not urged.

On the other hand a judgment *in personam* is no evidence of the truth of the decision or of its grounds between strangers or a party and a stranger: the reasons for this rule are commonly stated to rest on the ground of *res inter alios acta* (or *judicata*) *alteri nocere non debet*, it being considered unjust that a man should be affected, and still more be bound, by proceedings in which he could not make a defence, cross-examine or appeal (Phipson on Evidence (8th Ed.) 419, 420).

A person who is joined as a defendant in action though no relief is claimed against him is merely a formal party to the proceedings. It may sometimes happen that a matter put in issue in an

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

action by a plaintiff may not be in issue between him and such a defendant. The 1st defendant was not a necessary party to action No. 22031 : as he knew that no claim was made against him and his wife he would ordinarily refrain from taking any steps to assert his rights in that action ; moreover he was *inops consilii* and did not take any active part in the litigation. It is true he gave evidence at the trial but this is not of much importance for the 1st defendant's presence in the witness-box was due, as suggested by the appellant's counsel, to the fact that he was called by the plaintiff.

In the circumstances it would be inequitable to hold that the 1st defendant is precluded from asserting his rights to the land by the existence of the judgment in the previous action.

The learned Commissioner seems to have directed all his attention to the question of *res judicata*. He does not consider the question of possession at all but at the close of his judgment he answers issue thus—plaintiff has prescriptive possession. This affords very little justification for respondent's contention that he has succeeded on the question of prescription.

The appeal is allowed ; the plaintiff's action is dismissed with costs in both Courts but I reserve the right to the plaintiff, if he is so advised, to bring an action on the ground of prescriptive possession against the appellant, provided all costs of the present proceedings have been paid by the plaintiff.

Appeal allowed.

Coram : HOWARD C.J. (President), JAYETILEKE, J. & CANEKERATNE, J.

REX vs. W. F. FERNANDO.

Appeal No. 25 *of* 1946 (*with leave obtained*), *S. C. No.* 39—*M. C. Chilaw No.* 28029.

Argued and Decided on : 10th June, 1946.

Court of Criminal Appeal—Verdict of culpable homicide—Self-defence—Right exceeded—Trial Judge's view that accused guilty of murder—Sentence of ten years' rigorous imprisonment—Is it excessive in the circumstances.

The appellant was found guilty by the jury of culpable homicide not amounting to murder as he had exceeded the right of self-defence. The learned trial Judge, after this verdict, stated that in his view the appellant was guilty of murder and passed a sentence of ten years' rigorous imprisonment.

Held : That the jury's verdict indicated that they accepted the appellant's story of self-defence, and in the circumstances the sentence passed was excessive.

S. Sivasubramaniam, for the appellant.

T. S. Fernando, C. C., for the Crown.

HOWARD, C.J

In this case the appellant was charged with the offence of murder and was found guilty by the jury of culpable homicide not amounting to murder. After this verdict had been recorded, the learned Commissioner put certain questions to the foreman of the jury. The first question was " Was it in self-defence or under grave and sudden provocation ? " The Foreman answered " Self-defence ". The learned Commissioner then put the question " Did he exceed his right ? " Apparently there was no answer to that question, but it must be assumed that the jury brought in the verdict they did on the ground that the appellant had been attacked and had used his knife in the exercise of the right of private defence but had exceeded that right. I would further observe that before he passed sentence the learned Commissioner addressed the prisoner as follows :— " You are a very lucky man. My own view is that you are guilty of murder. Still the jury are the judges of facts. They have taken a merciful view of your case ". The learned Commissioner then proceeded to pass a sentence of 10 years' rigorous imprisonment.

We think that the learned Commissioner has erred in not giving effect to the verdict of the jury. The verdict of the jury indicates that they, generally speaking, accepted the appellant's story. We think that a sentence of 10 years' rigorous imprisonment, having regard to the acceptance of that story, is excessive. In these circumstances we reduce the sentence to one of 5 years' rigorous imprisonment.

Sentence varied.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present : Keuneman, J., & Canekeratne, J.

CHINNIAH vs. SINGHOAPPU

S. C. No. 63—*D. C.* (*Inty.*) *Batticaloa* 165.
Argued & Decided on : 5th November, 1945.

Civil Procedure—Order to re-issue summons on a defendant several times—Failure on the part of plaintiff to take any steps—Order refusing further process—Is it justifiable.

The learned District Judge made order on about nine occasions that summons on the 2nd defendant should be re-issued on fresh stamps. The plaintiff had taken no steps and on the last occasion the Judge made order refusing further process. The plaintiff appealed.

Held : That the Court was justified in making the order.

G. Thomas, for plaintiff-appellant.

G. P. J. Kurukulasuriya, for 1st defendant-respondent.

Keuneman, S. P. J.

In this case since the 3rd of February, 1944, the District Judge has kept making the order that summons on the 2nd defendant should be re-issued on fresh stamps. The case has been coming up about once a month on an average but the plaintiff has taken no steps whatever to implement that order. He has apparently slept on his rights and has been of no assistance whatsoever to the Court. On the 23rd of November, 1944, when the matter finally came up, no steps had been taken by the plaintiff to carry out that order of the Judge and the Judge made the following order :—" The plaintiff has failed to take steps as ordered for about nine times. I refuse further process. Submit for abatement in due course ". This is clearly an order refusing further process which the Judge was justified in doing in view of the fact that each of his previous orders had been entirely disregarded by the plaintiff. This is clearly not an order for abatement of the action. That may or may not take place in due course. In the circumstances the order made by the District Judge is correct and the appeal is dismissed with costs.

Canekeratne, J.
I agree.

Appeal dismissed.

Present : Wijeyewardene, S.P.J. and Jayatileke, J.

WIJERATNE Vs. SAPUGODAGE MENDIS APPU *et al.*

S. C. No. 273—*D. C.* (*F*) *Kalutara No.* 22902.

Argued on : July 26, 1946.
Decided on : August 26, 1946.

*Decree—Sale in execution of—Purchase by decree-holder—*Bona fide *purchase by third party from decree-holder—Subsequent reversal of decree—Is title of* bona fide *purchaser affected by such reversal.*

Held : That the title of a *bona fide* purchaser from a decree-holder who purchased at a sale held in execution of his decree is not affected by the subsequent reversal of such decree.

N. E. Weerasooriya, K.C., with *U. A. Jayasundere* and *Vernon Wijetunga* for the plaintiff-appellant.

E. B. Wickremenayake, for the defendants-respondents.

Wijeyewardene, S.P.J.

The plaintiff was in 1932 the owner of the land forming the subject matter of this action. By P 3 of 1932 the plaintiff leased the land to the first and the third defendants for a term of twelve years commencing from November 11, 1932, for a sum of Rs. 420 paid to the plaintiff at its execution. It was further provided by P 3 that, if the lessees put up a boutique on the leased land, they should pay to the plaintiff additional rent at Rs. 60 a year during the last six years of the lease.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The second defendant, an uncle of the plaintiff, sued the plaintiff in C. R. Kalutara, 8,995 and obtained judgment by default in November, 1935. In execution of that decree the land in question was sold in July, 1946 for Rs. 105. The second defendant became the purchaser at that sale, obtained Fiscal's conveyance D 2 of November 4, 1936, and conveyed his interest in the land to the first defendant by D 3 of November 17, 1936, for Rs. 200.

The plaintiff sued the first and the third defendants in C. R. Kalutara, 10,181 in June, 1941, for the recovery of Rs. 25 which he said was due to him as rent for five months under P 3 in respect of a boutique constructed by them in January, 1941. The first defendant filed answer in August, 1941, denying the plaintiff's right to recover any rent and claiming the property by virtue of D 3. That action was dismissed in February, 1942, as the plaintiff was absent on the date of trial.

In September, 1941, the plaintiff applied in C. R. Kalutara, 8,995 for the vacation of the decree of 1935 entered against him. Notice of that application was served on the second defendant and as he did not show cause the decree was set aside and the plaintiff was allowed to file answer in that case. As the second defendant failed to appear on the trial date, decree was entered on December 11, 1941, dismissing the plaintiff's case.

The plaintiff, thereupon, filed the present action against the first defendant on November 6, 1942, alleging that the first defendant was wrongfully claiming to be the owner of the land. The first defendant filed answer claiming the land under D 3. The second and the third defendants were subsequently added as parties on the application of the plaintiff's proctor. The present appeal is by the plaintiff against the decree of the District Court dismissing his action.

I wish to observe that the issues framed at the trial of this case are of the most unsatisfactory nature. Some dealt with matters about which there was no dispute while the others were of too general a nature. Though, no doubt, it is usual for the practitioners to suggest issues, the duty rests on the trial Judge to see that the case proceeds to trial on proper issues which set out precisely the questions to be determined by him.

The only point that was argued at the hearing of the appeal was whether the first defendant lost his title on D 3 of 1936 by reason of the reversal of the original decree in C. R. Kalutara, 8,995 and the dismissal of that action in 1941. That point had not been raised specifically in the issues framed at the trial.

There is no evidence placed before us as to the grounds on which the original decree in C. R. Kalutara, 8,995 was set aside. The law has been clearly established in a series of cases that where the decree holder himself is the purchaser at the sale in question, the sale may be set aside if the decree is subsequently reversed. It was sought to be deduced from this that the first defendant who got his conveyance D 3 from the decree holder—the purchaser at the Fiscal sale—obtained also a title which was liable to be set aside on the reversal of the decree. We informed Counsel at the argument that we were unable to assent to that proposition. Nothing has been proved or even alleged against the *bona fides* of the first defendant. He gave evidence at the trial that he informed the plaintiff in 1936 that the land was going to be sold by the Fiscal and that he bought it later for Rs. 200 from the decree holder as he was interested in the property which he had taken under a lease. All that evidence stands uncontradicted. On the other hand there is a suggestion made by the first defendant in his evidence that the plaintiff and the second defendant, plaintiff's uncle, acted in collusion in getting the original decree in C. R. Kalutara, 8,995 vacated. The evidence of the plaintiff throws no light on the proceedings in that case.

I find that the view expressed by us at the argument is in consonance with the decisions of the High Court of Madras in *Marimuthu Udaijan et al vs. Subbaraya Pillai et al.* (1903) 13 Madras Law Journal 231 and in *Sheik Ismal Rowther et al. vs. Rajab Rowther* (1906) 30 Indian Law Reports (Madras Series) 295. In the latter case the appellants were *bona fide* purchasers from the first defendant who had purchased a property in execution of a decree obtained by him against the plaintiff. Subsequent to the purchase by the appellants the decree was set aside on the ground that it had been obtained by fraud. Holding that the title of the appellants was not affected by the reversal of the decree Subrahmania Aiyar, J. and Benson, J. held :—

> " Assuming that the first defendant in obtaining the decree had been guilty of misrepresentation or fraud, the proceedings were only voidable, and a *bona fide* purchaser from him is entitled to rely on his title as such. The plaintiff had only an equity to set aside the proceedings which were the result of fraud or misrepresentation, and that equity cannot be allowed to prevail against persons in the position of the appellants."
>
> " It is by no means clear that it was the duty of the appellants when aware that their vendor's title was under a Court sale, to refer to the decree on which the sale was held ; but, assuming that it was, we are unable to agree to the argument urged for the plaintiff that a reference to the decree as it stood before it was set aside would have shown any flaw in the title of the first defendant so as to fix the appellants with notice of the first defendant's fraud."

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

I am aware that a contrary view has been taken in *Satis Chandra Ghouse vs. Rameswari Dasi et al.* (1915) All India Reporter 42, Calcutta 363. The High Court of Calcutta based its decision on the following passage in the judgment of the Privy Council in *Zain-ul-Abdin Khan vs.. Asghar Ali Khan* (1888) 10 Allahabad 166 :

> "Some of the defendants were the decree-holders, and some were persons who came in under them ; but all the defendants who are in that position may for the purpose of this judgment be classed under the head of the decree-holders. Others of the defendants were not decree-holders, but merely purchasers under the execution and strangers to the decree upon which the execution issued."

The High Court of Calcutta appears to have inferred from the above passage that the Privy Council enunciated therein a principle that the purchasers from the decree holders were in the same position as the decree holders themselves with regard to the validity of their claims to property sold in execution of a decree subsequently reversed. That inference, I would say with respect, is erroneous as may be seen from an examination of the Privy Council decision.

The facts in *Zain-ul-Abdin Khan vs. Ashgar Ali Khan* (*supra*) were briefly as follows :—An *ex parte* decree was entered in 1874 directing A, *inter alia* to pay a sum exceeding Rs. 100,000 to X, Y and Z. That decree was set aside by the Privy Council about 1879 and at the subsequent hearing of the suit before the High Court of Allahabad a decree was entered in 1880 reducing the amount payable by A to X, Y and Z to Rs. 3,746 and costs taxed at Rs. 4,908. Meanwhile X, Y and Z executed the decree of 1874 and several properties of A were sold in execution on various occasions. The first sale was on November 17, 1874 to B for Rs. 5,050 and the sales on subsequent occasions in 1874, 1875 and 1876 were to X, Y and Z and also to C, D and E, who were not parties to the action. After 1880, A filed an action against (i.) B, (ii.) X, Y and Z, and (iii.) purchasers from X, Y and Z to set aside the sales in execution. A, however, stated in his plaint that the sale to B "might stand good as satisfying what was due under the decree of 1880." C, D and E were subsequently added as parties on an order of Court. The Subordinate Judge who heard the case set aside the sales of (i.) the property claimed by B, (ii.) the properties claimed by C, D and E, and (iii.) the properties claimed by X, Y and Z and the purchasers from X, Y and Z. An appeal was preferred to the High Court against that judgment by B, C, D and E *alone* and the High Court reversed the judgment of the Subordinate Judge against the appellants on the ground that the sales to them were not rendered invalid by the modification of the *ex parte* decree of 1874. The High Court decreed that the "plaintiff's (A's) action will stand dismissed." On an appeal against the judgment of the High Court, the Privy Council affirmed the decision of the High Court but observed that the decree of the High Court were liable to be misunderstood as a dismissal of A's action not only against B, C, D and E but also against X, Y and Z and the purchasers from them. The Privy Council, therefore, made it clear that the decrees of the High Court "must be construed as applicable only to the defendants who had appealed and whose appeals were decreed, and not to the defendants who had not appealed, and who were not before the Court and had not objected to the decision of the Subordinate Judge." It will thus be seen that the Privy Council was adjudicating on the rights of B, C, D and E alone and not on the rights of X, Y and Z or the purchasers from them. For convenience of reference, X, Y and Z and the purchasers from them were grouped together by the Privy Council as "decree holders" in contradistinction to B, C, D and E with those rights alone the Privy Council was concerned. I have no doubt the Privy Council was thinking only of this convenience of reference when it spoke of "the purpose of this judgment" for which the "decree holders" and "the persons who came in under them" might be "classed under the Head of decree holders." The interpretation placed by the High Court of Calcutta on the above passage in the judgment of the Privy Council appears to me to be entirely irreconcilable with the clear indication given by the Privy Council that the decree passed by it applied only to the defendants who had appealed to it.

For the reasons given by me I would dismiss the appeal with costs.

JAYETILEKE, J.
I agree.

Appeal dismissed.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Present : DE SILVA, J.

PERERA Vs. POLICE

S. C. No. 160—*M. C. Colombo South No.* 4202
Argued and Decided on : 22nd May, 1946.

Penal Code Section 451—Evidence necessary to establish that accused is a reputed thief.

Held : That in a charge under section 451 of the Penal Code, evidence of previous convictions of accused cannot be led to establish the fact that he is a reputed thief.

M. Ratnam, with *E. B. Saturukulasingham*, for the accused-appellant.
H. A. Wijemanne, C.C., for the Attorney-General.

DE SILVA, J.

In this case the accused has been convicted of an offence under Section 451 of the Penal Code and sentenced to imprisonment for a period of one year and two years' police supervision.

In the course of the evidence for the prosecution it was proved that the accused had six previous convictions. These convictions were apparently referred to to show that the accused was a reputed thief. I think it is not open to the prosecution to lead evidence of previous conviction to establish the fact that the accused is a reputed thief. The evidence available for the prosecution must be evidence of the reputation of the accused, apart from previous convictions.

Whatever that may be, the evidence does not establish the intention with which the accused was alleged to have loitered on the road. There are no circumstances from which an intention to commit theft or any other unlawful act can be inferred. In the circumstances I set aside the conviction and acquit the accused.

Conviction set aside.

Present : WIJEYEWARDENE, S.P.J. AND JAYETILEKE, J.

MUDALIYAR WIJETUNGA Vs. DUWALAGE ROSSIE *et al.*

S. C. No. 274—*D. C. (F) Kalutara No.* 23236.
Argued on : July 17 and 18, 1946.
Delivered on : August 12, 1946.

Fidei commissum—*Gift—Acceptance by donee—Sale of gifted property by donor to third party—Improvements made by the third party—Subsequent revocation of conditions of gift by donor—Can donor revoke such conditions—Sale in execution against third party—Action by* fidei commissarii *against such purchaser—Compensation*—Jus retentionis

N and S were entitled to a certain land. In 1906 N gifted his half-share by deed P 3 to his daughter C who accepted it subject to the conditions :

(*a*) that she should not sell, mortgage or otherwise alienate the property.
(*b*) that upon her death the property should devolve upon certain persons designated as " all her children being heirs descending from her and those who have obtained authority as her executor or administrator.

In 1911, N purchased S's half-share and transferred the entirety of the land to E, who planted and otherwise improved it.

In 1918 by deed D 1, N purported to cancel the conditions subject to which gift on P 3 was made and by deed D 6 of the same year gifted the property absolutely to C.

At a sale in execution of a decree against E the property was sold and the defendant-appellant purchased it and obtained conveyance D 4.

C died leaving the four plaintiffs who in this action claimed a half-share as *fidei commissarii* on deed P 3. The plaintiffs succeeded and the defendant appealed.

Held : (i.) That P 3 created a valid *fidei commissary* donation which involved 'the benefit of the family'.
(ii.) That N, the donor had no power to revoke the gift to the *fidei commissarii* without their consent.
(iii.) That a fiduciary is entitled to claim compensation for improvements against the *fidei commissarii.*
(iv.) That a purchaser from a fiduciary is in the same position as a fiduciary as regards a claim for improvements.
(v.) That the defendant-appellant was a *bona fide* possessor and was entitled to recover compensation for improvements made by E from the plaintiffs and to a *jus retentionis* until compensation is paid.

H. V. Perera, K.C., with *N. E. Weerasooriya, K.C.*, and *H. W. Jayawardene*, for defendant-appellant.

L. A. Rajapakse, K.C., with *A. C. Gunaratne, J. M. Jayamanne*, and *T. B. Dissanayake*, for plaintiffs-respondents.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Wijeyewardene, S.P.J.

This is an action for declaration of title brought by the plaintiffs against the defendant in respect of a half share of a land called Panditha Udumukelle.

Two persons Nandiris and Siyaneris were entitled to the entire land in equal shares. By Deed, P 3 of 1906, Nandiris gifted his half share to Carlina subject to certain conditions. By Deed P 2 of 1911 Siyaneris sold his half share to Nandiris. By Deed, D 3 of February 8, 1919, Nandiris sold the entire land to E. C. de Fonseka. By Deed D 1 of March 22, 1918, Nandiris purported to cancel the conditions subject to which the gift P 3 was made and to gift the half share absolutely to Carlina who by Deed, D 6 of March 24, 1918, conveyed the half share to Nandiris. In satisfaction of a hypothecary decree entered against E. C. de Fonseka in 1935, the entire land was sold, and at the sale the defendant became the purchaser and obtained in his favour the Deed D 4 of 1941. Carlina died in 1923 leaving as her children the four plaintiffs the eldest of whom was born in 1910. I may observe at this stage that no issue was framed at the trial with regard to the prescriptive rights of parties.

The present appeal is by the defendant against the decree entered by the District Judge declaring the plaintiffs entitled to a half share of the land as *fidei commissarii* under the Deed of gift, P 3.

The questions of law that have to be considered on this appeal are :—

(1) Did P 3 create a valid *fidei commissum* ?

(2) If P 3 created a *fidei commissum*, was such *fidei commissum* revoked effectually by D 1 ?

(3) Is the defendant entitled to claim compensation for improvements admittedly effected by E. C. de Fonseka ?

(4) Is the defendant entitled to a right of retention until such compensation is paid to him ?

The Deed P 3, is written in Sinhalese. It is a gift to Carlina on the eve of her marriage. It contains a clause prohibiting Carlina from selling, mortgaging or otherwise alienating the gifted property. It then proceeds to say that upon her death the property should devolve upon certain persons who were designated as " all her (Carlina's) children being heirs descending from her and those who have obtained authority as her executor or administrator." The Sinhalese words are :—

ඇගෙන් පැවත එන දරු උරුමක්කාර පොල්මීඃ
අද්මිනිස්ත්‍රාසි කාරාදිවූ බලේලත් සියල්ලන්ඩත්

I am unable to uphold the contention of the appellant's Counsel that the reference to " those who have obtained authority as her executor and administrator " in P 3 makes it impossible to say with certainty who the *fidei commissarii* are. The answer to that argument is found in the following passage from the judgment of Pereira, J. in *Wijetunga et al. vs. Wijetunga* (1912) 15 N. L. R. 493 :—

> " What the deed means is that, alternatively, that is to say, in default of heirs the property is to vest in executors or administrators. In default of heirs, Alvino, as *fiduciarius*, would, of course be absolute owner of the subject of the *fidei commissum*, and a disposition by him of the same by will would then have full effect, and thus the use of the words, " executors " and " administrators " (the latter implying administrators *cum testemento annexo* could be explained away without doing violence to the language employed, and in a manner that gives effect to the obvious intention of the grantor to create a *fidei commissum*."

I hold that P 3 created a valid *fidei commissum* and that the *fidei commissarii* are " the children of Carlina being heirs descending from her."

I shall now consider the question whether Nandiris could have revoked the gift to the *fidei commissarii* created by P 3.

The Deed P 3 shows that Carlina accepted the " said gift " under the Deed. This is clearly an acceptance by Carlina of the gift to her subject to the conditions and restrictions set out in the Deed. It is, however, argued on behalf of the appellant that Carlina's acceptance was only an acceptance on her behalf and that, in the absence of an acceptance by the *fidei commissarii*, the donor was entitled to revoke the gift to the *fidei commissarii*.

The appellant's Counsel relied on the following passage from *Voet* 39-5-43. (de Sampayo's Translation) :—

> " Undoubtedly, in the absence of acceptance by the *fidei commissary* or in his name by a notary or other person in conformity with our law, the better opinion is that the donor may change his mind in regard to the *fidei commissum* just as a change of mind is admissible in regard to the donation itself, as explained in above num. 13, before the donee has accepted it."

But this general rule as laid down by *Voet* is not accepted without qualification by Perezius :—

> " The greater dispute is whether a donor who has gifted property to another with this pact and limitation that after a certain time he should restore it to some third person, can, in the meantime, revoke the pact. The majority hold the view that the donor is not permitted to revoke the pact even if there has been no acceptance by him in whose favour it was made. This they prove from *d.1.3.h.t.* which gives an immediate *actio utilis* to the third party on whom the benefit of the liberality is bestowed so that, since he has acquired a right—for this apparently cannot be denied if he is entitled to the *actio*—the donor will not be permitted to revoke the pact and limitation because by so doing he would be taking away from another without his consent a right which he has acquired which the law does not allow. They prove also the same opinion from *1.1.ff. Qui Sine manumiss.* where Paulus says if a slave has been put up for sale on these terms that after a certain

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

time he should be manumitted, even if the vendor changes his mind he can yet seek his liberty because what was once his wish ought not later to displease him nor should a pact annexed to a gift to the advantage of another be revoked without his consent. Gomez *(d. loco n.30)*; Rod. Suarez *(ad l. quoniam in priorib decl. legis Regni, octavo quaeritur)*; Fachinaeus *(lib.8. cntr cap. 38)*."

"The former opinion (*i.e.*, the opinion that the gift cannot be revoked) would be the more correct if the gift made to one person is made in favour of a family in which the donor wishes the property gifted to remain; for by no pact can it be revoked in respect of after-comers; for it is sufficient in order that it may be considered in perpetual donation that the first donee has accepted it so that there is no need of a subsequent acceptance *(1.69. Sec. 3 ff.de leg. 2)* where the burden imposed on the first donee results in an action available to all as Molin says *(de Hisp.primog. 1.4.0.2n.75)* because it would be absurd, in order to make a *fidei commissum* irrevocable, to require the acceptance of infants and persons not yet born." *(Perezius Bk.8 Tit 55 Sec. 7 & 12 : Wickremanayake's Translation).*

Pothier who discusses the conflicting views of the jurists on this question sets out as follows the reasons for the view of those belonging to the school of Perezius :—

"The clause of the act of donation which contains the charge imposed upon the donatory, includes a second donation, or a *fidei commissary* donation by the donor to the third person. This second donation, without the intervention of the person in whose favour it is made, receives its full perfection by the first donatory accepting the donation subject to the charge, since by that acceptance he contracts, in favour of the third person without the intervention of the latter in the act, an engagement to accomplish the charge. From this engagement arises a right, which is acquired by the third person, to demand that the charge shall be accomplished; this right is irrevocable, and it shall be not in the power of the donor to discharge the first donatary in prejudice of the right acquired by the third person; for the clause which includes the second or *fidei commissary* donation, making part of an act of donation *inter vivos*, the *fidei commissary* donation included therein is of the same nature, and consequently is a *donatio inter vivos*, and consequently irrevocable. It ought then to be no, longer in the power of the donor to revoke it, by discharging the first donatary from the charge imposed upon him, and from the engagement which he had contracted in favour of the second. With regard to the rules of law relied upon in support of the opposite opinion, *Quacque eodem modo dissolvuntur quo colligata sunt. Quae consensu contrahuntur consensu dissolvuntur*: these rules only apply as between the contracting parties; and not in prejudice of any right acquired by a third person. This results from the last law *ff.de pact.* which decides that the surety who has acquired a legal exception (*un droit de fin de non recevoir*) by an agreement between the creditor and the principal debtor, cannot be deprived of that right by an opposite agreement of the same parties." (Pothier on Obligations Part 1, Articles 5, Section 75; *Evan's Translation).*

At this stage it is desirable to consider what kind of a gift is indicated by Perezius when he speaks of "a gift made to one person which is made in favour of a family in which the donor wishes the property to remain."

While dealing with testamentary *fidei commissa* left to a family *Voet* (36-1-27) discusses the definition of "family" according to Justinian. He then proceeds to consider two kinds of such *fidei commissum—fidei commissum unicum* and *fidei commissum multiplex*—and says :—

"The bequest may be of such a kind that the *fidei commissum* is a single one, and where it has operated once, or where there has been one restitution to the family, the *fidei commissary* obligation is determined, nor is the person who by virtue of such a restitution to the family has acquired the property or the inheritance obliged after his death to restore it to another member of the same family, but he is able to transfer it to a stranger by act *inter vivos* or by last will.

But, on the other hand, it may be a recurring (multiplex) *fidei commissum*, circulating as it were throughout the family, with the result that the person to whom, in the first instance, restitution has been made as being one of the family, is bound to restore the inheritance to another member of the family and he again to a third member, and so on, so long as there are members of the same family surviving.

The first kind of bequest, where the terms of the *fidei commissum* are completely satisfied by a single act of restitution and the *fidei commissary* is not obliged to make a further and repeated restitution, seems to take place when the testator, in unqualified terms, by means of words which have special reference to the person (*conceptis in personam*) of the heir, has prohibited the appointed heir from alienating the property or inheritance out of the family, without any further directions, or had ordered him to leave the estate to the family." *(Voet 36.1.28. Mc Gregor's Translation).*

On the above passage in *Voet* and in view of Sections 2 and 3 of the Entail and Settlement Ordinance I hold that the gift to be considered in this case is a *fidei commissary* donation which "involves the benefit of the family" as mentioned by Perezius.

The view favoured by Perezius that such a donation is irrevocable even in the absence of an acceptance on behalf of children not yet born *in esse* appears to me the more reasonable view.

An identically similar question was decided in *Ex Parte Orlandini and two others* (South African Law Reports (1931) Orange Free States Provincial Division page 141). In that case Mrs. Orlandini gifted a property in equal shares to Daniel Brink and Stephanus Brink with the condition that at the death of each of them his share shall "devolve on his children or still to be born of his now existing marriage." At that time Daniel Brink had two minor sons and Stephanus Brink one minor son. Mrs. Orlandini and Daniel Brink and Stephenus Brink presented a petition to Court for the revocation of the *fidei commissum* about three years after the execution of the Deed of gift. The Court consisting of Sir J. E. R. de Villiers, Judge-President, and Mr. Justice Fisher disallowed the application and in the course of his judgment de Villiers, J.-P., said :—

"Now it seems to me that the argument of Perezius is unanswerable, for, if acceptance by minors and unborn

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

persons were necessary to lend binding force to a *fidei commissum in favorem familiae*, it would follow that such a *fidei commissum* could not, in practice, be constituted by act *inter vivos*......... The only question which remains is whether the *donatio* made to Daniel and Stepehnus Brink falls within the principle stated by Perezius. The reference by him (in the passage quoted) is to a case where a donation made to an individual "involves the benefit of the family, the donor wishing that the property should remain in the family." It seems to me that in the present case the transfer of the land to Daniel and Stephenus Brink on condition that they may not dispose of it but that on the death of each it is to go to his children born or to be born of his existing marriage, falls within the description of a "*donatio* involving the benefit of a family, within which the donor wishes it to remain." The reasoning of Perezius also applies, for here too we have minors, and unborn issue of Daniel and Stephenus' existing marriages. It must therefore be held, in accordance with the passage quoted from Perezius, that upon the acceptance of the *donatio* by the first two donees (David and Stephenus) the *fidei commissum* became effective and effective and binding as a whole. It can therefore not be revoked without the consent of the *fidei commissaries*."

There are certain local decisions on this point and the conflicting views expressed by various Judges create some difficulty. The earliest case is *Weerakkodage John Perera vs. Avoo Lebbe Marikar* (1884) 6 Supreme Court Circular 138. In the case the property was granted by Juan to his daughter Anna subject to the condition that she should not alienate or encumber it and that after the death it should be enjoyed "by her heirs and descendants in perpetuity under the bond of *fidei commissum*." Anna accepted the gift. Sometime afterwards, but before any children were born to her, Juan devised the property absolutely to Anna by a last will. Anna conveyed the property to the defendant whose title was disputed in that case by the plaintiff, a son of of Anna born after Juan's death. It was held that the plaintiff was entitled to succeed and Clarence, J., who accepted and acted upon the opinion of Perezius said :—

"I find therefore, the Roman-Dutch Jurists, so far as their hypothetical reasoning or imaginary cases go, favouring what seems to me the commonsense view, that where a voluntary family settlement is made, by which somebody benefits immediately and other classes contingently on their being born and living to inherit, the settlement takes effect in favour of these future classes immediately on its taking effect, *qua* the immediate participator."

The Counsel for the appellant questioned the soundness of this decision on the ground that it would be "intolerable" for the unborn to be bound by the contracts of the living. That no doubt is a principle which would readily be accepted in case of contracts where there is even a possibility of the contract being prejudicial to the interests of the unborn. But I fail to see how under our law a gift could even be burdensome to children not *in esse* and why in the case of such a contingency—if such a contingency could arise—the *fidei commissary* donees could not free themselves from that burden. It was then contended that the case of *Weerakkodage John Perera vs. Avoo Lebbe Marikar* (*supra*) could be distinguished as the *fidei commissum* in that case was a perpetual *fidei commissum*. I am unable to accept the contention based on the use of the words "in perpetuity."

Professor Lee dealing with Perpetual Fidei Commissum at page 384 of his Introduction to Roman-Dutch Law (Third Edition) says :—

"The testator then, may tie up the property for ever if he pleases. But the mere use of the word 'perpetual, or the like, is not sufficient to produce this result."

"Thus, if he says :—'I will that my goods after the death of my first heir shall descend to my next of hin then in being, and that they shall always go from one to the other of my blood relations, and shall not at any time pass outside my family," these words will not be sufficient to tie up the property beyond the fourth generation inclusive, unless he goes on to add that : 'the *fidei commissum* shall not at any time or in any event whatsoever come to an end,' or other words of like import."

Moreover as stated earlier by me we have the authority of Voet that a *fidei commissum* in favour of a family may be a *fidei commissum multiplex* or a *fidei commissum unicum* and there is also the additional fact that at present, even if a donee uses language sufficient to create a perpetual *fidei commissum*, the Entail and Settlement Ordinance will render nugatory any restraint on alienation for a longer period than "the lives of persons who are in existence or *en ventre sa mere* at the time when such.........deed.........is executed and are named.........in such.........deed.........and the life of the survivor of such persons."

It was also submitted that the decision had not the binding authority of a Full Court decision. As the appellant's Counsel appeared to question the correctness of the statement of the Editor of the Law Reports that it was the judgment of Clarence, J. and Dias, J. that was delivered by Clarence, J. I examined the original judgments kept at the Supreme Court Registry and found that the statement in the Law Reports was correct as the judgment delivered by Clarence, J. had been signed by both Clarence J. and Dias, J. while a separate dissenting judgment was given by Burnside, C.J. In 1884 the Supreme Court consisted of a Chief Justice and two Puisne Justices and therefore, the decision in *Weerakkodage John Perera vs. Avoo Lebbe Marikar* (*supra*) would be a Full Court decision binding on us (*vide Jane Nona vs. Leo* (1923) 25 N. L. R. 241 and *Appu Sinno vs. Girigoris* (1914) 3 Balasingham's Notes of Cases 20).

Soysa at el. vs. Mohideen (1914) 17 N. L. R. 279 was a decision of a Bench of two Judges on the question of the revocability of a *fidei commissary*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

donation where the *fidei commissarii* were not *in esse* at the date of the execution of the deed. In that case the Supreme Court followed with approval the decision of Clarence, J. and Dias, J. in the earlier case which was regarded as a binding authority.

Carolis et al. vs. Alwis (1944) 45 N. L. R. 156 is again a decision of a Bench of two Judges and the Court had to consider then a similar question. The plaintiffs in that case who claimed as *fidei commissarii* were minors at the time of the execution of the Deed of gift (*vide* page 161). This Court expressed in that case a view that even where the *fidei commissarii* were not *in esse* the *fidei committens* could revoke the deed if there was no acceptance on behalf of the *fidei commissarii.*

There is, as mentioned earlier by me, a conflict of views among the Roman-Dutch Jurists on the necessity of an acceptance on behalf of *fidei commissarii* not *in esse* to make a *fidei commissary* donation irrevocable. But as pointed out by Professor Lee (*vide* An Introduction to Roman-Dutch Law, Third Edition, page 16) where the opinion of the Jurists are at variance or bear an archaic stamp the courts adopt the view supported by authority or most conconant with reason.

For the reasons given by me I hold that the question now under consideration must be answered in the negative.

I agree with my brother Jayetileke (*a*) that the defendant is entitled to claim compensation at Rs. 250 an acre in respect of improvements and (*b*) that the defendant has the right to retain possession of the property until his claim is satisfied.

The District Judge has given the plaintiffs damages at Rs. 20 per month from November 4, 1941, till they are restored to possession. In view of our decision on the question of compensation and *jus retentionis* the plaintiffs would have a right to claim damages at Rs. 20 a month only from the date when the defendant's claim to compensation is satisfied.

I affirm the decree of the District Court subject to the modification indicated by me in the two preceding paragraphs.

The appellant will pay the respondents the costs of this appeal.

JAYETILEKE, J.

I have had the advantage of reading the judgment prepared by my brother. I entirely agree with that judgment and do not find it necessary to add any words of my own.

There remains only the question whether the defendant is entitled to set up any claim for compensation for improvements against the plaintiffs who are *fidei commissaries.* It is admitted that the land was planted with budded rubber by E. C. de Fonseka after he purchased it from Nandoris on D 3. There are no grounds for holding that E. C. de Fonseka did not believe that he had good title to the land when he planted it. He had a deed in his favour which purported to give him title and the probability is that he planted the land in the *bona fide* belief that he was the owner.

The authorities indicate that a *fiduciary* is entitled to compensation for useful improvements effected by him from the *fidei commissaries.* In *Livera vs. Abeysinghe* (18 N. L. R. 57), it was held that a purchaser from a *fiduciary* could not claim compensation for useful improvements effected by him from the *fidei commissaries.* There was an appeal in that case to the Privy Council and the judgment of the Privy Council is reported in 19 N. L. R. at page 492. The Privy Council did not decide the question whether a *fiduciary* could claim compensation for useful improvements effected by him from the *fidei commissary,* but it held, on the facts, that the appellant was a trespasser and that he could not, therefore, be regarded as a *bona fide* improver. In *Dassanayake vs. Tillekeratne* (20 N. L. R. 89), it was held that a *fiduciary* is entitled to the same rights of compensation for improvements as any other *bona fide* possessor and to the retention of the property until the compensation is paid, and that a purchaser from a *fiduciary* is in the same position as a *fiduciary.* In *Du Plessis vs. Estate Meyer & others* (1913 Cape Supreme Court Reports 1006 at page 1018), Searle, J. said :—

> "No case has been quoted in which the Court had laid down the principle that a *fiduciary* or his estate can claim as against *fidei commassaries* for the beneficial expenditure on the property, the subject of the *fidei commissum.* But the Roman-Dutch Law authorities are certainly in favour of the view that he can do so."

In *Brunsden's Estate vs. Brunsdens Estate & others* (1920 Cape Supreme Court Reports page 159 at page 171), Kots, J. said :—

> "It was generally conceded that a *fiduciary* was entitled to compensation for improvements effected by him and *Voet* 36.1.6 and *Du Plessis vs. Meyer* were referred to in support of it. We may take it that a *fiduciary* is entitled to have expenses and improvements which a *bona fide* possessor is entitled to claim."

I would, accordinly, hold that the defendant is entitled to compensation for improvements effected by his predecessor and to retain possession of the land till he is paid the compensation. The trial Judge has not assessed the compensation but Counsel suggested that the amount should be fixed by us. On the question of assessment the general rule is that the improver if entitled to the cost of improvements or the present value of it whichever is less. Having regard to the price of land planted with rubber at the time of the institution of the action I think it would be advantageous to the plaintiffs to pay the costs of the improvements which I would fix at Rs. 250 per acre. I agree with the order made by my brother.

Appeal dismissed.

END OF VOL. XXXII.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org