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 XXXIII

WITH A DIGEST

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The plaintiff, claiming to be the Viharadhipathi of the Mailapitiya Vihare instituted this action in 1941 for a declaration of title to a paddy field alleging it to be an appurtenant of the Vihare. The defendant *inter alia* denied the plaintiff's right to maintain the action on the ground that he was not the rightful incumbent of the temple in question.

Admittedly Ratnajothi was the last lawful incumbent. It was also in evidence, (*a*) that about the year 1940, Ratnajothi brought the plaintiff to the temple in question, and after placing him in charge of the Vihare with the consent of the dayakas, disrobed himself: (*b*) that thereafter the plaintiff collected the rents and produce of other lands appurtenant to the Vihare.

The plaintiff was not in Ratnajothi's line of pupillary succession nor was there evidence of any other right in the plaintiff to succeed to the incumbency.

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When the defendant was appointed in 1928 he accepted the keys of the said Deva Raja Vihare and the effects belonging to it, *i.e.*, certain articles necessary for the performance of the ceremonies at the shrine. The defendant was re-appointed on 3rd July, 1938, for a short time according to plaintiff

In March, 1943, plaintiff requested the defendant to hand over the keys and the articles of the said

Vihare entrusted to him but was refused and this action was instituted.

The defendant contended (*a*) that the right to officiate at the shrine rooms is regulated by the Sisyanu Sisya paramparawa rule of succession and that such right had devolved on him : (*b*) that he had acquired the right to hold the office by prescription : (*c*) that as a pupillary descendant of one of the original priests he was entitled to be appointed to one of the five shrine rooms.

The District Judge held against the defendant who appealed.

Held : (i.) That the plaintiff was entitled to the right and privilege of appointing bhikkus to officiate at the five shrine rooms which comprise Dambulla Vihare.

(ii.) That as regards the articles belonging to the Vihare in question, the defendant was in the position of a bailee and he is bound to re-deliver them to the plaintiff.

(iii.) That the fact that the articles vested in the trustee of the Vihare is no justification for the defendant's refusal to re-deliver them to the plaintiff.

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The three appellants were convicted of (*a*) attempted murder (*b*) causing simple hurt.

It was in evidence that the injured man was admitted to hospital on 3-7-44 suffering from a fracture of the parietal bone ; that he was discharged from hospital on 14-9-44, after his fracture was healed ; that on 24-9-44 he was again admitted to hospital suffering from bed sores ; that he died on the morning of 23-10-44 ; that the post-mortem revealed that death was due to septic absorption due to bed sores.

It was contended for the appellant that a statement made by the injured man (deceased at the time of trial) to the Headman, to the effect that the appellants assaulted him, should not have been admitted and its admission had caused substantial miscarriage of justice.

A further objection was taken to the admission of a similar statement made by the injured man to his son, who, in the course of giving evidence in support of the 2nd count (of causing simple hurt to himself) stated that on hearing cries he ran to his father who was lying fallen and on questioning him as to who assaulted him, mentioned the names of the three accused as his assailants. The assault on the son took place within one fathom from his father.

Held : (i.) That the statement of the deceased to the Headman was inadmissible under section 32 of the Evidence Ordinance. Nor was it admissible under section 6 as it did not form part of the *res gestæ*.

(ii.) That having regard to the evidence in the case the court was satisfied that no substantial miscarriage of justice had resulted from the admission of such statement.

(iii.) That the statement of the deceased to his son was inadmissible under section 32 of the Evidence Ordinance, but was admissible under section 6 as forming part of the *res gestæ*.

(iv.) That as the trial judge in his charge suggested that the accused or anyone of them may by reason of self-induced intoxication have been incapable of forming a murderous intention he should have pointed out, that (*a*) if the jury thought that there was no murderous intention but merely knowledge that their acts were likely to cause death, the offence was one only of attempted culpable homicide not amounting to murder (*b*) that if knowledge was not established the offence was one of voluntarily causing hurt.

(v.) That as it appeared from the charge that the directions on common intention did not make it clear to the jury that to convict all the accused of the offence of attempted murder, each one of them at the time of the assault was actuated by a common intention not only to beat the injured man, but also to cause his death, or such bodily injuries as were sufficient to cause death, the conviction for attempted murder should not be allowed to stand.

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Indictment for murder—Plea of self-defence—Failure of trial Judge to comment on matters vital to defence—Misdirection—Remarks prejudicial to accused.

The appellant was indicted with murder by shooting but was convicted of culpable homicide not amounting to murder—jury indicating that he exceeded the right of private defence—None of the prosecution witnesses saw the shooting but the appellant admitted causing the two injuries on the deceased which according to expert evidence had been caused by gunshots fired from 70 and 10-15 feet respectively. The appellant further stated that he set out to go to Point Pedro with a gun when the deceased came with a sword calling on him to stop. Appellant hurried away to escape and at the same time loaded his gun. He warned the deceased and when deceased was about 46 feet fired the 1st shot. The deceased continued to come on and when appellant found he could not retreat any further owing to a deep ditch, he fired the 2nd shot (fatal) at a distance of 6 to 10 feet, as he feared he would be killed. The learned trial judge (*a*) failed to comment on the expert evidence which would have furnished the jury with the range at which each of the shots was fired.

(*b*) inadvertently made an error in stating the distance at which the 2nd shot was fired leaving a possible impression that the shot was fired at a distance three times as great as the actual distance.

(*c*) failed to point out that the further retreat of the appellant was prevented by the deep ditch.

Held : (i.) That these amounted to misdirections on a matter vital to the defence and the conviction could not be allowed to stand.

(ii.) That, when an accused had been indicted separately with the murder of another person on the same day and acquitted after trial, a reference to such "murder," by the trial judge in his charge without pointing out to the jury that he had been acquitted, may cause considerable prejudice in the minds of the jury against the accused.

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there was "latent provocation." The learned trial judge failed to direct that it would be possible for them to return a verdict of causing grievous hurt on grave and sudden provocation.

Held : That in the circumstances, the conviction should be altered to one under section 326 of the Penal Code and that a sentence of two years' rigorous imprisonment would be sufficient.

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Held : That, where a plea of culpable homicide not amounting to murder was accepted, and the evidence recorded by the Magistrate indicated that the accused exceeded his right of self-defence and that he fatally injured the paramour of his mistress when trying to break into his house, a sentence of four years' rigorous imprisonment would be adequate.

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Held : (i.) That a statement, made by a co-accused to the Magistrate in the course of his inquiry implicating the other accused ; could be taken into consideration by the jury, where such co-accused gave evidence re-affirming in effect the statement made to the Magistrate, provided that the Judge gave a proper direction to them on the question of corroboration.

(ii.) That where several accused, charged with murder, were defended by one assigned counsel and one of the accused, contrary to instructions given to his counsel, got into the witness-box and gave evidence implicating the other accused, whereupon the court assigned his defence to another counsel, such accused could not be said to have been unrepresented till the 2nd counsel took over.

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A proctor pleaded guilty to a charge of criminal breach of trust of a postal order of the value of ten rupees. An application was then made to the Supreme Court to strike his name off the roll of proctors. In view of the special circumstances of the case the Supreme Court suspended him from practice for one month.

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Held : That the pleas of guilt cannot be regarded as unqualified admissions of guilt.

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Held : That in the circumstances, the refusal to postpone was justified.

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Held : That the plea of *autrefois acquit* was not available because at the earlier trial the accused was never in peril and had merely been discharged.

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An application was made for a postponement of the trial on the ground that the principal witness for the prosecution was absent. The Magistrate refused the applicant and called upon the prosecution to lead evidence of witnesses who were present. This was not done and the accused was discharged.

A fresh plaint was subsequently filed charging the accused on the same facts. Accused raised the plea of *autrefois acquit*.

Held : That the plea of *autrefois acquit* was not available to the accused as there was no adjudication upon the merits of the earlier charge.

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Held : (i.) That a sudden confession of adultery without more can never constitute provocation of a sort which might reduce murder to manslaughter.

(ii.) That this rule applies to either spouse alike.

Per VISCOUNT SIMON :—(*a*) In dealing with provocation as justifying the view that the crime may be manslaughter and not murder, a distinction must be made between what the judge lays down as matter of law, and what the jury decides as matter of fact. If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self control to the degree and method and continuance of violence which produces the death, it is the duty of the judge as a matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (*a*) that a reasonable person, in consequence of the provocation received, might be so rendered, subject to passion or loss of control as to be led to use the violence with fatal results, and (*b*) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict. It is hardly necessary to lay emphasis on the importance of considering, where the homicide does not follow immediately upon the provocation, whether the accused, if acting as a reasonable man, had "time to cool."

(*b*) The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self control whereby malice which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce to manslaughter seldom applies. Only one very special exception has been recognised, viz. the actual finding of a spouse in the act of adultery. This has always been treated as an exception to the general rule : *Manning R. vs. Maddy* (1671) 2 Keb. 829 ; 1 Veut 158. Blackstone Commentaries Bk. IV p. 192, justifies the exception on the ground that "there could not be a greater provocation." But it has been rightly laid down that the exception cannot be extended.

(*c*) It is enough to say that the duty of the judge at the trial, in relevant cases, is to tell the jury that a confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter, and that in no case could words alone, save in circumstances of a most extreme and exceptional character, so reduce the crime. When words alone are relied upon in extenuation, the duty rests on the judge to consider whether they are of this violent provocative character, and if he is satisfied that they cannot reasonably be so regarded, to direct the jury accordingly.

(*d*) The reason why the problem of drawing the line between murder and manslaughter, where there has been provocation, is so difficult and so important, is because the sentence for murder is fixed and automatic. In the case of lesser crimes, provocation does not alter the nature of the offence at all: but it is allowed for in the sentence.

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Held: (i.) That where a "deed of rectification" is executed the vendor's title vests in the vendee as from the date of the original deed and not from the date of the rectification.

(ii.) That the vendee could regard himself as successor in title to the vendor as from that date and also avail himself of any prescriptive possession by the vendor.

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Certiorari—Defence (Miscellaneous) Regulation 43c—The Essential Services (Avoidance of Strikes and Lock-outs Order, 1942—Settlement of trade dispute by Tribunal—Jurisdiction of Tribunal to award damages—Meaning of "trade dispute."

The Controller of Labour, acting under section 6 (2) of the Essential Services (Avoidance of Strikes and Lock-outs Order, 1942), referred a dispute between a workman and an employer engaged in performing essential services to the Tribunal appointment under section 5. The Tribunal was appointed for the *settlement* of trade dispute in essential services. Section 8 of the Order enacted that the award of the Tribunal was to be final and was not to be called in question in any Court. The Tribunal, in settling the dispute, amongst other things, awarded a sum as damages to the workman. The employer moved for a writ of *certiorari* to quash the award on the ground that the Tribunal acted without jurisdiction or in excess of jurisdiction. It was submitted that the dispute, being one between the employer and a single workman, was not a "trade dispute" within the meaning of the Order of 1942, and that the Tribunal had no jurisdiction to award damages.

Held: (i.) That the definition of "trade dispute" in the Order of 1942 was wide enough to include a dispute between an employer and a single workman.

(ii.) That the dispute in question was a trade dispute in an essential service.

(iii.) That the duty of the Tribunal was to settle the dispute and that in awarding damages to that end the Tribunal was acting within its jurisdiction.

Defence (Food Control) Regulation, Part III. Regulation 11 (6)—Meaning of "forthwith."

Held: That the word "forthwith" in Regulation 11 (6) in Part III. of the Food Control Regulations is used to mean "in a reasonable time," that is to say, when the act is one which can be done without any delay at all, and there are no special circumstances occasioning delay, documents must be made available for inspection at once.

Defence (Control of Textiles) Regulations—Regulation 14 (1)—Meaning of the word "dealer"—Does it include an unlicensed dealer—Applicability of section 67 of the Ceylon Penal Code to Defence Regulations.

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A quantity of rice, in excess of the authorised quantity, was found and seized in business premises of which one of the accused was tenant. The other accused was the manager of the business. No specific evidence was given as to the date of purchase or acquisition of the rice by the accused, but evidence given by the prosecution to the effect that the rice had been purchased or acquired on the date of the seizure was not controverted by the defence. Both accused were convicted.

Held : (i.) That the contention that the accused had acquired the rice on the date of seizure was entitled to prevail.

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(ii.) That, in the absence of a provision that offences committed before the expiry of a regulation can be dealt with as though the expiry had not taken place, no charge based on such regulation pending at the time of such expiry can be proceeded with thereafter.

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Muslim father's donation to minor. When possession by father can be regarded as possession by minor.
See Muslim Law 106

Ejectment

Power to eject from Crown land held on permit.
See Land Development Ordinance 4

Election

Disqualified person voting at election of Chairman of Village Committee—Validity of Election.
See Quo Warranto 41

Encroachment upon Crown Lands Ordinance.

Sections 9 and 10.
See Thoroughfares Ordinance 26

Essential Services (Avoidance of Strikes and Lock-outs) Order, 1942

Settlement of trade dispute by tribunal—Jurisdiction to award damages.
See Defence Regulations 48

Evidence

Evidence—Register of lands belonging to a charitable trust kept at Kachcheri—Is a certified copy of such register admissible—Absence of proof of authority to keep such register or of purpose for which it was made or of the nature of sources of information entered therein—Weight to be attached to such document—Hearsay.

Held : (i.) That a "register of gifted lands" belonging to a charitable Trust kept at a Kachcheri is not a public document and a certified copy thereof is inadmissible in evidence.

(ii.) That even if it is admissible, in the absence of proof of the purpose for which, or on whose authority it was made, or of the nature of the knowledge which the persons who supplied the details as regards title to the lands therein had, no weight can be attached to such evidence.

CHELLIAH & ANOTHER vs. SAIVA PARIPALANA SABHAI 9

Judicial notice cannot be taken that Food Control guard is a public servant.
See Penal Code 22

Judicial notice of Proclamation bringing Ordinance into operation.
See Rent Restriction Ordinance 85

Admittance of documents in appeal.

The appellant sought to produce in appeal the records of two Village Tribunal cases, relevant to the subject matter of the appeal and discovered after the appeal had been filed.

Held : That the documents may be admitted.

ENDRIS DE SILVA & ANOTHER vs. ARNOLIS ... 39

Burden of proof in prosecution for cultivation of hemp plant.
See Poisons Opium and Dangerous Drugs Ordinance 47

Evidence—Conspiring to smuggle paddy on forged permit—Charge of fraudulently or dishonestly using as genuine a forged permit—Only evidence is that one of the conspirators pointed out accused as the person who gave the permit—Denial by such conspirator at trial that he pointed out—Is such evidence admissible —Evidence Ordinance, section 10.

The appellant was charged (as first accused) with having fraudulently or dishonestly used as genuine a document forged for the purpose of cheating, namely the document P 2 which purported to be a permit purporting to have been issued by the Deputy Food Controller of Vavuniya in favour of the second accused authorising him to transport paddy.

It was established by evidence (*a*) that the document was a forged one, (*b*) that the appellant knew that it was a forged document. As regard the fact that the appellant used P 2 either fraudulently or dishonestly as genuine the only evidence was that of witnesses who stated that soon after the police brought to the Deputy Food Controller's Office a man called Ponnambalam found to be transporting paddy on permit P 2, Ponnambalam, when questioned as to who gave him permit P 2, pointed out the appellant, who was a clerk in the Office.

At the trial this evidence was objected to on the ground that this evidence was not admissible until after Ponnambalam was called. When subsequently Ponnambalam was called he denied having pointed out the appellant on that occasion.

The learned District Judge accepted the evidence of the witnesses that Ponnambalam pointed out the appellant and convicted the accused who appealed.

Held : (i.) That the evidence objected to was admissible under section 10 of the Evidence Ordinance as there was sufficient evidence to establish a conspiracy between the appellant, the second accused and Ponnambalam.

Evidence Ordinance

Section 92—Document signed by one of the parties —Is it a written agreement—Can oral evidence be led to prove intention different from that expressed in document.

Held : That a document signed by one party is not a written agreement within the meaning of section 92 of the Evidence Ordinance, and, oral evidence, therefore, is admissible to show that the real intention of the parties was different from the language of the document.

Excise Ordinance

Possession of Arrack in excess of prescribed quantity—Arrack kept by accused for the benefit of another who possessed a permit—Can accused be convicted.

Held : That a person who merely keeps arrack in his possession for the benefit of another who is a permit-holder, cannot be said to have committed an offence.

Sections 2 and 43 (g)—Sale of brandy without licence—What constitutes a sale—Liquor procured for private use. Burden of proof.

Held : (1) That a transfer of the goods by acceptance of a cheque in payment of the article constitutes a sale within the meaning of section 2 of the Excise Ordinance.

(2) That when the prosecution proves that a sale has taken place, the burden is cast on the accused to show that the foreign liquor he sold was what had been legally procured for his private use.

Food Control

Fugitive Offenders

Fugitive Offenders Act, 1881—Offender arrested in Ceylon on warrant issued by Indian Court—Warrant defective—Proceedings under the Act abandoned—Order for the release of offender on bail—Validity of order.

The petitioner was alleged to be a fugitive offender for whose arrest a warrant had been issued by an Indian Court. He was arrested and taken before a Magistrate but no one was present to testify to the authenticity of the warrant or to the identity of the petitioner. The police then abandoned their claim for the surrender of the petitioner under the warrant and moved that he be released on bail. The Magistrate made order accordingly.

Held : (i.) That when the police abandoned their claim for surrender under the warrant, the petitioner's detention under the warrant came to an end.

(ii.) That the original arrest was not made under section 32 (1) (*i*) of the Criminal Procedure Code and that there had not been a new arrest of the petitioner under that section.

(iii.) That the order for bail was made when the petitioner was not under lawful arrest and was irregular.

Husband and Wife

Improvements

Injunction

Interpretation Ordinance

Application of section 6 (3) to written laws that have expired.
See Defence Regulations 89

Judge

Mentioning during trial that if accused guilty, sentence of imprisonment not justified—Effect on accused's plea of guilt.
See Criminal Procedure 6

—And jury—Functions of—
See Penal Code 12

Discretion of—To bring heirs as parties in partition action.
See Partition 28

Judicial Notice

See Under Evidence.

Jurisdiction

Court of Requests—Action for definition of boundaries—Test of jurisdiction.

Held : That in an action for definition of boundaries it is wrong to regard the value of the land as the test of jurisdiction.

CHANDRANAYAKE HAMINE *et al* vs. GUNASEKERA *et al* 4

Of Magistrate—To order ejectment from Crown land held on permit.
See Land Development Ordinance 4

To order restoration of goods in a case of Criminal breach of trust of goods.
See Criminal Procedure 27

Tribunal appointed under Essential Services (Avoidance of Strikes and Lock-outs) Order, 1942—Jurisdiction to award damages.
See Defence Regulations 48

Of Civil Courts in religious matter.
See Buddhist Law 60

Jury

And Judge—Functions of.
See Penal Code 12

Land Development Ordinance

Land Development Ordinance (Cap. 320)—Permit to occupy Crown land—Cancellation—Should it be registered under section 58 (1) to render it valid.

Order of ejectment—Conditions necessary to be fulfilled before conferring jurisdiction on Magistrate—Section 119 of the Ordinance.

Does death of a permit-holder amount to effecting its "cancellation" within the meaning of Chap. IX of the Ordinance—Sections 106-118.

Held : (i.) That provisions of section 58 (1) of the Land Development Ordinance and the allied sections in which reference is made to the necessity for registration refer only to lands alienated by grant under the Ordinance and not lands given on a permit.

(ii.) That a Magistrate would not have the special jurisdiction conferred on him by section 119 of the Ordinance to make an order of ejectment in the case of lands given on a permit unless where (*a*) the permit has been cancelled, (*b*) notice had been given to the party in unlawful possession or occupation after such cancellation.

(iii.) That there is nothing in sections 106-118 of the Ordinance to indicate that the death of a permit-holder is to be regarded as effecting a cancellation of the permit within the meaning of Chapter IX.

JAYAWARDENA vs. FERNANDO, A. G. A. ... 4

Landlord and Tenant

Right of lessee, on expiry of notarial lease, to plead Rent Restriction Ordinance.
See Rent Restriction Ordinance 19

Letters of Administration

Stamping of—
See Civil Procedure Code 108

Malice

Proof of in action for damages for wrongful search of house.
See Damages 81

Mandamus

No other remedy—When mandamus will issue.
See Urban Councils' Ordinance 1

Writ of Certiorari or Mandamus—Validity of Election—Failure to make successful candidate party—Application at hearing to add—Should it be allowed.

Held : (i.) That an application for a Writ of Certiorari or Mandamus for a declaration that an election is void cannot be maintained without making the successful candidate a party to the application.

(ii.) That an application at the hearing to add the successful candidate as a party should not be allowed.

GOONETILEKE vs. GOVT. AGENT, GALLE ... 16

Maintenance

Application for Maintenance—Absence of applicant on date of inquiry—Dismissal of application—Motion to vacate order of dismissal—Refusal by Magistrate—Is the order refusing to vacate an appealable one—Supreme Court—Powers of Revision—Maintenance Ordinance, Section 17.

The applicant in a maintenance action appealed from an order made by the Magistrate refusing to vacate his order dismissing her application as she was absent when the inquiry was taken up.

The respondent's counsel raised a preliminary objection that the order appealed from was not an appealable order. The Supreme Court upheld the objection, but exercising the powers of revision vested in it, set aside the order and sent the matter back for inquiry.

LEELAWATHIE vs. HENDRICK 40

*Offer by husband to take his wife back—Husband living in adultery—*Bona fides *of husband.*

A wife claimed maintenance from her husband. The husband offered to take his wife back. It was found that the husband was living in adultery.

Held : That the husband's offer was not a *bona fide* one and that the applicant was entitled to maintenance.

MANOMANI vs. VIJIYERATNAM 72

Maintenance—Application for—Promise of marriage on paternity being imputed—Corroboration.

When the defendant in a maintenance action, on paternity being imputed to him, does not protest, but makes a promise of marriage.

Held : That this statement furnishes the best corroboration of the mother's testimony as regards paternity.

JOSLIN FERNANDO vs. CHARLES APPUHAMY ... 103

Misdirection

In charge of rape.
See Penal Code 8

In charge of attempted murder.
See Court of Criminal Appeal ... 91, 101

In charge of murder—Failure to comment on vital matters.
See Court of Criminal Appeal 99

Murder

Provocation sufficient to reduce to manslaughter
See Penal Code 12

Muslim Law

Father's donation of property to minor—Possession by father—Can it be regarded as possession by minor.

Held : That in Muslim Law, where a father donated property to a minor, possession by the father must be deemed to be possession of the minor, who is entitled to reckon such possession in establishing prescriptive title.

UTHUMALEBBE & ANOTHER vs. MUHAIYATHEEN BAWA 106

Parties

Application at hearing to add necessary party.
See Mandamus 16

Administrator—When proper party in partition proceedings.
See Partition 28

Misjoinder of—Dismissal of action.
See Servitude 29

Partition

Partition case—Death of party—Administrator party to interlocutory decree—Rights of the heirs of the deceased to intervene after such decree—Civil Procedure Code, Section 472—Is it applicable to partition proceedings.

Held : (i.) That section 472 of the Civil Procedure Code is applicable to partition proceedings.

(ii.) That under section 472 of the Civil Procedure Code the administrator is the proper party to such proceedings, although the Judge has discretion to bring the heirs also as parties to the action.

(iii.) That where an administrator had not fully administered the estate, he should continue to represent the heirs of the deceased and any decree entered against him would bind the heirs too.

MACKEEN & ANOTHER vs. PULLE & TWO OTHERS 28

Penal Code

Rape—Defence that accused had no connection with the girl—Is consent relevant then—Misdirection in the charge to jury.

Held : That in a charge of rape it does not necessarily follow that because the accused's defence was that he had had no connection with the girl the question of consent was irrelevant.

REX vs. G. ARIYARATNE ... ...

Section 183—Voluntarily Obstructing Food Control Guards—Absence of evidence showing that they were duly entrusted or vested with duty, power or authority to act as such—Can judicial notice be taken that Food Control Guards are Public Servants.

Held : (i.) That mere assertions by persons that they are Food Control Guards and that they were on patrol duty when they detected an alleged offence of transporting rice without a permit without evidence that they were duly entrusted or vested with power or authority to act as such, are not sufficient to establish that they were public servants within the meaning of section 183 of the Penal Code.

(ii.) That a Food Control Guard is a "Public Servant" cannot be judicially taken notice of.

SEENITHAMBY & OTHERS vs. JANSZ, A.G.A., KALMUNAI 22

Section 67—Applicability to Defence Regulations
See Defence Regulations 73

Section 443.
See Criminal Procedure Code 78

Sections 183 and 344—Public Servant—Obstruction to—Search of accused's house to ascertain whether rice or paddy hoarded—Authority to search granted by Deputy Food Controller under Regulation 2 A of Food Control Regulations 1938 and 1943—Resistance by accused—Legality of such authority.

Held : (i.) That Regulation 2 A of the Food Control Regulations 1938 and 1943 does not empower the issue of an authority to inspect and search premises for the purpose of ascertaining whether there is any hoarding of a controlled article.

(ii.) That the Regulation authorises the search of such places or premises as those to which the controlled article has been transported or removed, not any or all places generally.

(iii.) That an attempt to search premises for controlled articles hoarded under such an authority is illegal and could be lawfully resisted.

DARLIS vs. RAJENDRA, A.G.A., MATARA ... 94

Poisons, Opium and Dangerous Drugs Ordinance

Poisons, Opium and Dangerous Drugs Ordinance—Cap. 172, sections 26, 76 (1) (a) and 76 (5) (a)—Cultivation of the hemp plant without a licence from the Governor—Meaning of "cultivation"—Onus of proof of licence.

Held : (i.) That the act of placing a shade or screen over newly planted ganja plants amounted to the cultivation of such plants.

(ii.) That ganja plants came within the definition of "hemp plants" and that the offence of the accused did not require proof of *mens rea*.

(iii.) That once the prosecution established that the accused had cultivated the hemp or ganja plants, the onus shifts on to the accused to show that he did so with a licence from the Governor.

MARAMBE EXCISE INSPECTOR vs. JOAN ... 47

Postponement

See Criminal Procedure Code 105

Prescription

When can vendee avail himself of vendor's prescriptive possession.
See Deed 17

Prescriptive possession of road reservation.
See Thoroughfares Ordinance 26

Prevention of Crimes Ordinance

Prevention of Crimes Ordinance (Chap. 18) Sections 5, 6 and 7—Conviction of accused—Five previous convictions—Sentence of two years' rigorous imprisonment and two years' Police supervision—Is the sentence regular.

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

(ii.) That there is nothing to prevent a Magistrate from combining the punitive powers given to him by sections 5 and 6 of the said Ordinance.

P. S. 1744 SIRISENA vs. PILLAI *alias* PERIYAM ... 7

Probate

Stamping of—
See Civil Procedure Code 108

Proctor

Application for striking off the roll.
See Courts Ordinance 75

Provocation

Sufficient to reduce murder to manslaughter.
See Penal Code 12

Public Servant

That Food Control Guard is, cannot be judicially noticed.
See Penal Code 22

Resistance to—
See Penal Code 94

Quo Warranto

Election of Village Committee Chairman—Disqualified member voting at election.

A person disqualified for election to a Village Committee was duly nominated and elected, without objection, as a member of the committee and took part in the election of the Chairman. The respondent was elected Chairman by a majority of one vote. It was submitted, but not proved, that the disqualified member voted for the respondent, that his vote should have been rejected, and that the presiding officer should have drawn lots as on an equality of votes.

Held: (i.) That the disqualified member was entitled to vote at all deliberations of the Committee and that the election of the respondent as Chairman was valid.

(ii.) That the petitioner had not discharged the burden of proving that the disqualified member voted for the respondent.

FERNANDO vs. GOONESEKERE 41

Registration

Of permit to occupy Crown land.
See Land Development Ordinance 4

Rent Restriction Ordinance No. 60 of 1942

Notarial lease—Expiry of term of lease—Right of lessee to plead Rent Restriction Ordinance.

Held: That the Rent Restriction Ordinance applies to premises leased as well as to premises held on a tenancy from month to month and that a "tenant" can plead the benefit of section 8 where the premises in question were occupied under a lease which has terminated by effluxion of time.

GUNARATNE vs. THELENIS *et al* 19

Standard rent—Payment of rent in excess of standard rent—Judicial notice of Proclamation bringing Ordinance into operation.

The plaintiff sued the defendant for rent, ejectment and damages for overholding after the tenancy had been determined after notice. It was found that the defendant had tendered the rent to the plaintiff's proctor who had refused to accept the same. The defendant counter-claimed that the rent payable, which had been agreed upon between the parties before the enactment of the Ordinance, was in excess of the standard rent chargeable under the Ordinance. He, therefore, asked for a refund of the excess. No evidence was led as to the amount payable as rates on the premises in question or as to the date on which the Ordinance came into operation within the area.

Held: (1) That judicial notice will be taken of a Proclamation bringing the Ordinance into operation.

(2) That, in view of the tender by the defendant, the plaintiffs' case must fail.

(3) That the rates payable must be considered in assessing the "standard rent."

(4) That, after the Ordinance came into operation within the area, the plaintiff was prohibited from receiving rent in excess of the standard rent and that any such excess received by him must be refunded to the defendant.

DE SILVA vs. SIRIWARDANE 85

Res Gestæ

See Court of Criminal Appeal 91

Revision

Court acting in revision where no appeal lies.
See Maintenance 40

Revision—Court of Requests—Order refusing amendment of plaint—Can the Supreme Court set it aside by way of revision—Civil Procedure Code, section 753.

Held: (i.) That section 753 of the Civil Procedure Code does not prescribe the scope of or put a limitation on the powers of this Court to deal with an application in revision.

(ii.) That the limitation that is imposed by this section is as regards the order the Court may pass, namely, if it could not have passed a particular order on appeal then, such an order could not be made even if the matter be brought before it by way of revision.

Road Reservation

Can rights to be acquired by possession or user.
See Thoroughfares Ordinance 26

Sale within the meaning of the Excise Ordinance.
See Excise Ordinance 84

Search of house wrongfully—Action for damages.
See Damages 81

Sentence

Of two years rigorous imprisonment and two year's police supervision.
See Prevention of Crimes Ordinance 7

False allegations made by accused—Power of Court to enhance punishment.

Held: That an enhanced punishment should not be imposed merely because an accused person has made certain allegations which are later proved to be false.

Servitude

Action for right of footway—Misjoinder of parties and causes of action—Is court bound to dismiss action.

Held: (i.) That clear, precise and cogent evidence is necessary to establish a servitude like a right of way.

(ii.) That where there is a misjoinder of parties and causes of action, a court is not bound to dismiss the action.

Stamps

On probate or letters of administration.
See Civil Procedure Code 108

Thoroughfares Ordinance (Cap. 148)

Sections 67 and 72—Land marked off and reserved for construction of road—Can rights to such land be acquired by possession or user—Can compensation for improvements be claimed in respect of such land.

Encroachments upon Crown Lands Ordinance—Can possessor of such road reservation for over ten years claim rights referred to in section 9—Effect of section 10 of the same Ordinance.

Held: (i.) That land marked off and reserved for the construction of a road, comes within the definition of the word "road" in section 72 of the *Thoroughfares Ordinance* (Cap. 148).

(ii.) That as a claim for compensation for improvements is a right acquired by virtue of possession or user, no such claim can be entertained in respect of a road reservation in view of section 67 of the Thoroughfares Ordinance.

(iii.) That a person, who has been in possession for over ten years of land reserved for a road, is precluded by section 10 of the Encroachments upon Crown Lands Ordinance from claiming the rights conferred by section 9 of the same Ordinance.

Trust

Register of lands belonging to charitable trust—Admissibility of certified copy.
See Evidence 9

Trustee—Association to establish Pirivena for teaching Buddhism—Agreement by members that right to appoint principal and teachers to Pirivena to be with the association—Establishment of Pirivena—Appointment of Principal—Dedication by deed of premises on which Pirivena built to Sanga by way of gift to such Principal and to his successors in office as appointed by Sabha—Can such successor in office maintain action against trespasser without conveyance, vesting order, or other assurance—Trusts Ordinance Section 113, sub-sections 1, 2 and 3—Applicability of sub-section 2 and 3.

The plaintiff alleged (i.) that 13 persons formed themselves into an association called Vidyadara sabha, the chief object of which was to obtain a portion of land in Colombo and to establish a Pirivena for teaching Buddhism.

(ii.) That by P1 it was agreed by the said Sabha *inter alia* (*a*) that the right of appointment of the Principal and teachers of the said Pirivena should be with the Sabha; (*b*) that the mode of appointment of future members was to be prescribed by the Sabha.

(iii.) That the Sabha established the Vidyodaya Pirivena and about 1873 appointed Venerable Hikkaduwe Sri Sumangala Nayake Thero as its Principal.

(iv.) That by deed P2A dated 9-3-1876 one of the members of the Sabha, who was the owner of the premises on which the Pirivena was built, in furtherance of the said common object transferred the premises (by way of a gift to the Sangha) to the Venerable Hikkaduwe Sri Sumangale Nayake Thero and to his successors in the office of principal as appointed to the Pirivena by the Sabha.

(v.) That on the death of each principal his successor was appointed by the Sabha, the last principal appointed being the plaintiff.

The plaintiff asked for a declaration that he held the premises in question in trust for and as trustee of the members of the Sabha (2-14 defendants) and for an order for ejectment against the 1st defendant, who was in the alleged wrongful and unlawful occupation of a portion of the premises.

The 1st defendant contended by way of preliminary issues that the plaintiff could not maintain the action as he was not appointed trustee as required by sub-sections 2 and 3 of section 113 of the Trusts Ordinance and that the properties did not vest in him.

The District Judge held against the plaintiff, who appealed.

Held : (i.) That as the deed P2A granted the legal estate to the Venerable Sri Sumangala Nayake Thero, Principal of the Pirivena, and on his demise to the Principal appointed by the Sabha, the legal title to the premises described in P2A devolved on the plaintiff, being the person for the time being holding that office, without the need of any conveyance, vesting order or other assurance by virtue of section 113 (1) of the Trust Ordinance.

(ii.) That in the circumstances, sub-section 2 and 3 of section 113 of the Trusts Ordinance have no application and the plaintiff was not debarred from maintaining the action.

VEN. BADDEGAMA PIYARATANA NAYAKE THERO vs. VEN. VAGESWARACHARIYA MORONTUDUWE SRI DHAMMANANDA NAYAKE THERO & OTHERS 33

Urban Councils Ordinance

Writ of Mandamus—Powers, duties and functions of the Secretary of an Urban Council under Urban Councils Ordinance No. 61 of 1939—Powers and duties of the Chairman of the Council—Interdiction or suspension of the Secretary by the Chairman—Remedy available to Secretary.

The petitioner, who is the Secretary of the Urban Council, Anuradhapura, applied for a *writ of mandamus* to be issued on the respondent, the Chairman, for his restoration to office, after the latter had ordered him not to receive papers, or have access to documents and further to hand over documents and articles in his charge to the Chief Clerk. The petitioner considered himself interdicted or suspended from the performance of his powers legally vested in him by the Urban Councils Ordinance No. 61 of 1939.

Held : (1) That the Chairman's orders amounted to a prohibition of the exercise of the powers conferred on the Secretary by statute.

(2) That the Chairman was acting outside the scope of his powers in prohibiting the exercise of these powers.

(3) That as no other remedy is open to the petitioner, who is legally entitled to the office and to perform such duties, a *writ of mandamus* will be issued.

MARCELIN PERERA vs. SOCKALINGAM CHETTIAR 1

Vendor and Purchaser

Deed of Rectification—Time at which title vests in vendee.
See Deed 17

Prescriptive possession by vendor—When vendee can avail himself of—
See Deed 17

Village Communities Ordinance

Election of Chairman—Disqualified member voting—Validity of Election.
See Quo Warranto 41

Words and Phrases

"Assisting" in management of brothel.
See Brothels' Ordinance 58

"Cultivation" of hemp plant.
See Poisons Opium and Dangerous Drugs Ordinance 47

"Dealer" in Defence (Control of Textiles) Regulations.
See Defence Regulations 73

"Forthwith"
See Defence Regulations 56

"Sale" within the meaning of the Excise Ordinance.
See Excise Ordinance 84

"Trade Dispute"
See Defence Regulations 48

Workmen's Compensation Ordinance (Cap. 117)

Assault on one workman by another—Loss of index finger—Accident arising out of his employment.

The appellant, an engine turner and lighter under the Ceylon Government, was assaulted by a fellow workman as a result of which his right index-finger had to be amputated. At the argument in appeal it was agreed that the claim was in respect of an injury caused to a workman by an accident arising in the course of his employment.

Held : That that accident did not arise out of his employment.

CHARLES APPU vs. ADDITIONAL CONTROLLER OF ESTABLISHMENTS 24

Present: HOWARD, C.J.

MARCELIN PERERA vs. SOCKALINGAM CHETTIAR

Application for a Writ of Mandamus against A. Sockalingam Chettiar

Argued on: 22nd May, 1946.
Decided on: 30th May, 1946.

Writ of Mandamus—Powers, duties and functions of the Secretary of an Urban Council under Urban Councils Ordinance No. 61 of 1939—Powers and duties of the Chairman of the Council—Interdiction or suspension of the Secretary by the Chairman—Remedy available to Secretary.

The petitioner, who is the Secretary of the Urban Council, Anuradhapura, applied for a *writ of mandamus* to be issued on the respondent, the Chairman, for his restoration to office, after the latter had ordered him not to receive papers, or have access to documents and further to hand over documents and articles in his charge to the Chief Clerk. The petitioner considered himself interdicted or suspended from the performance of his powers legally vested in him by the Urban Councils Ordinance No. 61 of 1939.

Held: (1) That the Chairman's orders amounted to a prohibition of the exercise of the powers conferred on the Secretary by statute.

(2) That the Chairman was acting outside the scope of his powers in prohibiting the exercise of these powers.

(3) That as no other remedy is open to the petitioner, who is legally entitled to the office and to perform such duties, a *writ of mandamus* will be issued.

Cases referred to: *The King vs. The Company of Free Fishers and Dredgers of Whitstable in the County of Kent* (7 East 353).
The King vs. Speyer, The King vs. Cass (1916 1 K. B. 595).
The King vs. Mayor of London (100 E. R. 96).
Samynathan vs. Whitehorn (35 N. L. R. 225).
Mohamed Sahib vs. The Principal Collector of Customs (2 C. L. W. 330).

H. V. Perera, K.C., with *H. W. Jayewardena*, for the petitioner.
N. Nadarajah, K.C., with *E. B. Wickremanayake and H. Wanigatunge*, for the respondent.

HOWARD, C.J.

The petitioner prays that the Court may be pleased to issue a *Writ of Mandamus* on the respondent directing him—

(*a*) to restore the petitioner to his office in the Urban Council of Anuradhapura;

(*b*) to withdraw the orders made without authority;

(*c*) to countermand the orders of the 12th November, 1945, and 12th February, 1946, referred to in paragraphs 6 and 19 of his petition and to cause all official documents necessary for the performance of the petitioner's functions and duties to be handed to the petitioner and to allow the petitioner access to all official documents and files;

(*d*) to permit the petitioner to carry out his functions and duties as Secretary of the said Council.

The petitioner is the Secretary and the respondent is the Chairman of the Urban Council of Anuradhapura. On the 30th October, 1945, the respondent by letter P1 called upon the petitioner to show cause within 7 days why he should not be punished on various charges which were specified. Copies of the correspondence (13 annexures) in support of these charges were attached to P1. By letter of the 5th November, 1945, (P2) the petitioner replied by saying that he did not wish to submit a formal explanation as the procedure adopted was irregular. After the exchange of some further letters the respondent on the 12th November, 1945, wrote P5 which is worded as follows:—

"*Secretary,*

Please note that from today you shall not receive any papers of this office and have access to any of the official documents, etc., until you hear from me to the contrary.

Please hand over forthwith to the Chief Clerk Mr, K. B. Kulatunga all official documents and other articles in your charge, and await further orders.

Sgd. SOCKALINGAM CHETTIAR,
Chairman, U. C.
12-11-45."

There was a further exchange of letters between the petitioner and the respondent in which the former endeavoured to elucidate from the latter as to whether he was interdicted from duty. On the 13th November, 1945, the petitioner by P6 informed the respondent that he took it, he was interdicted from duty and was handing over and leaving the office. On the 14th November, 1945, the respondent by P9 called for an explanation from the petitioner as to why he was not in office. On the 14th and 19th November, 1945, the respondent by P12 and P13 informed the petitioner that he was not interdicted or suspended from duty. The petitioner was also told by P12 that he must be in the office during office hours. On the 31st January, 1946, the respondent resigned

his office of Chairmanship of the Council. On the same day the Chief Clerk wrote the following letter (P18) to the petitioner :—

" *Mr. Perera, Secretary,*

I have fully considered your order of even date. You will appreciate that I am under orders of the previous Chairman to do certain work and perform functions of the Secretary. All this comes under office arrangements which will hold good till a new Chairman is elected. I regret therefore that I am compelled to carry out all duties I was hitherto doing.

Under the circumstances I regret I cannot comply with your request for keys, etc., of which I have temporary custodianship.

If C. L. G. orders me to hand over everything to you I shall be only too pleased to do so.

Sgd. KULATUNGA,
Anuradhapura, 31-1-46. *Chief Clerk.*

The Chief Clerk also instructed all officers to comply with the previous Chairman's order of the 12th November, 1945. Also on the same day the Chief Clerk by letter P19 consulted the Commissioner of Local Government with regard to his position. By P20 dated 1st February, 1946, the Commissioner of Local Government informed the Chief Clerk that the petitioner was still the Secretary of the Council and that the Chief Clerk should hand over to the petitioner what he took over from him and resume his former duties under him. On the 12th February, 1946, the respondent was re-elected Chairman of the Council. On the same day by P21 he directed that the petitioner should hand over all official papers to the Chief Clerk.

Mr. Nadarajah on behalf of the respondent has contended that the latter's action have been within the ambit of the powers vested in him by the Urban Councils Ordinance No. 61 of 1939 as amended. He further argues that the petitioner has not been either interdicted or suspended by the respondent. I will first consider whether this argument can be maintained. I find from the dictionary that the word " interdict " means " prohibit " or " forbid ". The office of Secretary to an Urban Council is created by section 39A which is worded as follows :—

" (1) Every Urban Council shall appoint a fit and proper person to be the Secretary of the Council.

(2) The Secretary of an Urban Council shall exercise, perform and discharge such powers, duties and functions as are conferred or imposed upon him by this Ordinance or by rules made under section 205 or by any other written law for the time being in force.

(3) During the period intervening between the expiry of the term of office of the members of an Urban Council under section 16 and the election of a Chairman after the ensuing general election of members to that Council, and, in the event of the vacation of the office of both the Chairman and the Vice-Chairman by the death, resignation, removal or disqualification of the holders thereof, then, during the period intervening between the vacation of the office of the Vice-Chairman and the election of a new Chairman, the Secretary of the Council shall, in addition to the powers referred to in sub-section (2), have authority, subject to the approval of the Commissioner and subject to such limitations and conditions as may be prescribed by rules under section 205, to incur expenditure on behalf of the Council, to make payments out of the local fund, and to exercise and perform such of the powers, duties and functions of the Chairman as may be specified by the Commissioner or prescribed by rules as aforesaid."

Sub-section (2) it will be observed provides that the Secretary shall not only perform and discharge the powers, duties and functions conferred on him by the Ordinance but also those conferred on him by rules made under section 205. A perusal of the provisions of the Ordinance indicates that duties are conferred on the Secretary by section 34 (6), 40 and 228 of the Ordinance. Under section 248 of the Ordinance it is provided that the rules made under the repealed Ordinance (Cap. 195) shall continue in force. Those rules are contained in Ceylon Government Gazette No. 8458 of the 16th June, 1939, and provides for the vesting of various duties and powers in the Secretary. Rule 19 provides that all counterfoiled books shall be in his charge. Rule 24 for the initialling of entries in the Register of cheques. Regulations 28A, 43, 57, 83, 91, 94, 95, 96, 166, 173, 191, 221 and 233 make provision for other duties. By virtue of section 14 (1) (*e*) of the Interpretation Ordinance (Cap. 2) all rules shall have the force of law as fully as if they had been enacted in the Ordinance. The Secretary was therefore vested with numerous duties vested in him by Statute. In his letter of the 12th November, 1945, the respondent has informed the petitioner that he shall not receive any papers or have access to any of the official documents and that he is to hand over forthwith to the Chief Clerk Mr. K. B. Kulatunga all official and other documents in his charge and await further orders. In his letter of the 12th February, 1946, (P21) the petitioner is informed that the orders of the respondent of the 12th November, 1945, stand and he is to hand all official papers to the Chief Clerk. In my opinion those directions of the 12th November, 1945, and the 12th February, 1946, by the respondent prohibited the petitioner from performing the duties and functions vested in him by Statute. They amount to an interdiction or suspension of the petitioner.

The next question is whether the respondent in interdicting or suspending the petitioner was acting within his powers. In my opinion he was not. It is true that by section 34 (2) it is provided that the Chairman shall be the executive officer of the Council and all executive acts and respon-

sibilities which are by the Ordinance directed or empowered to be done or discharged by the Council may unless a contrary intention appears from the context be done or discharged by the Chairman. The duties and responsibilities of the Chairman are also elaborated and defined by Rules 1 and 2 of the Rules to which reference has been made. But neither in the Ordinance nor the rules is there any provision empowering the Chairman to interfere with the statutory duties imposed on the Secretary by law. Nor is there any power permitting the Chairman to interdict or suspend the Secretary from the performance of those statutory duties. In fact it is clear from the provisions of section 239A that no such power is vested in the Chairman. This section is worded as follows :—

> "(1) No executive officer shall be removed or dismissed from his office except for misconduct or for neglect of, or incapacity for, his duties, and except on a resolution passed by not less than two-thirds of the total number of members of the Council.
>
> (2) No executive officer shall be suspended or fined or reduced in status nor shall the increments to his salary be withheld for any breach of departmental rules or discipline or for carelessness, incompetence, neglect of duty or other misconduct except on a resolution passed by not less than two-thirds of the total number of members of the Council.
>
> (3) In this section 'executive officer' means any officer appointed to be or to act as the Secretary, the Electrical Superintendent or the Superintendent of Works of an Urban Council and includes any officer declared by the Executive Committee, by rule made under section 205, to be an executive officer for the purposes of this section."

The Secretary of the Council can only be suspended by virtue of a resolution passed by not less than two-thirds of the total number of members of the Council. It is clear therefore that in suspending the petitioner the respondent was not acting within the scope of the authority vested in him by law.

It only remains to consider whether in the circumstances a *Writ of Mandamus* will lie. In Short on *Mandamus*, p. 224 it is stated as follows :—

> "A *mandamus* is certainly a prerogative writ, flowing from the King himself, sitting in this Court, superintending the police and preserving the peace of this country, and will be granted wherever a man is entitled to an office or a function, and there is no other adequate legal remedy for it." But the Court ought to be satisfied that they have ground to grant a *mandamus* : "It is not a writ that is to issue of course, or to be granted merely for asking."

Can it be said in this case that there is no other remedy? No other remedy can be suggested. In the case of *The King vs. The Company of Free Fishers & Dredgers of Whitstable in the County of Kent* (7 East 353) the applicant for a *Writ of Mandamus* was left in possession of his office and only excluded from participating in the profits. A *mandamus* was refused on the ground that he had his action for the tort against those who disturbed him in his perception of them. In this case no ordinary action is open to the petitioner against the respondent for prohibiting him from performing his duties. In *The King vs. Speyer* and *The King vs. Cass* (1916) (1 K. B. 595) the question arose as to the issue of a *quo warranto*. At p. 612 Lord Reading, C.J., stated as follows :—

> "No case has been cited of a refusal by the Court of an information where the re-appointment to an office held at pleasure would be illegal. It would seem strange that the Court by refusing the remedy should perpetuate illegality. I cannot conceive why the Court should refuse to interfere if the appointing body persisted in retaining in office a person disqualified in law and no remedy other than the information is available. In the present case the information sought is the only means of testing the legality of the appointment, and if, as contended, it is contrary to law, *quo warranto* would seem in principle a convenient and proper way to obtain a judicial decision to that effect. If the irregularity in the appointment of an office held at pleasure could be cured by immediate reappointment, the Court in the exercise of its discretion would doubtless refuse the information, but if, as in this case, any reappointment would be illegal, I cannot see any sound reason why the Court should not permit the matter to be brought before it."

Applying this reasoning to the present case which is an application for a *Writ of Mandamus*, the petitioner is legally entitled to the office and to perform the duties of such office. If after the issue of the Writ the respondent again suspends the petitioner such action would be illegal. The application for the Writ is the only means of testing the legality of the respondent's actions and if such actions are contrary to law, *mandamus* would seem in principle a convenient and in fact the only way to obtain a judicial opinion to that effect. In the cases of *The King vs. Mayor of London* (100 E. R. 96), *Samynathan vs Whitehorn* (35 N. L. R. 225), and *Mohamed Sahib vs. The Principal Collector of Customs* (2 C. L. W. 330) a *writ of mandamus* was refused in each case because another remedy was available to the applicant. In the present case no other remedy is available. The application is therefore granted with costs and a *writ of mandamus* will issue, but will be limited to paragraphs (*a*), (*c*) and (*d*) of the application.

Application granted.

Proctors: *Messrs. Moonesinghe and Jayamaha*, for the petitioner.

S. Sivasubramaniam, for the respondent.

Present : WIJEYEWARDENE, J.

CHANDRANAYAKE HAMINE *et al* vs. GUNASEKERA *et al.*

S. C. No. 122—*C. R. Gampaha No.* 2946.
Argued on : September 17th, 1946.
Decided on : September 19th, 1946.

Court of Requests—Action for definition of boundaries—Test of jurisdiction.

Held : That in an action for definition of boundaries it is wrong to regard the value of the land as the test of jurisdiction.

L. A. Rajapakse, K.C., with *H. W. Jayawardene*, for the plaintiffs-appellants.
No appearance for the defendants-respondents.

WIJEYEWARDENE, J.

This is an action for declaration of boundaries. Two persons Don Brampy and Peter Gunasekera were the owners of undivided 2/3 and 1/3 share respectively of a land called Nugelandewatte of the extent of nearly 23½ acres. By a deed of partition executed in 1904 these persons became entitled to a defined northern lot and a defined southern lot in lieu of the undivided shares. The plaintiffs are the heirs of Don Brampy and the defendants, the heirs of Peter Gunasekera.

The plaintiffs filed this action for the definition of the boundary between the two divided portions as shown in Plan 676 of 1936.

The first defendant filed an answer pleading that he had been in adverse possession for 15 years of a portion of nearly 5 acres forming part of the northern lot originally allotted to Don Brampy by the deed of partition and that he had acquired a prescriptive title to it. He pleaded further that the court had no jurisdiction as he valued the cause of action over Rs. 300. The other defendants did not file any answer.

Several issues were framed at the trial one of which referred to the jurisdiction of the court.

The plaintiff gave evidence stating *inter alia* that he leased by P3 of 1937 for 5 years to the first defendant the entire northern lot allotted to Brampy. As the first defendant failed to quit the premises on the expiry of the lease, he filed a case in the Court of Requests of Gampaha and obtained the decree P1 of 1942 against the first defendant. That decree was affirmed in appeal. That decree declares the plaintiff entitled to recover the possession of the entire northern lot including the portion claimed by the first defendant in this case by adverse possession. The plaintiff explained further that it was during the subsistence of that lease that the boundary in question became obliterated as the first defendant was in possession of the northern lot as lessee and of the southern lot as an heir of Peter Gunasekera. The plaintiff admitted that the value of an acre of the land was about Rs. 1,000 but valued his action Rs. 100.

The defendant led no evidence but contended " that the test of jurisdiction on an action of this sort would be the value of the land, the boundary of which is sought to be defined ". The Commissioner of Requests held against the plaintiff on this question of jurisdiction and dismissed his action with costs.

The Commissioner of Requests is clearly wrong. I set aside the decree. On the evidence led in the case the plaintiff has established his claim to have the boundary defined. I remit the proceedings to the lower Court for the Commissioner of Requests to take the necessary steps to have the boundary defined.

The appellant will be entitled to costs here and costs in the lower Court up to date. All other costs will be in the discretion of the Commissioner of Requests.

Decree set aside.

Proctor : *P. Jayewardene* for the plaintiffs-appellants.

Present : WIJEYEWARDENE, J.

JAYAWARDENE vs. FERNANDO, A. G. A.,

S. C. No. 215—*M. C. Puttalam No.* 33019.
Argued on : 15th March, 1946.
Decided on : 26th March, 1946.

Land Development Ordinance (Cap. 320)—Permit to occupy Crown land—Cancellation—Should it be registered under section 58 (1) to render it valid.

Order of ejectment—Conditions necessary to be fulfilled before conferring jurisdiction on Magistrate—Section 119 of the Ordinance.

Does death of a permit-holder amount to effecting its "cancellation" within the meaning of Chap. IX of the Ordinance—Sections 106-118.

Held: (i.) That provisions of section 58 (1) of the Land Development Ordinance and the allied sections in which reference is made to the necessity for registration refer only to lands alienated by grant under the Ordinance and not lands given on a permit.

(ii.) That a Magistrate would not have the special jurisdiction conferred on him by section 119 of the Ordinance to make an order of ejectment in the case of lands given on a permit unless where (*a*) the permit has been cancelled, (*b*) notice had been given to the party in unlawful possession or occupation after such cancellation.

(iii.) That there is nothing in sections 106-118 of the Ordinance to indicate that the death of a permit-holder is to be regarded as effecting a cancellation of the permit within the meaning of Chapter IX.

Walter Jayawardene, for the accused-appellant.

A. C. Alles, C. C., for the Crown.

WIJEYEWARDENE, J.

This is an appeal against an order of ejectment made under Section 125 of the Land Development Ordinance (Chapter 320 of the Legislative Enactments).

The Assistant Government Agent of Puttalam issued a permit in the prescribed form to one Manuel Perera in 1943 in respect of the land in question for a period of years. Manuel Perera nominated his wife, the accused, as his successor under section 77 of the Ordinance. In October, 1944, the Assistant Government Agent cancelled that nomination under section 82 at the request of Manuel Perera who then nominated his grandson. That nomination was duly endorsed on the permit under section 80. Manuel Perera died in November, 1944. Thereupon, the Assistant Government Agent issued a notice on the accused who was living on the land requesting her to leave the land at the end of June, 1945. On the accused failing to comply with his request the Assistant Government Agent purporting to act under section 120 presented a written report to the Magistrate and obtained the order appealed against.

At the hearing before the Magistrate the only point of law urged on behalf of the accused was that her nomination as the successor of Manuel Perera was not duly cancelled as the document cancelling the nomination was not registered under section 58 (1). That contention is clearly untenable. I agree with the learned Magistrate that the provisions of that section and the allied sections in which reference is made to the necessity for registration refer only to lands alienated by grant under the Ordinance and not to lands given on a permit.

The accused has, however, raised another point of law in the petition of appeal, namely, that the Magistrate had no jurisdiction to make an order against her.

Now section 120 under which the written report in this case was presented refers to a "holding" and requires the Assistant Government Agent to state that *the grant relating to the holding has been cancelled* and that the person named in the report is in unlawful possession or occupation of such holding though served with a notice under section 119. It may also be noted that section 119 empowers the Assistant Government Agent to issue a notice to a person in possession or occupation of a holding after "the grant of a holding has been cancelled".

Those sections which refer only to "holdings" (*i.e.* lands alienated by grant under the Ordinance) are made applicable to lands given on permits by section 128 which reads:

> "The provisions of this chapter (Chapter IX. of the Ordinance) shall apply *mutatis mutandis*, in a case where any person is in unlawful or unauthorised possession or occupation of Crown land after the cancellation of the permit whereby such land was alienated."

It necessarily follows from the sections I have mentioned that the Magistrate would not have the special jurisdiction conferred on him to make an order of ejectment in the case of lands given on a permit unless where (*a*) the permit had been cancelled, and (*b*) the notice had been given to the party in unlawful possession or occupation after such cancellation.

Now there is not the slightest suggestion in this case that the permit issued to Manuel Perera had been cancelled. The cancellation of permits is referred to in sections 106-118, but there is nothing in those provisions to indicate that the death of a permit-holder is regarded as effecting a "cancellation" of the permit within the meaning of Chapter IX. An examination of section 124 of the Ordinance confirms the opinion I have expressed.

Appeal allowed.

Proctors: *Abeyakoon*, for the appellant.

Before : KEUNEMAN, S.P.J. & WIJEYEWARDENE, J.

THE ATTORNEY-GENERAL Vs. FERNANDO.

Application to enhance the sentence in D. C. (Criminal) N'Eliya, 244/4948 (36)

Argued and decided on : 11th September, 1946.

Criminal Trial—Trial Judge mentioning during the course of the examination of 1st prosecution witness that even if accused were found guilty facts of case would not justify sentence of imprisonment—Plea of guilt by accused—Influence of the Judge's remarks on.

The trial Judge in a criminal case in the course of the examination of the 1st prosecution witness stated that " judging from the facts and circumstances of the case as revealed by the evidence ", he felt that that was not a case in which a sentence of imprisonment was called for even if he found the accused guilty after trial. Later the accused pleaded guilty to the two indictments against him and was convicted and sentenced to a fine of Rs. 50 on each of the three counts of the 1st indictment and to imprisonment till the rising of the Court on the 2nd indictment. On an application by the Attorney-General for enhancement of sentence the accused pleaded that he would not have pleaded guilty to the indictments but for the suggestion thrown out by the Court that if he pleaded guilty he would be leniently dealt with.

Held : That the pleas of guilt cannot be regarded as unqualified admissions of guilt.

J. A. P. Cherubim, Crown Counsel, in support.

G. P. J. Kurukulasuriya, for the accused-respondent.

KEUNEMAN, S.P.J.

Although this matter started as an application for enhancement of sentence on the part of the Crown, certain facts have come to our notice as a result of which we are inclined to think that the plea of guilt in the case of both indictments tendered by the accused was not an unqualified plea of guilt. The accused himself in his affidavit states that whilst the first witness for the prosecution was giving evidence a suggestion was thrown out by the learned District Judge that on the facts and circumstances of the case he was disposed to deal with the accused as a first offender or impose a nominal fine, if he tendered a plea of guilt. The learned District Judge to whom this affidavit was submitted does say that it is incorrect that he said that he would deal with the prisoner leniently if he pleaded guilty, but on the other hand the District Judge does also say that before adjourning for lunch he mentioned from the bench that, judging from the facts and circumstances of the case as revealed by the evidence of the witness, he felt that this was not a case where a sentence of imprisonment was called for, even if he found the accused guilty after trial. We are disposed to accept the explanation of the District Judge, but even accepting that explanation there can be little doubt that the remarks made by the District Judge may have influenced the accused to tender a plea of guilt although the accused felt and maintained that he was not guilty. In this state of things I think it would be unfair to the accused to uphold his plea of guilt. In the circumstances I order that the pleas of guilt be not regarded as an unqualified admission of guilt and that the conviction entered on the pleas be set aside. The cases will be sent back to be heard by another District Judge. It is to be clearly understood that no inference unfavourable to the accused should hereafter be drawn in consequence of the mere fact that the accused tendered a plea of guilt in the manner in which he did.

WIJEYEWARDENE, J.

I agree.

Conviction set aside and case sent back.

Proctor : *A. J. M. de Silva,* for the accused-respondent.

Present : SOERTSZ, A.C.J.

P. S. 1744 SIRISENA Vs. PILLAI *alias* PERIYAM

S. C. No. 1125—*M. C. Chilaw No.* 26955.

Argued and Decided on : 19th October, 1945.

Prevention of Crimes Ordinance (*Chap.* 18) *Sections* 5, 6 *and* 7—*Conviction of accused—Five previous convictions—Sentence of two years' rigorous imprisonment and two years' Police supervision—Is the sentence regular.*

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

(ii.) That there is nothing to prevent a Magistrate from combining the punitive powers given to him by sections 5 and 6 of the said Ordinance.

Accused-appellant in person.

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

SOERTSZ, A.C.J.

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

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

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

Appeal dismissed.

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

REX vs. G. ARIYARATNE.

Appeal No. 21—*S. C. No.* 22, *M. C. Negombo* 44343.
Argued on : 26th and 27th March, 1946.
Decided on : 27th March, 1946.

Penal Code—Rape—Defence that accused had no connection with the girl—Is consent relevant then—Misdirection in the charge to jury.

Held : That in a charge of rape it does not necessarily follow that because the accused's defence was that he had had no connection with the girl the question of consent was irrelevant.

M. M. Kumarakulasingham, with *T. A. De S. Wijesundara*, for accused-appellant.

T. S. Fernando, Crown Counsel, for Attorney-General.

CANNON, J.

The appellant was convicted of rape of a girl aged 17. He is said to be aged about 30. The Crown case was that she was employed at the same camp as the accused on labour work and on the day in question when work was finished and the workpeople were leaving, the accused went to the girl and threatening her with a knife which he showed to her made her accompany him into some scrub jungle where a few hours later he raped her. He then left her saying he was going for some money and clothes, and after about quarter of an hour one Kamal Baas, another employee at the camp, came along and took the girl to a neighbouring house of a woman where she spent the night. It is said that the scene of the crime was near a footpath which was used by labourers going to and from the camp and that was how Kamal happened to be at the scene. The next day she went home but did not tell her sisters all that had happened, merely stating that she had been threatened with assault by the accused. Her mother was not at home and did not return home until the next day when the girl in reply to a question by the mother said that she had been raped but did not mention the accused's name although she said that she knew it and could identify him.

The defence was that the accused had had nothing to do with the girl, that there was no corroboration of her story in the legal sense, that is, implicating the accused, although her evidence that someone had connection with her and that she was before the incident a virgin was corroborated because the doctor verified her evidence on that point. The witness Kamal was said to have absconded.

There are two main grounds of appeal, namely, (1) regarding the summing-up on the question of consent, and (2) the Judge's directions on corroboration. On page 5 of the summing-up the Judge is recorded as saying :

> " The burden of proof is on the Crown. The Crown must prove that this accused committed this offence and that it was done against the will of the woman, or if it was with her consent, that her consent was obtained by fear of death or of hurt. In this case, fortunately, you are not concerned with the second point. Here you are concerned with the identity of the person who committed the act. If it was the accused, then you are on safe ground in holding that it was done against her will, or at least that her consent was obtained when she was in fear of death or of hurt. It is not the case of the accused that the girl went with him with her consent on this day to have sexual intercourse with him. His case is that he had nothing to do with her. So you are really concerned with the first point—was it this accused who had sexual intercourse with the girl."

Now, it is correct that in other parts of the summing-up the learned Judge directs the jury upon the necessity of proving absence of consent, but emphasis was made by Mr. Kumarakulasingham in his able presentation of the case to us that the passage which I have read is of a categorical nature. It may be that the Judge meant the jury to understand that if they did not accept that view of the defence, it being that the accused had had no connection with the girl, then if they believed the girl's story that he had, they would have no reasonable anxiety as to the truth of her statement that it was against her will, but the passage seems to direct the jury that the question of consent is not a matter for their consideration. It does not follow necessarily that because the accused's defence was that he had had no connection with the girl that therefore the question of consent was irrelevant.

Crown Counsel, Mr. Fernando, concedes that the jury may have thought that the question of consent was a matter of minor importance and for that reason feels unable to support the conviction. We are of the same opinion and it is, therefore, unnecessary to go into the question of corroboration.

The appeal is allowed and the conviction quashed.

Appeal allowed.

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

CHELLIAH & ANOTHER vs. SAIVA PARIPALANA SABHAI

S. C. No. 249—*D. C. (F) Jaffna No.* 16614

Argued on : 17th and 18th September, 1946.

Decided on : 25th September, 1946.

Evidence—Register of lands belonging to a charitable trust kept at Kachcheri—Is a certified copy of such register admissible—Absence of proof of authority to keep such register or of purpose for which it was made or of the nature of sources of information entered therein—Weight to be attached to such document—Hearsay.

Held : (i.) That a " register of gifted lands " belonging to a charitable Trust kept at a Kachcheri is not a public document and a certified copy thereof is inadmissible in evidence.

(ii.) That even if it is admissible, in the absence of proof of the purpose for which, or on whose authority it was made, or of the nature of the knowledge which the persons who supplied the details as regards title to the lands therein had, no weight can be attached to such evidence.

Per KEUNEMAN, J.—A vesting order was in fact obtained by the plaintiff in respect of the named lands " and other properties belonging to the said *Tharman* ", *i.e.* the *madam* in question. It was argued that the vesting order included all lands even though they were neither named nor described. I have considerable doubts whether lands which were completely unidentifiable in the proceedings could be said to have been vested in the plaintiff, and I have further doubts whether the vesting order bound parties who were not parties to the proceedings in which the vesting order was obtained.

G. Crosette Thambyah, with V. K. Kandesamy and *C. Shanmuganayagam*, for the 1st and 2nd defendant-appellants.

N. Nadarajah, K.C., with *C. Renganathan* for plaintiff-respondent.

KEUNEMAN, S.P.J.

The plaintiff, a corporation incorporated under Ordinance 17 of 1931 (Cap. 240) sued the defendants to obtain judgment declaring that the properties mentioned in the schedule to the plaint were subject to the Charitable Trust known as the *Chitambaram Ambalavanasamy Punnianachy Tharman*, and that the plaintiff as the lawful trustee of the said trust was entitled to possess the said properties.

Plaintiff obtained judgment as prayed for, and the 1st and 2nd defendants appeal.

There were several matters which the plaintiff had to establish in order to succeed in this action :

(1) Was there a charitable trust as described in the plaint ?

(2) Were the three lands described in the schedule to the plaint subject to the said trust ?

(3) Was the plaintiff the duly appointed trustee in respect of these three lands ?

(1) The plaintiff's case was that one Punnianacham founded at Chidambaram in India and in Jaffna the trust described in the plaint which was also known as the *Punnianachy Mada Tharmam.* It was alleged that this trust was created for the establishment and maintenance of a *madam* or place of rest for pilgrims who go to worship at the famous shrine of Ambalavanarsamy Temple in Chidambaram, South India, and for the purpose of making contributions to the temple for various *poojas* and other ceremonies of the temple. Under the terms of this trust a madam was in fact built at Chidambaram but this now appears to be in ruins.

In this appeal I do not think there has been any real controversy as regards the existence of the trust as alleged. It is in evidence that the plaintiff has been in possession of certain lands and had administered those lands for the purposes of this trust. The plaintiff has also obtained a vesting order as trustee for these lands—not those in the schedule to the plaint. In my opinion the plaintiff has made out a sufficient case in this respect, and the District Judge has so held.

(2) It is strongly urged for the appellants that the plaintiff has failed to prove that the three lands described in the plaint are subject to this trust. It has been established in evidence that the 1st land Kurunthan and the 2nd land Arachchivayal originally belonged to Ramanathan Mudaliyar. The thombus of 1822 (P9 and P10) strongly support that contention. There is no proof that Punnianacham was even a descendant of Ramanathan Mudaliyar, nor is it shown how Punnianacham obtained any title to the said lands. In fact we know nothing of Punnianacham and she appears to be a legendary figure. There is no evidence that Punnianacham dedicated these

two lands for the purpose described. It is no doubt also true that the appellants have failed to prove that they are the descendants of Ramanathan Mudaliyar. The District Judge has in fact rejected the pedigrees filed by all the parties to this action. But the burden rested on the plaintiff, and he has failed to provide evidence to prove this point. As the case now stands there is nothing to show that the legal title to these lands has been transferred away from the descendants of Ramanathan Mudaliyar, or that this title ever resided in Punnianacham or in any person who made the dedication in trust.

As regards the 3rd land in the schedule to the plaint, Thalymanodai, the thombu P11 of 1822 shows that the title stood in the name of " Sithamparar Ambalavanar Pandaram ". The appellants contended that this was a human being, but the plaintiff alleged that this was the god Ambalavanar Swamy whose shrine at Chidambaram was well known. I think on this point the District Judge was right in holding that the title was in the name of the god. But this does not overcome the difficulties of the plaintiff. There was no doubt evidence of a trust in favour of the god but there was no proof here that the trust was for the special purposes alleged by the plaintiff. I think the ordinary and natural presumption would be that the trust was for the benefit of the temple of the god Ambalavanar Swamy of Chiddambaram, and not for the establishment of the *madam* or for the other special purposes detailed by the plaintiff. The thombu P11 does not disclose the identity of the trustee in whom the legal title to this land was vested.

The point was of importance because at the trial, though not in the answer, the appellants maintained that not only the third land but also the first two lands in the plaint were held by them in trust for the temple of the god at Chidambaram.

The document P22 of 1914 was produced to establish the fact that K. Arumogam, an uncle of the appellants, after declaring that all three lands were held by him as trustee for the Ambalavanar Swamy Temple at Chidambaram, purported to appoint the appellants as co-trustees with him to look after and manage the trust properties. There can be little doubt that Arumogam and the appellants have been in possession of these lands for a considerable time, although the District Judge has held, I think rightly, that the appellants have failed to prove that they are the descendants of Ramanathan Mudaliyar who was the proprietor according to thombus P9 and P10 of the first two lands.

In arriving at a decision as to whether the three lands in the schedule to the plaint were subject to the trust as alleged by the plaintiff, the facts must be examined.

It is clear that the oral evidence led by both sides must be eliminated, for the District Judge has himself said " I think the oral evidence in this case is not very helpful for arriving at a verdict in this case ", and has rejected the pedigree both by the plaintiff and by the appellants.

After discussing the evidence provided by the thombus, the District Judge went on to examine the documents in the case. The first document he mentioned was P12, the Paddy Commutation Register, in respect of the first land in the plaint. The name of the proprietor was given as " Nadarayar Ambalavanar ". The District Judge rightly holds that this is the god. There is no doubt that this provides evidence that this land was held on trust for the god, but it leaves unanswered the question whether the trust was in favour of the temple of the god or in favour of the *madam* and other matters specified by the plaintiff.

Another document is P13, the Paddy Commutation Register for 1884—1890 in respect of the first two lands in the plaint. Under name of proprietor is entered " Sitthamparathalam Ambalavanaswamy Temple Land " and A. Sithamparapillai of Copay is said to be the manager. As the document now reads there is attached a promise to pay the land tax by K. Ramalingam of Vannarponnai. The District Judge is not correct in stating that this K. Ramalingam is shown in the document as " the person in whose management the two lands were ". Further, in the register itself there is a correction. The original promisor was put down as Ponnambalam Karthigesar, an ancestor of the appellants, but this name has been scored off and the name of K. Ramalingam inserted.

There is no evidence to shew by whom or under what circumstances this correction was made. There is some evidence in the case that K. Ramalingam acted as trustee in respect of the trust as regards other lands, not those mentioned in the plaint. But even accepting the amendment as genuine—and this is doubtful—there is nothing in the document P13 to prove that K. Ramalingam was a trustee in respect of the lands mentioned in the plaint.

Document P14 tells against the pedigree of the appellants but does not carry the case of the plaintiff any further. The same comment may be made as regards P15. Document P16 and P17 relate to a land not mentioned in the plaint, of which the manager was the K. Ramalingam previously mentioned.

Documents P28 and P35 relate to an action in which K. Ramalingam was sued on a bond and admitted the claim, as trustee of the madam in question. The plaintiff in that case proceeded to seize the first two lands mentioned in this plaint in virtue of his decree but there is nothing to shew what followed on this seizure and there is no evidence that these lands were sold in execution. These documents are therefore inconclusive on the question we have to decide.

The main document on which the District Judge relied was P36, which he described as a certified copy from " a register of gifted lands belonging to the Chidambaram Ambalavanarswamy kept at the Jaffna Kachcheri ". This was apparently prepared on the 20th February, 1906. The first two lands in the plaint are mentioned in the " register ", and under the column " Belonging to which *madam* " was entered " The Punnianachcham madam ". Under the column " Name of the person who is possessing now " was entered the name of K. Arumogam, the uncle of the appellants.

It has not been established or even suggested that the " register " (P36) was made under any statutory duty on the part of the Government Agent. It appears to be a purely private document. It had not even been shown for what purpose this document was made or on whose authority. We do not know enquiries were made in this connection or from whom. All that document indicates is that it was based on reports " submitted by the Udayar and Vidhanes of the villages in question to the Manigar ". What knowledge these persons had or could have had with regard to the title to these lands or the nature of the trust affecting them has not been shown. The learned District Judge has come to the conclusion that " the document P36 clearly shows that K. Arumogam recognised that at least lands Nos. 1 and 2 in the schedule to the plaint belonged to the Punnianachcham Madam ".

It is clear that the District Judge is wrong in this finding. Nothing in the document shews that K. Arumogam recognised the equitable title alleged by the plaintiff. In fact we do not even know whether any enquiries were made from K. Arumogam in this connection. In my opinion the document P36 should have been rejected as hearsay evidence. No section of the Evidence Ordinance makes this document admissible. Even if it was admissible I do not think any weight can be attached to this evidence.

Another document mentioned by the District Judge is deed P21 of 1913 whereby Pararajasingham, the owner of the land on which the Pillayar Temple stood on the west of the first land in the plaint, conveyed that land to the Pillayar Temple. In the deed the eastern boundary of the land conveyed is described as property belonging to the Punnianacham Mada Tharmam, *i.e.* madam in question in this case. I do not think this document is of any value, more especially as the oral evidence of Pararajasingham has not been accepted by the District Judge.

One other document may be mentioned, P5, which consists of proceedings brought by the plaintiff in 1938 against 16 persons ; (it is to be noted that the appellants were not among these 16 persons) to obtain a vesting order under section 112 of the Trust Ordinance in respect of certain named lands. These lands, however, did not include the three lands mentioned in the plaint. A vesting order was in fact obtained by the plaintiff in respect of the named lands " and other properties belonging to the said *Tharmam* ", *i.e.* the *madam* in question. It was argued that the vesting order included all lands even though they were neither named nor described. I have considerable doubts whether lands which were completely unidentifiable in the proceedings could be said to have been vested in the plaintiff, and I have further doubts whether the vesting order bound parties who were not parties to the proceedings in which the vesting order was obtained.

But it is not necessary in this appeal to decide these points because the vesting order in fact throws no light upon the question whether the three lands mentioned in the plaint were subject to the trust alleged by the plaintiff.

(3) In the circumstances it is not necessary to decide the further question whether the plaintiff has proved that he is the duly appointed trustee in respect of these three lands. All I need say is that a number of difficult and controversial points have been argued in this connection. It is also clear that the plaintiff has never been in possession of these three lands as *de facto* trustee.

In the result I set aside the judgment of the District Judge and dismiss the plaintiff's action as against the 1st and 2nd defendants, who will have costs in both courts.

JAYETILEKE, J.
I agree.

Set aside.

Proctors : *S. Cumarasurier*, for the defendant-appellants.
A. Arulambalam, for the plaintiff-respondent.

IN THE HOUSE OF LORDS

Present : VISCOUNT SIMON, LORD MACMILLAN, LORD PORTER, LORD SIMONDS AND LORD DU PARCQ.

HOLMES vs. DIRECTOR OF PUBLIC PROSECUTIONS

Argued on: 5th, 7th, 8th, 9th, 10th May, 1946.

Decided on: 4th July, 1946.

Criminal Law—Indictment for Murder—Provocation—Wife's confession of adultery—Whether sufficient provocation to reduce murder to manslaughter—Functions of judge and jury.

Held : (i.) That a sudden confession of adultery without more can never constitute provocation of a sort which might reduce murder to manslaughter.

(ii.) That this rule applies to either spouse alike.

Per VISCOUNT SIMON :—*(a)* In dealing with provocation as justifying the view that the crime may be manslaughter and not murder, a distinction must be made between what the judge lays down as matter of law, and what the jury decides as matter of fact. If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self control to the degree and method and continuance of violence which produces the death, it is the duty of the judge as a matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (*a*) that a reasonable person, in consequence of the provocation received, might be so rendered, subject to passion or loss of control as to be led to use the violence with fatal results, and (*b*) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict. It is hardly necessary to lay emphasis on the importance of considering, where the homidice does not follow immediately upon the provocation, whether the accused, if acting as a reasonable man, had " time to cool."

(b) The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self control whereby malice which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce to manslaughter seldom applies. Only one very special exception has been recognised, viz. the actual finding of a spouse in the act of adultery. This has always been treated as an exception to the general rule : Manning *R. vs. Maddy* (1671) 2 Keb. 829 ; 1 Veut 158. Blackstone Commentaries Bk. IV, p. 192, justifies the exception on the ground that " there could not be a greater provocation." But it has been rightly laid down that the exception cannot be extended.

(c) It is enough to say that the duty of the judge at the trial, in relevant cases, is to tell the jury that a confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter, and that in no case could words alone, save in circumstances of a most extreme and exceptional character, so reduce the crime. When words alone are relied upon in extenuation, the duty rests on the judge to consider whether they are of this violent provocative character, and if he is satisfied that they cannot reasonably be so regarded, to direct the jury accordingly.

(d) The reason why the problem of drawing the line between murder and manslaughter, where there has been provocation, is so difficult and so important, is because the sentence for murder is fixed and automatic. In the case of lesser crimes, provocation does not alter the nature of the offence at all : but it is allowed for in the sentence.

Cases referred to : *Woolmington vs. Director of Public Prosecutions* (1935) A.C. 462 ; 25 Cr. Ap. R. 72.
Mancini vs. Director of Public Prosecutions (1941) 3 All. E.R. 272 ; 1942 A.C. 1.
R. vs. Maddy (1671) 2 Keb. 829 ; 1 Veut 158.
R. vs. Pearson (1835) 2 Lew C.C. 216.
R. vs. Morley (Lord) (1666) 6 State Tr. 770 ; 1 Sid. 277.
R. vs. Mawbridge (1706) Kel 119 ; 1 East, P.C. 276, 278.
R. vs. Rothwell (1871) 12 Cox C.C. 145.
R. vs. Jones (1908) 72 J.P. 215.
R. vs. Palmer (1913) 2 K.B. 29, 82 L.J., K.B. 531 ; 8 Cr. Ap. R. 191.

P. E. Sandlands, K.C., with *Elizabeth K. Lane*, for the appellant.

Sir Frank Soskice, K.C., Solicitor-General with *Anthony Hawke* and *Rodger Winn* for the Crown.

Viscount Simon.

My Lords, the appellant was charged with murdering his wife and was convicted of this crime at Nottingham Assizes, at a trial before Charles, J., and a jury, on Feb. 28 last. On his applying to the Court of Criminal Appeal for leave to appeal against this conviction, that Court (Lord Goddard, L.C.J., Wrottesley and Groom-Johnson, J.J.) treated his application as the actual appeal and dismissed it for the reasons given in a judgment read by Wrottesley, J. on April 5. On April 12 the appellant obtained from the Solicitor-General (who was acting in place of the Attorney-General under the Law Officers Act, 1944) a certificate that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance, and that it was desirable that a further appeal should be brought to this House. The point of law is whether Charles, J. was right in telling the jury that, upon the evidence at the trial, and having regard to the law, it was not open to the jury to find a verdict of manslaughter, and that the statement by the accused's wife to him that she had been unfaithful to him was not such provocation as could justify a verdict of manslaughter instead of murder. More generally, the question we have to consider is what are the respective functions of judge and jury in such cases, and how the law draws the line between instances of provocation which would and those which cannot, make it proper for the jury to be left to decide on the facts on the appropriate verdict.

The appellant killed his wife, according to his own evidence, on the night of Sunday or in the early hours of Monday, Nov. 18 or 19 of last year, in the kitchen of the house where they lived. On the previous Saturday he had telegraphed to a Mrs. X, who, lived in a different part of the country and with whom he admitted that he had previously had sexual relations, that she might expect him on the Sunday or Monday. He travelled on the Monday to Mrs. X and told her that his wife had left him. In fact, his wife's dead body was discovered next day in the room where he had killed her. She had received a severe wound on the head caused by the hammer head for breaking coal which was close to her hand, and she had many bruises on her body, but the final cause of death was manual strangulation. The appellant's story was that there was a quarrel between them on the Saturday night, originating from some persons winking in the direction of his wife in a public house that evening; he said that he had entertained suspicions of his wife's conduct with regard to other men in the village, and that there had been some suggestion made to him with regard to her and his own younger brother. The quarrel, he said, culminated in his wife saying, "Well it will ease your mind, I have been untrue to you," and she went on, "I know I have done wrong, but I have no proof that you haven't—at Mrs. X's." "With this," the appellant's statement continued, "I lost my temper and picked up the hammer head and struck her with the same on the side of the head. She fell on her knees and then rolled over on her back, her last words being, 'It's too late now, but look after the children.' She struggled just for a few moments and I could see she was too far gone to do anything I did not like to see her lay there and suffer, so I just put both hands round her neck until she stopped breathing, which was only a few seconds." In the witness box, the appellant was asked in cross-examination, "When you put your hands round that woman's neck and gave pressure through your fingers, you intended to take your wife's life, did you not?" and he answered, "Yes."

There was no corroboration at the trial to support the accused's statement that his wife admitted her unfaithfulness, but for the purpose of deciding whether Charles J's direction to the jury was correct, it must be assumed that she did, and that either her confession or her pertinent inquiry about his own misconduct provoked him to lose his temper. The House was unanimous in holding that the direction given by the judge was correct; there were no circumstances of special aggravation, and confession of adultery, grievous as it is, cannot itself justify the view that a reasonable man (or woman) would be so provoked as to do what this man did. The House accordingly dismissed the appeal, while taking further time to pronounce upon the more general question of law and principle discussed in the course of the argument.

In dealing with provocation as justifying the view that the crime may be manslaughter and not murder, a distinction must be made between what the judge lays down as matter of law, and what the jury decides as matter of fact. If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self control to the degree and method and continuance of violence which produces the death, it is the duty of the judge as a matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (*a*) that a reasonable person, in consequence

of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (*b*) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict. It is hardly necessary to lay emphasis on the importance of considering, where the homicide does not follow immediately upon the provocation, whether the accused, if acting as a reasonable man, had " time to cool."

The distinction, therefore, is between asking " Could the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did ? " (which is for the judge to rule), and, assuming that the judge's ruling is in the affirmative, asking the jury, " Do you consider that, on the facts as you find them from the evidence, the provocation was in fact enough to lead a reasonable person to do what the accused did ? " and, if so, " Did the accused act under the stress of such provocation?"

Woolmington vs. Director of Public Prosecutions (1935) A.C. 462 ; 25 Cr. Ap. R. 72 shows that if the jury, after a proper summing up, entertains a reasonable doubt as to the answers to these questions, it ought to give the accused the benefit of the doubt. *Mancini vs. Director of Public Prosecutions* (1941) 3 All. E.R. 272 ; 1942 A.C. 1 points out the importance of considering the nature of the weapon used in retort—in that instance, Macnaughten, J. was held to be justified in excluding the possibility of mere manslaughter when a dagger was employed in resentment to a blow aimed at the accused with a fist, " the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter." (1941) 3 All E.R. 272, at p. 277.

The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self control whereby malice which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce to manslaughter seldom applies. Only one very special exception has been recognised, viz. the actual finding of a spouse in the act of adultery. This has always been treated as an exception to the general rule : Manning *R. vs. Maddy* (1671) 2 Keb. 829; 1 Veut 158. Blackstone's Commentaries Bk. IV, p. 192, justifies the exception on the ground that " there could not be a greater provocation." But it has been rightly laid down that the exception cannot be extended, *e.g.* by Marker B., in *R. vs. Pearson* (1835) 2 Lew C.C. 216, where he insisted on the condition of ocular observation. Even if Iago's insinuations against Desdemona's virtue had been true, Othello's crime was murder and nothing else.

Necessary self-defence, or action taken in the necessary defence, for example, of wife or child from outrage or maltreatment, stand apart, as in such cases there is no crime at all committed.

This brings me to the question which, as I understand, was the actual reason why the law officer's certificate was given in this case : viz : whether " mere words " can ever be regarded as so provocative to a reasonable man as to reduce to manslaughter felonious homicides committed upon the speaker in consequence of such verbal provocation. There is nothing in the decision of this House in *Macini vs. Director of Public Prosecutions* (1941) 3 All. E.R. 272 ; 1942 A.C. A which was intended to prejudice this question, nor does the decision in fact do so.

It is first to be observed that provocation by " mere words " may have more than one meaning. It may mean provocation by insulting or abusive language, calculated to rouse the hearer's resentment. The contrast with provocation by physical attack is obvious. A blow may in some circumstances rouse a man of ordinary reason and control to a sudden retort in kind, but the proverb reminds us that hard words break no bones, and the law expects a reasonable man to endure abuse without resorting to fatal violence. It is in this sense that the constantly repeated statement in the old books that " mere words " (not being menace of immediate bodily harm) do not reduce murder to manslaughter is to be understood : see Hale's Pleas of the Crown, Emlyn Edn. Vol. 1 p. 456, citing the resolution of all the judges in 1666, in *R. vs. Morley* (Lord) (1666) 6 State Tr. 770 ; 1 Sid. 277, at p. 771 ; *R. vs. Mawbridge* (1706) Kel 119 ; 1 East, P.C. 276, 278 (17 State Tr. 57, at p. 66) Hawkin's Pleas of the Crown, Bk. 1 ch. 13 sect. 33 : East's Pleas of the Crown, Vol. 1 p. 233.

There is, however, a different sense which may sometimes attach to the meaning of " mere words" for they may be used, not as an expression of abuse, but as a means of conveying information of a fact, or of what is alleged to be a fact. This must be the sense in which Blackburn, J. spoke in *R. vs. Rothwell* (1871) 12 Cox C.C. 145, when in the course of summing up to a jury in the case of a man charged with murdering his wife, he went so far as to say (12 Cox C.C. 145, at p. 147) :

> "As a general rule of law no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect, for instance, if a husband suddenly hearing from his wife that she had committed adultery and he having no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter."

It is to be noted that Blackburn, J. said "might," and not "would" and the illustration had no resemblence to the facts of the case he was trying.

Blackburn, J's dictum was applied in the accused's favour in *R. vs. Jones* (1908) 72 J.P. 215 and was not dissented from in *R. vs. Palmer* (1913) 2 K.B. 29, 82 L.J., K.B. 531 ; 8 Cr. Ap. R. 191, when, however, the Court of Criminal Appeal refused to extend the suggested exception to cover the case of a man engaged to be married to a young woman whom he killed when she confessed to illicit intercourse with someone else. Channell, J., in delivering the judgment of the court, said that the reason for the exception suggested by Blackburn, J. was that a sudden confession is treated as equivalent to a discovery of the act itself.

In my view, however, a sudden confession of adultery without more can never constitute provocation of a sort which might reduce murder to manslaughter. The dictum attributed to Blackburn, J. and any cases which seem to accept or apply it, can no longer be regarded as good law. The rule, whatever it is, must apply to either spouse alike, for we have left behind us the age when the wife's subjection to her husband was regarded by the law as the basis of the marital relation, when, as Bracton said (see Pollock and Maitland's History of English Law, 2nd Edn. Vol. II, p. 406), she was sub *virga viri sui* and when the remedies of the Divorce Court did not exist. Parliament has not conferred on the aggrieved wife the same right to divorce her husband for unfaithfulness alone as he holds against her, and neither, on hearing an admission of adultery from the other, can use physical violence against the other which results in death and then urge that the provocation received reduces the crime to mere manslaughter.

It is not necessary in this appeal to decide whether there are any conceivable circumstances accompanying the use of words without actual violence, which would justify the leaving to a jury of the issue of manslaughter as against murder. It is enough to say that the duty of the judge at the trial, in relevant cases, is to tell the jury that a confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter and that in no case could words alone, save in circumstances of a most extreme and exceptional character, so reduce the crime. When words alone are relied upon in extenuation, the duty rests on the judge to consider whether they are of this violent provocative character, and if he is satisfied that they cannot reasonably be so regarded, to direct the jury accordingly.

There are two observations which I desire to make in conclusion. The first is that the application of common principles in matters such as this must to some extent be controlled by the evolution of society. For example, the instance given by Blackstone's Commentaries Bk. IV, p. 191, citing an illustration in Kel. 135, that if a man's nose was pulled and he thereupon struck his aggressor so as to kill him, this was only manslaughter, may very well represent the natural feelings of a past time, but I should doubt very much whether such a view should necessarily be taken nowadays. The inquiry done to a man's sense of honour by minor physical assaults may well be differently estimated in different ages. And, in the same way, one can imagine in these days at any rate, words of a vile character which might be calculated to deprive a reasonable man of his customary self-control even more than would an act of physical violence. But on the other hand, as society advances, it ought to call for a higher measure of self control in all cases.

The remaining reflection is as follows : the reason why the problem of drawing the line between murder and manslaughter, where there has been provocation, is so difficult and so important, is because the sentence for murder is fixed and automatic. In the case of lesser crimes, provocation does not alter the nature of the offence at all : but it is allowed for in the sentence. In the case of felonious homicide, the law has to reconcile respect for the sanctity of human life with recognition of the effect of provocation upon human frailty.

Appeal dismissed.

Lord Macmillan, Lord Porter, Lord Simonds and Lord Du Parcq

Concurred.

Solicitors : Ludlow & Co. for the (appellant) ; Director of Public Prosecutions (for the Crown.)

Present: HOWARD, C.J.

SIMAN vs. MUSAFER, S. I. POLICE

S.C. No. 376 M. M. C. Colombo No. 69462

Argued and Decided on: 17th June, 1946.

Excise Ordinance—Possession of Arrack in excess of prescribed quantity—Arrack kept by accused for the benefit of another who possessed a permit—Can accused be convicted.

Held : That a person who merely keeps arrack in his possession for the benefit of another who is a permit-holder, cannot be said to have committed an offence.

J. A. L. Cooray, for accused appellant.
V. T. Thamotheram, C.C., for the *Attorney-General.*

HOWARD, C.J.

In my opinion the conviction in this case cannot be supported. The accused was charged with having in his possession without a permit from the proper authority 56 drams of arrack which was 40 drams in excess of the prescribed quantity, in breach of section 16 of the Excise Ordinance. The evidence established, and the Magistrate has accepted that evidence, that the accused was merely keeping the arrack for the benefit of a man called Gunaratne and that this arrack was intended for the use of Gunaratne. Gunaratne gave evidence and produced a permit for the arrack in question. In these circumstances it cannot be said that the accused had exclusive possession of the arrack or any real possession, apart from physical possession on behalf of some one else at all. The conviction is therefore set aside.

Conviction set aside.

Proctors : V. Jansz for the appellant.

Present: KEUNEMAN, S.P.J.

GOONETILEKE vs. GOVT. AGENT, GALLE

Application for a Writ of Certiorari or Mandamus on the Government Agent, Galle.

Argued and Decided on: 27th September, 1946.

Writ of Certiorari or Mandamus—Validity of Election—Failure to make successful candidate party—Application at hearing to add—Should it be allowed.

Held : (i.) That an application for a Writ of Certiorari or Mandamus for a declaration that an election is void cannot be maintained without making the successful candidate a party to the application.
(ii.) That an application at the hearing to add the successful candidate as a party should not be allowed.

C. V. Ranawake with *Dodwell Gunawardene*, for the Petitioner.
Douglas Jansze, C.C., for the respondent.

KEUNEMAN, S.P.J.

The petitioner applies for a Writ of Certiorari or Mandamus and prays in his petition that the Court may be pleased to declare the election in connection with the Village Committee void and direct the Government Agent to hold a fresh election in respect of the ward. The objection has been taken in the first instance that no order such as is claimed by the petitioner can be made when the successful candidate has not been made a party. This was held in the case of *Carron vs. Government Agent, W. P.* (46 N.L.R. p. 237). I think the objection on the part of the Government Agent is a good one.

An application is now made to me to add the successful candidate as a party to the case. I think the application comes at too late a stage of these proceedings and that I should not allow such an application now.

The application of the petitioner is refused with costs.

Application refused.

Proctors : *Valentine E. S. Perera* for the Petitioner.

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

COSTA & ANOTHER vs. REITH

S. C. No. 201—*D. C. (F) Kandy No.* 589.

Argued on : 11th, 12th and 13th September, 1946.
Decided on : 18th September, 1946.

Deed of rectification—Does title vest from the date of rectification or from date of original deed—Can vendee avail himself of vendor's prescriptive possession from date of original deed.

Held : (i.) That where a " deed of rectification " is executed the vendor's title vests in the vendee as from the date of the original deed and not from the date of the rectification.

(ii.) That the vendee could regard himself as successor in title to the vendor as from that date and also avail himself of any prescriptive possession by the vendor.

Cases referred to : *Malmesbury vs. Malmesbury* (31 Beaven 407.)
Craddock Bros. vs. Hunt (1923 2 Ch. Div. 136.)
United States of America vs. Motor Trucks Ltd. (1924) A. C. 196.
Goonesekera vs. Pieris (28 N. L. R. 228).

N. E. Weerasooriya, K.C., with *H. W. Jayewardene*, for the plaintiff-appellants.
H. V. Perera, K.C., with *N. K. Choksy and B. D. Gandevia*, for the defendant-respondent.

KEUNEMAN, S.P.J.

This action was brought by the plaintiffs on the 30th August, 1941, for a declaration that they were entitled to a half share of the estate known as SPRINGHILL of about 64 acres. The plaintiffs alleged that the premises in question were by Fiscal's Transfer No. 10 of the 29th April, 1916, (P1) transferred to Joseph Costa and Brothers of Matale Town, the partners of which firm at the time of P1 were the two plaintiffs and Ponniah Peries and Stanislaus Costa, the brother-in-law and brother respectively of the plaintiffs.

The defendant alleged that in 1920 by P15 the partnership firm acquired the estate known as LONGVILLE and that about 1923 the two estates Longville and Springhill were amalgamated and treated as one estate under the name of LONGVILLE ESTATE, and that at the time of the dissolution of the firm of Joseph Costa and Brothers in 1926 Longville Estate including Springhill was at the distribution of the assets allotted to Ponniah Peries and Stanislaus Costa, and that the deed D28 of the 2nd September, 1926, was executed to achieve that object ; and that by D30 of the 15th March, 1932, Ponniah Peries and Stanislaus Costa conveyed the whole of Longville Estate including Springhill to the defendant.

It appears however that both in D28 and D30 the description of the parcels was only applicable to Longville Estate and did not include Springhill. As regards D30 the defendant obtained from his vendors a deed of rectification D47 dated 20th September, 1941, but the deed D28 has not been rectified. The defendant also pleaded that her had obtained a title by prescription to Springhill.

After trial the learned District Judge dismissed plaintiffs' action, and the plaintiffs appeal.

Counsel for the appellants strongly contested the finding of the District Judge that it was proved by the defendant that at the distribution of assets Springhill was allotted to Ponniah Peries and Stanislaus Costa. The District Judge himself found that the defendant was " obliged to rely entirely upon document D25 " to establish this part of his case. The District Judge has subjected this document to a detailed examination and has concluded that this document established the allegation that Springhill was allotted to Ponniah Peries and Stanislaus Costa. D25 was undoubtedly in the handwriting of the first plaintiff himself, but he explained that this document was merely a suggestion made by him at an early stage of the negotiations and did not represent the final settlement. The first plaintiff's evidence has not been accepted, but the fact remains that the defendant was not able to furnish evidence that D25 was the final settlement as to the distribution of assets. Neither Ponniah Peries nor Stanislaus Costa has given evidence, and the defendant himself was not acquainted with the facts. There are also certain other matters which tell against the District Judge's finding, for he himself drew attention to the fact that the values of the properties shown in D25 and D28 are not in agreement and said further that " the two plaintiffs got in addition to what was allotted to them under D25 further assets to

the value of Rs. 57,041.50 ". I may add also that in D25 Longville Estate including Springhill appears to have been allotted to Ponniah Peries alone and not to him and Stanislaus Costa. On the whole, I am not satisfied that there was sufficient evidence before the District Judge to establish the allegation that Springhill had been allotted to the defendant's vendors at the distribution of assets at the time of the dissolution.

The District Judge also appears to have held that at the time of the acquisition of Springhill the only two partners of the firm of Joseph Costa & Brothers were Ponniah Peries and Stanislaus Costa and that the legal title to Springhill Estate vested in them alone. I do not think it was open to the Judge to come to this conclusion in view of the pleadings in the case and of the absence of any evidence to support the finding.

I may add that it was not necessary to call upon respondent's counsel on these points because the case could be decided on the issue of prescription. There was very strong evidence that since the purchase of Longville the two estates have been amalgamated and administered as one estate, and that the amalgamated estate has for a long period been known as Longville Estate, and that Springhill has been known as Springhill Division. Since the dissolution of the partnership in 1926 Ponniah Peries and Stanislaus Costa have been in possession of the amalgamated estate as owners and have dealt with the income from it. In point of fact the produce of the amalgamated estate has been dealt with by the mortgagees of Longville who have applied the income to the liquidation of mortgage debts due in respect of Longville. On no occasion have accounts been asked for or obtained by the plaintiffs in respect of Springhill, and in my opinion the explanation given by the first plaintiff that the four partners desired to keep the property in common so as to provide for " Costa Town " or for the building of a church has been rightly rejected.

Another strong point against the plaintiffs is that they by D29 of the 18th January, 1931, agreed to purchase from the defendant's vendors both Longville and Springhill of about 500 acres—the joint acreage was in fact about 468 acres. I think this amounts to a clear acknowledgment by plaintiffs that they had no title to Springhill and that the title was at the time vested in Ponniah Peries and Stanislaus Costa. I am unable to accept the suggestion of the first plaintiff that the plaintiffs were merely agreeing to purchase Longville and the *share* of Springhill of the two others. It is in evidence that the deed was read over to the plaintiffs and that they were able to understand what the deed contained. This is at any rate a good starting point for prescription, and the subsequent possession of the defendant's vendors was exclusive and adverse to the plaintiffs. I do not think there can be any question that from the date of his purchase in 1932 the defendant has been in exclusive and adverse possession.

I also think the further inference may fairly be drawn from the document D29 read in conjunction with the rest of the evidence that since 1926 the defendant and his vendors have been in prescriptive possession of Springhill as against the plaintiffs.

It has been argued by counsel for the appellants that there are certain facts which tell against this view. He referred first of all to the document P9 whereby the plaintiffs as well as the vendors to the defendant leased Springhill Estate bungalow to Mr. Gibb on the 8th November, 1930, and argued that at the time all the four persons were regarded as owners of Springhill. I have considered the explanation given by the District Judge and am inclined to the view that the argument based upon P9 is inconclusive. As the learned District Judge further points out, the agreement D29 was entered into after the date of P9.

Another point urged for the appellants was that the possession by the second plaintiff of the block known as the Post Office buildings was antagonistic to the claim of the defendant. That these buildings stood on Springhill and that 2nd plaintiff took the income of these buildings is clear. But I agree with the finding of the District Judge that the Post Office buildings were treated as a separate unit independent of the estate proper and that the second plaintiff has now acquired a prescriptive title thereto. In any event these buildings have now been excluded from the scope of this action. Has the second plaintiff kept this block as and for his share in Springhill it would have been natural for him to concede a half share of it to defendant's vendors. This he has not done.

The further point has been urged for the appellants that defendant's possession only dated from the time of his deed D30, namely 15th March, 1932, and that ten years had not elapsed at the date of action, namely 30th August, 1941. It was contended that the defendant could not add to this the period of possession by Ponniah Peries and Stanislaus Costa for the reason that at the date of the plaint he had not obtained his deed of rectification, D47, and so could not be regarded for the purposes of this action as the successor

in title to those two persons. It was argued that the subsequent deed of rectification was of no avail to the defendant.

I do not agree with this contention. In *Malmesbury vs. Malmesbury* (31 Beaven 407, at p. 418) it was held that " after.....rectification a court of law will treat the settlement as in that form from the earliest period ". In *Craddock Bros. vs. Hunt* (1923) 2 Ch. Div. 136, at p. 151, the Court of Appeal held that " after rectification the written agreement does not continue to exist with a parol variation ; it is to be read as if it had originally been withdrawn in its rectified form ". See also the decision of the Privy Council in *United States of America vs. Motor Trucks Ltd.* (1924) A. C. 196. The same principle has also been accepted in Ceylon, see *Goonesekera vs. Pieris* (28 N. L. R. 228). I hold that, in view of the deed of rectification, the defendant was vested with his vendors' title to Springhill, not at the date of the rectification but from the date of the original deed to him, namely 15th March, 1932, and that the defendant could from this date regard himself as the successor in title to Ponnaah Peries and Stanislaus Costa and also avail himself of any prescriptive possession by these two persons.

In the result I hold that the defendant and his predecessors in title have been in prescriptive possession of Springhill since the date of the dissolution of the partnership in 1926, or in any event since the 18th January, 1931. More than ten years have elapsed before action brought and the title of the plaintiffs has been extinguished.

The appeal is dismissed with costs.

WIJEYEWARDENE, J.

I agree.

Appeal dismissed.

Proctors : *N. Coomarasamy*, for the plaintiff-appellant.

Malcolm Van Reyk, for the defendant-respondent.

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

GUNARATNE vs. THELENIS *et al.*

S. C. 332 *C. R. Galle* 25044.
Argued on : 9th October, 1946.
Decided on : 16th October, 1946.

Rent Restriction Ordinance, No. 60 *of* 1942—*Notarial lease—Expiry of term of lease—Right of lessee to plead Rent Restriction Ordinance.*

Held : That the Rent Restriction Ordinance applies to premises leased as well as to premises held on a tenancy from month to month and that a " tenant " can plead the benefit of section 8 where the premises in question were occupied under a lease which has terminated by effluxion of time.

Cases referred to : *Cruise vs. Terrell* (1922) 1 K. B. 664.
Remon vs. City of London Real Property Co., Ltd. (1921) 1 K. B. 49.
Maroof vs. Leaff (46 N. L. R. 25).
Overruled : *Asia Umma vs. Cader Lebbe* (47 N. L. R. 230.)

N. Nadarajah, K.C., with *E. B. Wikramanayake*, for the plaintiff-appellant.
N. E. Weerasooriya, K.C., with *A. M. Charavanamuttu and B. Senaratne*, for the defendants-respondents.

KEUNEMAN, S.P.J.

This matter has been referred to us by the learned Chief Justice under section 38 of the Courts Ordinance to determine the question whether the defendants can plead the benefit of section 8 of the Rent Restriction Ordinance, No. 60 of 1942, where the premises in question were occupied under a notarial lease which has terminated by effluxion of time.

In the reference the Chief Justice drew attention to the decision of de Silva J. in *Asia Umma vs Cader Lebbe* (47 N. L. R. 230)* and to the fact that in England a different view was taken in the same connection—see *Cruise vs. Terrell* (1922) 1 K. B. 664.

The argument of the appellant in short was that section 8 applied only to the case of a monthly tenancy and not to the case of a lease for a fixed term. In the present case the plaintiff by P 1 dated 2nd December, 1939, leased the premises in question to the defendants at Rs. 30

* 32 C. L. W. 56.

a month for a term of 4 years expiring on the 30th November, 1943. The lessees agreed that at the expiration of the lease they would peaceably and quietly surrender and give up the premises to the lessor, and that in the event of their failure to do so they would pay damages at Rs. 50 per month for every month or part of a month for which possession was withheld from the lessor.

In *Asia Umma vs. Cader Lebbe* (supra) de Silva, J. said: "The provisions of the Rent Restriction Ordinance seem to contemplate the case of a tenancy terminable by notice, and though there is a 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 a tenancy between the parties. I am therefore of opinion that the Rent Restriction Ordinance has no application in this case."

I think it is necessary to examine the terms of our Rent Restriction Ordinance to determine the question referred to us. The first section that requires our attention is section 8, which runs as follows:—

> "Notwithstanding anything in any other law, no action or proceedings for the ejectment of a tenant of any premises to which this Ordinance applies shall be instituted in or entertained by any court unless the Assessment Board, on the application of the landlord, has in writing authorised the institution of such action or proceedings."

This is followed by a proviso which declares that the authorisation of the Board is not necessary in certain cases, of which the following may have application to this case: (*a*) that rent has been in arrear for one month after it became due, or (*b*) the tenant has given notice to quit, or (*c*) that the premises are in the opinion of the Court required as a residence for the landlord or any member of his family, or for the purposes of his trade, business, profession, vocation or employment.

One of the first points argued for the appellant was that the term "tenant" in section 8 has no application to a lessee whose term has expired. It was first contended that the terms "landlord" and "tenant" had no real application to the case of a lease. I do not agree with this. No authority has been cited in support of it. The essence of a contract, whether for lease or for monthly tenancy is the contract of letting and hiring, and in my opinion the phrases "landlord" and "tenant" are applicable both in the case of a lease and of a monthly tenancy. Further, under section 16 "landlord" in relation to any premises means the person for the time being entitled to receive the rent of such premises." This language is wide enough to cover a lessor of the premises. I do not think the word "tenant" is inappropriate to describe a lessee, or that a restricted meaning should be given to the word "tenant."

The further point was urged that the word "tenant" cannot be properly applied to a lessee after the expiration of the lease. It was said that by effluxion of time the tenancy expired and the overholding lessee must be treated as a trespasser, and no longer a tenant. I do not agree with this argument either. Section 8 itself contains in proviso (*b*) a reference to the case where a tenant has given notice to quit. This proviso will certainly cover the case of a monthly tenancy, and in that case the tenant can certainly determine the tenancy by giving due notice to quit. Yet in the proviso he is still referred to as a tenant although the contract of tenancy may have been determined. In my opinion the word "tenant" includes a person who has at one time occupied the position of a tenant, even though at the time of action the tenancy was no longer in existence.

In England, under the Rent Restriction Acts, a similar meaning has been assigned to the word "tenant." In *Remon vs. City of London Real Property Co., Ltd.* (1921) 1 K. B. 49, Bankes, L.J. said: "It is, however, clear that in all the Rent Restriction Acts the expression tenant has been used in a special, a peculiar sense, and as including a person who might be described as an ex-tenant and who had continued in occupation without any legal right to do so, except possibly such as the Acts themselves conferred upon him." This finding was directly approved by Warrington L.J. and indirectly by Lord Sterndale, M.R., in *Cruise vs. Terrell* (supra). In my opinion the finding in these cases is equally applicable to the Ceylon Ordinance.

The further point has been urged by Counsel for the appellant that the Rent Restriction Ordinance applies only to monthly tenancies and not to a lease for a fixed term. A similar argument was advanced in England in the case of *Cruise vs. Terrell* (supra) and rejected by all the Judges on the ground that the section (12 of the Act of 1920—10 & 11 Geo. 5 c. 17) which applied to all lettings must also apply to a letting for a term certain, and further that expressions in various other sections of the Act supported that contention.

The Ceylon Ordinance is not in exactly the same terms as the English Act, but section 2 (2) applies to all premises which are used or occupied or intended to be used or occupied for the purposes of residence, or for the purposes of any trade, business, undertaking, profession, vocation or employment, or for any other purpose whatsoever. This is very wide language, and no attempt has been made in the Act to draw any distinction between monthly tenancies and leases for a fixed term. As I have already pointed out, the words "landlord" and "tenant" are equally appropriate to monthly tenancies and to leases.

Further, under section 5 (1) the "standard rent" broadly speaking is the annul value of the premises assessed by the local authority as at November, 1941, but the proviso states that where premises are let at a progressive rent under a *lease* the standard rent is the rent payable in respect of that period under the terms of the lease. I think this is a clear indication that premises leased are also affected by the Ordinance.

Reference may also be made to a similar proviso in section 5 (2). The special reference to leases at a progressive rent is necessary because in those cases there was a variation in the rent from time to time. But if such leases are affected by the Ordinance I think it follows that leases where there was no variation in the rent must equally be affected.

Further, in section 6 (2) there is a reference to rents payable under the terms of the tenancy by the month or the quarter or the half year. This appears to contemplate continuing tenancies for periods of more than one month, and under our law the continuing tenancy from month to month is the only valid tenancy recognised in the common law, and we do not have the continuing tenancy from year to year or for other fractions of the year, though perhaps they may be created by a lease.

On the matter referred to us, I am of opinion that the terms of our Rent Restriction Ordinance are wide enough to apply to premises leased as well as to premises held on a tenancy from month to month. Also I do not see any reason why the legislature should have drawn a distinction between the two tenancies.

In his reply and at the very end of his argument, Counsel for the appellant endeavoured to raise a new point which has not been referred to us. He contended that the agreement by the lessees in the lease P 1 to surrender and give up possession of the premises at the expiration of the lease amounted to a notice to quit given by the tenant under proviso (*b*) of section 8.

It is a matter of doubt whether this agreement in the deed can be regarded as a notice to quit, more especially in this case where there was the further agreement that in the event of the failure of the lessees to deliver over possession they would pay damages at an enhanced rate. I do not think it is necessary to consider this point for several reasons.

First, it has not been raised in the plaint as a ground on which the authorisation of the Assessment Board is unnecessary. In *Maroof vs. Leaff* (46 N. L. R. 25) I have expressed the opinion that in view of section 8 "it is now necessary for a plaintiff to allege that he comes in under one of these cases," *i.e.*, under provisos (*a*) to (*d*). Further there is no issue in the case which specifically raises this matter. Also this was not at any stage of the trial raised as a ground for dispensing with the necessity of authorisation by the Assessment Board. Obviously the point was not raised before the Chief Justice in appeal, nor has it been referred by him to the Divisional Court. In my opinion this matter cannot now be considered by this Court.

The arguments of the Counsel for the appellants cannot be sustained.

The appeal is accordingly dismissed with costs.

WIJEYEWARDENE, J.
I agree.

JAYETILEKE, J.
I agree.

Appeal dismissed.

Proctors : Wickramanayake for the appellant.
A. E. P. Jayatilaka for the respondents.

Present: DIAS, J.

SEENITHAMBY & OTHERS VS. JANSZ, ASSISSTANT GOVT. AGENT KALMUNAI

S. C. No. 616-621 *of* 1946—*M. C. Kalmunai No.* 1754.
Argued: 15th and 16th October, 1946.
Decided on: 23rd October, 1946.

Penal Code, section 183—*Voluntarily Obstructing Food Control Guards—Absence of evidence showing that they were duly entrusted or vested with duty, power or authority to act as such—Can judicial notice be taken that Food Control Guards are Public Servants.*

Held : (i.) That mere assertions by persons that they are Food Control Guards and that they were on patrol duty when they detected an alleged offence of transporting rice without a permit without evidence that they were duly entrusted or vestedwith power or authority to act as such, are not sufficient to establish that they were public servants within the meaning of section 183 of the Penal Code.

(ii.) That a Food Control Guard is a " Public Servant " cannot be judicially taken notice of.

Per DIAS, J.—" A further serious defect in this charge is that it does not specify the manner in which the alleged obstruction was caused. *R. vs. Paramanpalam*, (1935) 37 N.L.R. 385. I cannot leave this part of the case without expressing surprise as to how an " A. G. A. (E) " and an Inspector of Police came to pass such a defectively worded plaint, and how the Magistrate came to adopt and copy this gibberish into the charge he framed. I can only surmise that this was done by some clerk, and the Magistrate adopted it without studying it and satisfying himself that it was a good and proper charge.

Cases referred to : *R. vs. Dingiri Banda*, (1929) 31 N.L.R. 301.
Perera vs. Alwis, (1944) 45 N.L.R. 136.
R. vs. Paramanpalam, (1935) 37 N.L.R. 385.
Mendis vs. Kaithan Appu, (1935) 37 N.L.R. 285.
Rosemale-cocq vs. Kaluwa, (1936) 38 N.L.R.

G. E. Chitty with *G. T. Samarawickreme*, for accused-appellants.
A. C. M. Ameer, C. C., for respondent.

DIAS, J.

The six accused appellants and the 7th accused were jointly charged with committing three offences alleged to have been committed on December 27, 1945, at a place called Periyakaliar. In the first count the 1st and 2nd accused alone were charged with transporting two bags of rice without a permit in breach of the appropriate Defence Regulations. In view of the arguments advanced at the hearing of this appeal, it is necessary that count 2 should be set out at length. It runs as follows :—

" At the time and place aforesaid and in the course of the same transaction, the above mentioned seven accused did voluntarily obstruct Food Control Guards (1) S. Saravanai, (2) A. K. Rajadurai, (3) S. Seenithamby and (4) V. Sanmugampillai acting under the lawful orders of such public servants, and thereby committed an offence punishable under section 183 Chap. 15 N.L.E. of Ceylon."

This charge has been copied by the Magistrate *verbatim* from the Police plaint filed in the case.

In the third count the seven accused were jointly charged with voluntarily causing hurt " to the said Food Control Guards " under sec. 314 of the Penal Code.

The Magistrate found the 1st to the 6th accused guilty of the first two charges and the 1st accused alone guilty under the third charge. It is not clear how the Magistrate could have convicted any one other than the 1st and 2nd accused under the first count, because that charge was preferred against them alone. He fined the 1st and 2nd accused Rs. 300 each on the first charge. The 2nd, 3rd, 5th and 6th accused were fined Rs. 50 each on the second count while the 1st and 4th accused he sentenced to undergo four months' imprisonment on count 2. On the third count he sentenced the 1st accused to one month's rigorous imprisonment.

The following submissions were made on behalf of the appellants :—

(*a*) Count 2 in the charge is defective in that it does not in terms of sec. 169 of the Criminal Procedure Code give sufficient notice of the matters with which the accused are charged, and in particular because the charge is unintelligible, the manner of the alleged obstruction is not specified, and the status of Food Control Guards to be considered "Public servants" within the meaning of sec. 183 of the Penal Code has neither been alleged in the charge nor proved by the evidence.

(*b*) The third count has not been established, because if the persons to whom hurt is alleged to have been caused have not been proved to be Food Control Guards or "Public Servants" no offence would be committed by resisting them when these persons tried to stop the 1st and 2nd accused.

(*c*) The charges disclose a misjoinder of charges and accused, because the three offences were not committed in the same transaction within the meaning of sections 180 (I) and 184 of the Criminal Procedure Code.

In a charge under sec. 183 of the Penal Code the prosecution has to establish (*i*) that the persons obstructed were public servants, or persons acting under the lawful orders of a public servant, and (ii.) that the accused voluntarily obstructed such persons. I have carefully read through the record after hearing counsel, but fail to find any sufficient evidence which establishes the first ingredient necessary to constitute this offence.

The copy of the Defence (Purchase of Foodstuffs) Regulations 1942 handed to me by Crown Counsel contains no definition of "Food Control Guards." Regulation 6 (i.) empowers a person authorised thereto in writing by a Government Agent to stop vehicles or vessels used in contravention of the Regulations. The accused were not alleged to be transporting rice in a vehicle or vessel, and there is no evidence that these Food Control Guards had any authority in writing. Similarly Rule 6 (2) empowers a person authorised in writing by the Government Agent to enter, inspect and search places or premises. There is no proof that these Guards had any such authorisation, and they were not endeavouring to make any search or inspection. Crown Counsel has referred me to Regulation 2 (2) of the Defence (Miscellaneous) Regulations where it is provided that "any person entrusted or vested by or under any defence regulation with any duty, power or authority shall be deemed to be a "public servant" within the meaning of the Penal Code. The point, however, is that there is no evidence at all that any of these Guards have, in fact, been entrusted or vested with any duty power or authority under the Defence (Purchase of Foodstuffs) Regulations under which they purported to act. The only evidence is that the witnesses Saravanai, Rajadurai, and Sanmugampillai have stated that they are Food Control Guards and that they were out on patrol when the incidents occurred. In my view such assertions do not prove that were in fact public servants. This was a prosecution undertaken by the Police. The plaint has been signed by a person styling himself "A. G. A. (E) Kalmunai" and countersigned by one K. Kandiah who is the Inspector of Police Kalmunai and a Police Sergeant conducted the prosecution. It is therefore greatly to be regretted that by reason of the negligence of these public servants a matter which should have been capable of easy proof has been omitted.

Crown Counsel has cited the case of *R. vs. Dingiri Banda*, (1929) 31 N.L.R. 301 which decides that where in a charge of obstructing a public servant under sec. 183 the public servant states that he holds the appointment in question, and that statement is not contradicted, it is not necessary to produce his act of appointment. It is to be noted that in that case there was no appearance for the accused respondent. A person stated that he was an "*arachchi*" and no question was raised as to his status until the trial Judge took it up in his judgment. Everybody knows what an "*arachchi*" is, but who and what is a "Food Control Guard"? In *Perera vs. Alwis*, (1944) 45 N.L.R. 136, this Court refused to take judicial notice of a "Price Control Inspector." I am unable to judicially notice a "Food Control Guard." It was the duty of the prosecution to establish that the persons obstructed were "Food Control Guards" and that such Guards were "public servants." There has been a failure of proof of an ingredient of the offence and for that reason alone charge 2 fails.

A further serious defect in this charge is that it does not specify the manner in which the alleged obstruction was caused. *R. vs. Paramanpalam*, (1935) 37 N.L.R. 385. I cannot leave this part of the case without expressing surprise as to how an "A. G. A. (E)" and an Inspector of Police came to pass such a defectively worded plaint, and how the Magistrate came to adopt and copy this gibberish into the charge he framed. I can only surmise that this was done by some clerk, and the Magistrate adopted it without studying it and satisfying himself that it was a good and proper charge.

Magistrates must not slavishly adopt as charges the plaints tendered by the Police, either in summary or non-summary cases, but should themselves independently consider the matter and see that the charges, whether in summary or non-summary proceedings are in due form and adequately set out the offence or offences.

In my opinion the second charge fails because a requisite ingredient has not been established.

With regard to the third charge, the Magistrate has held that the case has been exaggerated by the prosecution witnesses. The doctor found that Rajadurai had a superficial abrasion on the root of his ring finger. The doctor said that, in his opinion, he would expect to find a deeper injury if it was caused by Rajadurai snatching a knife from another. Saravanai had a contusion on his forehead. Assuming that the 1st and 2nd accused were transporting rice, and that Saravanai and his companions stopped them and wanted to take them forcibly to the Food Control Station, it is but natural that the accused would resist, and that their friends would come to their aid. There is no proof that these men were public servants or that the accused knew or had reason to believe that they were public servants. There is no proof that the Guards disclosed their status or authority. I do not think that the accused exceeded their rights of private defence in the circumstances, and this charge fails.

In regard to the first charge, the 1st and 2nd accused gave no evidence. There is direct evidence that they were seen transporting two bags of rice. When questioned they stated they had no permits. In the melee which followed, the bags of rice disappeared. Some of the spilt rice was produced at the trial. The evidence which the Magistrate has accepted establishes the charge under section 4 of the Defence Regulations. The fact that the Guards have not been proved to be Public Servants does not affect the guilt of the 1st and 2nd accused on Count 1.

I have been asked to send back the case as against the 1st to the 6th accused on Count 2 for a new trial. I do not think I shall be justified in so doing. To accede to such a request will merely encourage slackness, negligence and inexactitude on the part of prosecutors. *Mendis vs. Kaithan Appu*, (1935 37 N.L.R. 285 ; *Rosemalecocq vs. Kaluwa*, (1936) 38 N.L.R. at p. 374.

In view of these findings, it is unnecessary to consider whether there has been a misjoinder of charges and accused.

I affirm the convictions and sentences of the 1st and 2nd accused under Count 1. I set aside the convictions and sentences under Count 2 and discharge the accused under that Count. I acquit the 1st accused under Count 3 and the 3rd, 4th and 5th accused under Count 1.

Convictions of 1st and 2nd accused on Count 1 affirmed.

Convictions of the accused on other Counts set aside.

Proctors : K. W. Devanayagam for the appellant.

Present : Wijeyewardene, J.

CHARLES APPU vs. ADDITIONAL CONTROLLER OF ESTABLISHMENTS

S. C. No. 368/1946 : *Workmen's Compensation No. C*30/6882/43.
Argued on : 11th October, 1946.
Decided on : 17th October, 1946.

Workmen's Compensation Ordinance (*Cap.* 117)—*Assault on one workman by another—Loss of index finger—Accident arising out of his employment.*

The appellant, an engine turner and lighter under the Ceylon Government, was assaulted by a fellow workman as a result of which his right index-finger had to be amputated. At the argument in appeal it was agreed that the claim was in respect of an injury caused to a workman by an accident arising in the course of his employment.

Held : That that accident did not arise out of his employment.

Cases referred to : *Trim Joint District School Board of Management vs. Kelly* (1914) A. C. 667.
Reid vs. British and Irish Steam Packet Company (1921) 2 K. B. 319.
Lee vs. S. Q J. Breckman, Limited (1928) 21 Butterworths' Workmen's Compensation Cases 32
Lawrence vs. George Matthews (1924) *Limited* (1929 1 K. B. 1.
Thom or Simpson vs. Sinclair (1917 A. C. 127.
Holden vs. Premier Waterproof and Rubber Company, Limited (1930) 23 Butterworths' Workmen's Compensation Cases 460.

H. Wanigatunga, for the applicant-appellant.
D. Jansze, Crown Counsel, for the Crown.

WIJEYEWARDENE, J.

This is an appeal against an order rejecting the claim of the applicant under the Workmen's Compensation Ordinance.

The applicant was employed as an engine turner and lighter under the Ceylon Government at the time of the accident. He was transferred in December, 1943, to Kurunegala where there were rooms on the railway premises and these were available to the workmen desiring to occupy them. He reported for duty at the Running Shed there on December 6, 1943 and was given by the fitter-in-charge a key for a room in the middle of a line of five rooms usually occupied by unmarried workmen. He found that his predecessor had occupied the room at the end of the line and insisted on having that room. The fitter-in-charge explained to him that all the five rooms were of the same size and type and that some days ago the corner room was allotted to another workman, Fernando, as Fernando's sisters who were staying with Fernando found it rather inconvenient to occupy a room in the middle of a line occupied by unmarried men. Though there was no hard and fast rule that a workman should be given the room occupied by his predecessor, the fitter-in-charge asked Fernando to give the corner room to the applicant in order to avoid any unpleasantness. Fernando agreed to vacate his room the next day. Shortly afterwards, when the applicant was returning from the room of a workman after making arrangements to leave his luggage there for the day, Fernando assaulted him at the Running Shed and bit his right index finger. That finger had to be amputated as a result of the injury.

It was agreed at the argument before me that the loss of earning capacity was 10% and that the claim was in respect of a personal injury caused to a workman by an accident arising in the course of his employment. The only question that has to be decided is whether the accident arose out of the employment.

This case does not fall within the class of cases (*e.g., Trim Joint District School Board of Management vs. Kelly* (1914), A. C. 667 ; *Reid vs. British and Irish Steam Packet Company* (1921) 2 K. B. 319) where the nature of the employment was such that the likelihood of an assault was connected with and incidental to the employment. Here there is a specific finding by the Commissioner that there was no proof whatever " that there was attached to his employment a risk of being assaulted." This case is similar to *Lee vs. S. & J. Breckman, Limited* (1928) 21 Butterworths' Workmen's Compensation cases 32. In that case Lee, a porter employed by a firm of upholsterers was carrying furniture from his employers' premises to a railway collecting van in charge of Debuse, the van driver. In the course of the loading an altercation arose between the two men owing to a remark made by Lee regarding Debuse's method of work. Debuse struck Lee and the injury resulted in the loss of one eye. The Court of Appeal held that those facts did not justify a finding that the accident arose out of the employment.

Mr. Wanigatunga who appeared for the appellant sought to bring this case within the fourth proposition laid down by Russell, L.J. in *Lawrence vs. George Matthews* (1924) *Limited* (1929) 1 K. B. 1 at page 19 :—

> " A sufficient causal relation or causal connection between the accident and the employment is established if the man's employment brought him to the particular spot where the accident occurred, and the spot in fact turns out to be a dangerous spot. If such a locality risk is established, then the accident " arises out of " the employment, even though the risk which caused the accident was neither necessarily incident to the performance of the man's work, nor one to which he was abnormally subjected."

That proposition based on the decision in *Thom* or *Simpson vs. Sinclair* (1917) A. C. 127 was stated in those terms in a case where the Court was considering the death of a commercial traveller who was riding on a road when he was struck down by a falling tree which was blown down by a severe gale then prevailing in the locality. Commenting on that proposition, Lawrence, L.J., said in *Holden vs. Premier Waterproof & Rubber Company, Limited* (1930) 23 Butterworths' Workmen's Compensation cases 460 at page 471.

> " What is meant by a dangerous spot in this connection is a spot which owing to its locality is in fact inherently dangerous although the danger may be a lurking danger and not known to any one, such as a wall with a bad foundation which may collapse—a tree which may fall : it does not mean that because the accident happened at a particular spot, and because the workman did in fact incur danger at that spot, that therefore it was a dangerous spot within the fourth proposition."

I do not think that the applicant is entitled to claim the benefit of that proposition.

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

Appeal dismissed.

Proctors : *N. W H. Keegel*, for the appellant.

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

WIJESINGHE vs. THE ATTORNEY-GENERAL

S. C. No. 296 (*F*)—*D. C. Nuwara Eliya* 2504.
Argued and Decided on: October 18th, 1946.

Thoroughfares Ordinance, sections 67 *and* 72—*Land marked off and reserved for construction of road—Can rights to such land be acquired by possession or user—Can compensation for improvements be claimed in respect of such land.*

Encroachments upon Crown Lands Ordinance—Can possessor of such road reservation for over ten years claim rights referred to in section 9—*Effect of section* 10 *of the same Ordinance.*

Held: (i.) That land marked off and reserved for the construction of a road, comes within the definition of the word " road " in section 72 of the Thoroughfares Ordinance (Cap. 148).

(ii.) That as a claim for compensation for improvements is a right acquired by virtue of possession or user, no such claim can be entertained in respect of a road reservation in view of section 67 of the Thoroughfares Ordinance.

(iii.) That a person. who has been in possession for over ten years of land reserved for a road, is precluded by section 10 of the Encroachments upon Crown Lands Ordinance from claiming the rights conferred by section 9 of the same Ordinance.

E. F. N. Gratiaen, with *Anton Muttukumaru*, for the defendant-appellant.
H. W. R. Weerasooria, Crown Counsel, for the Crown-respondent.

KEUNEMAN, S.P.J.

In this case it is clear that the land in question was acquired under the Land Acquisition Ordinance and a Certificate of Acquisition was duly issued in 1914 vesting the premises in His Majesty the King. There can be no question that it still remains to this day Crown property.

Two points have been urged by Counsel for the appellant, first, that he was entitled to be paid compensation for improvements under the common law. It is however, obvious that in the acquisition proceedings the land was taken over by His Majesty for a public purpose, namely, for deviating the Tawalantenna-Watagoda road. I think it is clear that the premises in question come within the definition of the word " road " in section 72 of the Thoroughfares Ordinance (Cap. 148), namely, that it is land which has been marked off and reserved for the construction of a road. Section 67 of the Thoroughfares Ordinance accordingly applies, namely, that the provisions of the Prescription Ordinance and of any other law relating to the acquisition of rights by virtue of possession or user shall not apply to roads. In my opinion a claim for compensation for improvements is a right acquired by virtue of possession or user and as this case refers to premises which constitute a road I think that no claim for compensation can be entertained.

The second point, raised by Counsel for the appellant is under section 9 of the Encroachment upon Crown Lands Ordinance (Cap. 321). The appellant claims that he should be entitled to a grant from Government of the land on payment of half the improved value of the land or in the alternative that the Government should not be allowed to eject him until the Government has paid him half the improved value of the land and the full value of any buildings erected thereon. This is a claim on the footing that the appellant has been in uninterrupted possession of the land for not less than ten years. Unfortunately for the appellant, however, section 10 enacts that the provisions in section 9 do not apply to any public road, street, or highway. I think that the appellant is precluded from making his claim under section 9 and that that claim cannot be entertained by us.

We have considered the question as to whether the plaintiff in this case, namely, the Crown is entitled to costs of this action and of the appeal. Having regard to the length of time during which

the defendant and his predecessors in title have remained in undisturbed possession of this land, which had been acquired by the Crown as far back as 1914 for the purposes of a road, since when no steps seem to have been taken by Government till shortly before the institution of this action towards giving effect to the purpose for which the land was acquired, this seems to be a case where an ex-gratia payment of compensation to the defendant in respect of the cultivation made by him on the land under the belief that he had good title to it may be favourably considered by the authorities. I further think that the reason that I have just advanced constitute a good reason for not giving the plaintiff costs either of the action or of the appeal. In substance, therefore, the appeal is dismissed without costs, subject to this that the order for costs made against the appellant in the Court below will be deleted.

Appeal dismissed.

JAYATILEKE, J.
I agree.

Proctors : *E. G. Jonklas* for the appellant.

Present : DIAS, J.

MARTIN SINGHO & ANOTHER vs. THAMBIAH & TWO OTHERS

In Revision—M. C. Colombo No. 16289.
Argued on : 17th October, 1946.
Decided on : 23rd October, 1946.

Criminal Procedure—Conviction for criminal breach of trust of goods—Power of Court to order restoration of goods to complainant.

Held : That a Criminal Court has no power to order goods in respect of which criminal breach of trust has been committed to be restored to the owner.

Cases referred to : *Shand vs. Atukorale* (37 N. L. R. 55).
Thynat vs. Sinnetamby (3 C. W. R. 9).
Abdul Hamid vs. Alvarez (4 C. W. R. 250).

H. A. Kottegoda, for the applicant-petitioner.
S. J. Kadirgamar, for the 2nd and 3rd respondents.

DIAS, J.

In this case the Police charged one Madasamy Suppiah with having on April 23, 1946, committed criminal breach of trust of 15 cases of Capstan Navy Cut cigarettes, the property of the 3rd respondent, which had been entrusted to Suppiah, as a carter, in breach of section 390 of the Penal Code. Amongst the productions referred to in this plaint are 205 tins of cigarettes—Capstan Navy Cut P 2. It appears that Suppiah misappropriated these cases and transferred them to Somapala, who transferred them to Noris, who in turn sold them to the 2nd petitioner, Mahatun ; in whose possession 205 tins of cigarettes were found.

Mahatun gave evidence at the trial for the prosecution. After trial the Magistrate convicted Suppiah who was sentenced to undergo 2 years rigorous imprisonment. The Magistrate then made the following order :—" It is clear from his (Mahatun's) statement that P 2 (the 205 tins of cigarettes) were stolen goods bought from Noris Appu. I order the restoration of the tins to the complainant," i.e., the 3rd respondent, whose servant the 2nd respondent is.

It is obvious that this order was made under section 413 (1) of the Criminal Procedure Code.

The petitioners who are Mahatun and his brother the 1st petitioner said to be the owner of Sirima Stores, where the cigarettes were found, now move the Court to revise the Magistrate's order and that the cigarettes should be restored to them.

I accept the findings of the Magistrate. The cigarettes are property produced before the Magistrate's Court regarding which an offence of criminal breach of trust appears to have been committed within the meaning of section 413 (1) of the Criminal Procedure Code. It is laid down in *Shand vs. Atukorale* (37 N. L. R. 55), that a Criminal Court has no power to order goods in respect of which *criminal breach of trust* has been

committed to be restored to the owner. It is clear that not only are these cigarette tins the subject of a criminal breach of trust but they also passed through the hands of two persons before Mahatun purchased them. I see no reason why I should not follow this decision, which although not cited at the argument, appears to be exactly in point.

I think it was the duty of the Magistrate in these circumstances to restore the property to the possession in which it was found, leaving it to the respondents to establish any claim thereto in a civil action.

No doubt as laid down in *Thynat vs. Sinnetamby* (3 C. W. R. 9) and *Abdul Hamid vs. Alvarez* (4 C. W. R. 250), a Magistrate is vested with a judicial discretion by section 413 in making an order for the restoration of property; but this Court has the undoubted power in proper cases to revise the exercise of that discretion although it would be slow to do so.

In this case the Magistrate has made a wrong order which must be rectified.

I therefore set aside the order of the Magistrate and direct that the 205 tins of cigarettes (P 2) should be forthwith restored to the possession of Mahatun, the 2nd petitioner.

Since writing this judgment Mr. Kadirgamar has brought to my notice the case of *Shand vs. Atukorale* as he thought it was his duty to do so. Counsel has acted rightly and properly. For the reasons I have given earlier I cannot distinguish this case from that case.

Order set aside.

Proctors : *S. Canagarajah*, for the petitioner.
Julius & Creasy, for the respondents.

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

MACKEEN & ANOTHER vs. PULLE & TWO OTHERS

S. C. No. 28-0—*D.C. Interrogatory Kandy No.* 162.
Argued and Decided on : 10th October, 1946.

Partition case—Death of party—Administrator party to interlocutory decree—Rights of the heirs of the deceased to intervene after such decree—Civil Procedure Code, Section 472—*Is it applicable to partition proceedings.*

Held : (i.) That section 472 of the Civil Procedure Code is applicable to partition proceedings.

(ii.) That under section 472 of the Civil Procedure Code the administrator is the proper party to such proceedings, although the Judge has discretion to bring the heirs also as parties to the action.

(iii.) That where an administrator had not fully administered the estate, he should continue to represent the heirs of the deceased and any decree entered against him would bind the heirs too.

N. Nadarajah, K.C., with *H. W. Thambiah and S. R. Wijetileke*, for the intervenient-appellants.
N. E. Weerasooria, K.C., with *Cyril E. S. Perera*, for the plaintiff-respondent.

KEUNEMAN, S.P.J.

In this case the heirs of one Jainudeen sought to intervene in the partition case after the interlocutory decree had been entered. Objection was taken by the plaintiff that the interlocutory decree was binding on the appellants because the administrator of Jainudeen's estate was a party to the earlier proceedings and to the interlocutory decree.

In appeal Mr. Nadarajah argued first, that the administrator was not a proper party to this partition action and that the heirs of Jainudeen were the proper parties to the action. I cannot accept this argument. In my opinion section 472 of the Civil Procedure Code is applicable to proceedings under the partition ordinance. I do not think it is necessary to discuss the earlier authorities on this point. Under section 472 the administrator appears to be the proper party to

the proceedings rather than the heirs although the heirs may in the discretion of the Judge be brought in as parties to the action also.

A further point is urged by Mr. Nadarajah that in this case the administrator, who is in point of fact the 1st defendant in the case, was *functus officio* as administrator because he had completely and fully administered the estate, before the date of action. It had been proved by the production of letters of administration that the 1st defendant was in fact appointed as the administrator of the estate. The burden lay upon the appellant to prove that the administrator had fully administered the estate. This they did not succeed in doing and in substance the learned District Judge has so held. No doubt, if the administraor had fully administered the estate it would not be necessary to have him as a party to the proceedings, but where he has not fully administered the estate, I think it is clear that he would continue to represent the heirs of the deceased person and accordingly any decree entered against him would be binding on the heirs as well. In the circumstances, I think this appeal must be dismissed with costs.

Appeal dismissed.

JAYETILEKE, J.

I agree.

Proctors: *Marikkar and Marikkar*, for the intervenient-appellant.
W. R. Wickramaratne for the respondent.

Present: DIAS, J.

PODIHAMY & ANOTHER vs. SIMON APPU & TWO OTHERS

S. C. No. 190 *of* 1946—*C. R. Matara No.* 1047.
Argued on: 15th October, 1946.
Decided on: 18th October, 1946.

Servitude—Action for right of footway—Misjoinder of parties and causes of action—Is court bound to dismiss action.

Held: (i) That clear, precise and cogent evidence is necessary to establish a servitude like a right of way.

(ii) That where there is a misjoinder of parties and causes of action, a court is not bound to dismiss the action.

Cases referred to: *Ramanathan Chetty vs. Marikar* (11 Ceylon Law Recorder 111).
Abraham Singho vs. Jayaneris Singho (14 Ceylon Law Recorder 121).
Kudhoos vs. Joonoos (41 N. L. R. 251).
Wickramatillaka vs. Marikar (2 N. L. R. 12).

H. W. Thambiah, for the 1st and 2nd defendants-appellants.
C. V. Ranawake with H. A. Kottegoda, for the plaintiff-respondent.

DIAS, J.

The plaintiffs sought to establish a right of foot path from his land to the Village Committee Road as against three defendants, of whom the 1st and 2nd are the appellants.

In the plaint it was asserted that the plaintiffs were the owners of a divided land marked lot C 2, and that the three defendants "are the owners of a divided lot.....towards the north" and that this land lay between the plaintiff's land and the Village Committee road. The plaintiffs stated that for over twenty years they had been using a foot path "across the defendants' land in order to reach the land called Range Mahawatte and the V. C. road." It is pleaded that the defendants wrongfully and unlawfully obstructed the path.

A commission was issued to Mr. Ferdinands a surveyor to locate the corpus in dispute. This he has done in the presence of the parties and submitted a plan and his report to the Court.

When the Surveyor went to the land the plaintiffs pointed out to him the paths R-X-Y-T and T-S-U as being the foot paths claimed by them. Clearly therefore what the plaintiffs want are a path over the lands of the appellants, as well as

a pathway from T-S-U to the Village Committee road on the east over the 3rd defendant's land. It is clear that such claims cannot be made in this action without creating a misjoinder of parties and causes of action. Plaintiffs' Counsel therefore moved to withdraw the action as against the 3rd defendant. Counsel for the appellants then cited the case of *Ramanathan Chetty vs. Marikar* (11 Ceylon Law Recorder III.), and asked that the whole action should be dismissed. The Commissioner refused that application and ordered the trial to proceed.

It has been urged before this Court that there being a misjoinder of parties and causes of action, there is no alternative but to dismiss the whole of the plaintiff's action, and the case of *Abraham Singho vs. Jayaneris Singho* (14 Ceylon Law Recorder 121) was also cited. I am, however, content to follow the decision in *Kudhoos vs. Joonoos* (41 N. L. R. 251).

A Court should not be fettered by technical objections based on matters of procedure. Where the law permits it, the Judge should brush them aside by rectifying the mistake and by casting the offending party in costs. *Wickramatillaka vs. Marikar* (2 N. L. R. 12).

I am of the view that a Court is not bound to dismiss an action on the ground of a misjoinder of parties and causes of action. It was open in this case for the trial Judge to strike out the 3rd defendant from the case, and to allow the action to proceed as between the plaintiffs and the appellants.

On the question of fact I do not feel disposed to interfere. The Commissioner saw the witness and probably heard the very same arguments which have been adduced before me. Undoubtedly clear, precise and cogent evidence is necessary to establish a servitude like a right of way. I agree that it is not sufficient that witnesses should come forward and merely say that they saw plaintiffs possess the land or use a foot path without specifying precisely how the land was possessed or how the path was used. If there is any insufficiency in the evidence on this point, one may ask what was the appellants' Counsel doing in not cross-examining adequately? It is urged that the Commissioner has not discussed the evidence. I think he has done so, although he might have elaborated his findings. No doubt this pathway is rather inconvenient for the appellants, but I am satisfied that the findings of the trial Court should not be disturbed.

I dismiss the appeal with costs.

Appeal dismissed.

Proctors : *E. P. Wijetunge*, for the appellant.
Abeyegunawardena & Abeyegunawardena, for the respondents.

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

NONA KUMARA vs. PATHUMA NATCHIA & ANOTHER

S. C. No. 293—*D. C. Kegalle Case No.* 1629.

Argued on : 16th, 25th and 26th September, 1946.

Decided on : 10th October, 1946.

Deed—Consideration acknowledged to have been received earlier—Finding by Court that consideration not paid—Does this fact justify Court in holding that deed is a donation.

Held : That the mere fact that the transferor did not receive the consideration mentioned in the deed does not justify a Court holding that such a deed is a donation.

Case referred to : *Mohamadu vs. Hassim* (1913 16 N. L. R., 368).

N. Nadarajah, K.C., with *E. B. Wickremanayake and C. R. Gunaratne*, for 2nd defendant-appellant.

L. A. Rajapakse, K.C., with *M. I. M. Haniffa and M. S. Abdulla*, for plaintiff-respondent.

JAYETILEKE, J.

The parties to this action are Muslims. The 1st defendant was married to the plaintiff on November 16, 1933, and it is alleged that he was married to the 2nd defendant on February 7, 1939. The 1st defendant was at the date of his marriage with the plaintiff entitled to the land which forms the subject matter of this action and to several other lands. In or about the year 1936 he got into financial difficulties and the plaintiff's father paid his debts and got him to transfer all his lands to the plaintiff by deed No. 5045 dated September 11, 1936, attested by G. C. Molligoda, Notary Public (P 5). By deed No. 8038 dated January 19, 1939, attested by G. C. Molligoda, Notary Public (P 6) the plaintiff re-transferred all the lands to the 1st defendant. P 6 is on the face of it an out and out transfer in consideration of a sum of Rs. 20,000 paid by the 1st defendant to the plaintiff. The Notary's attestation shows that the consideration was not paid in his presence but was acknowledged to have been received by the plaintiff. By deed No. 2795 dated February 17, 1939, attested by M. S. Akbar, Notary Public (2D 18) the 1st defendant gifted the land which forms the subject matter of this action to the 2nd defendant in consideration of marriage and of love and affection. In this action the plaintiff sought to have P 6 declared null and void and to have the 2nd defendant ejected from the land described in the plaint on the ground that her signature was obtained to it by the 1st defendant by undue influence, intimidation and threats.

The learned District Judge held in favour of the plaintiff on the question of minority and against her on the question of undue influence, intimidation and threats. He also held that the plaintiff did not receive the consideration mentioned in P 6. We see no reason to differ from any of these conclusions. The learned District Judge, however, declared P 6 to be null and void on the ground that it was a donation. At the argument before us Mr. Nadarajah contended that the learned District Judge was not justified in holding that P 6 was a donation in the absence of an issue and, particularly, in the absence of any evidence on the point. He further contended that even if the finding can be supported the evidence shows that P 6 was ratified by the plaintiff after she attained majority. An examination of the plaint, which was amended on three occasions, shows that no suggestion was made at any time of an original gift. Indeed, the plaintiff did not in her evidence pretend that P 6 was a gift by her to her husband. It may be that the question was not raised in view of the provisions of section 92 of the Evidence Ordinance (Chapter 11).

However that may be, the plaintiff must stand or fall on the issues raised at the trial. The plaintiff's remedy is an action to recover the consideration from the 1st defendant and not to claim a cancellation of the conveyance. (*Vide Mohamadu vs. Hassim* (16 N. L. R. 368). We do not think that the trial Judge was justified in holding that P 6 was a donation merely because the plaintiff did not receive the consideration mentioned in it. Counsel for the respondent conceded that if we were of opinion that the finding of the trial Judge that P 6 is a donation is not correct the judgment could not be supported. It is therefore unnecessary for us to consider the question of ratification. For these reasons we would set aside the judgment appealed from and dismiss the plaintiff's action with costs here and in the Court below.

KEUNEMAN, S.P.J.

I agree.

Proctors : *L. O. Gunawardena*, for the appellant.
T. Abeyesekera, for the respondent.

Present : DIAS, J.

YOWAN vs. HUBERT, PRICE CONTROL INSPECTOR.

S. C. No. 1036—*M.C. Colombo, No.* 17936.

Argued and Decided on : 16th October, 1946.

Sentence—False allegations made by accused—Power of Court to enhance punishment.

Held : That an enhanced punishment should not be imposed merely because an accused person has made certain allegations which are later proved to be false.

Cases refered to : Inspector of Police vs. Hussain (36 N. L. R. 329.)
Rex vs. John, 47, N. L. R. 359.

H. V. Perera, K.C., with *S. Saravanamuttu* and *M. E. Dharmawardene*, for the accused-appellant.

J. G. T. Weereratne, Crown Counsel for the *Attorney-General.*

DIAS, J.

In spite of Mr. Perera's persuasive arguments this is not a case in which I could interfere with the Magistrate's finding on the question of fact. All the arguments which Mr. Perera has addressed to this Court must have been available to the learned Magistrate and he has carefully weighed the evidence, although incidental parts of his order may be open to criticism, but he has found against the appellant, and I do not see how I could interfere. There was an accomplice's evidence which could have strongly corroborated him, but for some reason that evidence was not led, but there is corroboration and the Magistrate has correctly addressed his mind to the question of law. I therefore see no reason to interfere with the Magistrate's findings on fact.

After convicting the accused the Magistrate expressed himself as follows :—" I think the case calls for a heavy fine though the amount of the profiteering is small. The charges that have been made against the Inspectors by way of defence are so serious that they are bound to result in their dismissal if accepted. The consequence of failing to establish this must rebound on the accused." He therefore sentenced the accused to pay a fine of Rs. 750 or in default, to undergo 6 weeks rigorous imprisonment, although the profiteering in which the accused was charged amounted to only 2 cents.

I am of opinion that the learned Magistrate has erred in his reasons for imposing what amounts to be a savage sentence. In the first place this was a case where a man was tempted by the authorities to commit an offence. No doubt this is a necessary evil, but when a man is tempted to commit an offence by a public servant, one must have regard for that fact in passing sentence. But the Magistrate has erred on another point. It was laid down so long ago as 1934, in the case of *Inspector of Police, Negombo vs. Hussain*, (36 N. L. R. 329) ; * "The learned Magistrate found this was an aggravation of his offence. In my opinion the accused person is entitled to make any suggestion he likes. They may be false or true but if they are false they should not be taken into account to enhance the punishment. The principle of our Criminal Law is that the accused is innocent until the crime is proved and every latitude ought to be allowed to the accused to prove his defence so long as the rules of evidence are adhered to."

This principle was recently re-affirmed by Mr. Justice de Silva in the case of *Rex vs. John*, 1946, 47, N. L. R. 359, where it was laid down that when imposing sentence on an accused the Court should not be influenced by the circumstance that the accused made some false allegation against the Police.

I therefore affirm the conviction, but I set aside the sentence and impose in lieu thereof a fine of Rs. 100 or in default, one month's rigorous imprisonment.

Conviction affirmed. Sentence varied.

Proctors : *N. J. V. Cooray* for the appellant.

* 2 C. L. W. 347 Edd.

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

VEN. BADDEGAMA PIYARATANA NAYAKE THERO vs. VEN. VAGESWARACHARIYA MORONTUDUWE SIRI DHAMMANANDA NAYAKE THERO & OTHERS

S. C. 215—*D. C. F. Colombo* 2882 *L.*
Argued: 23rd October, 1946.
Decided: 25th October, 1946.

Trustee—Association to establish Pirivena for teaching Buddhism—Agreement by members that right to appoint principal and teachers to Pirivena to be with the association—Establishment of Pirivena—Appointment of Principal—Dedication by deed of premises on which Pirivena built to Sanga by way of gift to such Principal and to his successors in office as appointed by Sabha.—Can such successor in office maintain action against trespasser without conveyance, vesting order, or other assurance—Trusts Ordinance Section 113, sub-sections 1, 2 *and* 3—*Applicability of sub-sections* 2 *and* 3.

The plaintiff alleged (i.) that 13 persons formed themselves into an association called Vidyadara Sabha, the chief object of which was to obtain a portion of land in Colombo and to establish a Pirivena for teaching Buddhism.

(ii.) That by P1 it was agreed by the said Sabha *inter alia* (*a*) that the right of appointment of the Principal and teachers of the said Pirivena should be with the Sabha ; (*b*) that the mode of appointment of future members was to be prescribed by the Sabha.

(iii.) That the Sabha established the Vidyodaya Pirivena and about 1873 appointed Venerable Hikkaduwe Sri Sumangala Nayake Thero as its Principal.

(iv.) That by deed P2A dated 9-3-1876 one of the members of the Sabha, who was the owner of the premises on which the Pirivena was built, in furtherance of the said common object transferred the premises (by way of a gift to the Sangha) to the Venerable Hikkaduwe Sri Sumangale Nayake Thero and to his successors in the office of principal as appointed to the Pirivena by the Sabha.

(v.) That on the death of each principal his successor was appointed by the Sabha, the last principal appointed being the plaintiff.

The plaintiff asked for a declaration that he held the premises in question in trust for and as trustee of the members of the Sabha (2-14 defendants) and for an order for ejectment against the 1st defendant, who was in the alleged wrongful and unlawful occupation of a portion of the premises.

The 1st defendant contended by way of preliminary issues that the plaintiff could not maintain the action as he was not appointed trustee as required by sub-sections 2 and 3 of section 113 of the Trusts Ordinance and that the properties did not vest in him.

The District Judge held against the plaintiff, who appealed.

Held : (i.) That as the deed P2A granted the legal estate to the Venerable Sri Sumangala Nayake Thero, Principal of the Pirivena, and on his demise to the Principal appointed by the Sabha, the legal title to the premises described in P2A devolved on the plaintiff, being the person for the time being holding that office, without the need of any conveyance, vesting order or other assurance by virtue of section 113 (1) of the Trust Ordinance.

(ii.) That in the circumstances, sub-section 2 and 3 of section 113 of the Trusts Ordinance have no application and the plaintiff was not debarred from maintaining the action.

R. L. Pereira, K.C., and *L. A. Rajapakse, K.C.*, with *G. T. Samarawickreme* and *Dharmakirti Peiris*, for the plaintiff-appellant.

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

E. B. Wickramanayaka, for the other defendants-respondents (except the 6th).

KEUNEMAN, S.P.J.

In this case a large number of issues were framed but, at the suggestion of counsel for the 1st defendant, issues 19, 20 and 21 were tried as preliminary matters. The issues in question are as follows :—

19. Was the plaintiff appointed lawful trustee according to the requirements of the Trusts Ordinance of 1918 ?

20. Is the plaintiff vested with the properties in Schedules A and B ?

21. If issues 19 and 20 or either of them are answered against the plaintiff, can plaintiff maintain this action ? It was agreed that these three issues should be tried " on the assumption but without conceding the truth of the allegations in the plaint."

The District Judge decided these issues against the plaintiff and dismissed his action with costs payable to the 1st defendant.

In his plaint the plaintiff alleged that thirteen persons on or about the 6th December, 1873

formed themselves into an association called *Vidyadhara Sabha*. The chief object of the Sabha was to obtain a portion of land in Colombo and to establish a Pirivena thereon for the purpose of teaching Buddhism. Certain agreements by the said persons were then set out, including the agreement that the right of appointment of the Principal and teachers of the said Pirivena should be with the Sabha. The mode of appointment of future members was to be prescribed by the Sabha, the membership being restricted to thirteen persons. Provision was also made for the filling of vacancies among the thirteen persons by reason of their death. I may add that the agreement in question was embodied in document P1-No. 925 of the 6th December, 1873.

The Sabha collected money and constructed a building for the Pirivena, and established the Vidyodaya Pirivena, and about 1873 appointed the Venerable Hikkaduwa Sri Sumangala Nayaka Thero as the Principal.

By deed No. 1259 dated 9th March 1876 (P2A) one of the thirteen persons, who was the owner of the premises on which the Pirivena was built, in furtherance of the common object transferred the premises in Schedule A of the plaint to the Venerable Hikkaduwa Sri Sumangala Nayaka Thero and to his successors in the office of Principal.

The actual deed took the form of a gift and assignment to the priest I have mentioned and " on his demise to the Principals appointed to the Pirivena " by the thirteen persons, " and on their death by the gentlemen ' who joined the Sabha.' " The gift was " by way of a dedication absolute and irrevocable and as Sanghika property."

The plaint further alleged that the Sabha made arrangements to acquire the adjoining premises—described in schedule B of the plaint—for the Vidyodaya Pirivena, and that these premises were transferred by deed No. 2134 dated 4th April 1884 (P3). This deed took the form of a plain transfer to the Rev. Mabotuvana Siddharta Thero, but the plaint alleged that he held the legal title in trust for the members of the Sabha.

It was further alleged that certain buildings had been erected on these premises. It was also stated that on the death of each Principal his successor was appointed by the Sabha, the last Principal appointed being the plaintiff.

The plaint finally alleged that the 1st defendant about December, 1941 wrongfully and unlawfuly entered into occupation of a portion of the premises.

The plaintiff prayed *inter alia* for a declaration that he held the premises in question in trust for and as trustee of the 2nd to the 14th defendants as members of the Sabha, and for ejectment of the 1st defendant from the premises.

The argument addressed to the District Judge and in appeal by the 1st defendant was that the plaintiff had not been duly appointed trustee within the terms of section 113 of the Trusts Ordinance (Cap. 72). It was contended that the case did not fall within section 113 (1)—which runs as follows :—

> " Where, whether before or after the commencement of this Ordinance, it is declared or intended in any instrument of trust that the trustee shall be the person for the time being..... holding or acting in any office or discharging any duty in any public or private institution..... the title to the trust property shall devolve from time to time upon the person for the time being holding or acting in any such office, or discharging such duty, without any conveyance, vesting order, or other assurance otherwise necessary for vesting the property in such person."

It seems clear that the language used is wide enough to cover the present case, at any rate as far as the premises in schedule A are concerned. The deed P2A grants the legal estate to the Venerable Sumangala Nayaka Thero, Principal of the said Pirivena, and on his demise to the Principal appointed by the Sabha. On the plain terms of the sub-section the legal title should devolve upon " the person for the time being holding.....that office " without the need of any conveyance, vesting order or other assurance.

It has been argued before us that this sub-section does not apply where the appointment to the office is made by the author of the trust or, as in this case, by the persons who are alleged in the plaint to be the beneficiaries. No authority has been cited in support of this contention, and we are unable to import such a meaning into the sub-section. In our opinion section 113 (1) applies to the present case, so far as the deed P2A is concerned. The deed P3 does not raise the present point. The plaintiff no doubt will have to establish his contention with regard to the land in schedule B. But that is a matter of evidence, and the preliminary objection raised does not apply to these premises.

The 1st defendant further argues that section 113 (2) and (3) apply to the present case, and contends that these sub-sections, if applicable, exclude the operation of section 113(1). I have doubts whether the last part of the argument is good, but I do not think it is necessary to decide the point and shall merely determine the question

whether sub-section (2) and (3) are applicable to this case.

The relevant portions of the sub-sections are as follows :—

113 (2)—" Where, whether before or after the commencement of this Ordinance, in the case of any charitable trust, or in the case of any trust for the purpose of any public or private association (not being an association for the purpose of gain) a method for the appointment of new trustees is prescribed in the instrument of trust.....or by any rule in force, or in the absence of any such prescribed method is established by custom, then upon any new trustee being appointed in accordance with such prescribed or customary method, and upon the execution of a memorandum referred to in the next succeeding sub-section, the trust property shall become vested without any conveyance, vesting order, or other assurance in such new trustee."

113 (3)—" Every appointment under the last preceding sub-section shall be made to appear by a memorandum under the hand of the person presiding at the meeting or other proceeding at which the appointment was made, and attested by two other persons present at the said meeting or proceeding. Every such memorandum shall be notarially executed."

It was argued in this case that a method for the appointment of new trustees was prescribed in the instrument of trust, or in the alternative was established by custom in this case. I do not agree with this contention which is based upon a misconception. Nowhere in the document P2A is there any mention of the appointment of trustees. On the contrary the trustees are declared to be the Principals appointed by the Sabha. There is no doubt reference to the method of appointment of the Principals. But that is an entirely different matter. The considerations which may influence the Sabha to appoint a Principal are not necessarily the same as they would take into account in appointing a trustee. Further, the references to the method of appointment of the Principals are at the most words of description put in in order to give greater clarity to the term " Principal." The method of appointment of the Principal is laid down in document P1, and has only been referred to in document P2A to indicate the kind of " Principal " that is meant. I do not think the sub-sections (2) and (3) apply to the present case. I may add that the document P3 is not affected by the argument of the 1st defendant, for reasons already mentioned.

Counsel for the 1st defendant further argued that the prayer of the plaint was incorrect, inasmuch as the members of the Sabha are not the beneficiaries, and that the trust is in reality a charitable trust. This may be a matter for investigation in the District Court and may affect the decree which the plaintiff may obtain, but it has no bearing on the present argument.

In the circumstances I hold that as regard the matters raised under issues 19, 20 and 21 there is no bar to the maintenance of the present action. I set aside the judgment of the District Judge and send the case back for the determination of the other issues in the case. The plaintiff will have the costs of appeal and of the inquiry in the District Court from the 1st defendant.

JAYATILEKE, J.

I agree.

Set aside.

Proctors : *D. R. de S. Abeynayake*, for plaintiff-appellant.
Merrill Pereira & Gunasekera, for 1st defendant.
D. E. Weerasuriya, for 2-14 defendants

Present: DIAS, J.

DE SILVA vs. SIRIWARDANE

S. C. No. 162 *of* 1946—*C. R. Colombo No.* 99325.
Argued: 28th and 29th October, 1946.
Decided on: 1st November, 1946.

Rent Restriction Ordinance, No. 60 *of* 1942—*Standard rent—Payment of rent in excess of standard rent—Judicial notice of Proclamation bringing Ordinance into operation.*

The plaintiff sued the defendant for rent, ejectment and damages for overholding after the tenancy had been determined after notice. It was found that the defendant had tendered the rent to the plaintiffs' proctor who had refused to accept the same. The defendant counter-claimed that the rent payable, which had been agreed upon between the parties before the enactment of the Ordinance, was in excess of the standard rent chargeable under the Ordinance. He, therefore, asked for a refund of the excess. No evidence was led as to the amount payable as rates on the premises in question or as to the date on which the Ordinance came into operation within the area.

Held : (1) That judicial notice will be taken of a Proclamation bringing the Ordinance into operation.

(2) That, in view of the tender by the defendant, the plaintiffs' case must fail.

(3) That the rates payable must be considered in assessing the "standard rent."

(4) That, after the Ordinance came into operation within the area, the plaintiff was prohibited from receiving rent in excess of the standard rent and that any such excess received by him must be refunded to the defendant.

Cases referred to : *Jayakodi vs. Silva* (44 N.L.R. 379).
Edirisinghe vs. Cassim (46 N.L.R. 334).
Wijemanne & Co. vs. Fernando (47 N.L.R. 62; 32 C.L.W. 28.
Edmund vs. Jayawardene (46 N.L.R. 306).
Chairman Municipal Council vs. Silva (1917) 4 C.W.R. 152.
Marikar vs. Marikar 22 N.L.R. 142).
Paramasothy vs. Suppramanian (39 N.L.R. 532).
Hull Blyth & Co. vs. Valiappa Chettiar (39 N.L.R. 100.
Natchiappa Chettiar vs. Pesonahamy 39 N.L.R. 377.
Chow vs. de Alwis 47 N.L.R. 44.
Kuma vs. Banda (21 N.L.R. 294).
Sellathurai vs. Kandiah ((1923) 1 T L.R. 212).

H. W. Jayewardene, for the plaintiff-appellant.
P. Navaratnarajah, for the defendant-respondent.

DIAS, J.

The appellant sued the respondent to recover rent for part of May and for the months of June to August, 1945, aggregating Rs. 58, in respect of premises bearing No. 71, Robert's Road, Kalubovila, which he had let to the respondent on a contract of monthly tenancy since September 1939. He also asked for ejectment and damages on the ground that the respondent was over-holding after the tenancy had been determined by notice.

The appellant stated that the rent agreed on from the very commencement of the tenancy was Rs. 15 per mensem.

The respondent, in his answer, pleaded that the rent for the period in question had been duly tendered to the plaintiff's proctor who refused to accept the same. He further stated that the Rent Restriction Ordinance, No. 60 of 1942, having been proclaimed for this area on the 15th of February, 1943, the "standard rent" for the premises was only Rs. 5 per mensem, and not Rs. 15. He had overpaid the appellant from February, 1943 to May, 1945 a sum of Rs. 405 instead of the sum of Rs. 135, thereby paying a sum of Rs. 270 in excess of what he was by law bound to pay. Giving the appellant credit for a sum of Rs. 20 for the months of June to September, 1945, he claimed in reconvention a refund of Rs. 250.

The first question which arises is whether the respondent has proved the date on which the Rent Restriction Ordinance was applied to this locality ? Section 2 (1) of the Ordinance provides that the Governor may, from time to time, by Proclamation published in the Gazette, declare that the Ordinance shall be in force in any area specified in the Proclamation, and appoint the day on and after which the Ordinance shall be in force in such area.

No evidence of this has been led at the trial, and the relevant Gazette has not been produced. It was held in *Jayakodi vs. Silva*, (44 N.L.R. 379) that a Court is bound to take judicial notice of the date on which an Ordinance has been brought into operation. In *Edirisinghe vs. Cassim*, (46 N.L.R. 334) it was laid down that a Court could take judicial notice of the date on which a Defence Regulation came into operation. In an old case reported in *Ramanathan* (1877) *page* 10, it was held that a Proclamation issued by the Governor can be taken judicial notice of without proof. No doubt, this case was decided before the Evidence Ordinance became law, but I fail to see why a Court cannot take judicial notice of a Proclamation issued by the Governor, if it can do so in the case of a Regulation.

I, therefore, allowed the respondent's counsel to produce the Gazette No. 9084 of February 12, 1943, which shows that the Ordinance was applied to the Mount Lavinia District on February 15, 1943.

The Rent Restriction Ordinance, therefore began to operate in this area on February 15, 1943.

The next question is whether the respondent has, under sections 4 and 5 of the Ordinance established what is the "standard rent" for these premises ? This is arrived at by adding the annual value of the premises and the amount of rates leviable for the year and dividing the result by 12—*Wijemanne & Co. vs. Fernando*, (47 N.L.R. at p 64).*

* 32 C. L. W. 28.

The respondent has called a clerk of the Dehiwala-Mount Lavinia Urban District Council who produced a certified copy of the assessment register—D2. This shows that the annual value during the relevant period is Rs. 55. The rates are not specifically stated, but D2 states that the "monthly rent" is Rs. 5. The witness stated that in 1945 the assessor had assessed the premises at Rs. 5 a month.

Dealing with this point the Commissioner says in his judgment :—"On reference to D2..... I find that in 1941 the monthly rental is Rs. 4·50 and the annual value Rs. 50 and for the years 1942, 1943 and 1944 the monthly rental is assessed at Rs. 5 and the annual value Rs. 55.

"Therefore, I find that the plaintiff had recovered from the defendant Rs. 10 in excess of the standard rent."

The appellant criticises this finding. He submits that in order to ascertain the "standard rent" one must add the annual value and the rates. D2 does not show what the rates leviable are, and, in the absence of that factor, the "standard rent" cannot be calculated. The appellant was asked whether he paid the rates but he was not asked what the amount he paid was. I, therefore, agree with the appellant's contention that the respondent has failed to establish what the standard rent is.

On the question of tender, the Commissioner has held against the appellant, who, in his evidence, admitted that although the respondent's proctor remitted money on behalf of the respondent from June, 1945 appellant's proctor refused to accept those rents.

The main question for decision arises on the respondent's claim in reconvention. It is submitted for the appellant that this monthly tenancy began in September, 1939, long before the Rent Restriction Ordinance became law. At that date it was lawful for a landlord and tenant to agree upon a rental of Rs. 15 per mensem. An agreement by the parties as to the duration of a tenancy may be for a definite time, or it may continue until a certain event takes place, or run from period to period. In the case of a monthly tenancy it runs from month to month until determined by proper notice to quit. (Wille on Landlord and Tenant pp. 36, 37 ; Thambiah on Landlord and Tenant pp. 31, 32).

It is therefore urged that anterior to the date when the Rent Restriction Ordinance was proclaimed in this area, there was in existence a *lawful* agreement between the parties under which the respondent had to pay a monthly rental of Rs. 15.

It is submitted that even assuming that the "standard rent" for these premises after February, 1943 was Rs. 5 per mensem, the Rent Restriction Ordinance cannot retrospectively affect vested lawful rights which had come into existence prior to the Proclamation of the Ordinance in that locality. Even if the Ordinance has a retrospective effect, it is argued that by virtue of section 17 of the enactment the increase of Rs. 10 over the standard rent of Rs. 5 is saved, because it is in accordance with the terms of a "lawful agreement relating to the tenancy."

This question arose in a different form in *Edmund vs. Jayawardene*, (46 N.L.R. 306). In that case the parties on the 15th of December, 1942 entered into an agreement that the tenant should pay a rental of Rs. 23 per mensem commencing from 1st January, 1943. The Rent Restriction Ordinance became law on the 26th December, 1942, so that when the agreement became operative, the Ordinance was in force.* At that date the standard rent for the premises in question was only Rs. 15 per mensem. It was held that the question whether the Ordinance could affect vested rights did not arise, because on the day the agreement began to operate, the Ordinance was already in force. Jayetileke, J. said :—"The section (3 (2)) prohibits the increase of rent from the day the Ordinance came into operation, namely, December 26, 1942. The material date in this case is January 1, 1943, when the increase became effective, and not December 15, 1942, when the increase was agreed on."

The plaintiff, in that case, therefore, was held disentitled to recover from the defendant anything more than the standard rent under section 3 (1). The question which arises here did not, therefore, come up for decision in that case.

In the present case, the rental of Rs. 15 per mensem was agreed upon and had become effective nearly three years before the Ordinance became law and four years before it was applied to this area.

It is a cardinal rule of construction that a statute must be construed strictly and not be extended to interfere with ordinary or vested rights. (*Chairman Municipal Council vs. Silva* (1917) 4 C.W.R. at p. 152 ; *Marikar vs. Marikar* (1920) 22 N.L.R. at p. 142). A retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise

* The Ordinance came into force within the area in question, viz., Gampola, only on February 15, 1943—Proclamation published in Gazette No. 9084 of February 12. 1943,—Edd. C. L. W.

than as regards a matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or consideration already past, must be presumed out of respect to the Legislature, to be intended not to have a retrospective effect—*Paramasothy vs. Suppramanian*, (39 N.L.R. at p. 532).

It is another rule of construction that one may consult the preamble of the Statute to find out its meaning and keep its effect within its real scope.—*Hull Blyth & Co. vs. Valiappa Chettiar*, (39 N.L.R. at p. 100; *Natchiappa Chettiar vs. Pesonahamy*, 39 N.L.R. 377; *Chow vs. de Alwis*, 47 N.L.R. at p. 44; *Kuma vs. Banda*, 21 N.L.R 294). Nevertheless, where the meaning of the section is plain, it is not possible for the preamble in any wise to qualify the enacting sections of the statute—*Sellathurai vs. Kandiah*, ((1923) 1 T.L.R. 212).

The preamble to the Rent Restriction Ordinance says that it is an Ordinance to restrict the increase of rent and to provide for matters incidental to such restriction. "To increase" means to amplify, augment, enlarge or swell. The object of the Legislature, therefore, was to restrict landlords who by taking advantage of the existing shortage of living accommodation, made inequitable demands for rents from tenants who, by force of necessity, had to accede to such exorbitant demands. Section 3 (1) (*b*) expressly provides for that by enacting that it shall not be lawful for the landlord "to increase the rent of such premises in respect of any such to an amount in excess of such authorised rent." Clearly this appellant has not done that. There is, however, the effect of section 3 (1) (*a*) to be considered. That sub-section in clear and unequivocal language provides that "*it shall not be lawful*" for the landlord "*to demand, receive*, or *recover* as the rent of such premises in respect of any period commencing on or after the appointed date, any amount in excess of the authorised rent of such premises as defined for the purposes of this Ordinance in section 4."

The meaning of those words is that where at the date this Ordinance applies, the rent payable under the pre-existing law is in excess of the authorised rent, the landlord was debarred from *demanding, receiving*, or *recovering* any amount in excess of the authorised rent. The language of the section being clear, there is no justification to give it a restricted meaning. I, therefore, hold that the contention of the appellant on this point fails.

The next question is whether section 17 permits any escape from this situation? This question was recently considered in *Wijemanne & Co. vs. Fernando, (Supra)*.

Soertsz, J. said :—"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 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."

Section 3 makes it unlawful for the landlord to recover the old rent, and section 14 penalises a breach of that requirement. *Wijemanne & Co. vs. Fernando* is binding on me. I therefore hold that section 17 affords no relief to the appellant.

The position then is this: The plaintiff's claim fails and his action must be dismissed. On the claim in reconvention the respondent has failed to prove what the standard rent is. If the aggregate of this sum is in excess of what the respondent has paid the appellant, the latter must refund such excess to the respondent.

I, therefore, affirm the findings of the Commissioner in dismissing the plaintiff's claim. I set aside the order of the Court below in regard to the claim in reconvention, and send the case back for proper proof in terms of the Ordinance as to what is the standard rent for these premises and for adjudication as to what amount, if any, on such computation is due from the appellant to the respondent. There will be no costs of this appeal. All other costs shall be in the discretion of the Commissioner of Requests.

Sent back.

Proctors: V. A. de Silva for the appellant.
F. N. Jayaratne for the respondent.

Present: DIAS, J.

ENDRIS DE SILVA & ANOTHER vs. ARNOLIS

S. C. No. 125—*C. R. Galle Case No.* 25487.
Argued and Decided on: 28th October, 1946.

Evidence—Admittance of documents in appeal.

The appellant sought to produce in appeal the records of two Village Tribunal cases, relevant to the subject matter of the appeal and discovered after the appeal had been filed.

Held : That the documents may be admitted.

Cases referred to : *Jandiris et al vs. Deve Renta et al* 33 N.L.R. 200.
Piyaratne Unanse vs. Nandina 37 N.L.R. 109.

H. W. Jayawardene, for the plaintiffs-appellants.
G. P. J. Kurukulasuriya with *Conrad Dias*, for the defendant-respondent.

DIAS, J.

In view of the order which I propose to make I do not think that I should say anything about the facts which are in issue in this case.

The plaintiffs-appellants sued the defendant-respondent for house rent and ejectment. The plaintiffs' case is that by prescriptive title they are entitled to a house bearing assessment No. 986 standing on the land called Moderawatta at Dodanduwa. They allege that the defendant rented this house at a monthly rental of Rs. 1·50 per mensem and is their tenant. It is said that the defendant defaulted in August, 1942. Therefore the plaintiffs are claiming arrears of rent Rs. 43·50 and for ejectment.

The defendant denied these averments and further pleaded that he took no house on rent from the plaintiffs and that he was not liable. On the first trial date the issues were framed and the plaintiffs obtained a date to adduce proof that notice to quit was given; this matter having been raised by the defence. On the next date the defendant admitted the notice to quit and the case proceeded to trial, the plaintiffs being unable to produce any rent receipts. They called oral evidence to prove that the defendant was the plaintiffs' tenant and also stated that there were two Village Tribunal cases against this defendant in regard to this house in which the question of tenancy was admitted by the defendant, but these cases could not be produced as they were said to have been destroyed. After the appeal was filed the plaintiffs filed an affidavit producing two Village Tribunal cases from Hikkaduwa Nos. 837 and 86 in which it is alleged that this defendant was the defendant there and that the tenancy referred to in those cases related to this very house and that therefore the defendant is now estopped from raising the question that he is not the plaintiffs' tenant.

Mr. Jayawardene for the plaintiffs-appellants has cited two cases; 33 New Law Reports 200 and 37 New Law Reports 109, where evidence of this kind has been admitted by this Court under Sec. 37 of the Courts Ordinance. It is, of course, obvious that this right is one which must be very cautiously exercised but the Court would have less hesitation in admitting such evidence when it consists of a judicial record or a deed or similar evidence which came into existence long before the dispute arose and the chances of fabrication are extremely remote. I agree with Mr. Kurukulasuriya that this power must be very jealously guarded but nevertheless I see no reason in a case of this kind why the plaintiffs should be penalised. Mr. Kurukulasuriya submits four reasons for holding that these two Village Tribunal cases do not refer either to the defendant or to this house. He says that there is no proof that the defendant in those cases is the defendant in the present case or that the house which came into question in the Village Tribunal is this house, or the quantum of rent claimed in those cases referred to the rent now claimed which is stated to be Rs. 1.50 per mensem. Finally he points out that it was possible for the plaintiffs to create false evidence by instituting

collusive Village Tribunal cases. If this is so, one would have expected the plaintiffs to produce these cases in the fore-front of their present action.

In the circumstances, I set aside the order made by the Commissioner and send the case back for the recording of fresh evidence rendered necessary by the production of the documents in question and after hearing further arguments the learned Commissioner will proceed to deliver his finding. All costs to abide by the final result of the trial.

Sent back.

Proctors: *D. & R. Amarasuriya*, for plaintiffs-appellants.
S. Wimalasuriya, for defendant.

Present: WIJEYEWARDENE, J.

LEELAWATHIE vs. HENDRICK

S. C. No. 939—*M. C. Matara No.* 59027.
Argued on: 16th September, 1946.
Decided on: 26th September, 1946.

Maintenance-Application for—Absence of applicant on date of inquiry—Dismissal of application—Motion to vacate order of dismissal—Refusal by Magistrate—Is the order refusing to vacate an appealable one—Supreme Court—Powers of Revision.—Maintenance Ordinance, Section 17.

The applicant in a maintenance action appealed from an order made by the Magistrate refusing to vacate his order dismissing her application as she was absent when the inquiry was taken up.

The respondent's counsel raised a preliminary objection that the order appealed from was not an appealable order. The Supreme Court upheld the objection, but exercising the powers of revision vested in it, set aside the orders and sent the matter back for inquiry.

H. W. Thambiah, for applicant-appellant.
G. P. J. Kurukulasuriya, with *Vernon Wijetunga*, for defendant-respondent.

WIJEYEWARDENE, J.

The appellant applied to court on March 11, 1945, for an order of maintenance against the respondent in respect of her illegitimate child born in August, 1944. The inquiry began on August 18, 1945, when the appellant's evidence was concluded. The appellant's mother was then called as a witness but before her examination in chief was concluded she was taken ill and the inquiry was adjourned for September 7, 1945. On this day the inquiry was postponed for October 9, as the respondent's proctor applied for a date on personal grounds and on the latter date it was again postponed for November 14, on which date the inquiry was postponed for December 12, for want of time. On December 12, and on the immediately subsequent occasion January 16, 1946, the inquiry could not be continued as the appellant's proctor had to attend the Supreme Court. On all those prior dates the appellant was present in court. When the inquiry was finally resumed on February 20, 1946, the appellant was absent and the Magistrate dismissed the application without giving any reason. The appellant then filed an affidavit on February 26, together with a medical certificate from a Veda Aratchi endorsed by a Doctor with British qualifications and moved to have the order vacated on the ground that she was unable to attend court as she had bronchitis and fever. The Magistrate refused that application without giving any reasons. The appellant has appealed against that refusal.

I think that this is a matter in which I should give relief by way of revision. I vacate the orders of the Magistrate dated February 20, 1946, and February 26, 1946, and direct the Magistrate to hold the inquiry. I think it desirable that instead of proceeding on the evidence that has been recorded he should re-hear the appellant and her mother if either the appellant or respondent makes an application to that effect.

I make no order as to the costs in this court.

Sent back.

Proctors: *K. Ratnasingham*, for the applicant-appellant.
A. S. de S. Amarasuriya, for the defendant-respondent.

Present: DIAS, J.

FERNANDO vs. GOONESEKERE

Application for Writ of Quo Warranto against G. D. G. Goonesekera of Ragama. No. 353.

Argued: 25th October, 1946.
Decided on: 29th October, 1946.

Quo Warranto—Election of Village Committee Chairman—Disqualified member voting at election.

A person disqualified for election to a Village Committee was duly nominated and elected, without objection, as a member of the committee and took part in the election of the Chairman. The respondent was elected Chairman by a majority of one vote. It was submitted, but not proved, that the disqualified member voted for the respondent, that his vote should have been rejected, and that the presiding officer should have drawn lots as on an equality of votes.

Held : (i.) That the disqualified member was entitled to vote at all deliberations of the Committee and that the election of the respondent as Chairman was valid.

(ii.) That the petitioner had not discharged the burden of proving that the disqualified member voted for the respondent.

Cases referred to : *David & Co. vs. Albert Silva* (31 N.L.R. 316).
Samarakoon vs. Ponniah (32 N.L.R. 257).
Rajadurai vs. Thanabalasuriya (10 T.L.R. 120 ; 12 C.L. Rec. 233).
Mendias Appu vs. Hendrick Appu (46 N.L.R. 126).

H. V. Perera, K.C., with *E. B. Wickramanayake* and *E. O. F. de Silva*, for the petitioner.
N. E. Weerasooriya, K.C., with *H. A. Kottegoda*, for the respondent.

DIAS, J.

The petitioner, W. Simeon Fernando, prayed for a writ of *quo warranto* to oust the respondent, who is the *de facto* Chairman of the Village Committee of Kanuwana on the ground that his election to that office is null and void on the ground that he failed to obtain the majority of the votes of the members legally entitled to vote at the meeting at which he was elected.

The Village Committee of Kanuwana consists of thirty-one members. The respondent, G. Don Gilbert Goonesekera, and one Norbert Sri Vardhana are both duly elected members. On nomination day one P. Simon Peter Perera, admittedly an ex-convict, who has served a sentence of two years' rigorous imprisonment for attempted murder was nominated for one of the wards. There being no other candidate, and no objection having been raised by anybody as to his qualifications for election, he was declared to be duly elected. Section 13 (*e*) of the Village Communities Ordinance (Chap. 198) disqualifies for election a person who has served a sentence of imprisonment of either description for a period of three months or any longer period, on conviction of any "crime" within the meaning of the Prevention of Crimes Ordinance (Chap. 18). It is common ground that the offence of attempted murder is such a "crime." Obviously therefore, this ex-convict was disqualified, but nobody appears to have raised any objection, until this trouble arose. (Section 15).

After the election of the members, the next thing to be done is to elect the Chairman and the vice-Chairman. Under the repealed Ordinance (section 20 (7)) the voting had to be by "secret ballot." By section 27 of the existing Ordinance (as amended by Ordinance No. 11 of 1940 sec. 7) the election of the Chairman and the vice-Chairman is by ballot. The presiding officer at such election is the Government Agent. Such election is to be conducted, subject to the provisions of section 27 (1), in accordance with such procedure as may be prescribed by rules under section 59 of the Ordinance. These rules of procedure were not cited at the argument. They will be found in Volume III of the Subsidiary Legislation of Ceylon for 1941 at pages 322-323. I note in passing that section 59 of the principal Ordinance has been successively amended by Ordinance Nos. 11 of 1940 section 12, and 54 of 1942 section 24.

Part III of the rules provide the procedure to be followed at the election of a Chairman and a vice-Chairman. I reproduce the relevant rule :—

2 (*a*) If there are two candidates for election and the names of such candidates are formally proposed and seconded, the Presiding Officer shall proceed to the election of one of the candidates by ballot.

(*b*) The Presiding Officer shall, thereupon, take a count and declare the candidate who obtains the larger number of votes the duly elected Chairman of the Committee.

(*c*) In the event of the election being rendered indecisive by reason of an equality of votes, the matter shall be decided by lot, cast or drawn, in such manner as the Presiding Officer may, in his discretion, determine.

I am entitled to presume that the Presiding Officer at this election regularly performed his official duties before declaring the respondent to be the duly elected Chairman of this Village Committee. If as stated in paragraph 14 of the petitioner's affidavit and the one subsequently filed by the defeated candidate, Sri Vardhana, the latter's objection against the ex-convict participating in the ballot was made before the ballot was taken, there are thirty other persons as well as the Presiding Officer who would be aware of that fact, and who would be in a position to testify. If as asserted by the petitioner the Presiding Officer before taking the ballot questioned the ex-convict, and if the latter admitted that he was a disqualified person, it is highly improbable that the Presiding Officer would have allowed him to vote.

In any event I think the Presiding Officer, as a disinterested person, if requested to do so, would have given the petitioner an affidavit to that effect, or at least expressed willingness to testify before this Court whenever required to do so. There is no evidence that any attempt was made to secure that decisive evidence.

The petitioner asserts in paragraph 15 of his affidavit that the respondent was elected by a majority of one vote—Sri Vardhana securing 15 while the respondent obtained 16 votes. This is pure hearsay, because the petitioner, not being a Committee member but only a voter, could not have been present. His evidence is therefore indirect and obtained second-hand. In paragraph 16 the petitioner further says "*I have reason to believe* that the said P. Simon Peter Perera (the ex-convict) voted for the respondent at the said election." This again is hearsay. The reasons for his belief are not stated in the affidavit.

After notice had been issued and the respondent filed his affidavits denying (*a*) that Sri Vardhana had taken any objection to the status of the ex-convict to vote before the ballot was held, or (*b*) that the ex-convict did, in fact, vote for the respondent—the petitioner filed a supplementary affidavit from Sri Vardhana, the defeated candidate. This affidavit asserts that he took objection to the status of the ex-convict before the ballot was taken. He further states that the ex-convict voted for the respondent, but does not disclose the facts on which this statement is made.

The submission made on behalf of the petitioner is that the ex-convict having voted for the respondent, who thereby secured election by a majority of a single vote, the election is rendered indecisive—for, if the vote of the ex-convict is eliminated, there would result an equality of votes between the two candidates.

The Presiding Officer not having proceeded to determine the question of chairmanship by lot, the election is bad and therefore the respondent is not the *de jure* chairman. On the other hand, if it is the fact that the ex-convict voted for Sri Vardhana, then the respondent secured a majority in spite of that disqualifying vote, and his election is good.

The proof tendered by the respondent is equally unsatisfactory.

In paragraph 9 of his affidavit he states "*I verily believe* that the said P. Simon Peter Perera.....voted for the said Norbert Perera Sri Vardhana," but the grounds for this belief are not stated. The affidavit of Don Simeon Jayasinghe, a Committee member, who should be in a position to give direct evidence merely asserts "*As far as I know*, I have *cause to believe* that the said P. Simon Peter Perera voted for Norbert Perera Sri Vardhana." The grounds of his knowledge and belief are withheld from this Court.

Section 181 of the Civil Procedure Code makes it clear that affidavits must be confined to a statement of such facts which the declarant is able of his own knowledge and observation to testify to. An exception is made in the case of an interlocutory affidavit, in which statements regarding his belief may be admitted, " provided reasonable grounds for such belief be set forth in the affidavit "—see *David & Co. vs. Albert Silva* (31 N.L.R. 316), *Samarakoon vs. Ponniah* (32 N.L.R. 257) and *Rajadurai vs. Thanabalasuriya* (10 T.L.R. 120 ; 12 C.L. Rec. 233).

It is obvious that the affidavits produced in this case contravene the salutory provisions of section 181 of the Civil Procedure Code. It was suggested, for this reason, and in view of the conflicting nature of the evidence, the Court would feel disposed to allow the parties to lead oral evidence—for example, of the Government Agent and the ex-convict.

I cannot accede to such a request. It is possible that cases may arise where such a course is necessary or desirable; but this is not such a case. In the first place section 15 of the Ordinance (as amended by Ordinance No. 54 of 1942 section 9) provides that no person shall be a candidate for election as a Committee Member unless he is qualified for election within the meaning of section 13. The proper time to object to the election of a candidate on the ground that he is not qualified for election is when the nomination papers are delivered—see section 15 (3) (as amended by Ordinance No. 11 of 1940 section 4). This, however, does not operate as a bar to a subsequent application to this Court to set aside such election—*Mendias Appu vs. Hendrick Appu* (46 N.L.R. 126). No such steps have been taken. This ex-convict, therefore, has been declared to have been "duly elected" (section 15 (4)) and continues to serve in the Committee as a "duly elected" member thereof.

If so, he is lawfully entitled to vote at all the deliberations of the Committee including that held for the purpose of electing the Chairman. I doubt whether the Presiding Officer has power under such circumstances to refuse such a person to vote, even if objection had been taken to his status. On this ground alone, this application must fail. In the second place, the burden of proof is on the petitioner. He has, in my opinion, failed to discharge it. For both these reasons, I refuse this application with costs.

Application refused.

Proctors: *C. H. de Silva*, for the Petitioner.
D. L. Gunasekere, for the respondent.

Present: Dias, J.

KANDASAMY vs. ROSAIRO, S. I. POLICE

Application in Revision—M. C. Point Pedro No. A. 40.
Argued: 17th October, 1946.
Decided on: 21st October, 1946.

Fugitive Offenders Act, 1881—*Offender arrested in Ceylon on warrant issued by Indian Court—Warrant defective—Proceedings under the Act abandoned—Order for the release of offender on bail—Validity of order.*

The petitioner was alleged to be a fugitive offender for whose arrest a warrant had been issued by an Indian Court. He was arrested and taken before a Magistrate but no one was present to testify to the authenticity of the warrant or to the identity of the petitioner. The police then abandoned their claim for the surrender of the petitioner under the warrant and moved that he be released on bail. The Magistrate made order accordingly.

Held: (i.) That when the police abandoned their claim for surrender under the warrant, the petitioner's detention under the warrant came to an end.

(ii.) That the original arrest was not made under section 32 (1) (*i*) of the Criminal Procedure Code and that there had not been a new arrest of the petitioner under that section.

(iii.) That the order for bail was made when the petitioner was not under lawful arrest and was irregular.

H. V. Perera, K.C., and *N. Nadarajah, K.C.*, with *H. W. Thambiah*, and *H. W. Jayewardene*, for the petitioner.

H. H. Basnayake, K.C., Attorney-General, with *Deheragoda, Crown Counsel*, for the respondent.

Dias, J.

One Kandasamipillai was convicted by the Sessions Judge of Nagapatam of the offence of Criminal Intimidation under section 506 of the Indian Penal Code and was sentenced to undergo two years' rigorous imprisonment and to pay a fine of Rs. 1,000.

The convict having appealed, he was admitted to bail pending the hearing. The Appellate Court deleted the sentence of fine, but affirmed the conviction and sentence of imprisonment. It is alleged that the convict absconded to Ceylon and failed to surrender and serve his sentence in India. It is asserted that that convict is this petitioner and that he is now unlawfully at large in Ceylon before the expiration of his sentence.

The proceedings I am asked to revise are the record of the attempts made by the Indian authorities with the assistance of the local police to obtain the surrender of the alleged convict under the provisions of Part II of the Fugitive Offenders Act, 1881 (44 and 45 Vict. c 69).

The warrant P1 which was issued by the Indian Court appears to be defective. In fact, the petitioner after his arrest has been discharged from his detention under P1 and the proceedings under the Act abandoned, while the Indian escort has returned to India without the alleged fugitive. The learned Attorney-General who appeared to assist the Court stated that the Indian authorities have been requested " to supply proper papers." We are particularly concerned with what happened after the proceedings under the Fugitive Offenders Act were abandoned.

Under Part II of the Act certain British territories which lie in close proximity to each other are " grouped " for the purpose of that part of the Act. British India and Ceylon are members of one such group. (See Proclamation dated 21-3-1918 published in Govt. Gazette No. 6932 of 28-3-1918).

Section 34 of the Act provides that where a person *convicted* by a Court in any part of His Majesty's dominions of an offence, is unlawfully at large before the expiration of his sentence, each part of the Act shall apply to such person in like manner as it applies to a person *accused* of the like offence committed in the part of His Majesty's dominions in which such person was convicted. If a convict in British India escapes to Ceylon before the expiration of his sentence and is unlawfully at large here, the Indian authorities can therefore demand his surrender under the simple procedure provided by Part II of the Act.

The escort arrived in Ceylon, the warrant P1 was endorsed by the local Magistrate, and the petitioner was arrested and produced before the Court. It was at this stage that the trouble began. At that point of time the officer of the escort had left Ceylon. He was therefore not available to identify the petitioner. It also seems as if the warrant P1 under which the petitioner was arrested is itself defective.

When the case was taken up before the Magistrate on September 9, 1946, the local police moved for a summons on Abdul Rahiman, the Indian escort, to depose to the authenticity of the warrant P1 and the identity of the petitioner. It was stated that the Ceylon police had cabled to the Indian authorities to produce further evidence in support of the application for surrender.

The Magistrate then adjourned the case until September 12. On that day the police again moved for a date to enable them to produce documents proving the identity of the petitioner. It then became clear that the petitioner could not be held in custody indefinitely on a defective warrant and without adequate proof of identity.

An application for a writ of *habeas corpus* or in revision might lead to the unconditional release of the petitioner, so that when the evidence and papers arrived in Ceylon (as the authorities hoped they would) the petitioner might not be in Ceylon to be rearrested. Therefore, the question arose how the petitioner could be prevented from leaving Ceylon before the proper proof arrived.

The Magistrate appears to have drawn the attention of the police officer to the provisions of section 32 (1) (*i*) of the Criminal Procedure Code at which that officer appears to have grasped as a drowning man clutches at a straw.

This is how the record reads :—

> " In view of these submissions of counsel, Mr. Bandaranayaka (the police officer) *now* relies on section 32 (1) of the Criminal Procedure Code read with the Fugitive Offenders Act, 1881, for the arrest of Kandasamy present in Court, or in support of an adjournment. *He does not now rely upon the warrant P1 already produced.* Mr. Bandaranayaka *now* moves under section 39 of the Criminal Procedure Code that R. A. Kandasamy present in Court be discharged on bail being furnished."

In other words, the police abandoned their claim for surrender under the Indian warrant. Until a proper warrant and sufficient evidence was received from India, the accused was to be deemed to have been arrested under section 31 (1) (*i*) of the Criminal Procedure Code and released on bail under section 39, so that he could not leave the Island although not under physical detention.

Of course if this procedure is sanctioned by law there is nothing more to be said about it; but the validity of the order made by the Magistrate in discharging the petitioner from arrest on his furnishing bail in Rs. 20,000 " to appear in Courts on September 28, 1946, and thereafter when directed on every date of adjournment of hearing at this Court and in the higher Court," has been strongly called in question and criticised by Mr. Perera for the petitioner, as a gross abuse of procedure, and an invasion on the liberty of the subject.

I agree with Mr. Perera that when the police stated they were not proceeding under the Indian warrant P1, the detention of the petitioner under that warrant came to an end. I think it is to suggest that the arrest of the petitioner on September 5, 1946, was both under the warrant P1 as well as under section 32 (1) (*i*) of the Criminal Procedure Code, and that while the detention under the warrant P1 ceased, the detention under section 32 (1) (*i*) continued. I also agree with Mr. Perera that there has not

been a new arrest of the petitioner under section 32 (1) (*i*) after the police abandoned their case under the warrant P1. The effect of that abandonment is that the petitioner automatically became free, and there has been no subsequent arrest.

To suggest that section 39 of the Code applies (assuming it is an enabling section) is meaningless if the petitioner was not under lawful arrest, when the order for bail was made.

Mr. Perera has taken the further objection that for the application of section 32 (1) (*i*) certain conditions must exist at the time of the arrest. To justify the arrest of a person under that subsection he must have been concerned in, or he must be one against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in any act committed in any place out of this Island, which if committed in this Island would have been punishable as an offence, and for which he is under the Fugitive Offenders Act 1881 liable to be apprehended or detained in custody in this Island.

There is no proof that at the time this petitioner was arrested on September 5, 1946, the arresting officer had such information, or that he made the arrest for any reason other than that he had an endorsed warrant P1 authorising the arrest.

I hold that it is impossible to contend *ex post facto* that the arrest of this petitioner on September 5, 1946, was also made under section 32 (1) (*i*) of the Criminal Procedure Code. There having been no subsequent arrest, the applicability of section 39 is ousted.

I entertain doubts whether section 39 of the Code is an enabling section at all. It merely declares the law. When a person is arrested, unless it is a case where police bail may be taken, the police officer can detain such person for twenty four hours, after which it is his duty to take or send the man to the nearest Magistrate—section 126A. It is then open to the Magistrate either to remand the suspect to the custody of the Fiscal or to admit him to bail. Section 39 merely draws attention to these provisions of the law to indicate that the police after making an arrest cannot themselves discharge the prisoner unless it is a case in which police bail can be taken.

In my opinion, the proceedings are irregular. It is for the Indian authorities to place the proper materials before our Courts. In order to enable them to do so, the local authorities and the Ceylon Courts will render every assistance lawfully possible. But to strain the law in the way that has been here attempted, in order to keep under control a person who may leave the Island before the escort and the perfected papers arrive is an encroachment on the liberty of the subject which cannot be countenanced.

If before the arrival of the escort armed with the proper papers the Indian authorities desire to have a suspected fugitive arrested or detained, the Act provides a simple procedure for the issue of a provisional warrant under section 16 of the Act. This has not been done and I need not discuss the matter further.

I set aside the order of the Magistrate dated September 12, 1946, calling upon the petitioner to furnish security, and direct that the bail bonds be forthwith discharged, and that the petitioner shall be freed from all restraint so far as these proceedings are concerned.

Order set aside.

Proctors: *K. Ratnasingham*, for the Petitioner.

Present: DIAS, J.

ELIAS POLICE SERGEANT vs HEWASILIYANGE

S. C. No. 874 *of* 1946—*M. C. Hatton No.* 8346.
Argued: 18th October, 1946.
Decided on: 23rd October, 1946.

Price control—Sale of potatoes above controlled price—Does the price order apply to locally grown potatoes—Are the columns specifying the controlled commodity and the Importers', wholesale and retail prices to be regarded as interdependent.

Held: (i.) That the price order published in Government Gazette No. 9267 dated 5th May, 1944 applied to locally grown potatoes.

(ii.) That each column in the said price order is independent and that while column 2 refers to imported things, the other columns refer to goods whether imported or locally grown.

H. V. Perera, K.C., with *G. P. J. Kurukulasuriya* and *Conrad Dias*, for accused-appellant.
J. G. T. Weeraratne, C.C., for complainant-respondent.

DIAS, J.

The accused was charged with having on 23-3-1946 at Norton in the Hatton District sold one pound of potatoes to Mrs. Drury for Rs. 1 which was a price in excess of the controlled price which was 29 cents per pound. This charge was laid under section 5 of Ordinance No. 39 of 1939. The controlled prices are to be found in the order made under section 3 of the Ordinance and published in Gazette No. 9267 dated 5-5-1944. It is not in dispute that the controlled price for potatoes is 29 cents per pound.

Mr. Perera for the appellant is unable to question the findings of fact of the Magistrate. He has however submitted that in law the conviction of the appellant cannot stand.

The Gazette contains five columns. The first column specifies the name of the controlled commodity. Column 2 specifies the *Importer's* maximum price per cwt. gross to a wholesaler. Column 3 sets out the maximum wholesale price per cwt. gross. Column 4 states the maximum wholesale price per pound nett. Column 5 specifies the maximum retail price per pound nett.

Mr. Perera argues that because Column 2 refers to the "importer's maximum price," therefore that column can only refer to imported commodities and not to locally grown produce. He says that therefore Columns 3, 4, and 5 must also necessarily refer to imported articles. In other words, the order in question only applies to imported potatoes and not to locally grown potatoes. Therefore, according to this argument, a man can sell retail locally grown potatoes at any price, even though it exceeds the controlled prices specified in this order. It is submitted that there being no proof that what the accused sold Mrs. Drury were not locally grown potatoes, there is a reasonable doubt, and that the accused must therefore be acquitted.

I am unable to accede to this argument. The fallacy lies in assuming that Columns 2, 3, 4 and 5 are interdependent, and that what is controlled in Columns 3 to 5 must necessarily mean imported commodities. There is no warrant for such an assumption. I hold that each Column is independent and that while Column 2 refers to imported things, the other columns refer to goods whether imported or locally grown. In my opinion, the point of law fails.

The accused was sentenced to three months' rigorous imprisonment. The reasons given by the Magistrate for imposing such a sentence are that the accused not only charged an exorbitant price for an article of food but has also taken up a defiant attitude and that his conduct calls for severe punishment. Mr. Perera has asked me to consider the question of sentence, especially as it is the small dealer who is detected and punished, whereas the important profiteers in the black market appear to escape with impunity. I have carefully considered the matter, but I do not feel disposed to interfere. Persons like the accused, whether they trade in a big way or otherwise, are a pest to society. Offences like this one are difficult to detect, and when some person is public spirited enough to come forward and expose a case of profiteering, it is the duty of the Courts in the name of society to see that the punishment fits the crime. I think the sentence is richly deserved.

Appeal dismissed.

Proctors: *S. Sellathurai* for the accused appellant.

Present: DIAS, J.

SUMANAPALA vs. JAYETILEKE, S. I. POLICE

S. C. No. 1184—*M. C. Colombo No.* 18874.
Argued and Decided on: 18th October, 1946.

Criminal procedure—Undefended accused—Failure to comply with section 296 (1) *of the Criminal Procedure Code.*

Held: That the failure to comply with the requirements of section 296 (1) of the Criminal Procedure Code is a fatal irregularity.

Appellant in person.
A. C. M. Ameer, Crown Counsel, for the Attorney-General.

Dias, J.

The accused is undefended. He was also undefended at the trial. It was therefore essential that when the case for the prosecution concluded and when the Magistrate called upon the accused for his defence, he should have carefully complied with the requirements of section 296 (1) of the Criminal Procedure Code. This has not been done.

The accused in his petition of appeal has complained that the learned Magistrate failed to record his evidence on the day of the trial. This may well be the case if the Magistrate has not informed the appellant of his right to give evidence or to make an unsworn statement from the dock.

There are two chains of authority under this section, one of which takes the view that the failure to comply with section 296 (1) of the Criminal Procedure Code, is a fatal irregularity rendering the conviction liable to be quashed. The other chain of authority suggests that even where the record does not show that the provisions of section 296 (1) were complied with yet if it is clear that the accused was aware of the points he has to meet such irregularity would not be fatal to the conviction.

Mr. Ameer submits that the Court will follow the latter chain, but there is nothing in the proceedings to show that the accused was aware of his rights, or of the points made against him. I am not prepared to apply the presumption that judicial acts were regularly performed in this case, nor am I prepared to send the case back to the Magistrate to enquire whether, in fact, he complied with the provisions of this section. I am in the presence of a fatal irregularity which, I do not think, can be cured. I therefore quash the conviction and direct that the accused be retried before another Magistrate.

The accused will be remanded and I trust that the trial will take place at a very early date. The accused may stand out, if he prefers it, on bail with two sureties in a sum of Rs. 500.

Conviction quashed.

Present : Dias, J.

MARAMBE, EXCISE INSPECTOR, vs. JOAN

S. C. No. 1064—*M. C. Kurunegala No.* 30470.
Argued on : 22nd October, 1946.
Delivered on : 23rd October, 1946.

Poisons, Opium and Dangerous Drugs Ordinance—Cap. 172, *sections* 26, 76 (1) (*a*) *and* 76 (5) (*a*)—*Cultivation of the hemp plant without a licence from the Governor—Meaning of "cultivation"—Onus of proof of licence.*

Held : (i.) That the act of placing a shade or screen over newly planted ganja plants amounted to the cultivation of such plants.

(ii.) That ganja plants came within the definition of "hemp plants" and that the offence of the accused did not require proof of *mens rea*.

(iii.) That once the prosecution established that the accused had cultivated the hemp or ganja plants, the onus shifts on to the accused to show that he did so with a licence from the Governor.

Cases referred to :—

Inspector of Excise vs. Lebbe (1929) 31 N. L. R. 211.
Wilson vs. Kotalawala (1946) 47 N. L. R. 45.
Perumal vs. Arumogam (1939) 40 N. L. R. 532.
Mudaliyar, Pitigal Korale, vs. Kiribanda (1909) 12 N. L. R. 304 (Div. Ct.).
Chelliah vs. Cooper (1937) 39. N. L. R. 172.
Wijesinghe vs. Dhanapala (1938) 39 N. L. R. 534.
Joseph vs. Sugatadasa (1938) 17 T. L. R. 3.
Perera vs. Kannangara (1939) 40 N. L. R. at p. 466.

A. C. M. Ameer, Crown Counsel, for complainant-appellant.
C. R. Gunaratne, for accused-respondent.

Dias, J.

The charge against the accused is that he on March 26, 1945, at Meegahaella, without a licence from the Governor, planted, cultivated or had in his possession 15 hemp plants in breach of the provisions of section 5 of the Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172) and punishable under section 76 (5) (*a*) of that Ordinance.

The testimony of Excise Inspectors Marambe and Sabaratnam is to the effect that on receipt of certain information they proceeded to the spot and saw the accused by the side of a stream planting branches to serve as a screen to give shade to 15 ganja plants. These appeared to have been newly planted. The soil was loose round them and the leaves were drooping. When the accused saw the Inspectors, he took to his heels and was arrested. The plants were then uprooted, parcelled, sealed and produced in Court. Both Inspectors say that they are ganja plants, and there has been no cross-examination to suggest that it is disputed that the plants are ganja plants.

When the case for the prosecution closed, the Magistrate without calling upon the defence, acquitted the accused holding that the evidence did not disclose that the accused planted, cultivated or possessed the ganja plants. In his opinion, the case, at its best, is only one of strong suspicion against him. The complainant appeals against that order with the sanction of the Attorney-General.

I agree with the Magistrate that there is no evidence that the accused planted or possessed these ganja plants. Is there evidence that he cultivated them? "Cultivation" is the improvement of a plant by the exercise of labour and care. In *Inspector of Excise vs. Lebbe* (1929) 31 N. L. R. 211 where the evidence was that a site had been cleared and prepared in a belt of jungle adjoining the garden of the accused, who was seen loosening the soil round the ganja plants growing at that spot and weeding the site, it was held that the accused had "cultivated" ganja plants.

I hold that the act of placing a shade or screen over newly planted ganja plants amounts to the cultivation of such plants. The evidence which the Magistrate has not disbelieved proves that these plants had been newly planted in a prepared site and that by giving cover or shade to them, the accused was engaged in cultivating them.

Ganja plants come within the definition of "hemp plants". *Wilson vs. Kotalawala* (1946) 47 N. L. R. 45. The offence with which the accused is charged is one which does not require the proof of *mens rea* by the prosecution—*Perumal vs. Arumogam* (1939) 40 N. L. R. 532.

It has been urged on behalf of the appellant that it is incumbent on the prosecution to establish that the accused acted without the licence of the Governor" in terms of section 26 which defines the offence. I am unable to agree. It is for the prosecution to establish that hemp or ganja plants had been cultivated, and that such cultivation was done by the accused. The onus then shifts to the accused to establish by a balance of evidence that what he did was with the licence of the Governor, this being an exception to criminal liability—see *Mudaliyar, Pitigal Korale vs. Kiribanda* (1909) 12 N. L. R. 304 (Div. Ct.); *Chelliah vs. Cooper* (1937) 39 N. L. R. 172; *Wijesinghe vs. Dhanapala* (1938) 39 N. L. R. 534; *Joseph vs. Sugatadasa* (1938) 16 T. L. R. 3 and *Perera vs. Kannangara* (1939) 40 N. L. R. at p. 466.

In my opinion the acquittal of the accused was premature. The accused should have been called upon for his defence. I set aside the acquittal and send the case back for trial in due course.

Case sent back.

Proctors: *Bede Perera*, for the accused-respondent.

Present: Dias, J.

BROWN & Co., Ltd. vs. ROBERTS

Application No. 303.
Application for a Writ of Certiorari against T. W. Roberts.

Argued on: 29th and 30th October, 1946.
Decided on: 7th November, 1946.

Certiorari—Defence (Miscellaneous) Regulation 43c—*The Essential Services (Avoidance of Strikes and Lock-outs Order*, 1942—*Settlement of trade dispute by Tribunal—Jurisdiction of Tribunal to award damages—Meaning of "trade dispute."*

The Controller of Labour, acting under section 6 (2) of the Essential Services (Avoidance of Strikes and Lock-outs Order, 1942), referred a dispute between a workman and an employer engaged in performing essential services to the Tribunal appointed under section 5. The Tribunal was appointed for the *settlement* of trade disputes in essential services. Section 8 of the Order enacted that the award of the Tribunal was to be final and was not to be called in question in any Court. The Tribunal, in settling the dispute, amongst other things, awarded a sum as damages to the workman. The employer moved for a writ of *certiorari* to quash the award on the ground that the Tribunal acted without jurisdiction or in excess of jurisdiction. It was submitted that the dispute, being one between the employer and a single workman, was not a " trade dispute " within the meaning of the Order of 1942, and that the Tribunal had no jurisdiction to award damages.

Held : (i.) That the definition of " trade dispute " in the Order of 1942 was wide enough to include a dispute between an employer and a single workman.

(ii.) That the dispute in question was a trade dispute in an essential service.

(iii.) That the duty of the Tribunal was to settle the dispute and that in awarding damages to that end the Tribunal was acting within its jurisdiction.

Cases referred to :—

Ibrahim vs. Edirisinghe (1931) 32 N. L. R. at p. 215.
Bulankulam vs. Omeru (1913) 1 B. N. C. at p. 42.
Bliss vs. Perera (1912) 1 C. A. C. p. 82.
Thamotherampillai vs. Govindasamy (1946) 47 N. L. R. at p. 198.
Local Government Officers vs. Bolton Corporation (1942) 2 A. E. R. at p. 435.

H. V. Perera, K.C., with *E. F. N. Gratiaen* and *G. E. Chitty*, for the petitioner.

T. W. Roberts, respondent, absent.

S. Nadesan, for United Engineering Workers' Union on notice.

M. F. S. Pulle, Acting Solicitor-General, with *H. Deheragoda, Crown Counsel*, on notice, as *amicus curiae*.

Dias, J.

The petitioners, Messrs. Brown & Company, Limited, are an engineering firm engaged in performing " essential services ". They had an employee named Kittu, a labourer for 18 years. He was an unskilled workman who did cooly work. His duties were to clean the machinery in the electric department, sweep the place and to do odd jobs. On November 27, 1945, Mr. Grant of the petitioner's firm found Kittu " idling ". Grant, therefore, ordered him to " copper " some carbon brushes. Kittu told Grant that if he was to do semi-skilled work, he should be given higher pay. This the firm was unwilling to do, and the upshot of the matter was that Kittu was given one day's notice and sent away.

Some time previous to this incident, there had been correspondence between the United Engineering Workers' Union, to which some employees of the petitioner's firm, including Kittu, belonged. On October 25, 1945, that is to say, more than a month before the trouble about Kittu took place, the Union was in correspondence with the firm regarding the wages of two workmen in the petitioner's carbon brush department. Obviously, this could not refer to Kittu, see exhibits P1 and P2.

When the trouble about Kittu arose in November, Kittu complained to the Union which telephoned to the Managing Director of firm. On November 30, 1945, the Union received the letter P3 from the Managing Director stating that the firm had " made a full enquiry, and were satisfied on the evidence available that Kittu tendered his resignation which was accepted ". The Union was told that the question of Kittu's re-employment, therefore, did not arise. It is clear that the Union on behalf of Kittu and other employees in the petitioner's firm was endeavouring to persuade the petitioner to re-employ Kittu, whereas the petitioner was unwilling to do so. A dispute had therefore arisen. One obvious solution of the deadlock was for Kittu to file a civil action for wrongful dismissal. The Union, however, took a different course of action. The question is whether that action and the subsequent proceedings were lawful ?

On December 27, 1945, the Union presented to the Commissioner of Labour the petition X1. It states that " a large number of the employees of the respondent company who are engaged in an essential service are members of the Union ; that Kittu was unlawfully and wrongly dismissed without sufficient cause ; that this action was a " victimization " of an employee and that the " members of the petitioner's Union view with alarm and concern the said action of the respondent ". It was stated that a " trade dispute " had thereby arisen. The Union demanded that Kittu should be reinstated and his wages paid for the days he was unable to work. The Union requested the Controller to refer the dispute to the appointed Tribunal.

After some delay, the Controller of Labour acting under section 6 (2) of "The Essential Services (Avoidance of Strikes and Lock-outs) Order 1942" (hereafter referred to as "the Order of 1942")—referred the petition to the "Tribunal" appointed under section 5 of the Order of 1942, to "settle" this dispute. The Tribunal consisted of Mr. T. W. Roberts, the respondent to this application.

The inquiry before Mr. Roberts commenced on April 30, 1945. The Union, the petitioners, and the Controller of Labour were all represented by their respective lawyers. Mr. Rowan, who appeared for the petitioner, took the preliminary objection that the Tribunal had no jurisdiction to hold the inquiry or to grant the relief claimed.

These objections were (1) that Kittu was at that date no longer an employee of the firm and, therefore, no trade dispute could arise; (2) that the claim for his reinstatement was a matter for the Civil Courts; (3) that the Tribunal had no jurisdiction to order reinstatement; and (4) that there was no "trade dispute" between the petitioners on the one hand and their workmen on the other. Mr. Roberts brushed aside the last three objections and ruled that in order to decide whether the first point was sound, certain issues of fact had to be decided, and directed that the inquiry should proceed.

The Tribunal eventually decided (1) that Kittu had been dismissed without cause, (2) that he should not be reinstated, (3) that one day's notice was inadequate in the case of a servant who had served the petitioner for eighteen years, and (4) he awarded a sum of Rs. 250 as damages to Kittu for wrongful dismissal.

Under section 8 (1) of the Order of 1942 the findings of the Tribunal must be embodied in an award. Section 8 (2) provides that such award subject to the provisions of section 9 (which have no bearing or relevance to this case) shall be final and shall not be called in question in any Court of Law. It is common ground, however, that if this Court finds that the Tribunal acted without jurisdiction, or in excess of its jurisdiction, the award cannot stand.

The petitioner firm now moves for a writ of *Certiorari* to quash this decision and award on the ground that it is void and of no effect.

Certiorari is the process by which this Court examines, and, if necessary, corrects, unless expressly withheld by statute, the proceedings of any inferior Court or statutory authority vested with judicial or quasi-judicial functions, if the latter had usurped a jurisdiction which it does not possess. It is conceded by all parties that the Tribunal was acting judicially or quasi-judicially in holding this inquiry. The only question then is whether the Tribunal acted without jurisdiction or in excess of its jurisdiction.

Before proceeding to discuss the arguments advanced at the hearing, it would clarify matters if the history of the Order of 1942 is considered.

In the year 1931 the Industrial Dispute (Conciliation) Ordinance (Chap. 110) was enacted. The key-note of that statute was the "settlement" of industrial disputes by conciliation. No compulsion could be brought to bear by law on employers and workmen in a trade dispute. It is obvious that the provisions of this enactment would be of little or no value at a time of national emergency, like a state of war or its aftermath.

The Trade Union Ordinance (Chap. 110) became law in 1935. It gave legal recognition to registered trade unions. It was realised that employers and employed should work in combination to safeguard their mutual interests. The definition of the expression "Trade Union" in section 2 (*c*) of the Ordinance indicates that the Union was the representative of the parties in trade disputes. Once the Union was registered the law accorded to it certain rights and privileges —see section 20-22, but it was not a legal person (32 Hailsham 456). The acts of the Union are the acts of its members. It is not a corporation, but is a body more in the nature of a Club.

At the outbreak of the war in 1939 the Imperial Emergency Powers (Defence) Act (2 & 3 Geo. vi. c. 62) was passed. It empowered the Governor to make Defence Regulations *inter alia* for securing the public safety, the defence of the Realm, the maintenance of public order, and the efficient prosecution of the war "and for maintaining supplies and *services essential* to the life of the community". Acting under these powers the Governor issued Defence Regulation 43c. The principle underlying that Defence Regulation is "to prevent work being *interrupted by trade disputes in essential services*". This regulation empowered the Governor to establish a Tribunal for the "*settlement*" of trade disputes in essential services and *to make strikes in such services illegal.* Chapter 110 of our Ordinances was specially preserved by section 430 sub-section (3). It will be observed that section 12 of the Order of 1942 gives effect to this provision. Section 43c subsection (5) makes it a criminal offence to contravene any prohibition or other provision contained in any Order made under section 43 C (1).

The Order of 1942 is based on section 43c of the Defence Regulations. This object is to ensure that there should be peace and tranquility in

essential services during a national emergency. Section 3 of this order makes it a criminal offence to commence, continue, or participate in, or do any act in furtherance of any strike or lock-out in connection with any " trade dispute " in any *essential services*. For example, were it not for the existence of the prohibition in section 3 of the Order of 1942, it would not have been illegal for this Union to have called out a strike of the petitioner's workmen when the firm refused to reinstate Kittu. It is pointed out by the Solicitor-General and counsel who represents the Union that if the contention advanced by the petitioner is right, that there was in this case no " trade dispute " which was lawfully referred to the Tribunal the Union by calling a strike in an essential service could have brought the work in the petitioner's firm to a standstill. It is pointed out that the law having deprived the workers of their right to strike in an essential service, gave them in exchange a Tribunal whose duty it was, not to adjudicate according to strict legal rights, but " *to settle* " trade disputes, so that work in essential services would not be paralysed by strikes and lock-outs.

The Order of 1942 defines a " trade dispute " to mean " any dispute or difference between employers and workmen, or between workmen and workmen, in or in connection with, or incidental to, the performance of any essential services ". This definition follows that given in Defence Regulation 43c (4), but departs from the definition of " Trade Dispute " contained in Chapters 110 and 116, which are identical and read as follows : " A ' trade dispute ' shall mean any dispute or difference between employers and workmen, or between workmen and workmen connected with the employment or non-employment or the terms of the employment, or with the conditions of labour, of any person ".

The main question for decision here is whether the facts disclosed the existence of a " trade dispute " as defined by the Order of 1942 ? The petitioner's contention is that a " dispute " may have arisen, but that it was not a " trade dispute," and that the reference of such a dispute to the Tribunal was irregular, and that the Tribunal was acting without lawful jurisdiction in dealing with the matter. It is pointed out that the use of the word " means " in the definition indicates that it is a hard-and-fast definition, and that no other meaning can be assigned to the expression than is put down in the definition Stroud's Judicial Dictionary, p. 1181 ; *Ibrahim vs. Edirisinghe* (1931) 32 N. L. R. at p. 215 ; *Bulankulam vs. Omeru* (1913) 1 B. N. C. at p. 42 ; *Bliss vs. Perera* (1912) 1 C. A. C., p. 82. This contention is sound and cannot be controverted.

It is urged on behalf of the petitioner that a " trade dispute " under the Order of 1942 cannot arise between the employer *and a single workman*, and that no such dispute can arise in connection with the *non-employment* of a single workman. In other words, the contention is that the definition indicates by the use of the word " workmen " that for a dispute to become a " trade dispute " there should be a dispute or a difference between the employer on the one hand and his *workmen* on the other. Otherwise, it is contended there can be no " trade dispute " within the meaning of the Order of 1942.

It is to be observed that the plural is used in no less than three places in the definition of the expression " trade dispute ", namely, " employers ", " workmen " and " essential services ". Unless there is something repugnant in the subject or context, section 2 (*x*) of the Interpretation Ordinance (Cap. 2) provides that " words in the singular number shall include the plural, and *vice versa* see *Thamotherampillai vs. Govindasamy* (1946) 47 N. L. R. at p. 198.

I am unable to accept the interpretation sought to be placed on this definition by the petitioner. Assume there can be no " trade dispute " between an employer and a single workman, it must then also follow that no " trade dispute " can arise between a single employer like Messrs. Brown & Company and a group of their workmen. I can find nothing repugnant in the subject or context for interpreting the word " workmen " to include " workman ". It was pointed out that if the petitioner's contention is right, no " trade dispute " in an essential service could arise between a group of workmen and a single employer.

There is nothing to be gained by considering cases decided under the English Law which is different from the local Defence Regulations and the Order of 1942—see "The Conditions of Employment and National Arbitration Order, 1940 " made by the Minister of Labour and National Service under Regulation 58AA of the Defence (General) Regulations 1939. Therefore such observations as " it would be strangely out of date to be told, as was argued, that a trade union cannot act on behalf of its members in a trade dispute, or that a difference between a trade union acting for its members and their employer cannot be a trade dispute " per Lord Wright in the *National Association of Local Government Officers vs. Bolton Corporation* (1942) 2 A. E. R. at p. 435, cannot be applied to local conditions except with

great care and caution, because our law regarding trade unions has not developed as far as it has done in Britain. The English Law on the point had its origin in the Trade Disputes' Act of 1906 (6 Ed. vii. c. 41), whereas our Law on this point only began in the year 1931 and is still in an early stage of its evolution.

I hold that there was evidence before the Controller of Labour on the petition X1 on which he could be satisfied in terms of section 6 (2) that a "trade dispute" had arisen between the petitioner and Kittu as well as a group of workmen of the petitioner's firm who were members of this Union, and who were dissatisfied with the manner in which Kittu had been treated. Although the petition X1 does not specifically state this, it is clear that that is what is meant. Under section 2 (2) of the Order of 1942 "where any act is authorised or required to be done by any workman, that act may be done by any such workmen as the representative of all the workmen, *or by any officer of any registered trade union of such workmen*". It is argued that while the Union may lawfully represent a body of workmen, it cannot espouse the cause of a single workman, and that, therefore, the matter was irregularly placed before the authorities. I am unable to accept this contention. It is clear from the terms of X1 that the Union was acting for a body of men and not on behalf of one man. I cannot accede to the argument that because Kittu had been dismissed at the date X1 was submitted, therefore, there was no dispute between the employer and a workman. I agree with the petitioner that the reinstatement or "non-employment" of a workman is not referred to in the definition of "trade dispute" in the Order of 1942, but the definition if anything, is wider than the corresponding definition in Chapter 110 or 116, for it refers to "disputes or differences in, or in connexion with, or incidental to the performance of any essential services". I think this case is caught up in those words. The fact that Kittu personally makes no claim does not appear to affect the question at all.

It is urged that the Tribunal had no jurisdiction to award damages. What the tribunal was doing, was not the adjudication of a claim according to strict legal rights. It was "settling" a trade dispute in an essential service. The word "settlement" has not been defined in the Order of 1242 or in the Defence Regulations. It clearly means "the adjustment of differences" or the compromising of a trade dispute. As we know, when parties to an action "settle" a case, they do not always proceed according to strict legal rights. Once the Controller is satisfied under section 6 (2) that a trade dispute in an essential service existed and transmits the dispute to the Tribunal for "settlement", I do not think Mr. T. W. Roberts had any option but to proceed. If he acted illegally in making his award, he is not indemnified. Assuming he acted unreasonably (*e.g.* by awarding Kittu a lakh of rupees) or illegally (*e.g.* by ordering that one of the parties should be imprisoned), that would not affect his *jurisdiction* to deal with the matter and to effect a "settlement". Naturally, officers who are appointed to function as a tribunal are chosen persons, and it is expected that they will act judicially and reasonably. I can see nothing unreasonable in the manner in which Mr. Roberts "settled" the dispute. Whether the sum of money ordered to be paid to Kittu is called damages, or compensation, or a solatium, it was a "settlement", the effect of which was to avoid the dislocation of work in an essential service. In the circumstances, it is impossible to say that such order was either illegal, unreasonable, or made without jurisdiction or in excess of jurisdiction.

The petitioners' application, therefore, fails and must be dismissed with costs.

I desire to record my indebtedness to the learned Acting Solicitor-General, Mr. M. F. S. Pulle, for the assistance he rendered this Court as *amicus curiae*.

Application dismissed.

Proctors: *Julius & Creasy* for the Petitioners.
Kanagasundaram & Namasivayam for the United Engineering Workers' Union.

Present : CANEKERATNE, J.

PUNCHIRALA vs. DHAMMANANDA THERO

S. C. No. 162—*C. R. Matale, No.* 7,379
Argued on : 18th November, 1946.
Decided on : 29th November, 1946.

Buddhist Law—Controlling Viharadhipathi—Sisyanu Sisya Paramparawa—Bhikku who is not the rightful incumbent but in charge of Vihare—Can he maintain action for declaration of title to land appurtenant to such Vihare—Buddhist Temporalities Ordinance, Sections, 3 and 4.

The plaintiff, claiming to be the Viharadhipathi of the Mailapitiya Vihare instituted this action in 1941 for a declaration of title to a paddy field alleging it to be an appurtenant of the Vihare. The defendant *inter alia* denied the plaintiff's right to maintain the action on the ground that he was not the rightful incumbent of the temple in question.

Admittedly Ratnajothi was the last lawful incumbent. It was also in evidence, (*a*) that about the year 1940, Ratnajothi brought the plaintiff to the temple in question, and after placing him in charge of the Vihare with the consent of the dayakas, disrobed himself: (*b*) that thereafter the plaintiff collected the rents and produce of other lands appurtenant to the Vihare.

The plaintiff was not in Ratnajothi's line of pupillary succession nor was there evidence of any other right in the plaintiff to succeed to the incumbency.

Held: That the plaintiff could not maintain the action as he could not lawfully claim to be the head of the Vihare.

Cases referred to : Re. Budgett 1894, 2 Chancery 557.
Wickremesinghe et al vs. Unnanse et al, (22 N. L. R. at 237).
Dhammajoti vs. Sobita, (1913, 16 N. L. R. 408). *Indasatti vs. Ratnajotti*, (1915, 4 Bal. N. C. 39.
Dhammaratana Unnanse vs. Sumangala Unnanse et al, (1910, 14 N. L. R. 400).
Dhammaratana Unnanse vs. Sumangala Unnanse et al, (1910, 20 N. L. R. 507).
Gunananda Unnanse vs. Dewarakkita Unnanse, (1924, 26 N. L. R. 262).
Dhamma Joti vs. Saranande, (1881, 5 S. C. C. 8).
Rathanapala vs. Kewitiagala, (1879, 2 S. C. C. 26 at page 28).
Anunayake Thero vs. Dhammadassi Thero, (S. C. M. Nov. 1946—S. C. No. 294 D. C. Kandy 610.)
Dhammajoti vs. Sobita, (1913, 16 N. L. R. 408).

G. P. J. Kurukulasuriya with *S. R. Wijetileke*, for defendant-appellant.
E. B. Wickremanayake with *Vernon Wijetunga*, for plaintiff-respondent.

CANEKERATNE, J.

This appeal arises out of a claim by the plaintiff for declaration of title to a field called Polgahagoda. The plaintiff asserted that he was the Viharadhipathi of Mailapitiya Vihare and that the field belonged to the temple. These the defendant denied : he further pleaded that he had acquired a title by prescription to the field.

On the substantial question whether the land belongs to Mailapitiya Vihare, the Judge has given very cogent reasons for holding in favour of the temple, and it would hardly have been possible to contest successfully his findings on the question of title and possession. Counsel for the appellant attacks, and Counsel for the respondent defends, the right of the plaintiff to institute the action which was upheld by the trial Judge.

Saranankara Thero was the incumbent about forty years ago of Mailapitiya Vihare, which belongs to Asgiriya College. On his death about 1903 his pupil Chandrajothi became the incumbent and in 1933 he leased the field, which forms part of the lands belonging to the temple, to the defendant for a period of seven years. On the death of Chandrajothi in 1935, Ratnajothi Thero is alleged to have become the incumbent and somewhere in the year 1940 he brought the plaintiff to the temple and after placing him in charge of the Vihare he disrobed himself. Plaintiff is a pupil of Sumangala Thero of Murutolawa Vihare and belongs to the Malwatte fraternity.

This temple appears to have been exempted from the provisions of sub-section (1) of section 4 of Chapter 222 of the Legislative Enactments (Buddhist Temporalities Ordinance. The management of the property belonging to this temple is vested in the Viharadhipathi of Mailpitiya Vihare (sub-section 2). The Viharadhipathi is the principal Bhikku of a temple, whether resident or not (section 3). The Ordinance is one to amend and consolidate the law. It is legitimate in the interpretation of the sections to refer to the previous state of the law for the purpose of ascertaining the intention of the Legislature (*re* Budgett 1894, 2 Chancery 557). The presiding priest of a Vihare or incumbent has the control and administration of the Vihare

itself. Formerly (*i.e.*, up to 15th November, 1889) the possession of the land and other property appertaining to the Vihare was also in him; after the enactment of the Buddhist Temporalities Ordinance (3 of 1889) the property of the Vihare was vested generally in the trustee elected in the manner stated in the Ordinance. A bikkhu may be the presiding officer of a Vihare, or a resident priest, or a non-resident priest (*agantuge*); the presiding priest is known as *Viharadhipathi*; sometimes he is called the incumbent (the incumbency is called the *adhipathi kama*), in some cases the *Adhikari Bikshu*; (see 26 N. L. R. 257 and 20 N. L. R. 385). The Viharadhipathi has charge of the Vihare and premises and the rights and ceremonies within it; a resident priest has no such charge; he lives in the pansala in the Vihara premises and assists in the services; he generally is subordinate to the Viharadhipathi; the *agantuge* generally is not permanently resident in a particular Vihare, he goes to some Vihare and is there for some time; sometimes he may assist in the services. (Cf. the evidence at page 237, 22 N. L. R.; *Wickremesinghe et al vs. Unnanse et al*).

Succession to the incumbency is regulated by the terms of the original dedication. If no provision was made at the time of the original dedication for regulating the mode of succession, succession must be presumed to be in accordance with the rule of *Sissiyanu sissiya paramparawa* or pupillary succession, which is the general rule of succession. An incumbent cannot grant the right of succession to a stranger. (*Dhammajoti vs. Sobita*, 1913, 16 N. L. R. 408); (*Indasatti vs. Ratnasotti*, 1915, 4 Bal. N. C. 39).

The incumbency became vacant when Ratnajoti disrobed himself; the right of succession would have passed to his pupil if any, or to his co-pupils, or to those who were in the line of pupillary descent from the original grantee or incumbent. If the chain of pupillary succession is broken the rights of representation to the incumbency vest in the chapter of the college to which the temple belongs *Dhammaratana Unnanse vs. Sumangala Unnanse et al* (1910, 14 N. L. R. 400); *Dhammaratana Unnanse vs. Sumangala Unnanse et al* (1910, 20 N. L. R. 507); *Gunananda Unnanse vs. Dewarakkita Unnanse* (1924, 26 N. L. R. 262).

The dhayakayas of the Vihare were not the persons who dedicated it and could have had no right to appoint the plaintiff as the successor to the last incumbent. *Dhammajoti vs. Saranande* (1881, 5 S. C. C. 8); Cf. *Rathanapala vs. Kewitiagala* (1879, 2 S. C. C. 26, at p. 28). The plaintiff would not have been entitled to claim the incumbency of this temple before the enactment of the present Ordinance. Is he entitled to prefer a claim now? The language of the section (section 3) shows that residence is not the determining factor. He must however be the Viharadhipathi. A Viharadhipathi need not have his residence at the Vihare itself. It sometimes happens that the Viharadhipathi of a particular temple does not live there; he lives at another temple and another priest lives at the temple and looks after its affairs, usually with the consent of the incumbent or because he has some right to be there—examples: the Viharadhipathi of Dambulla Vihare, *Anunayake Thero vs. Dhammadassi Thero* (S. C. M. Nov. 1946; S. C. No. 294, D. C. Kandy, 610)*; and the tutor of the plaintiff in the case of *Dhammajothi vs. Sobita*. As a High Priest said in his evidence in the last case—"it is quite possible for a man to be pupil to two priests and succeed both."

A Viharadhipathi is one who can lawfully claim to be the head of the Vihare, one, generally, who can show that he is the pupil of the last incumbent or that he is in the line of pupillary succession. "*Mayurapada parivenadhipathi va b. visin*—by the V. B. who was the head of the May....." Dictionary of Sinhalese language, 1940, Vol. I., part 5, page 203. Had the plaintiff put forward a claim to recognition as Viharadhipathi according to the rules in force and had the trial Judge come to the conclusion that the claim had been established, it may have been difficult to disturb that finding. But no such contention was put forward by the plaintiff. It is clear that the plaintiff has no right to maintain this section and the appeal must consequently be allowed with costs of appeal. The costs of the hearing were increased by the defendant's denial of the rights of the temple to this field and his assertion of a title by prescription; the defendant failed to establish these to the satisfaction of the trial Judge; he will not be entitled to the costs of the trial in the lower Court.

Appeal allowed.

Proctors: *A. L. Samarasekere*, for the defendant-appellant.

S. J. B. Dharmakirti, for the plaintiff-respondent.

* See 33 C. L. W. 60.

Present : DIAS, J.

WILBERT PERERA vs. JOHORAN (S. I. POLICE)

S. C. No. 1,203 *of* 1946—*M. C. Panadure, No.* 34,759A.
Argued on : 8th November, 1946.
Decided on : 12th November, 1946.

Autrefois acquit—*Charge and conviction under repealed regulation—Conviction quashed, proceedings held to be a nullity—Subsequent charge and conviction for same offence under proper regulation—Plea of* autrefois acquit *under sections* 330 *and* 331 *of the Criminal Procedure Code—Its availability.*

Where a conviction under a repealed regulation is quashed on appeal, because the proceedings were held to be a nullity, and subsequently the accused was charged and convicted under the proper regulation, and on the plea of *autrefois* acquit being raised on behalf of the accused.

Held : That the plea of *autrefois acquit* was not available because at the earlier trial the accused was never in peril and had merely been discharged.

Cases referred to : *R. vs. Barron* (1914, 10 Crim. App. R. at page 87).
Rosemalecocq vs. Kaluwa (1936, 38 N. L. R. at page 373).
Senaratnv vs. Lenohamy (1917, 20 N. L. R. 44).
R. vs. William (1942, 44 N. L. R. 73 C. C. A.)
R. vs. McMinn (1945, 30 Crim. App. R. 138).

N. Nadarajah, K.C., with *V. Arulambalam*, for appellant.
A. C. M. Ameer, C.C., for Crown.

DIAS, J.

In M. C. Panadura, No. 34,759 this appellant was charged with precisely the same offence with which he was charged and convicted in the present case.

In the earlier case the accused appealed against his conviction and the judgment of the Supreme Court is reported in 46 N. L. R. 333.* Canekeratne, J. held that the accused had been charged under a regulation which had been repealed and that the effect of that repeal was to obliterate the regulation as completely as if it had never been brought into force. He said : " The accused, Perera, has not been properly charged and *the proceedings are a nullity.* I quash the conviction and leave it to the authorities, if so advised, to take any action against the accused."

Thereupon, in the present case, the appellant was again charged under the proper regulation published in *Government Gazette* No. 9,274, dated May 26, 1944. The charge is that the appellant on December 6, 1944, at Wadduwa did sell *half a pound* of dried sprats (" Haal-messas ") at fifty cents whereas the controlled price of *a pound* of this comestible was only forty-nine cents.

Both at the trial as well as in this appeal, the appellant raised the plea of *autrefois acquit* under sections 330 and 331 of the Criminal Procedure Code.

Counsel for the appellant takes his stand on the judgment of Reading, L.C.J. in *R. vs. Barron* (1914) 10 Crim. App. R. at p. 87. " The principle on which this plea depends has often been stated. It is this that the law does not permit a man to be twice in peril of being convicted of the same offence. If, therefore, he has been acquitted, *i.e.* found to be not guilty of the offence by a Court competent to try him, such acquittal is a bar to a second indictment for the same offence. This rule applies not only to the offences actually charged, but to any offence of which he could have been properly convicted on the trial of the first indictment." If I may say so with respect, that ruling is also the law of Ceylon. The language of section 330 of the Criminal Procedure Code and the illustrations appended to it indicate that our law is precisely the same as indicated by Lord Reading. I cannot, however, agree with the extended application which Counsel for the appellant endeavours to give to the language of the Lord Chief Justice of England. His submission is that because the Magistrate in the earlier case might by amending the charge have convicted the appellant, and because the Judge in appeal might have done the same thing, therefore, the doctrine of *autrefois acquit* applies as a bar to the subsequent charge. I am unable to agree with that contention.

In the earlier trial the accused was never in peril of conviction because, as was judicially declared by Canekeratne, J., it was a nullity. Therefore, the accused did not stand in jeopardy of conviction in that case. In 947 *M. C. Colombo, No.* 23,921 (S. C. Min. October 15, 1919) the accused was charged under the wrong section of an Ordinance and was acquitted. The Supreme Court held that the earlier acquittal did not bar a subsequent charge under the correct section. The principle is that he was never in peril at the

* 30 C. L. W. 69. (Edd)

first trial. In *Rosemalecocq vs. Kaluwa* (1936) 38 N. L. R. at p. 373, Abrahams, C.J. said : " In my opinion any illegal trial is no trial at all, and, therefore, an acquittal either by the trial Court or an Appellate Court would be ineffective." The learned Chief Justice in that case set aside the conviction and ordered the appellant to be discharged. An accused who is discharged and not acquitted cannot raise the plea of *autrefois acquit* when he is recharged. See *Senaratne vs. Lenohamy* (1917 20 N. L. R. 44 Div. Ct.), and *R. vs. William* (1942 44 N. L. R. 73 C. C. A.). In my opinion the order of Canekeratne, J. in the earlier case amounted to a discharge and was not an acquittal. Therefore the subsequent charge is not barred.

The case of *R. vs. McMinn* (1945 30 Crim. App. R. 138), cited by the appellant is distinguishable from the facts of the present case. There the accused was charged with larceny at the Petty Sessions. He consented to be tried summarily (c.f. section 166 of the Criminal Procedure Code) and was convicted. The accused then asked " that an outstanding offence for obtaining a cheque by false pretences in respect of which he had signed the usual ' other offences ' form should be taken into consideration." The Justices agreed and passed a sentence of six months' imprisonment. The accused appealed to the Quarter Sessions against the conviction for larceny and the appeal was allowed and the conviction was quashed. The accused was then committed to the Assizes for the offence of false pretences. On a plea of *autrefois convict* having been raised, the trial Judge upheld it. This decision rested on the direction of the trial Judge that the earlier proceeding *amounted to a conviction* of the accused for the offence of false pretences. That is not the case here. This appellant has not been convicted or acquitted in the earlier proceedings. He was merely discharged, and in such circumstances, a subsequent prosecution is not barred. I hold that the plea fails.

I see no reason to differ from the finding of fact as found by the Magistrate. The question of sentence has been pressed. I am unable to hold that the sentence is excessive. The appeal is dismissed.

Appeal dismissed.

Proctors : *Tirimanne & Meegama*, for accused-appellant.

Present : DIAS, J.

WEKUNAGODA vs. DE ALWIS

S. C. No. 960 *of* 1946—*M. C. Galle, No.* 648.
Argued on : 23rd October, 1946.
Decided on : 25th October, 1946.

Defence (Food Control) Regulations, Part III. Regulation 11 (6)—*Meaning of " forthwith."*

Held : That the word " forthwith " in Regulation 11 (6) in Part III. of the Food Control Regulations is used to mean " in a reasonable time," that is to say, when the act is one which can be done without any delay at all, and there are no special circumstances occasioning delay, documents must be made available for inspection at once.

Cases referred to : *Soysa vs. Anglo-Ceylon & General Estates Co.*, 1916, 19 N. L. R. 374).
De Silva vs. Seenathumma, (1940, 41 N. L. R. 241
Fernando vs. Nikulan Appu, (1920, 22 N. L. R. 1).
Gunasekera vs. Arsecularatne, (1924, 26 N. L. R. at page 68).

N. E. Weerasooriya, K.C., with *H. Wanigatunge* and *B. G. S. David*, for accused-appellant.
A. C. M. Ameer, C.C., for complainant-respondent.

DIAS, J.

There is no dispute on the facts of this case. The only question is whether the facts prove the offence charged.

Regulation II. (6) in Part III. of the Food Control Regulations provides—

> "Every authorised distributor, wholesale dealer or importer shall keep such books or registers and make such entries there in as the Food Controller may require, and shall *forthwith* produce such books or registers for inspectian on demand made by the Food Controller or by any person authorised by him for the purpose."

Five accused were charged with committing a breach of this rule which is punishable under section 6 of the Food Control Ordinance (C 132). The 2nd to the 5th accused have been acquitted. The 1st accused was convicted and fined a sum of Rs. 100. He appeals against that conviction and sentence.

What happened was this. On Saturday, February 9, 1946, Price Control Inspector Weerakoon armed with the letter P5 signed by the Assistant Government Agent, Galle, who is also the Deputy Food Controller, went to the wholesale establish-

ment of Messrs. Wekunagoda & Co. of which the appellant is the manager, and asked that the " Flour Register " should be handed to him for removal for inspection. This was at noon. The Inspector was told that as the 1st accused was absent at the time, the request could not be complied with until he returned. The 1st accused returned at about 1 p.m. which would be about the time the shop would cease work for the day. After the letter P5 had been explained to him, the 1st accused pointed out that this was a Saturday and that the time was 1 p.m. and that great inconvenience would be caused if the register was removed, particularly as the " Flour Return " had to be made on the Monday without which the firm could not obtain its supply of flour.

It was pointed out that on Monday morning the register would in the normal course be sent to the Kachcheri when the Inspector could obtain it from the Kachcheri. It was also pointed out that a temporary register could not be kept as that would only show the flour issued from 1 p.m. onwards, whereas the return would have to show a full account of all the flour issued.

Without conceding the reasonableness of this request, or initialling the register so that it could not be tampered with between Saturday and Monday, or without asking for a copy or inspecting the register at once, the Inspector obtained the statement P6 from the 1st accused and reported the matter to the authorities, who instituted this prosecution.

It was argued that Regulation II. (6) only authorised the inspection of registers in the shop or place of business and that it was illegal to demand its removal from the shop. This contention has been rightly dropped.

The Regulation requires that the distributor, dealer or importer should " forthwith " produce the register for inspection. In the circumstances of this case, can it be said that the 1st accused failed " forthwith " to produce the register ?

This word has been interpreted in a series of cases. In *Soysa vs. Anglo-Ceylon & General Estates Co.* (1916) 19 N. L. R. 374, it was construed to mean not " within a period reasonable in the circumstances ", but " without any delay that can possibly be avoided ". In *Fernando vs. Nikulan Appu* (1920) 22 N. L. R. 1 on the other hand, it was held to mean " in a reasonable time ". What is " reasonable " must depend on the circumstances of each case. The word " reasonable ' is to be interpreted, not as meaning reasonable' from the point of view of its effect upon the person to whom or in relation to whom the act is done, but reasonable from the point of view of the person who is called upon to do it. The person who is to do the act must do it as soon as he reasonably can. When the act is one which in its nature can be done without any delay at all, and there are no special circumstances occasioning delay, the act must be done at once. In such a case, all that is necessary to inquire is whether the act was done without any delay that could possibly be avoided. In *Gunasekera vs. Arsecularatne* (1924) 26 N. L. R. at p. 68, a search warrant directed the officer to whom it was directed to enter " forthwith " and search a certain house.

The search, however, was not carried out until nearly a month later. Ennis, J. said : " Then again *Soysa vs. Anglo-Ceylon & General Estates Co.* (1916) 19 N. L. R. 374 was cited to show that the word " forthwith " should be construed as meaning " without any delay that can possibly be avoided " and it was urged that in this case that there was a delay which could not be said to be unavoidable.....I have considered this question closely and I have come to the conclusion that the warrant was still valid and that the Magistrate by specifying the time within which the warrant should be returned, had considered what the warrant meant in directing an act to be carried out " forthwith ".

In *de Silva vs. Seenathumma* (1940) 41 N. L. R. 241 (Five Judges) in construing the word " forthwith " in section 756 of the Civil Procedure Code which requires that an appellant shall " forthwith " give notice to the respondent, it was held that the notice of security must be tendered or filed on the day on which the petition of appeal is received by the Court, and the case of *Fernando vs. Nikulan Appu* (1920) 22 N. L. R. 1 was cited with approval.

I am of opinion that the word " forthwith " as used in Regulation II. (6) is used in the sense in which it was interpreted to mean in *Fernando vs. Nikulan Appu* (1920) 22 N. L. R. 1, that is to say when the act is one which can be done without any delay at all, and there are no special circumstances occasioning delay, documents must be made available for inspection at once. This is a question of fact. As I have said before, there is no dispute on the facts which show that there were circumstances which occasioned delay. The accused, therefore, performed the act as soon as he reasonably could be expected to comply with the order. Therefore the provisions of Regulation II. (6) have been complied with.

I therefore quash the conviction and acquit the accused.

Conviction quashed.

Proctors : *Magdon Ismail*, for accused-appellant.

Present : DIAS, J.

SOLOMON APPU vs. R. C. PERERA INSPECTOR OF POLICE

S. C. No. 1,133 *of* 1946—*M. M. C. Colombo, No.* 80,639.
Argued on : 4th November, 1946.
Decided on : 8th November, 1946.

Brothels Ordinance (*Chap.* 25), section 2 (*a*)—*Charge of assisting in the management of a brothel—What constitutes "assisting"—Is evidence of previous acts of accused tending to show his interest in the brothel admissible—Evidence Ordinance, section* 14.

Held : (i.) That the word "assisting," in section 2 (*a*) of the Brothels Ordinance connotes that the person assisting does so willingly, voluntarily or with the intention of aiding the brothel keeper.

(ii.) That in a charge under section 2 (*a*) of the Brothels Ordinance, evidence that the accused on a previous occasion accosted a person and took him to the brothel in question and that he was seen on the pavement in front of the brothel on an earlier date is admissible under section 14 of the Evidence Ordinance to show intention or knowledge on the part of the accused.

(iii.) That such evidence would also be admissible to rebut a possible defence as the prosecution cannot lead evidence in rebuttal in a summary trial before a Magistrate.

Cases referred to : *Derby vs. Bloomfield* (91 L. T. 99, 20 Times Rep. 549).
R. vs Seneviratne(1925, 27 N. L. R. 100)—*R. vs. Mendis* (1941, 42 N. L. R. at page 250).
R. vs. Wickremasinghe (1934, 36 N. L. R. 135). *Dias vs. Wijetunge* (1946, 47 N. L. R. at page 225).
Herat vs. Ran Menika (1916, 2 C. W. R. 69).
R. vs. Peiris (1931, 32 N. L. R. 318.)
Wickremasuriya vs. Serahamy (1922, 4 Cey. L. Rec. 83).
Welipenna Police vs. Pinessa (1943, 45 N. L. R. 115).*

S. C. E. Rodrigo, for first and third accused-appellants.
J. G. T. Weeraratne, C.C., for the Crown.

DIAS, J.

There is ample evidence to support the conviction of the first accused of the offence of managing a brothel on June 15, 1946, in contravention of section 2 (a) of the Brothels Ordinance (Chap. 25). When the raid took place she ran out of the house and was arrested. In her possession was found a large quantity of money, including the marked currency note as well as English currency notes. She is the wife or the mistress of the second accused who has absconded. No doubt he was the chief manager of this house of ill-fame ; but on the night in question he was absent, and the first accused in his absence was managing the place. The defence does not contest that this was a brothel. The evidence against her is overwhelming and the defence raised by her has been rightly held to be false. I cannot say that the sentence imposed on her is excessive. The conviction and sentence of the first accused are, therefore, affirmed.

The third accused is the cousin of the first accused. It appears that the Police acted on two independent sources of information. S. H. M. Mohideen, the manager of the Free Arabic School in Panchikawatte Road, observed that men of the armed forces, European and non-European, were being taken into house No. 109 opposite the mosque and school. He rightly surmised that the place was being used for immoral purposes, and he, therefore, communicated with the Police. Anthonipillai, a soldier, was found to be suffering from venereal disease. On information given by him, the Military Police communicated with the Civil Police. A raid was then arranged and on the night in question Mr. R. C. Perera, Chief Inspector of Police, Flight Sergeant Brown, Gunner Barrett, Corporal Bowman of the Military Police and other constables went to the spot. Brown was given a marked ten-rupee note. He and Barrett were instructed to go to the house, while the rest of the raiding party watched.

Barret says he saw the third accused take two other Europeans into the house. After that the third accused came to them and enquired whether they wanted girls and took Brown inside requesting Barrett to wait near the door while he took Brown in. Chief Inspector Perera saw the third accused in the room in which Brown and a prostitute in a state of nudity were. Corporal Bowman also saw the third accused in the house. Constable Badoordeen saw the third accused speaking to Barret and Brown and taking Brown in while Barret stood at the door. The defence of the third accused was that on the night in question he had merely gone to No. 109, Panchikawatte Road to borrow Rs. 5 from the first accused.

* 26 C. L. W. 72 (Edd).

Then the Police came and took him to the Police Station. The Magistrate convicted the third accused under count 3 of the charge of assisting in the management of the brothel on the night in question.

Counsel argues that the conviction of the third accused cannot stand because the Magistrate allowed the prosecution to lead inadmissible evidence against him. The evidence objected to is to the following effect :—

(*a*) Anthonipillai stated that on June 1, 1946, *i.e.*, fourteen days previous to the commission of the offence charged, the third accused accosted him on the road and took him to this brothel where he contracted venereal disease. When the authorities questioned him, he took them to the place and pointed out the house.

(*b*) Constable Sirisena said that he watched this house on March 1 and March 12, 1946. This evidence was necessary to establish that the house was a brothel ; but he also stated : " On both days..... I saw third accused on the pavement in front of the house..... I saw third accused speaking to second accused."

It is submitted that this evidence is inadmissible in that it is evidence prejudicial to the character of the third accused. It is further argued that the third accused having been charged with a specific offence committed on a certain day, the fact that he may have committed similar offences on two days in March and on one day in June is inadmissible to prove that he committed the offence with which he is charged. Clearly, that evidence would be inadmissible unless it is admissible under some provision of the Evidence Ordinance. The evidence of Anthonipillai is admissible as part of the narrative as he had come to point out the house. It would not be evidence against the third accused unless it is admissible for that purpose under some other section of the Evidence Ordinance.

The third accused was charged with assisting in the management of this brothel. What is " assisting ? " The word is not defined in the Ordinance. The ordinary meaning of the word is " to help," " to take part," or " to aid." A person who having bought the bank at an " unlawful game " acts as banker when the game is played is " assisting in the conduct of a gaming house," *Derby vs. Bloomfield* (91 L. T. 99, 20 Times Rep. 549). " To assist in the management of a brothel " involves a state of mind in the person assisting. " To assist in an undertaking " or " to assist a person with money," or " to assist at a wedding "—all these acts involves a consenting mind on the part of the person assisting. It involves the mental element that the person giving the aid brings a willing mind to bear on the matter. One may, of course, " assist " indirectly without a willing mind, as where a householder by leaving his house for the night " assists " the burglars who break into the premises ; but the context in which that word is used in section 2 (a) of the Brothels Ordinance connotes that the person assisting does so willingly, voluntarily or with the intention of aiding the brothel keeper, *e.g.*, by acting as a pimp.

If that is so, then under section 14 of the Evidence Ordinance, the evidence which is objected to would be admissible. Section 14 provides that " facts showing the existence of *any* state of mind,—such as intention, knowledge, good faith, negligence, rashness, ill-will or goodwill towards any particular person—are relevant, when the existence of any such state of mind..... is in issue or relevant." *Explanation I.* to section 14 states : that " a fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question." That is to say the prosecution cannot show that the 3rd accused was generally earning his living by acting as a pimp, but can show that he was assisting this particular brothel by assisting its management by pimping for it. Such evidence, would in my opinion, be both relevant and admissible. This is made clear by the *illustration* (*p*) appended to section 14. It reads : " A is tried for a crime. The fact that he said something indicating an intention to commit that particular crime, *i.e.*, relevant. The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant."

The construction of section 14 of the Evidence Ordinance came before a Divisional Bench in *R. vs. Seneviratne* (1925, 27 N. L. R. 100—See *R. vs. Mendris* 1941, 42 N. L. R. at p. 250). It was held that it is not open to the prosecution to lead evidence to show that the person charged has committed other similar offences for the purpose of showing that he is a kind of person who would commit the crime with which he is charged, or of creating a bad impression against him as regards his character or conduct. The evidence of other acts must be relevant to the charge before the Court, for example to show his guilty mind or dishonest intention in the offence with which he is charged, when the existence of such state of mind is relevant or in issue. The fact that the admission of such evidence shows

that the accused has committed other crimes does not then make it inadmissible. An example of the working of this rule is furnished by *R. vs. Wickremasinghe* (1934, 36 N. L. R. 135. Cf. *Dias vs. Wijetunge*, 1946, 47 N. L. R. at p. 225). where in a charge of committing an unnatural offence, it was held that evidence of similar acts was tendered not to show a guilty passion between the accused and any of the boys or to rebut the suggestion of innocent association, but merely to show that the accused was likely to have committed the offence with which he was charged—such evidence is inadmissible. Similarly, in *Herat vs. Ran Menika* (1916, 2 C. W. R. 69). where the charge was of keeping a brothel, evidence that the accused had been leading immoral lives at a house other than that which formed the subject of the charge was held to be inadmissible.

This evidence would also be admissible to rebut a defence which would otherwise be open to the third accused, and which he did in fact raise, namely, that he innocently blundered into this transaction—*R. vs. Peiris* (1931, 32 N. L. R. 318. *Wickremasuirya vs. Serahamy* (1922, 4 Cey. L. Rec. 83). In a summary trial before a Magistrate the prosecution cannot lead rebutting evidence—*Welipenna Police vs. Pinessa* (1943, 45 N. L. R. 115.* Therefore the only opportunity which the prosecution had of leading this evidence was while the case for the prosecution was proceeding; but, of course, great care and caution must be exercised when such evidence is sought to be led. In cases of doubt, in a Magistrate's Court, it is best to reject such evidence altogether. In the other Courts the evidence can he led in rebuttal unless it is clearly admissible as part of the case for the Crown. In this case no harm has been done, because the defence raised by the third accused makes this evidence also admissible in order to rebut that defence.

The evidence which was objected to was therefore admissible both as proving the state of mind of the third accused under section 14 of the Evidence Ordinance as well as to rebut the defence set up by him at the trial.

I affirm his conviction and sentence and dismiss both appeals.

Appeal dismissed.

* 26 C. L. W. 72.

Present: KEUNEMAN, S.P.J. AND CANEKERATNE, J.

SRI DHAMMASIDDI THERO vs. DHAMMADASSI THERO.

S. C. No. 294—*D. C.* (*F*) *Kandy*, 610.

Argued on: 30th & 31st October, 1946.

Decided on: 18th November, 1946.

Buddhist Law—"Thewawa priest" or assistant to Viharadhipathi of Dambulle Vihare—Appointment of such thewawa priest by Viharadhipathi—Keys of Vihare and its effects entrusted to him—Refusal to redeliver to Viharadhipathi—Can such thewawa priest claim right to officiate under Sisyanu Sisya Paramparawa or by prescription—Should such dispute be referred to Sangha—Is it purely a religious matter—Jurisdiction of civil courts.

Plaintiff, as Viharadhipathi of Dambulle Vihare, which consists of five shrine rooms, appointed defendant on 15th August, 1928, as thewawa priest or "thewakarane unnanse" (an assistant to the plaintiff), to one of the shrine rooms, viz., Deva Raja Vihare. The evidence shows that every successor to this office must be a sacerdotal descendant of one or the other of two original bhikkus and the defendant was one such descendant.

When the defendant was appointed in 1928 he accepted the keys of the said Deva Raja Vihare and the effects belonging to it, *i.e.*, certain articles necessary for the performance of the ceremonies at the shrine. The defendant was re-appointed on 3rd July, 1938, for a short time according to plaintiff.

In March, 1943, plaintiff requested the defendant to hand over the keys and the articles of the said Vihare entrusted to him but was refused and this action was instituted.

The defendant contended (*a*) that the right to officiate at the shrine rooms is regulated by the Sisyanu Sisya paramparawa rule of succession and that such right had devolved on him: (*b*) that he had acquired the right to hold the office by prescription: (*c*) that as a pupillary descendant of one of the original priests he was entitled to be appointed to one of the five shrine rooms.

The District Judge held against the defendant who appealed.

Held: (i.) That the plaintiff was entitled to the right and privilege of appointing bhikkus to officiate at the five shrine rooms which comprise Dambulla Vihare.

(ii.) That as regards the articles belonging to the Vihare in question, the defendant was in the position of a bailee and he is bound to re-deliver them to the plaintiff.

(iii.) That the fact that the articles vested in the trustee of the Vihare is no justification for the defendant's refusal to re-deliver them to the plaintiff.

(iv.) That as rights of a temporal nature are involved in the action Courts of law could not refuse to adjudicate on such rights.

Cases referred to : 3 Maasdorp 127 (4th edition).
3 Burge 712 (see also Voet 13-6-1 : Van Leeuwen's Censura Forensis, 1-4-5-1).
Biddle vs. Bond (1859, 6 B. & S. 225).

N. E. Weerasooriya, K.C., with *S. R. Wijetileke*, for defendant-appellant.

E. A. P. Wijeratne with *Walter Jayawardene*, for plaintiff-respondent.

CANEKERATNE, J.

The appointment of the Vidharadhipathi of Dambulla Vihare has been, since the middle of the last century, in the hands of the chapter of Asgiriya Vihare. The present holder of the office is the plaintiff, the Anunayake Thero of Asgiri Vihare. Dambulu Vihare consists of five shrine rooms known as the Deva Raja Vihare, Maha Raja Vihare, Maha Alut Vihare, Paschima Vihare and Deveni Alut Vihare : Deva Raja Vihare appears to be the most important and in it are three devalas—a Vishnu, Natha and Kataragama devales. The practice has been for the Viharadahipati who resides in Kandy to appoint a Bhikkhu for each of these shrine rooms. His position seems to resemble that of an assistant to the Viharadhipati : he is called the *thewawa* Priest or *thewakarana Unnanse*.

The evidence shows that the bhikku appointed to officiate at a shrine room must be a sacerdotal descendant of Panawe Dipankara or of Madugalle Guneratne. This was not denied by Counsel for the respondent.

It appears that Panawe Dipankara had a pupil Nikawela Indrajoti, whose pupil was Nikawela Ananda. Nikawela Dhammadasi and Inamaluwe Sumangala were pupils of Nikawela Ananda. Muruthaoluwa Gunaratne was a pupil of the former, Inamaluwa (or Daniyagama) Ananda a pupil of the latter. The defendant is a pupil of M. Guneratne.

The plaintiff averred that he appointed the defendant on August 15, 1928, to perform the rites and ceremonies of the shrine room known as Deva Raja Vihare : the office is referred to hereafter as the office of *thewawa* priest. The defendant, according to the plaintiff, held the office of *thewawa* priest at this shrine room during the will and pleasure of the plaintiff. The defendant on the other hand contended that the right of officiating at the five shrine rooms is regulated by the *sisyanu sisya paramparawa* rule of succession. He claimed that the right of officiating at Deva Raja Vihare devolved on the sacerdotal line of N. Dhammadassi, *i.e.* on M. Guneratne, and then passed to the defendant. He also claimed that he had acquired a right to hold this office by prescription. There was another contention put forward by the defendant in the course of the trial that a pupillary descendant of M. Guneratne was entitled to be appointed the officiating priest at one of the five shrines at least. The learned Judge accepted the contentions advanced by the plaintiff : it is impossible to state that his conclusion is wrong.

The evidence shows that N. Dhammadassi was appointed the *thewawa* priest of Deva Raja Vihare about October 25, 1892, by U. (or Udugama) Buddharakkhita, the then Viharadhipati. He was re-appointed to the post by Sri Sumana, the successor of U. Buddharakkhita, about May 12, 1898, and he continued in the said office till about June 13, 1901, when Inamaluwe Sumangale became the *thewawa* priest.

N. Dhammadassi appears to have become a layman and was appointed the trustee of Dambulla Vihare by the Committee in 1903. About the 21st May, 1905, Muruthaoluwa Gunaratne (the tutor of the defendant), who had been the *thewawa* priest of Deweni Alut Vihare since May 14, 1903, succeeded I. Sumangala in the office of *thewawa* priest of Deva Raja Vihare ; he was succeeded by Embulambe Suwarnajoti about June 15, 1913, and Inamaluwe Sumangala succeeded the latter about June 11, 1917. On the death of I. Sumangala shortly afterwards, Embulambe Suwarnajothi was appointed in his place by the then Viharadhipathi (Sri Sumana). The plaintiff, who succeeded Sri Sumana, went to Dambulla Vihare and its shrines ; Embulambe Suwarnajothi was re-appointed the *thewawa* priest on this day and the plaintiff handed over the shrine room to him. Suwarnajothi continued to officiate till about August 15, 1928, when the defendant was appointed in his place by the the Plaintiff. The defendant came over from Maha Alut Vihare to Deva Raja Vihare ; he has succeeded his tutor Muruthaoluwa Guneratne in the office of *thewawa* priest of Maha Alut Vihare on the death of the latter in 1921. The defendant was re-appointed by the plaintiff on July 3, 1938.

The defendant accepted the keys of Deva Raja Vihare and " the effects belonging to it ", *i.e.*, the articles enumerated in a list, in August, 1928 ; on July 3, 1938, he handed over these articles to the plaintiff and on the same day he received them back from him. The plaintiff says that in 1938 he appointed the defendant to be the *thewawa* priest for a short period only—that is borne out by P42. The plaintiff on March, 1943 requested the defendant to hand over the keys of Deva Raja Vihare and the articles to him. The defendany refused to give them up and this action was instituted. The defendant does not defend the action on behalf of any third person but on his own account.

The trial Judge gave judgment in favour of the plaintiff in terms of paragraph 1 of the prayer (*i.e.* the right and privilege of appointing a bikkhu; he directed the defendant to deliver the articles to the plaintiff (paragraph 3 of the prayer). These are the two main points of contest and that can be conveniently dealt with in the reverse order.

There was a delivery of articles by the plaintiff to the defendant for a particular purpose on a contract express or implied that the articles shall be re-delivered as soon as the time for which they were given shall have elapsed. This is a contract of bailment of the kind known as commodatum. It does not matter if the thing lent is the property of a third party seeing that the ownership does not pass in the case of commodatum but only the natural detention and the use. 3 Maasdorp 127 (4th edition.) It is sufficient if the lender has a special (or qualified) property in the thing lent or the lawful possession of it. 3 Burge 712 (see also Voet. 13-6-1 ; Van Leeuwen's Censura Forensis, 1-4.5-1). The right of the bailee may be determinable at any instant at the will of the bailor, or otherwise in accordance with the terms of the bailment. There has been a determination of the bailment in this case and the right to take the articles has reverted to the plaintiff. The law also creates an estoppel against a bailee (section 117 of Evidence Ordinance). One who received property from another as his bailee must restore or account for that property to him from whom he received it. A bailee may set up a *jus tertii* if the facts show that there has been what is equivalent to an eviction by title paramount ; if the bailee retains possession of the goods and there has been no eviction, the bailee may nevertheless set up and rely upon the *jus tertii* if he defends this possession upon the right title and authority of the tertius. *Biddle vs. Bond* 1859, 6 B & S 225. It is not enough that the bailee has become aware of the title of a third person. The contention of the defendant that the ownership of the articles is vested in the trustee of the Vihare affords no justification for the defendant's refusal to redeliver them ; the present trustee is Daniyagama Ananda, who gave evidence for the plaintiff.

In the exercise of his right the plaintiff appointed the defendant the officiating priest in the shrine room ; this is a religious office which is attached to a place. The office is now wrongfully usurped by the defendant. The right to the possession of the articles enumerated in the plaint is in the plaintiff ; these are articles necessary for the performance of the ceremonies at the shrine room ; they must be kept at Deva Raja Vihare and the plaintiff must make provision for the preservation of these articles at the Vihare. As he lives in Kandy it would be necessary to entrust the article to some person living in the locality, perferable to a person in whom he has confidence. The most natural course in these circumstances would be to appoint a new *thewawa* priest and to give the articles to him. Rights of a temporal nature are involved in the action and a Court cannot refuse to adjudicate on such rights.

The appeal is dismissed with costs.

Appeal dismissed.

KEUNEMAN, S.P.J.
I agree.

Proctors : *Liesching & Lee*, for the appellant.
J. Ilangantilake, for the respondent.

Present : WIJEYEWARDENE, J.

THE FOOD & PRICE CONTROL INSPECTOR (PUTTALAM) vs. PUNCHI BANDA ABEYARATNE.

S. C. No. 811/1946 ; *M. C. Puttalam, No.* 33,566—(*Defence Regulations*).
Argued on : September 17, 1946.
Decided on : September 18, 1946.

Defence Regulations—Control of Prices—Bread—Price of a loaf or a part of a loaf of any weight—Is it controlled—Framing of charge—Criminal Procedure Code, section 187.

Held : (i.) That where an accused person is produced before a Magistrate charged with offences punishable with more than three months' rigorous imprisonment or a fine of fifty rupees, it is irregular to charge him from the plaint without framing a charge as required by section 187 (1) of the Criminal Procedure Code.

(ii.) That the maximum prices at which a loaf or a part of a loaf of bread of any weight could be sold are controlled.*

H. H. Basnayake, K.C., Acting Attorney-General with *A. C. M. Ameer, C. C.*, for the Crown.

No appearance for the accused-respondent.

WIJEYEWARDENE, J.

The accused was charged—

(1) with having sold at a place in the Revenue District of Puttalam 17 ounces of bread for 30 cents, a price in excess of the maximum retail price for that quantity of bread as fixed by an Order made by the Controller of Prices (Food) and published in the *Government Gazette* No. 9,276 of June 2, 1944, and

(2) with having failed to exhibit a notice setting out the maximum prices fixed by that Order.

The Police produced the accused before the Magistrate who, thereupon, charged the accused from the plaint filed by the Food and Price Control Inspector. Presumably, the Magistrate acted under the proviso to section 187 (3) of the Criminal Procedure Code. That provision, however, would not be applicable as the offences with which the accused was charged were punishable with more than three months' rigorous imprisonment or a fine of fifty rupees.

Without recording any evidence the Magistrate acquitted the accused, upholding the contention of the accused's Proctor that the Order did not control the price of a quantity of bread weighing 17 ounces.

The relevant provisions of the Order referred to in the charge are as follows :—

Clause II.—" The prices specified in columns 2 and 3 of the Schedule hereto (are) the maximum prices above which bread shall not be sold in 16 oz. loaves and 8 oz. loaves respectively within the area specified in the corresponding entry in column 1 of the Schedule hereto."

Clause III.—" Any loaf weighing more than 8 oz. or any part more than 8 oz. in weight of any loaf, shall not be sold in any area at a price higher than the price calculated proportionally by weight from the maximum price per 16 oz. loaf fixed by this Order for that area."

Clause IV.—" Any loaf weighing not more than 8 oz. or any part not more than 8 oz. in weight of any loaf, shall not be sold in any area at a price higher than the price calculated proportionally by weight from the maximum price per 8 oz. loaf fixed by this Order for that area."

The Schedule fixed for the Revenue District of Puttalam, 24 cents as " the maximum price per 16 oz. loaf," and 12½ cents as " the maximum price per 8 oz. loaf."

These provisions show that the present Order control the maximum prices at which a loaf or a part of a loaf of bread of any weight could be sold and that columns 2 and 3 of the Schedule have to be considered in finding the maximum price of a particular quantity of bread. The maximum retail price of such a quantity of bread cannot, of course, be ascertained in the absence of any evidence as to the individual weights of the various loaves or parts of loaves which together make that quantity. This is further made clear by the fact that column vii. of the Order requires the receipt given to a purchaser to set out not only the " quantity of the bread sold " but also " a description of the loaves sold."

I set aside the order of acquittal and send the case back for trial on a properly framed charge.

Set aside and sent back.

(See *Government Gazette* No. 9,276 of 2nd June, 1944). Edd.

Present : NAGALINGAM, A.J.

ARNELIS SINGHO vs. MARYNONA & ANOTHER.

S. C. No. 197—*C. R. Panadura, No.* 10,373.

Argued on : 26th November, 1946.

Derided on : 29th November, 1946.

Co-owner—Rubber plantation by—Can he possess plantation irrespective of the share of the soil entitled to.

Held : That a co-owner is entitled to possess the plantations made by him irrespective of the share of the soil he is entitled to till common ownership is put an end to by a partition decree.

Case referred to : *Podisingho vs. Alwis* (1920, 28 N. L. R. 201).

M. D. H. Jayawardene, for plaintiff-appellant.

H. W. Jayawardene, for defendants-respondents.

NAGALINGAM, A.J.

The plaintiff who is admittedly a co-owner with the first defendant and certain others of the land described in the plaint instituted this action for a declaration that he is entitled to the possession of certain rubber trees planted by him on a portion of the common land and for damages for wrongful possession of the plantation by the defendants. The defendants deny that the plantation was made by the plaintiff and further plead that the land with the plantation which, according to them, has been made by another co-owner, Nomis, had been allotted by amicable partition to the first defendant who had acquired a prescriptive title to the land including the plantation.

After trial the learned Commissioner held in favour of the plaintiff that he had made the plantation himself and also found that since November, 1941, the defendants had dispossessed the plaintiff of his rubber plantation. The learned Commissioner, however, held that as the land was undivided, the plaintiff though he may have made the entire plantation could not claim to possess more than a third, as that fraction represented the proportionate share of the soil to which he was entitled.

The extent of the right of a co-owner to the fruits of improvements made by him was the subject of conflicting decisions but they were all reviewed in the case of *Podisingho vs. Alwis* (1920, 28 N. L. R. 201) where a bench consisting of Lyall-Grant, J. and Maartensz, A.J. held that an improving co-owner is entitled to the fruits of the improvements effected by him. That case has recently been followed by Keuneman and Cannon, JJ. in an unreported case (S. C. No. 253, D. C. (F) Kalutara, 23,445, Supreme Court Minutes of 20th November, 1944).* No case appears to have been cited to the learned Commissioner and in view of the two cases referred to above it must follow that the view of the learned Commissioner that the plaintiff is entitled to a 1/3rd share of the plantation made by him cannot be supported. It is needless to add that the plaintiff will only be entitled to possess the plantation till such time as common ownership is put an end to by the institution of a properly constituted partition action in which the rights to compensation for the plantation would be adjudicated, in the event of the plantation made by him not being allotted to him. The learned Commissioner has accepted the quantum of damages as set out by the plaintiff, namely, the sum of Rs. 5 per mensem.

I would, therefore, set aside the judgment of the learned Commissioner and direct that decree be entered in favour of the plaintiff declaring him entitled to the possession of the rubber plantation standing on the land described in the plaint and to damages at Rs. 5 a month from November, 1941, till plaintiff is restored to possession of the plantation. The plaintiff will also be entitled to costs both of appeal and of the proceedings had in the lower Court.

Set aside.

Proctors : *Tirimanne & Meegama*, for appellant.
E. F. B. Suriyabandara, for respondent.

* 33 C. L. W. 65.

Present : KEUNEMAN & CANNON, JJ.

PEERIS SINGHO & ANOTHER vs. NOMIS

S. C. No. 253—*D. C. (F) Kalutara No.* 23445
Argued and decided on : 20th November, 1944.

Co-owner—Rights to improvements effected on common property.

Held ; That a co-owner who plants and improves a portion of the common land is entitled to take all the fruits of the improvements effected by him.

Cases referred to :—*Podi Singho vs. Alwis* (28 N. L. R., p 401).

E. B. Wickremenayake, for the defendants-appellants.

No appearance for the plaintiff-respondent.

KEUNEMAN, J.

In this case the District Judge rightly held that the plaintiff was entitled to an undivided half of the land less half an acre. As regards the rubber plantation to be found on both lots A and B, he appears to have held that the plantation on lot A was made by the defendants but he had not held whether the plantation on lot B was made by the defendants or not. He refused to record any finding because he thought that " one co-owner who plants a portion of the common land cannot keep the others out from the produce of such trees ". The point that he makes is that any co-owner is entitled to participate in the produce of an improvement made by another co-owner. The case of *Podi Singho vs. Alwis* (28 N. L. R., p. 401) was not cited to the District Judge. In that case Lyall-Grant, J. quotes a dictum of de Sampayo, J. on a case reported in 21 New Law Reports at page 415 and adds : " If this is correct, it follows that in the absence of evidence to the contrary, an improving co-owner is treated as a *bona fide* possessor and is entitled to mesne profits, unless it can be shown that he is not *bona fide*, *e.g.* by showing that against the expressed wishes of his fellow owners he had planted an area greater than that to which his share would entitle him ". And Maartensz, J. made the following comment :—" The appellants' contention is that although he did not make the rubber plantation he is entitled to a share of the income as the owner of a 1/3 share of the soil. The contention is a startling one, as there can be little doubt that according to the custom of the country a co-owner takes all the fruits of any improvement effected by him. He cannot at a partition of the land claim to be entitled to the improvements made by him but if they do not fall " within the share allotted to him he can claim by way of compensation the cost of the improvement or the improved value whichever is less ".

I do not think that the dictum of the District Judge in this case can be supported. However, as the finding on the facts has not been fully recorded by the District Judge, I think the best thing in this case would be to set aside the judgment of the District Judge except that part of it which declares the plaintiff entitled to an undivided half less half an acre and send the case back for trial of the other issues before the District Judge, who may if he pleases record his finding upon those issues and the result of those findings after having heard evidence or not. The discretion to allow further evidence will remain with the District Judge.

The appellant is entitled to the costs of this appeal. All costs in the Court below will be in the discretion of the District Judge.

CANNON, J.

I agree.

Sent back

Proctors : *D. R. de Silva*, for the appellant.

Present : DIAS, J. & NAGALINGAM, A.J.

THE KING VS. SABAPATHY POOPALASINGHAM VAVUNIYAN

D. C. Criminal No. 113 *of* 1946—*D. C. Vavuniya, No.* 109/19,411.
Argued : 20th November, 1946.
Decided on : 26th November, 1946.

Evidence—Conspiring to smuggle paddy on forged permit—Charge of fraudulently or dishonestly using as genuine a forged permit—Only evidence is that one of the conspirators pointed out accused as the person who gave the permit—Denial by such conspirator at trial that he pointed out—Is such evidence admissible—Evidence Ordinance, section 10.

The appellant was charged (as first accused) with having fraudulently or dishonestly used as genuine a document forged for the purpose of cheating, namely, the document P 2 which purported to be a permit purporting to have been issued by the Deputy Food Controller of Vavuniya in favour of the second accused authorising him to transport paddy.

It was established by evidence (*a*) that the document was a forged one, (*b*) that the appellant knew that it was a forged document. As regard the fact that the appellant used P 2 either fraudulently or dishonestly as genuine the only evidence was that of witnesses who stated that soon after the police brought to the Deputy Food Controller's Office a man called Ponnambalam found to be transporting paddy on permit P 2, Ponnambalam, when questioned as to who gave him permit P 2, pointed out the appellant, who was a clerk in the Office.

At the trial this evidence was objected to on the ground that this evidence was not admissible until after Ponnambalam was called. When subsequently Ponnambalam was called he denied having pointed out the appellant on that occasion.

The learned District Judge accepted the evidence of the witnesses that Ponnambalam pointed out the appellant and convicted the accused who appealed.

Held ; (i.) That the evidence objected to was admissible under section 10 of the Evidence Ordinance as there was sufficient evidence to establish a conspiracy between the appellant, the second accused and Ponnambalam.

G. E. Chitty with *F. W. Obeyesekere*, for first accused-appellant.
J. A. P. Cherubim, Crown Counsel, for the Crown.

DIAS, J.

The appellant and one Muttu Seevaratnam were charged on an indictment containing four counts as follows :—

1. The appellant alone was charged under sections 457 and 459 of the Penal Code with having between January 12, 1944 and April 26 1944, fraudulently or dishonestly used as genuine a document forged for the purpose of cheating, namely, the document P 1 which is an application to the Assistant Government Agent, Vavuniya, for the removal of paddy purporting to have been signed by one A. Sabapathy.

2. The second accused Muttu Seevaratnam was charged with the abetment of the above offence.

3. The appellant was charged under sections 457 and 459 of the Penal Code with having on or about April 24, 1944, fraudulently or dishonestly used as genuine a document forged for the purpose of cheating, namely, the document P 2 which purported to be a permit No. 078152 dated April 24, 1944, purporting to have been issued by the Deputy Food Controller, Mr. V. Kumaraswamy in favour of the second accused authorizing him to transport thirty-six bushels of paddy.

4. The second accused was charged with the abetment of the above offence.

The District Judge acquitted the appellant on Count 1 and the second accused on Counts 2 and 4. The appellant was convicted on Count 3 and sentenced to undergo a term of six months' rigorous imprisonment. From that conviction the appellant appeals.

The charge against the appellant on the third count is based entirely on circumstantial evidence. The question I have to decide is whether the relevant and admissible facts which have been established at the trial are only consistent with the guilt of the appellant and are inconsistent with any reasonable hypothesis of his innocence, having regard to the ingredients of the offence which the Crown had to establish beyond all reasonable doubt ?

In order to prevent the smuggling of rice from the Vavuniya District a Food Control Department was attached to the Vavuniya Kachcheri. Mr. V. Kumaraswamy whose signature on the permit P 2 is alleged to have been forged was the Assistant Food Controller. The evidence establishes the following facts :—The second accused, Muttu Seevaratnam and the witness Muttu Ponnambalam are brothers. The application P 1 was signed in blank by the second accused. It is dated February 16, 1944, at Kerudavil in the Jaffna District. It bears an endorsement addressed to the Assistant Government Agent (Emergency) Jaffna from the "D. R. O." giving certain details. It is quite clear on the evidence that the application P 1 was not received at the Vavuniya Kachcheri either by post from Jaffna or delivered by hand in the ordinary course of business. Had this been done, P 1 would have borne the date stamp of the Kachcheri showing the date it was received by post or handed in. Furthermore the receipt of the document would have been noted in the inward register of documents P 8 or P 9 which at the relevant dates were kept by the appellant. Had P 1 been dealt with in the Kachcheri in the normal way, it would have been submitted to Mr. Kumaraswamy who would by an endorsement have referred it to the D. R. O. of the place from where the paddy was to be obtained in the Vavuniya District. P 1 bears no such endorsement. The D. R. O. would return P 1 with his report. There is no such report in this case. The papers would then be re-submitted to Mr. Kumaraswamy who would

check the papers with the assessment forms, and when he was satisfied that everything was in order, he would authorize the issue of the permit for transportation. None of these things happened in this case. It was the duty of the appellant to draft the permit which would be then submitted to Mr. Kumaraswamy through the Chief Clerk, Panchacharam, or in his absence through Mr. Thambipillai, who acts for the Chief Clerk, whose duty it would be to give the papers a final check, signified by their initials on the foil and counterfoil of the permit book. This was not done in the case of the permit P 2. In fact the book from which P 2 was taken is not forthcoming. Mr. Kumaraswamy swears that the signature on the permit P 2 was not written by him. I see no reason for doubting his evidence on the point. His clerks, Panchacharam and Thambipillai, say that it is a good imitation of Mr. Kumaraswamy's signature. Cage I. of the application P 1 is in the handwriting of the appellant. Everything written on the reverse side of P 1, except the signature of the owner, is also in the handwriting of the appellant. The official witnesses who are familiar with the handwriting of the appellant have no doubt about the matter at all. The appellant has not given evidence nor denied that the writing is his. The permit P 2 is also in the handwriting of the appellant. There is no evidence from the appellant disputing that evidence.

On April 26, 1944, one Tharmalingam went to the Vavuniya Police Station and gave information regarding an attempt illegally to transport paddy from Vavuniya—see Exhibit P 4. The gist of his information was that an unknown man whom he could identify was attempting to transport fifteen bags of paddy from Vavuniya to Kudiruppu in Jaffna. He also stated : " This was transported in one Muthari's cart from one Poopalasingam's house, who is a clerk in the Food Control Office." I agree with Counsel for the appellant that there is nothing stated in P 4 to the effect that the appellant was seen accompanying the cart. I also agree that Tharmalingam and the appellant are admittedly not on good terms. But the fact remains that the witness did mention the name of Poopalasingham who was described as being a clerk in the Food Control Office. The name of the accused as given in the indictment is Sabapathy Poopalasingham Vavuniyan.

The police acting on this information proceeded to the Vavuniya Railway Station and found the witness Muttu Ponnambalam handing over to the railway checker sixteen bags of paddy. When he was asked to produce his permit, Ponnambalam produced the document P 2. The police then took Ponnambalam with P 2 to the Kachcheri. At the Kachcheri when he was requested to point out the person who gave him P 2, Ponnambalam is alleged to have pointed out the appellant. This evidence has been objected to as being inadmissible particularly as Ponnambalam did not admit doing so. I shall deal with this question presently. Mr. Kumaraswamy at once denied that the signature on P 2 was his. The document being in the handwriting of the appellant he was requested to produce the connected papers. He did not do so at once, but after a delay of about two hours, he produced the application P 1 and P 3 the assessment form from his drawer.

At the trial the witness Ponnambalam did not support the prosecution. The late stage at which he was called indicates that the prosecution did not expect him to support the case for the prosecution. According to him, his brother, the second accused, signed P 1 in his presence. He then took P 1 to the D. R. O. of Point Pedro and after that officer had made his endorsement P 1 was handed back to the second accused. The witness says he came to Vavuniya at the request of the second accused but he denies that he brought the application P 1 with him. He says that he removed sixteen bags of paddy from Thandikulam to the Railway Station. According to him it was the Chief Clerk, Panchacharam who gave him the permit P 2. He denies that he pointed out the appellant as being the person who gave him P 2.

In order to establish the guilt of the appellant under Count 3 the prosecution had to establish (*a*) that the document P 2 was a forged document, (*b*) that the appellant knew that it was a forged document, and (*c*) that knowing it to be a forged document, he either fraudulently or dishonestly used P 2 as genuine.

The trial Judge has held that P 2 is a forged document and that the signature of Mr. Kumaraswamy appearing on it was not written by that officer. I think the evidence on that point is overwhelming. If Mr. Kumaraswamy signed the document, there would be his endorsement on the application on P 1 and his signature on the foil of P 2. The witness himself swears that P 2 was not signed by him, and there is no reason whatever why his evidence should not be accepted. I hold that the prosecution has proved beyond all reasonable doubt that P 2 is a forged document.

Did the appellant know P 2 was a forged document ? I think the evidence on this point is equally overwhelming. Taking all the

established facts in combination they are only consistent with the view that the appellant knew P 2 was forged, and are inconsistent with any reasonable hypothesis to the contrary. It was his duty to write out the permits. P 2 is in his hand writing. The foil of P 2 would conclusively show that P 2 was signed by Mr. Kumaraswamy but the book is not forthcoming. The application P 1 was found in the appellant's possession. The fact that the normal office routine was not followed in this case must have clearly indicated to the appellant when he filled up the body of P 2 that there was something wrong with the transaction. How did the application P 1 reach the appellant? The evidence indicates that P 1 did not come by post nor was it handed in the normal way. Judged in the light of the other facts, the inference is irresistible that P 1 was directly handed to the appellant. How did P 2 leave the Kachcheri and reach the hands of Ponnambalam? How came Tharmalingam, an outsider, to implicate the appellant in the statement P 4? It is to be observed that the appellant who could have answered all these questions, chose to remain silent at the trial.

The defence argues that there is no evidence whatever to establish that the appellant used as genuine the document P 2. It is pointed out that even if the first two ingredients of the offence have been established, the Crown case fails on this point because there is no evidence whatever to show that the appellant on April 24, 1944, fraudulently or dishonestly used as genuine the document P 4. This is a question of vital importance and has received my careful and anxious consideration.

I agree with the Counsel for the appellant that there is no evidence except that which is objected to, to show that after filling in the body of the document, he dealt with it in any way. It is at this point that the admissibility of the evidence objected to becomes material. If that evidence is inadmissible, I think the contention of the appellant is sound and the accused must be acquitted.

The case for the Crown is put in this way: It is alleged that three persons, the second accused, Ponnambalam, and the appellant engaged themselves in a conspiracy to smuggle rice from Vavuniya to Jaffna. In pursuance of their common design it is alleged that the second accused signed the application P 1 and obtained the Point Pedro D. R. O.'s endorsement on it. P 1 was then handed to the appellant who wrote out the permit P 2 which bore the forged signature of Mr. Kumaraswamy. There is no proof that the appellant forged this signature. P 2 was then handed to the third conspirator who, under cover of P 2, conveyed sixteen bags of paddy to the Railway Station, when he was detected.

Section 10 of the Evidence Ordinance provides that: "Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence.....anything said, *done*, or written by any one of such persons in reference to their common intention after the time when such intention was first entertained by any of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

It is not easy to prove a conspiracy by direct evidence. In most cases it can only be inferred from circumstantial evidence—*Appuhamy vs. Appuhamy* (1920, 21 N. L. R. at page 438). Are there reasonable grounds for believing that the appellant and the other two men had conspired together to commit the offence of smuggling paddy from Vavuniya to Jaffna? "Belief" is something more than "suspicion." The circumstances must be such that a prudent man would feel reasonably convinced that a conspiracy exists—see *Kartigesu s. Alwis* (1929, 30 N. L. R. at page 508). Therefore, the foundation must first be laid by the prosecution to induce a reasonable ground for the belief that the parties concerned are conspirators—*Peris vs. Silva* (1913, 17 N. L. R. 139). For the sake of convenience, however, such evidence may be led before sufficient proof is given of the conspiracy on the prosecutor's undertaking to lead such evidence at a later stage.—*R. vs. Attanayaka* (1931, 34 N. L. R. at page 26). I think the evidence in this case when considered as a whole establish beyond a reasonable doubt that there was a conspiracy to smuggle paddy out of Vavuniya and that the parties concerned are the witness Ponnambalam, the second accused, and this appellant. In fact, without the co-operation of the appellant, the fraud could not be perpetrated. Once that is established anything said or *done* by Ponnambalam, one of the conspirators in reference to the common intention of all of them, is admissible evidence against the appellant not only for proving that he was a conspirator, but also to show that he was a party to it.

The charge against the appellant is that he did on April 24, 1944, use as genuine the forged permit P 2. One of the conspirators Ponnambalam when asked who gave him the permit P 2, pointed out the appellant as the man. Once the conspiracy was established, I am of opinion that

the evidence was admissible, even though the witness went back on his having done so when he gave evidence. The question is not whether Ponnambalam is to be believed, but whether the witnesses are to be believed who say that Ponnambalam pointed out the appellant to the police at the Kachcheri? On that point the District Judge has accepted the evidence of those witnesses who are corroborated by the action taken immediately thereafter, when the Assistant Food Controller called upon the appellant to produce the connected documents. The evidence therefore establishes that on that day the appellant did use as genuine the forged document P 2 by handing it over to Ponnambalam to enable that person to smuggle the rice out of the Vavuniya District.

I am, therefore, of opinion that the conviction is right and should be affirmed. The appeal is dismissed.

The cases cited by the appellant —*R. vs. Silva* (1925, 30 N. L. R. 193 at page 195; *R. vs. Harmanis* (1944, 45 N. L. R. at page 537; *R. vs. Don Samel* (1946, 47 N. L. R. at page 452) to show that hearsay in advance of calling the witness is not permissible have no application in the circumstances of this particular case.

I desire to deal with a matter which was stressed by Counsel for the appellant. He pointed out that the trial was concluded on July 9, 1946. The verdict of the Judge convicting the appellant was pronounced on July 10. Counsel stated that the petition of appeal was filed on that day and that the reasons for the conviction were only delivered on July 13. It was suggested by Counsel that this delay in giving reasons for the verdict was due to the Judge taking time to peruse the petition of appeal and adapting his judgment to meet the points made therein. That is a serious allegation to make against a judicial officer. A perusal of the record shows that it is unfounded. Immediately after pronouncing his verdict on July 10, the Judge recorded: "I have to start now by train to Chilaw on official duty, and I shall be coming back on the 13th instant on which date I shall give reasons. In the event of an appeal accused will give bail in Rs. 1,500. If no appeal is preferred direct the Superintendent of Prisons to produce accused on 13th July, 1946 before this Court." The journey from Vavuniya to Chilaw and back is a long and tedious one. The District Judge clearly stated that he would not be returning to Vavuniya until July 13. Obviously, he intended to write his judgment during the interval probably at Chilaw. There is no evidence at all that the District Judge would have seen or would be in a position to peruse a petition of appeal filed with the Secretary of the District Court of Vavuniya. With these facts before him, I consider it improper that Counsel should have made this insinuation against the learned Judge.

Nagalingam, A.J.

I agree.

Appeal dismissed

Present: Wijeyewardene & Canekeratne, JJ.

THE CHETTINAD CORPORATION LTD. vs. ERNEST PETER ARNOLD FERNANDO AND OTHERS

S. C. No. 112/1946—*D. C.* (*Inty.*) *Kegalle* 3473
Argued on: 10th December, 1946.
Decided on: 18th December, 1946.

Civil Procedure Code, section 669—*Underground encroachment by defendant by tunnelling into plaintiffs' land—Claim for damages—Application for commission to inspect and survey defendant's land—Has Court jurisdiction to make such order.*

Held; (i.) That where a *prima facie* case is made out that a person, who has the power to make use of his land to the injury of another, is actually doing so, the Court can, under section 669 of the Civil Procedure Code, notwithstanding the denial of such injury, issue a commission for survey and inspection of such person's land, if the Court thinks it necessary that it should have such evidence before it at the trial.

(ii.) That when issuing such a commission the Court should impose such conditions as it deems necessary to prevent injury to the person against whom it is issued.

Cases referred to :—*Dhoroney Dhur Ghose vs. Radha Gobind Kur* (1896) 24 Calcutta 117.
Cooper and Others vs. Ince Hall Company (1876) Weekly Notes 24.
Bennitt vs. Whitehouse (1860) 54 English Reports 311.

F. A. Hayley, K.C., with *N. E. Weerasuriya, K.C., E. F. N. Gratiaen, K.C., G. C. Thambiah* and *S. Nadesan*, for the defendant-appellant.

H. V. Perera, K.C., with *N. Nadarajah, K.C.*, and *H. W. Jayawardene*, for the plaintiffs-respondents.

WIJEYEWARDENE, J.

The plaintiffs and the defendant company claim to be the owners of two adjoining plumbago mines called Maha Bogala Mine and Karandawatte Mine respectively.

The plaintiffs filed their plaint on August 5, 1944, alleging that the defendant had encroached on the plaintiffs' property by tunnelling into it and had wrongfully removed plumbago from their mine. They alleged that it was necessary to have access to the tunnels in question through the defendant's mine for a proper inspection of the encroachment so as to enable them to submit to Court an accurate description of the course and extent of the wrongful tunnelling operations of the defendant and ascertain the quantity of plumbago wrongfully taken by the defendant. They said that before filing action they asked permission of the defendant for such an inspection and the defendant refused to grant such permission. They stated further that " the defendant was proceeding to fill up, flood and in other ways damage the said tunnels " and alter their existing condition and that they applied for and obtained from this Court under section 20 of the Courts Ordinance an injunction restraining the defendant from doing such acts for twenty-one days from July 21, 1944. They annexed to the plaint the sketch B drawn to scale showing the encroachment so far as they could ascertain from an inspection through their mine and estimated tentatively the damages sustained by them at Rs. 1,025,000. They prayed *inter alia* for an interim injunction and an injunction during the pendency of the action restraining the defendants from causing damage as stated in the plaint.

The plaintiffs filed with the plaint two affidavits —one from D. T. Seneviratne, the Managing Supervisor of the plaintiffs' mine, and the other from J. L. Fernando, the Secretary of a company working the Maha Bogala Mine under the plaintiffs. These affidavits substantiated the various material allegations in the plaint. Both these affidavits showed that D. T. Seneviratne " made a survey " of the encroachment by inspection through the plaintiffs' mine shortly after it was brought to his notice on June 30, 1944.

The defendant filed in September, 1944, a statement opposing the grant of the injunction and submitted two affidavits dated September 13, 1944, denying that the defendant encroached on the plaintiffs' mine or removed plumbago from it, or that the defendant's agents " have been filling up, flooding and in other ways damaging any tunnels alleged to have been made on the plaintiffs' land ".

On January 25, 1945, the plaintiffs applied to the Court under section 669 of the Civil Procedure Code for the issue of a Commission to two Licensed Surveyors named therein to survey and inspect " the land of the defendant company and the tunnels made therein which the said Surveyors and experts may consider necessary for the purpose of ascertaining the trace and extent of the encroachments made by the defendant company upon the petitioners' land ". The allegations in the petition were supported by an affidavit of the first plaintiff who stated that it was necessary to have access to the underground tunnels through the defendant's mine for a proper survey and inspection of the encroachment and that it was also necessary for that purpose " to make a survey both of the surface of the defendant company's land and of the tunnels dug into our land and the defendant company's land by the defendant company ".

The defendant filed on March 2, 1945, a statement objecting to the issue of the commission asked for by the plaintiffs but did not file a counter affidavit traversing the averments in the first plaintiff's affidavit.

The District Judge held an inquiry with regard to the granting of an injunction and the issue of a commission. No further affidavits were tendered at that inquiry and no oral evidence was led. The plaintiffs tendered certain letters marked P1 to P7 which had passed between the parties and their Proctors shortly after the discovery of the alleged encroachment and before the filing of this action. The District Judge admitted those documents though objected to by the defendant. I may add that at the hearing of the appeal before us no argument was addressed to us against the

admissibility of the documents and the Counsel for the defendant-appellant himself referred to these documents and read passages in support of his case.

The present appeal is from the order of the District Judge granting both the applications of the plaintiffs.

It was not seriously contended before us that the injunction should not have been granted. I fail to see what reasonable objection the defendant could have with regard to that injunction. If he is doing the acts complained of, it is right that he should be restricted from doing them. If he is not doing these acts, the injunction cannot do him harm as it will not hamper him in the working of his mine.

It was argued before us that the Commission for survey and inspection should not have been issued as :—

(*a*) the Court had no power under section 669 to issue a commission for the survey and inspection of the defendant's property ;

(*b*) in any event, the material placed before the Court by the plaintiff was not sufficient to justify the issue of such a commission.

The argument of Counsel on the first point was that as Section 669 of the Civil Procedure Code referred to the inspection and survey of only " any property being the subject of such action " the District Judge had no jurisdiction to authorise the commissioners to inspect and survey the defendant's land or his tunnels. It was argued that the jurisdiction under that section was not so wide as under Order 50 Rule 3 of the English " Rules of the Supreme Court, 1883 ", which provide for " the inspection of any property or thing being the subject of such cause or matter or as to which any question may arise therein ".

I do not think the jurisdiction of the Court is as limited as it is said to be by the appellant's Counsel. While sub-section (*a*) of the section speaks of " the inspection and survey of any property being the subject of such action ", sub-sections (*b*) and (*c*) say that for the purpose of such inspection and survey the persons authorised by the Court could " enter upon or into any land or building in the possession of any party to such action " and could make any " observation " " which may seem necessary or expedient for the purpose of obtaining full information or evidence."

The section of the Indian Code of 1882 corresponding to Section 669 of our Code is Section 499 and that section provided for the survey and inspection only of "any property which is the subject matter of such suit ". In *Dhoroney Dhur Ghose vs. Radha Gobind Kur* (1896) 24 Calcutta 117 where the High Court of Calcutta had to consider the scope of section 499 of the Indian Code a similar argument was addressed to Mr. Justice Ameer Ali who said :—

> " Mr. Pough contended that the last words (*i.e.* the words ' or as to which any question may arise therein ') not being contained in section 499 of the powers contained in Rule 3 (*i.e.* of Order 50 mentioned above) were not intended to be given by the Code. I entirely differ from that view. It seems to me that the words, ' or as to which any question may arise therein ' were omitted because it was thought that the words, ' the subject-matter of such suit ' were sufficiently comprehensive to cover all matters in issue in the suit."

No doubt, these remarks were made *obiter*, but they are entitled to the greatest respect as expressing the views of a great Indian Judge.

Before 1883 the Law in England on this matter was contained in Order 52 Rule 3 in the First Schedule to the Supreme Court of Judicature Act 1875. That Rule provided for the inspection only " of any property being the subject of such action ". In *Cooper and others vs. Ince Hall Company* (1876) Weekly Notes 24 decided under that rule the plaintiffs who were proprietors of a colliery of seven acres brought an action for trespass against the defendants the proprietors of an adjoining colliery of eight hundred acres. The plaintiffs applied for an order of inspection of the defendants' colliery and for that purpose for the removal of the barriers erected by the defendants between the mines, for liberty to go down into the defendants' mine and for liberty to take measurements, etc. The defendants objected on the ground that the Rule was never intended to enable a colliery proprietor to get an inspection of his neighbour's mine by a mere allegation of trespass. They further filed an affidavit to the effect that it was " important for reasons apart from the action that the working of the defendants' mines should not be seen by the plaintiffs ". Granting the plaintiffs' application Lindley, J., said :—

> " An order for inspection of this kind is so common in Chancery that I should have thought this was a matter of course. My impression is that the plaintiffs are entitled, almost as a matter of course, to inspect the defendants' mine about the alleged boundaries."

In *Bennitt vs. Whitehouse* (1860) 54 English Reports 311 the plaintiff who was the lessee of a coal mine stated that he had reason to suspect that the defendant, the lessee of the adjoining coal mine, was working from his own mine into the plaintiff's mine. He sued the defendant praying for an account of the coal wrongfully removed by the defendant, and payment of its value. The

defendant denied any encroachment and opposed an application of the plaintiff for an inspection of the defendant's mine. Sir John Romilly, M.R., allowed the application and said :—

> " Wherever it appears that a person has power to make use of his land to the injury of another, and there is *prima facie* evidence of his doing so, though it is contradicted still, as the only way of ascertaining the fact is by an inspection, the Court always allows it, if it can be done without injury to the defendant."

As regards the second point I need only say that in my opinion the plaintiffs have made a *prima facie* case affording a reasonable ground for belief that the defendants are trespassing on their mine. No doubt, the plaintiffs' statements are contradicted by the statements in the defendants' affidavit but the issue of a commission of this nature does not depend on the balance of testimony (*vide Bennitt vs. Whitehouse* (supra). The best evidence of the truth or the falsity of the plaintiffs' assertions will be supplied by an inspection and survey and it is necessary that the trial Court should have such evidence before it.

The order allowing the issue of the Commission should, however, be made subject to certain conditions. In the first instance the inspection and survey should be at the expense of the plaintiffs. The plaintiffs should also deposit a sum of Rs. 5,000 in Court as security against any damages that may be caused to the defendants by such inspection and survey. The District Judge should after notice to the parties fix (*a*) the period of time during which the inspection and survey will be made, reserving to himself the right to extend such period from time to time as it seems to him to be necessary ; (*b*) the period of notice that should be given in writing by the Commissioners to the defendants before such inspection and survey ; and (*c*) the maximum number of persons that should accompany the Commissioners on such inspection and survey. The written notice should give the names and description of persons who would accompany the Commissioners. Such persons should be elected from a panel of persons submitted by the plaintiffs to the District Judge and approved by him after notice to the defendant. The Court will have the right, to give such order and further directions as it may find necessary with regard to the execution of the Commission even after the issue of the Commission.

Subject to the modification indicated above the order of the District Judge will stand. The respondents are entitled to costs of this appeal.

CANEKERATNE, J.
I agree.

Appeal dismissed.

Proctors : *John Wilson*, for defendant-appellant.
R. V. Dedigama, for plaintiff-respondent.

Present : NAGALINGAM, A.J.

MANOMANI vs. VIJIYERATNAM

S. C. No. 965/*M. C. Jaffna Case No.* 10,391
Argued and decided on : 3rd December, 1946.

Maintenance—Offer by husband to take his wife back—Husband living in adultery—Bona fides of *husband.*

A wife claimed maintenance from her husband. The husband offered to take his wife back. It was found that the husband was living in adultery.

Held ; That the husband's offer was not a *bona fide* one and that the applicant was entitled to maintenance.

N. Kumarasingham, for the applicant-appellant.
H. W. Thambiah, for the defendant-respondent.

NAGALINGAM, A.J.

This is a maintenance case instituted by the wife against her husband. According to the wife, after about a year of her marriage she had to leave her husband because the latter was living in adultery with a woman called Pasuwathy and has been living with her aunt in Trincomalee for the last eight years. Two months prior to the date of the application she returned to Jaffna in order to prefer this claim.

On the first date of trial the husband offered to take the wife. The matter was discussed in Court and the wife herself agreed to go and live with her husband. A date was given to the husband to find out a suitable house and produce a report from the K. V. This he apparently did but when the matter was investigated, it was ascertained that the house which the K. V. had certified to be the one rented out by the defendant was one in which other people were yet living and who, according to the K. V., had expressed their willing-

ness to leave the premises when the applicant and defendant wanted to go into occupation. The case was again put off with a view to enable the defendant to obtain the document signed by the then occupants of the premises and the landlord showing that the house had been vacated and was available for occupation of the husband and wife. On the date given for the production of the report the defendant failed to produce the document but stated that as the applicant had raised objections to the locality he was looking out for another premises. A date was given to him to produce proof that he had secured another house. This he failed to do. The case went on to trial and the learned Magistrate has dismissed the application of the applicant.

I am not satisfied that the learned Magistrate has come to a correct conclusion on the evidence in this case. While it may be conceded that the woman has been guilty of stating what was false on the very first day that she gave evidence there can be little doubt that she gave that evidence for the purpose of showing that to her knowledge the defendant had been living with Pasuwathy. That part of her evidence may be discounted. On the second date she said that she had heard that the defendant was living in adultery with Pasuwathy although in re-examination she stated that she had seen Pasuwathy in defendant's house.

The learned Magistrate does not appear to have taken into consideration this piece of evidence which shows that even at the date she was giving evidence Pasuwathy was living in the house of the defendant. What is more, the defendant as recently as May, 1945, when he gave evidence in some other proceedings stated that Pasuwathy was his mistress whom he earlier described as his wife. The learned Magistrate's comment with regard to the admission of the defendant does not appeal to me. The learned Magistrate says that this is the case of an ignorant villager who under stress of cross-examanation had admitted a fact which bore no similitude to the real facts but when one considers the entire evidence of the defendant in that case, there can be little doubt that he made this admission with a full sense of appreciation of what he was stating.

If in May, 1945, he was living in adultery on his own admission and Pasuwathy is seen even after the maintenance proceedings in defendant's house, I think it is a fair inference to draw from these circumstances that the defendant was living in adultery even at the date of the application and has continued to do so even at the date of hearing. The learned Magistrate has also failed to take into consideration the fact that in a maintenance case the balance of probability is the determining factor. The defendant has not got into the witness box and denied any of the facts testified to against him.

Learned Counsel for the respondent on appeal argues that there should be proof that the defendant was living at the date of the application in adultery and not at an anterior date. The defendant's case was not as was attempted to be made out by counsel here that at some stage or other he may have lived in adultery with Pasuwathy but that he had given her up at the date of the application. In view of the facts established, I would hold that the offer by the husband to take his wife back was not a *bona fide* one, and the applicant has made out her case for an order for maintenance in her favour.

The defendant is said to be a painter by occupation and said to be making Rs. 100 per month. In the circumstances I would direct the defendant to pay the applicant Rs. 25 per month by way of maintenance. The applicant will have costs of appeal and of the proceedings in the lower Court.

Appeal allowed.

Proctors : *S. R. Ariyanayakam*, for applicant-appellant.
Sinnadurai, for Defendant-respondent.

Present : WIJEYEWARDENE, J.

PERERA vs. INSPECTOR GORDON

S. C. No. 638—*M. C. Colombo* 16749
Argued on : 26th September, 1946.
Decided on : 1st October, 1946.

Defence (Control of Textiles) Regulations—Regulation 14 (1)—*Meaning of the word "dealer"—Does it include an unlicensed dealer—Applicability of section* 67 *of the Ceylon Penal Code to Defence Regulations.*

Held ; (i.) That the word " dealer " in " no other person than a dealer " in Regulation 14 (1) of the Defence (Control of Textiles) Regulations means a dealer holding a textile license.

(ii.) That section 67 of the Ceylon Penal Code applies to breaches of the Defence Regulations.

S. Nadesan, for accused-appellant.
S. Mahadevan, Crown Counsel, for the Crown.

WIJEYEWARDENE, J.

The accused was charged—

(1) with having for sale certain regulated textiles in breach of Regulation 4 (2) of the Defence Control of Textiles Regulations published in Gazette No. 9388 of March 28, 1945, as amended by section 3 in Gazette No. 9430 of July 11, 1945 ; and

(2) with having been in possession of a quantity of regulated textiles in excess of that which he as a consumer could have purchased from a dealer by surrendering all the coupons issued to him for a year in breach of Regulation 14 (1) of the above Regulations.

Each of these offences is punishable with a fine of not less than Rs. 500 and not more than Rs. 5,000 or with imprisonment of either description for a period not exceeding one year or with both such fine and imprisonment (Regulation 59).

The Magistrate convicted the accused on both counts and sentenced him to pay a fine of Rs. 1000 and in default to undergo rigorous imprisonment for 3 months.

Admittedly the accused was a hawker and was, therefore, a person carrying on business as a dealer within the meaning of Regulation 2. He did not hold a textile licence authorising him to carry on such business. I see no reason, therefore, to interfere with his conviction on the first count.

Mr. Nadesan contended against the conviction on the second count—

(1) that Regulation 14 (1) penalised only the possession by persons other than dealers and that the accused who was admittedly a dealer, though an unlicensed one, would not be liable under that Regulation ;

(2) that there was no proof of the quantity of regulated textiles that the accused could have purchased by surrendering all the coupons issued to him for a year.

Regulation 14 (1) reads :—

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

Part II. of the Regulations consisting of Regulations 3 to 14 deals with trading in regulated textiles and the importation, transport and possession of such textiles. Regulation 2 empowers the Controller to issue a textile licence and Regulation 4 prohibits any person who does not hold such a licence from carrying on business as a dealer. Regulation 7 requires a " dealer " to exhibit his textile licence and Regulation 13 states that every " dealer " importing regulated textiles shall obtain an invoice containing such particulars as the Controller may prescribe. The proviso of Regulation 14 (1) itself states that the earlier provisions of that regulation shall not apply where a person employed by any " dealer " transports any regulated textiles to a registered store of that " dealer ". A study of these Regulations shows clearly that the word " dealer " in " no person other than a dealer " in Regulation 14 (1) means a dealer holding a textile licence. The accused who is not such a dealer would, therefore, be a person coming under that Regulation.

With regard to the second objection it is sufficient to state that the Inspector of Textile Control who gave evidence as to the quantity that the accused was entitled to possess was not even cross-examined. That evidence stands uncontradicted.

The accused is, however, charged with having being in possession of the textile goods at the time and place, that he was exposing the identical goods for sale. Could the prosecution frame two charges on the same set of facts and ask for separative convictions and sentences on the two charges ?

Section 67 of the Penal Code states that " where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or published.....the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences ".

This section would apply to breaches of the Defence Regulations (*vide* Section 38 of the Penal Code). That section enacts a rule of substantive law regulating the measure of punishment and it does not affect the question of conviction. The conviction therefore under both the counts would be in order and as the sentence passed is not in excess of the sentence which the Magistrate could have given for any one of them I do not see any reason for interfering with the sentence.

For the reasons given by me I dismiss the appeal.

Appeal dismissed.

Proctors : *A. Padmanathan* for the appellant.

Present : WIJEYEWARDENE & CANEKERATNE, JJ., & NAGALINGAM, A.J.

In *re* MOHAMED

In the matter of an Application under Section 17 of the Courts Ordinance.

Argued on : 9th December, 1946.
Decided on : 12th December, 1946.

Proctor—Pleading guilty to a charge of criminal breach of trust—Application to strike proctor off the Roll—Courts Ordinance, section 17.

A proctor pleaded guilty to a charge of criminal breach of trust of a postal order of the value of ten rupees. An application was then made to the Supreme Court to strike his name off the roll of proctors. In view of the special circumstances of the case the Supreme Court suspended him from practice for one month.

M. F. S. Pulle, Acting Solicitor-General with *E. L. W. de Zoysa, C.C.* for the Attorney-General.
F. A. Hayley, K. C. with *P. Navaratnarajah* for the respondent.

WIJEYEWARDENE, J.

On the application of the Solicitor-General under section 17 of the Courts Ordinance an order has been made on the respondent, a Proctor of this Court, calling upon him to shew cause why his name should not be removed from the Roll of Proctors entitled to practise before this Court.

The respondent was appointed to the office of Kathi under the Muslim Marriage and Divorce Registration Ordinance on April 10, 1941, and continued to hold that office till December 31, 1942. On April 24, 1942, one Mawjud sent to the respondent a postal order for Rs. 10 in part payment of mahr ordered by the respondent as Kathi of the Kathi Court of Maradana to be paid to one Zurath Nazeema. The respondent cashed the postal order and appropriated the proceeds to his own use instead of paying the money to Zurath Nazeema. He omitted further to record the receipt of that money in the prescribed book as required by section 21 (5) of the Ordinance.

As a result of certain investigations made by the Police on a complaint made by the Registrar-General, Case No. 44303 was instituted in the Magistrate's Court of Colombo against the respondent on the following written report under section 148 (1) (*b*) of the Criminal Procedure Code :—

"That he did on the 25th day of April, 1942, at Maradana within the jurisdiction of this Court commit criminal breach of trust of a postal order valued Rs. 10 belonging to M. L. M. Mawjud of No. 40, Madawala Road, Katugastota, and thereby committed an offence punishable under section 389 of the Ceylon Penal Code."

On September 25, the respondent who was represented by Mr. E. B. Weerakoon, Proctor, appeared on summons and pleaded not guilty. The case was then fixed for trial on November 13 and on that date it was postponed for December 22 for want of time. On the latter date the case was postponed for February 9, 1942, on the application of the prosecuting Inspector that a material witness for the prosecution was absent. On February 9 the respondent withdrew his plea of "not guilty" and made an unqualified admission of his guilt. The respondent's Proctor, Mr. Weerakoon, pleaded thereafter that the accused be dealt with under section 325 of the Criminal Procedure Code. The respondent was finger-printed on that day and the case was re-fixed for February 13 when the Magistrate dealt with the respondent under Section 325 of the Code and ordered the respondent to enter into a personal bond for Rs. 250 to be of good behaviour for six months and to pay Rs. 25 as expenses of this case and a further sum of Rs. 10 as compensation to Mawjud, the sender of the postal order.

The respondent filed for this inquiry an affidavit stating that at the time he received the postal order he was unable to attend to his work as Kathi with his usual care as owing to the Japanese Air Raid he had to leave his Colombo residence somewhat suddenly in April, 1942, and reside some eight miles away from Colombo. He submitted that through a mistake due mainly to the abnormal conditions at the time he forgot to pay the proceeds of the postal order to Zurath Nazeema or to record the receipt of the money in his book. He stated further that he pleaded to the charge on February 13, 1945, as he was " anxious to have an end of this case " and that it did not occur to him at that time that his " position as a Proctor might be prejudiced ".

Mr. Weerakoon, a leading Proctor practising in the Magistrate's Court, Colombo, was called as a witness by the respondent and gave evidence to the following effect :—

> "I remember his doing so (*i.e.* accused pleading guilty). Before he did so I gave him advice. I told him that he was taking a great risk. I told him that we were able to establish that he had no dishonesty on his part and practically he will be getting off altogether from the charge of criminal breach of trust..... I advised him not to plead guilty. However he pleaded guilty as he was anxious to finish up the case..... I told him that a confession of dishonesty was a serious matter for a Proctor. .....I don't remember exactly what and what advice I gave. I warned him against consequences."

As stated earlier the respondent says in his affidavit that he pleaded guilty, as he believed that the Magistrate would deal with him under section 325 of the Criminal Procedure Code and he assumed that since the Magistrate could not proceed to conviction under that section he did not run any risk of being suspended or disenrolled under Section 19 of the Courts Ordinance. Even if he felt justified in acting on such an assumption it is difficult to understand how as a professional man valuing his reputation for honesty and integrity he could make up his mind to plead guilty to a charge of criminal breach of trust if in fact he did not act dishonestly in appropriating the money for his own use. On the other hand it is equally difficult to understand how the Magistrate who recorded the plea of guilty permitted himself to make thereafter the inconsequential statement, " From all the circumstances in this case I am satisfied that the accused had no dishonest intention ".

The respondent had been a Proctor for sixteen years. His appointment as a Kathi may be taken as showing to some extent the position he had won for himself as a Proctor. The ledger kept by him as Kathi shows that he has duly recorded ten out of the eleven instalments sent by Mawjud from September, 1941, to September, 1942, amounting to Rs. 125. Six of these instalments amounting to Rs. 85 were received by him before the postal order in question and the remaining four after that. All the instalments so recorded have been duly paid to Zurath Nazeema.

On a careful consideration of the various aspects of this case I have reached the decision that the respondent had most probably got into the habit of using for his own purpose temporarily the various small remittances he received as Kathi from the litigants of the Kathi Court from time to time. He was, however, in a position to make the payments to those entitled to them when they demanded them as he duly recorded in his books the remittances received by him. In this instance, however, he omitted to make the entry owing to his failure to attend the Kathi office as he was living out of Colombo during that period. Owing to the absence of the relative entry he forgot the remittance of Rs. 10 he misappropriated and failed to make a payment to Zurath Nazeema. Such a temporary misuse of the money received by him as a Kathi is highly improper and rightly exposed him to a criminal charge. It is therefore, necessary to make an order against the respondent to show our condemnation of his conduct though there are circumstances which make it possible for us to treat him leniently.

The order of this Court is that the respondent be suspended from practice in the office of a Proctor for a period of one month from this date and that a sum of Rs. 100 be paid by him as the costs of these proceedings.

Present : NAGALINGAM, A.J.

APPUHAMY & ANOTHER vs. EKANAYAKE, S. I., POLICE

S. C. No. 910-911—*M. C. Kandy No.* 23126
Argued on : 9th December, 1946.
Decided on : 17th December, 1946.

Charge—Reference to Gazettes which did not disclose offence charged—Validity of conviction.

In a charge reference was made to certain Gazettes which, however, did not contain the provision of law under which the charge was made.

Held ; That a conviction, based on such charge, was bad.

Cases referred to :—*Kandasamy vs. Navaratnarajah* (1944, 45 N. L. R. 546).
Carolis Appu vs. A. G. A. Haputale (1945, 46 N. L. R. 262).

L. A. Rajapakse, K.C., with *H. W. Jayawardene*, for the accused-appellants.
J. G. T. Weeraratne, Crown Counsel, for the Attorney-General.

Nagalingam, A.J.

The two appellants in this case have been convicted of having transported 80 bags of wheat from one place in Ceylon to another place without a permit and the 1st accused-appellant has been sentenced to pay a fine of Rs. 25 and the 2nd accused-appellant a fine of Rs. 800.

The only point taken in appeal is that the charge is defective in that the laws the breach of which was alleged to have been committed by the accused have not only not been set out with any degree of precision but that on the contrary the laws referred to in the charge do not disclose the offence with which they have been charged. In view of the objection taken to the conviction I think it best to set out the relevant portion of the charge which reads as follows :—

> " You are hereby charged that you did within the jurisdiction of this Court at Kadugannawa on 22-3-46 transport a quantity of grain, to wit 80 bags broken wheat in lorry No. CE 4939 from one place in Ceylon to another place without a permit in breach of section 4 of the Defence (Purchase of Foodstuffs) Regulations published in Gazette No. 9004 of 11-9-42 and 9380 of 16-3-46 and 9530 of 12-3-46 and thereby committed an offence punishable under section 52 (1) and (3) of the Defence (Miscellaneous) Regulations."

Later the charge was amended by the deletion of the word " broken " before the word " wheat ", but the amendment has no material bearing on the question that has now arisen for determination.

The first Gazette quoted is Gazette No. 9004 of 11-9-42 which refers to transport of country rice and country paddy and makes no reference to wheat. The next Gazette referred to is one bearing No. 9380 of 16-3-46 but it is clear that there is no such Gazette bearing that date. Learned Crown Counsel says that the number of the Gazette quoted is correct but that the date is erroneous in that the year set out should be 1945 and not 1946. Learned counsel for the appellant says that he is unable to admit or deny the correctness of this statement but that he can only say that he has made search for a copy of the Gazette No. 9380 of 16-3-46, but that there is no such Gazette in existence. The third Gazette that is referred to is one bearing No. 9530 of 12-3-46, but this Gazette refers to transport of flour and not of wheat. It is therefore obvious, and learned Crown Counsel is obliged to concede, that no offence declared by these Gazettes to be a breach of any Regulation has been committed by the accused.

Learned Crown Counsel, however, invites me on the authority of *Kandasamy vs. Navaratnarajah* (1944, 45 N. L. R. 546) to send the case back for the charge to be properly framed and for proceedings to be taken afresh against the accused. In that case there was an omission to specify the order under which the regulation penalising the act was made and the case was remitted to the Magistrates' Court for proceedings to be taken after the conviction had been quashed. But learned Counsel for the appellant relies upon the later case of *Carolis Appu vs. A. G. A., Haputale*, (1945, 46 N. L. R. 262) where in circumstances very similar to the present and dealing in fact with the regulations relating to transport of grain this Court refused to remit the case for further proceedings. This was a case where, as in the present, there was not only no reference to the Gazette which constituted the offence but on the contrary express reference was made to certain other Gazettes which were said to embody the regulations constituting the offence with which the accused was charged and which had in fact no application whatsoever. This later case, therefore, is more apposite to the facts of the case before me and following it I would set aside the conviction and discharge the accused.

Conviction set aside.

Proctors : *M. Gunaratne*, for appellant.

Present : DIAS, J.

PINCHA vs. VELOO, SUB-INSPECTOR OF POLICE

S. C. No. 1176—*M. C. Gampaha No.* 31,891.
Argued on : 28th October, 1946.
Decided on : 29th October, 1946.

Criminal Procedure Code, section 152 (3)—*Charge under section* 443 *of the Penal Code—Should a conviction under this section be set aside merely because the Magistrate tried summarily.*

Held ; That a conviction under section 443 of the Ceylon Penal Code will not be set aside merely because the Magistrate tried the accused summarily.

Cases referred to ;—

Danhia vs. Donhamy (1901) 2 Browne 230.
Smith vs. Peleck Singho (1942) 20 C. L. Rec. lviii.
Appu vs. Babun (1919) 6 C. W. R. 319.
Kotiyagala vs. Alagiri (1934) 12 T. L. R. 22.
Nadarajah vs. Gopalan (1930) 32 N. L. R. 115.

H. W. Jayawardene, for accused-appellant.
J. G. T. Weeraratne, Crown Counsel, for Attorney-General.

DIAS, J.

The appellant was charged with the offences of house-breaking by night and theft from a dwelling house under sections 433 and 369 of the Penal Code. These offences are not summarily triable. The Magistrate, however, assumed jurisdiction under section 152 (3) of the Criminal Procedure Code and after trial convicted and sentenced him to undergo six months' imprisonment in the aggregate.

The only point taken in appeal is that the Magistrate should have taken non-summary proceedings and committed the appellant for trial before a higher court.

There are conflicting authorities on this point. In *Danhia vs. Donhamy* (1901) 2 Browne 230 and *Smith vs. Peleck Singho* (1942)* 20 C. L. Rec. lviii., it was laid down that a charge of house-breaking by night cannot be dealt with summarily under section 152 (3). On the other hand, in *Appu vs. Babun* (1919) 6 C. W. R. 319, Ennis, A.C.J., said :—

> " Although it is a counsel of perfection that ordinarily cases under section 443 of the Penal Code should not be tried summarily, and this has been commented on over and over again by the Supreme Court, at the same time it does not by itself afford necessarily a sufficient ground for setting aside the conviction and sending the case back for non-summary trial."

In *Kotiyagala vs. Alagiri* (1934) 12 T. L. R. 22;* Poyser, J., held that an offence under section 443 could be tried under section 152 (3). In the unreported case S. C. 776 M. C. Colombo 47,232 (S. C. Minutes November 24, 1942) Keuneman, J., following *Appu vs. Babun* (1919) 6 C. W. R. 319 held that such a trial does not by itself vitiate a conviction for house-breaking. In *Nadarajah vs. Gopalan* (1930) 32 N. L. R. 115 Dalton, J., queries whether the summary trial of an offence of house-breaking under section 152 (3) of the Criminal Procedure Code would have to be discontinued because the accused was a " re-convicted criminal"

The order made by the learned Judge is interesting :—" The proceedings, therefore, will be set aside..... and the case remitted for non-summary proceedings before another Magistrate. If on a trial following such a non-summary proceedings, a plea of *autrefois convict* is upheld, *these proceedings and the conviction, the subject-matter of this application, will stand* ".

I think the point of law fails. I have read through the proceedings and can find no sufficient grounds for setting aside these proceedings and sending the case back for non-summary proceedings.

Appeal dismissed.

Proctors : *A. Senanayake* for the appellant

* 23 C. L. W. 76 (Edd. C. L. W.)

* 2. C. L. W. 418 (Edd. C. L. W.)

Present : NAGALINGAM, A.J.

CHITTAMPALAM vs. RAJASOORIYA, I. P.

S. C. No. 1219-1220—*M. C. Colombo No.* 17,468.
Argued on : 6th December, 1946.
Decided on : 17th December, 1946.

Defence (Purchase of Foodstuffs) Regulations, 1942—*An unauthorised quantity of rice found in premises belonging to accused—No specific evidence that accused purchased or acquired the rice—Validity of conviction.*

A quantity of rice, in excess of the authorised quantity, was found and seized in business premises of which one of the accused was tenant. The other accused was the manager of the business. No specific evidence was given as to the date of purchase or acquisition of the rice by the accused, but evidence given by the prosecution to the effect that the rice had been purchased or acquired on the date of the seizure was not controverted by the defence. Both accused were convicted.

Held ; (i.) That the contention that the accused had acquired the rice on the date of seizure was entitled to prevail.

(ii.) That both accused must be held responsible for the acquisition of the rice.

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

G. P. A. Silva, Crown Counsel, for the Attorney-General.

NAGALINGAM, A.J.

These are two appeals from an order of the Magistrate of Colombo convicting two persons with having purchased or otherwise acquired 1,831 measures of country rice being a quantity in excess of that necessary to maintain the accused and members of their household in breach of Regulation 5 (1) of the Defence (Purchase of Foodstuffs) Regulations 1942.

The two accused are the owner and manager respectively of a business carried on at No. 2, Kachcheri Road, at which premises the rice was found on a search made by the Police on receipt by them of certain information. The search and discovery of the rice was made on 4th June, 1946, and in the charge this date is set out as the date of purchase or acquisition of the rice. It is contended on behalf of the accused or either of them that there is no evidence as to when the accused or either of them purchased or acquired the rice but that the evidence only discloses that on a search being made on 4th June, 1946, the rice that was seized by the Police was found on the premises on that day. It is true that no specific evidence was given as to the date of acquisition or purchase by the accused but the evidence led in the case sufficiently establishes that the Inspector of Police who found the rice on the 4th June testified to the effect that the rice had been purchased or acquired on that day. The accused did not challenge his evidence nor did they themselves give evidence controverting that testimony. The Magistrate, therefore, was right in holding that in the absence of any other evidence the contention on behalf of the prosecution that the accused had acquired the rice on that date was entitled to prevail.

A second point taken on behalf of the accused was that either a purchase or an acquisition should be a definite act and unless there is specific evidence to show that both the accused jointly purchased or acquired the rice the conviction of neither accused can be sustained. The evidence shows that the first accused was the tenant of the premises where the rice was found and that he carried on business with the assistance of his manager, the second accused. It is a point of some significance that the accused are not authorised dealers in rice, in fact, excepting for co-operative societies nobody else is authorised to deal in rice. From the circumstances that such a large quantity of rice as 1,831 measures was found not in a dwelling house but in the business place of the two accused, the ordinary and reasonable inference to be drawn is that the acquisition was made by both of them in the normal course of their trade and for the purposes of their business and therefore each of the accused would be as much responsible for the acquisition as the other.

I have carefully considered the question of the sentence imposed by the learned Magistrate and I am unable to say having regard to the facts that have transpired in this case that the sentences are excessive. The appeals fail and are dismissed.

Appeals dismissed.

Present : SOERTSZ, A.C.J.

FERNANDO vs. RAJASOORIYA, INSPECTOR OF POLICE.

Application for Revision in M. C. Colombo, 14,240 (185).
Argued on : 24th July, 1946:
Decided on : 1st August, 1946.

Criminal Law—Plea of autrefois acquit—*Is it available when there had been no adjudication upon the merits of the earlier charge.*

An application was made for a postponement of the trial on the ground that the principal witness for the prosecution was absent. The Magistrate refused the application and called upon the prosecution to lead evidence of witnesses who were present. This was not done and the accused was discharged.

A fresh plaint was subsequently filed charging the accused on the same facts. Accused raised the plea of *autrefois acquit*.

Held : That the plea of *autrefois acquit* was not available to the accused as there was no adjudication upon the merits of the earlier charge.

Cases referred to : *Gabriel vs. Soysa* (31 N. L. R. 314).
Sumangala Thero vs. Piyatissa Thero (39 N. L. R. 265).

H. V. Perera, K.C., with *U. A. Jayasundera* and *L. G. Weeramantry*, for the petitioner.
E. L. W. Zoysa, C.C., for the Attorney-General.

SOERTSZ, A.C.J.

This application for revision raises a question with which we have had to deal before. To mention two cases, there was *Gabriel vs. Soysa* (31 N. L. R. 314) in which Garvin, J. appears to have taken the view *obiter* that a Magistrate may enter a verdict of acquittal before hearing all the evidence the prosecution may have to offer in support of its case. He said of a contention to the contrary that "such a view of the section would deprive the Magistrate of the power to control the course of the trial", because, he observed, the words of section 190 do not "compel a Magistrate to record the evidence of every witness for the prosecution, no matter how numerous they may be, merely because the prosecution tenders them". In regard to the first of these observations, I ventured to point out in the case of *Sumangala Thero vs. Piyatissa Thero* (39 N. L. R. 265), that the Magistrate has the power to control the trial by *discharging* the accused if he is of the opinion that it would serve no useful purpose to proceed any further with the case, or, if he prefers to make an order of acquittal, he should be able to rule out any other evidence available to the prosecution for some good reason pertaining to the admissibility or relevancy of evidence. In such a case, there is a decision upon the merits and such a decision is essential for a valid plea of "*autrefois acquit*". This view is supported by good authority. Spencer Bower, relying upon many decisions of the English Courts, to which he makes reference, observes as follows in his treatise "The Doctrine of *Res Judicata*" at pages 32 and 33 : "Thus the dismissal of a summons, complaint or charge by a Court of summary jurisdiction, if expressly stated by the Court, or shown by evidence properly receivable to have proceeded upon a consideration of the merits, is a judicial decision of the innocence of the alleged offender..... But where the dismissal did not purport to have been or, was not in fact, founded upon a consideration of "the merits" even in the largest and most liberal sense of that somewhat elastic expression, it is not deemed to involve, or necessarily to involve, any adjudication of the innocence of the accused. Thus, when the complainant deliberately absented himself from the Court on the hearing of the summons.....and the defendant attended at the hearing and made a statement and obtained a dismissal of the summons.....it was held that the dismissal.....did not have the effect of a judicial decision that no assault had been committed."

In this case too, there was no adjudication upon "the merits" of the charge. The Magistrate expressly discharged the accused and, in reality, there was no more than a discharge of the accused, that is to say, a discontinuance of the proceedings against him. I should wish to make it clear, however, that if I may respectfully say so, the decision of Garvin, J. in *Gabriel vs. Soysa* is unexceptionable for there was in that case a decision upon the merits for the reason that, the warrant being held to have been defective, no amount of evidence led by the prosecution to show that there was resistence could have been of any avail to the complaint. The accused were, in law, entitled to resist an unlawful arrest. My disagreement is with some of the observations made by Garvin, J. I refuse the application for the revision of the Magistrate's order.

Proctor : *T. Terence Fernando* for the Petitioner.

Present : CANEKERATNE, J. & DIAS, J.

RAMIAH vs. RAYNER.

Argued on : 12th and 13th November, 1946.
Decided on : 21st November, 1946.

S. C. No. 19—*D. C.* (*F*) *Hatton, No.* 3,140.

Action for damages—Search of plaintiff's house by Police without judicial sanction on complaint of theft made by defendant—Stolen property not found—Charge made on inadequate information—Need "malice" on the part of the defendant be proved.

Held: That, in an action for damages for causing unjustified search of plaintiff's residence by the Police without judicial sanction, on an alleged charge of theft made by defendant on inadequate materials, the plaintiff need not prove malice on the part of the defendant.

Cases referred to :

Ramanathan Chettiar vs. Meera Saibu Marikar (1930) 32 N. L. R. at p. 195 Privy Council.
De Alwis vs. Murugappa Chettiar (1909) 12 N. L. R. 353 ; *Abdulla vs. Lushington* (1909) 13 N. L. R. 38 ; *Fernando vs. Peiris* (1916) 19 N. L. R. 264.
Fernando vs. Perera (1913) 16 N. L. R. 73.
Kandasamypillai vs. Selvadurai (1940) 42 N. L. R. 19.
Chitty vs. Peries (1940) 41 N. L. R. 145.
De Alwis vs. Murugappa Chettiar (1909) 12 N. L. R. at p. 355.
Abdulla vs. Lushington (1909) 13 N. L. R. at p. 40.

N. E. Weerasooriya, K.C., with *W. Jayasundera* and *V. Joseph*, for plaintiff-appellant.
Cyril E. S. Perera, with *S. R. Wijayatilake*, for defendant-respondent.

DIAS, J.

The plaintiff says that the defendant on March 4, 1944, made a false complaint of theft of three copper cauldrons against him to the Maskeliya Police which led to the search of the house where he was residing. He claimed a sum of Rs. 1,000 as damages. No stolen property was discovered at the search. One of the missing cauldrons was subsequently found in a ravine on the estate, but there is nothing to suggest that the plaintiff hid it there. No charge has been made in any court against the plaintiff and we must proceed on the presumption that he is innocent of the charge of theft.

The defendant is the Superintendent of Alton estate belonging to the Ceylon Tea Plantations, Limited. The plaintiff was originally the clerk tea-maker and latterly the tea-maker on the estate. The defendant took charge of the estate as Superintendent in November, 1943. Shortly after taking charge the defendant thought the plaintiff had too many assistants and he discontinued two men from the factory. It is obvious from the evidence that the defendant formed an unfavourable opinion of the plaintiff's work. He found that the plaintiff allowed the dhoby washing to be dried on the withering loft. He also was of opinion that the plaintiff took too long an interval for his meals. A state of friction, therefore, arose, and I believe the plaintiff when he says that the situation made it impossible for him to carry on his duties under the defendant.

His story about the manner in which the defendant is alleged to have abused him is, I think, exaggerated. Equally, the defendant's version appears to be an under-statement. The situation, however, was an impossible one, and the plaintiff gave notice and left the estate with his belongings on March 1, 1944. I cannot believe that the defendant was actuated by malice, spite, or ill-will against the plaintiff. The fact that a few hours after the plaintiff left the estate, the defendant finding him stranded on the road, endeavoured to assist him, negatives such a suggestion.

On March 4, 1944—that is to say three days after the plaintiff left, the defendant sent a telephone message to the Maskeliya Police which was recorded in the telephone register, P 2, as follows :—

> " On Wednesday 1st the tea-maker left here from Alton to Eildon Hall estate, Lindula. *He has taken the three rice boiling pots without my knowledge*, and I want to get them back as the value is about Rs. 200—made of copper. The name of the tea-maker is Therumiah."

A Police officer proceeded to Alton estate on the same day and recorded the statement of the defendant—P 3. In the course of that statement the defendant said :—

> " When I took charge of this estate in November last.....I saw three copper boiling pots in use daily to feed the children. These pots were last used on 5-1-44 for mass anchy treatment. At the.....time the tea-maker left the estate he did not give these to the estate. I learnt that these are estate property ..... I did not come across any entry (*i.e.*, in the inventory) with regard to the pots..... I presume these pots are not entered *deliberately in order to steal them. I learnt that these pots were removed by him to his present place*..... The tea-maker was responsible for all the articles in the estate as they were given to his care..... These pots are not in the estate now."

Taking the two statements P 2 and P 3 together, it is clear that the defendant was making a charge against the plaintiff of committing theft of these cauldrons. On that statement the Police had no option but to proceed to the plaintiff's residence and search the place.

It is to be noted that in making these statements the defendant did not disclose to the Police that on March 2, 1944, he had received from Jalaldeen, the clerk of the estate, the document. The Kanakapulle had reported to Jalaldeen that the three cauldrons had been brought for anchylostomiasis treatment at the request of the estate Apothecary. The Kanakapulle says in D 3 : " It *seems* that the same were returned to Mr. Ramiah the late tea-maker." The Kanakapulle also stated that when Ponnambalam Kangany was sent to the plaintiff to get them back, the latter told him that the cauldrons had been given to the defendant. The Kanakapulle says that he has "*now learnt*" that the plaintiff had removed them and he requests Jalaldeen to inform the defendant. The Kanakapulle's information that the plaintiff had removed these articles was derived from Selvadurai's cook, who has not been called.

The defendant, instead of telling the Police that the cauldrons were missing, and handing over D 3 to them, and requesting them to make the necessary inquiries, charged the plaintiff with theft. The information on which the defendant acted was quite inadequate to make a definite charge against the plaintiff. The direct result of the defendant's action was that the Police, without making further inquiry, went straight to the plaintiff's residence and searched the house of an innocent man.

Both sides appear to have proceeded under the belief that it was an ingredient of the plaintiff's cause of action that " malice " on the part of the defendant had to be established to entitle the plaintiff to succeed—see paragraph 4 of the plaint and issue 1. It is clear, however, from the authorities that for this kind of action the proof of " malice " is not essential. The principle is that any unjustified or wrongful act of the defendant which causes a trespass on the plaintiff's person or property is an actionable wrong, and if the plaintiff is able to prove that he thereby sustained assessable damages, the law will give him relief. Whether in such an action the plaintiff must go further and prove that the defendant acted " maliciously " the law draws a distinction between acts done without judicial sanction and those done under judicial sanction improperly obtained. *Ramanathan Chettiar vs. Meera Saibu Marikar* (1930) 32 N. L. R. at p. 195 Privy Council. McKerron says (McKerron on the Law of Delicts (2nd ed.) p. 247). " *Malicious Arrest* : It is an actionable wrong to procure the arrest of anyone by setting the law in motion against him maliciously and without reasonable and probable cause. This species of wrong must be distinguished from that of false imprisonment or arrest. In false imprisonment the imprisonment is the act of the defendant or his agent. In malicious arrest, the interposition of a judicial act between the act of the defendant and the imprisonment makes the imprisonment no longer the act of the defendant, but the act of the law ..... The importance of the distinction is that in an action for false imprisonment neither malice nor absence of reasonable and probable cause need be shown."

Once it has been established that the act complained of was the act of the defendant or his agent, the only question which remains is—was the act justified or not ? If the defendant acted " maliciously," that will be an element in the estimation of damages ; but the mere false imprisonment, illegal arrest, illegal seizure, or even an unjustified search gives a cause of action to the aggrieved person. (McKerron on the Law of Delicts, pp. 152-153). Our law reports contain many examples of this principle. (See *de Alwis vs. Murugappa Chettiar* (1909) 12 N. L. R. 353 ; *Abdulla vs. Lushington* (1909) 13 N. L. R. 38 ; *Fernando vs. Peiris* (1916) 19 N. L. R. 264. In *Fernando vs. Perera* (1913) 16 N. L. R. 73) the facts of which are almost identical with those of the present case, the defendant charged the

plaintiff before the Police with the theft of two cart wheels. The Police searched his house and found two cart wheels. He was charged with theft and acquitted. The plaintiff confining his claim to only so much damage as was sustained by reason of the defendant's action in having his cart wheels seized and detained by the Police, sued the defendant. It was held that in such an action it was not necessary to prove malice in the defendant to entitle the plaintiff to recover damages.

The Privy Council put the matter clearly in *Ramanathan Chettiar vs. Meera Saibo Marikar.* (1930) 32 N. L. R. at p. 195 Privy Council. " If goods are seized under a writ or warrant which authorised the seizure, the seizure is lawful and no action will lie in respect of the seizure *unless the person complaining can establish a remedy by some such action as for malicious prosecution.* Cf. *Kandasamypillai vs. Selvadurai* (1940) 42 N. L. R. 19. If, however, the writ or warrant did not authorize the seizure of the goods seized, an action would lie for damages occasioned by the wrongful seizure *without proof of* malice. These propositions not only state the law of this country upon the subject, but they are supported by decisions in the courts of countries where the Roman-Dutch law prevails." *A fortiori* when the wrongful arrest, seizure or search is done without judicial sanction, no malice need be proved. In the present case, the facts, which the District Judge accepted, prove that the defendant on totally inadequate materials set a ministerial officer in action. No judicial act was interposed between the charge made by the defendant and the search of the plaintiff's residence. The only question remaining is whether the defendant was justified in so setting the Police in motion? I think he was not. Had the defendant handed the document D 3 to the Police and left it to them to make the requisite inquiries and take the requisite action the position would have been different. In the result the plaintiff is absolved from the necessity of proving that the defendant was actuated by " malice."

Counsel for the respondent cited the case of *Chitty vs. Peries.* (1940) 41 N. L. R. 145. In that case the third defendant made a complaint to the Police charging the plaintiff with the theft of certain property. As a result of that complaint the Police visited the house of all the four defendants and recorded their statements. Thereafter, the Police decided to arrest the plaintiff. The plaintiff sued all four defendants alleging (as the plaintiff has done in the present case) that the four defendants wrongfully maliciously and without reasonable and probable cause caused the Police to arrest her on a charge of theft. The two questions which were argued were whether on the facts it could be said that the defendants instigated the plaintiff's arrest, and whether in a civil action it was open to the defendants to impeach the credit of the plaintiff by a statement of hers recorded in the Police information book. The plaintiff in *Chitty vs. Peries.* (1940) 41 N. L. R. 145. undertook an onus and proved an ingredient she was not strictly bound to prove.

In my opinion the trial Judge has reached a wrong conclusion on the facts established in this case. The decree appealed against must be set aside and judgment entered for the plaintiff.

I do not consider it necessary to send the case back for the assessment of damages, because all the materials are before us. The plaintiff claimed a sum of Rs. 1,000 as damages. It was laid down in *de Alwis vs. Murugappa Chettiar* (1909) 12 N. L. R. at p. 355, that in assessing damages in a case like this the Court will properly take into account the position in life of the parties and the circumstances under which the wrongful act was done, and whether the defendant acted in good faith or not, and whether the act was likely to be an affront to the plaintiff's dignity or to damage his reputation. In *Abdulla vs. Lushington* (1909) 13 N. L. R. at p. 40, where the Fiscal wrongly arrested the plaintiff, Wood Renton, J. said: " The damages (Rs. 250) are heavy. But no plea for their reduction was embodied in the petition of appeal, and I think we ought to treat them as if they had been assessed by a Jury." In the present case the plaintiff was not arrested. In all the circumstances of the case I think that a sum of Rs. 250 as damages would be adequate compensation for the wrong done to the plaintiff.

I, therefore, set aside the decree appealed from and enter judgment for the plaintiff for a sum of Rs. 250 with costs in the Court of Requests class both here and below.

CANEKERATNE, J.
I agree.

Set aside

Proctors : *A. J. M. de Silva* for plaintiff-appellant.
F. H. V. LaBrooy for defendant-respondent.

Present: DIAS, J.

B. JAMIS vs. A. F. C. BENEDICT, INSPECTOR, C. I. D.

Argued: 8th November, 1946.
Decided on: 12th November, 1946.

S. C. No. 794 of 1946—M. C. Colombo, No. 14,563.

Excise Ordinance (Cap. 42), sections 2 and 43 (g)—Sale of brandy without a licence—What constitutes a sale—Liquor procured for private use. Burden of proof.

Cases referred to:

Pakiampillai vs. Merry (1942) 44 N. L. R. 142.
Lockhart vs. Fernando (1925) 27 N. L. R. 229.
Hunter vs. Romiel (1936) 18 C. L. Rec. 174.
Mendis Appuhamy vs. Attapattu (1944) 45 N. L. R. 297.
Kachcheri Mudaliyar vs. Mohomadu (1920) 21 N. L. R. 369 Div. Bench

Held: (1) That a transfer of the goods by acceptance of a cheque in payment of the article constitutes a sale within the meaning of section 2 of the Excise Ordinance.

(2) That when the prosecution proves that a sale has taken place, the burden is cast on the accused to show that the foreign liquor he sold was what had been legally procured for his private use.

N. Nadarajah, K.C., with *P. Navaratnarajah*, for second accused-appellant.
J. G. T. Weeraratne, C.C., for the Crown.

DIAS, J.

The facts of this case are not in dispute. Inspector Benedict of the Criminal Investigation Department, received information which caused him to suspect that the first accused was in possession of stolen liquor. He therefore sent Peon Wilson on February 21, 1946, to a certain place in Darley Road to investigate the truth of his information. Wilson met the first accused who admitted that he had certain cases of brandy for sale. He agreed to sell them, but as there was another man in the business, he requested Wilson to see him again on the following day. Wilson reported these facts to Mr. Benedict. Accordingly on February 22, 1946, Wilson again saw the first accused and arranged to take delivery of the brandy at 9 a.m. that day at the Indian Press in Sea Street. Wilson thereafter met the first accused and this appellant at the Indian Press when the first accused showed him sample bottles of the brandy. Wilson requested them to wait saying that his principal would turn up shortly. Mr. Benedict and Sergeant Abeyewardene then met both accused. The first accused again produced the samples and informed Benedict of the price of the cases of brandy. The appellant, who was present, added that there were twelve cases in all and Benedict agreed to purchase the lot, and requested that the twelve cases should be brought to the Indian Press for delivery. The appellant agreed and the Inspector and his party left. On their return to the Indian Press half an hour later, they found that the dozen cases had been brought as agreed. The Inspector having examined the cases, issued his private cheque for a sum of Rs. 3,850 which was the price agreed on. As soon as the appellant took charge of the cheque, Sergeant Abeyewardene disclosed his identity, took back the cheque, seized the cases of brandy and arrested the two accused.

From the report submitted by Inspector Benedict to the Magistrate it is clear that the authorities were uncertain as to what precise charge should be framed against the accused, because the Inspector says that the cases of brandy are "suspected to be stolen property." It is, therefore, manifest that the accused were not arrested for an illegal sale, but for being in possession of stolen property. Subsequently, the Police filed a plaint charging both accused with having sold brandy on February 22, 1946, without a license from the proper authority in breach of section 43 (*g*) of the Excise Ordinance (Chap. 42).

The Magistrate acquitted the first accused and convicted this appellant who was fined Rs. 1,000 or in default to undergo six weeks' rigorous imprisonment. From that conviction and sentence the second accused appeals.

Two points were submitted on his behalf. It was argued in the first place that the evidence does not prove "a sale", and in the second place, even if a sale has been proved, that under section 17 (*d*) of the Ordinance, as it is lawful to sell

foreign liquor which the seller has legally procured for his private use, the appellant is cleared from liability.

In regard to the first submission, Mr. Nadarajah argues that the evidence clearly shows that the Inspector had no intention whatever of purchasing the cases of brandy ; that there never was any *consensus ad idem* between the buyer and sellers, the whole thing being a mere ruse or trap, and that the charge of selling was an afterthought when it was discovered that a more serious charge could not be formulated against the appellant. He submits that the evidence does not prove a " sale " of this brandy.

The only authority cited for the Crown is *Pakiampillai vs. Merry* (1942, 44 N. L. R. 142) where the word " sale " was defined for the purposes of the Control of Prices Ordinance, 1939. No assistance can be derived from such cases in construing the Excise Ordinance where the word " sale " has been given a special statutory definition which has been explained in a series of decisions which were not cited at the argument of this appeal.

The word " sale " in the Excise Ordinance has not the same meaning this word has in the Sale of Goods Ordinance (Chapter 70). For the purposes of the Excise Ordinance, the words " sale " or " selling " are defined to include any *transfer* otherwise than by way of gift—section 2. The authorities show that where there is a transfer of an excisable article from A to B, the burden of proof is on A to prove that the transfer was by way of gift. If he fails to do so, the transfer is " a sale " within the meaning of the Excise Ordinance. (See *Lockhart vs. Fernando*, 1925, 27 N. L. R. 229 ; and *Hunter vs. Romiel*, 1936, 18 C. L. Rec. 174). In the recent case of *Mendis Appuhamy vs. Attapattu* (1944, 45 N. L. R. 297), Soertsz, J. pointed out that the word " transfer " in relation to movable property is *commonly* understood as meaning that there was a handing or giving over of the thing by one person to another, *i.e.*, an actual physical handing over of a movable.

The solution of the problem which arises in this case is to be found in the answer to the question whether the prosecution has established beyond reasonable doubt that there was on this occasion " a transfer " of this brandy from the appellant to the Inspector ? If not, there can be no " sale." It may be that the conduct of the appellant may amount to an attempt to " sell " ; but Counsel are agreed that an attempt to commit an excise offence is punishable neither under the Excise Ordinance nor under section 490 of the Penal Code. *Kachcheri Mudaliyar vs. Mohomadu* (1920 21 N. L. R. 369 Div. Bench).

Obviously, it was an impossibility for the appellant physically to hand over twelve cases of brandy to the Inspector. The word " transfer," however, has other meanings besides its common meaning of the actual physical handing over of a movable. If the transferor places the thing before the transferee with the object of transferring the possession, this amounts to a transfer (*longa manu traditio*). In this case the deposit of the subject matter in the presence and at the disposition of the transferee takes the place of physical prehension, and *longa manu traditio* constitutes one of the forms of fictitious as distinguished from actual delivery. It is most appropriate to transactions where owing to the weight or the bulk of the article concerned, actual delivery is difficult. A resort to it in respect of portable movables would need some very special explanation. Indeed, it is obvious that, as in all cases where mental attitude is not clearly evidenced by physical dealing, the principle of *traditio longa manu* must be cautiously applied (2 Maasdorp (6th ed.) pp. 23-24 ; 2 Burge (1838 ed.) p. 694 ; 1 Nathan, p. 364).

What are the facts ? The Inspector and the appellant agreed on the price, and the twelve cases were brought from their place of deposit to the Indian Press at the request of the buyer. The goods were examined. The sale was agreed on and the price was paid by cheque. Having regard to all the circumstances, I am of opinion that there was a " transfer " of the cases of brandy from the appellant to the Inspector. The mental attitude of the parties is clearly evidenced by what was said and done. The goods were too bulky and too heavy for actual physical handing over. The transferor therefore brought the cases from where they were stored and placed them before the transferee who, after the price was paid, would become the owner and be free to remove them. The fact that the Inspector's actions were a mere ruse may be relevant on the question whether a sale under the Sale of Goods Act took place. It is irrelevant on the question whether under section 2 of the Excise Ordinance there was or was not a " a transfer " of the goods from the appellant to the Inspector.

There being a " transfer " of these cases from the appellant to the Inspector, and it being obvious that this was not a donation by him to the Inspector, the transaction is a " sale " within the meaning of section 2 of the Excise Ordinance. The first submission therefore fails.

It is next argued that the prosecution, having conceded that the appellant had lawfully purchased these twelve cases of brandy as evidenced by the receipt or invoice which was found in his possession—it is not an offence for the appellant to sell foreign liquor to the Inspector. "Foreign liquor" includes "all liquor other than 'country liquor'." "Country liquor" means liquor manufactured in Ceylon. Obviously, brandy is not manufactured in this Island. Therefore this brandy was "foreign liquor." Section 17 (*d*) of the Ordinance (as amended by section 4 of Ordinance No. 25 of 1938) provides that "nothing in this section applies to the "sale of any foreign liquor legally procured by any person *for his private use*, and sold by him or by auction on his behalf, or on behalf of his representative in interest upon his quitting a station or after his decease." I agree with Crown Counsel that this sub-section is in the nature of an exception to the criminal liability created by the main section. Therefore, once the prosecution has established beyond reasonable doubt that the accused "sold" an excisable article without a license, the burden shifts to the appellant to prove either by a preponderance of probability or by a balance of evidence that the foreign liquor which he had procured was "for his private use." That the appellant lawfully procured this brandy is not disputed by the Crown; but it is contended that it was not obtained "for his private use" but with the object of selling it at a higher or "black market" price. On this point the Magistrate, who saw the appellant give evidence, has decided against him.

The appellant stated that he had purchased fifteen cases for an "At Home" he gave after a wedding. He had made a grave miscalculation because only three cases were consumed by his guests. He, therefore, told the first accused that he was prepared to sell the remaining twelve cases "below cost." If that story is true or creates reasonable doubts of the truth of the case for the prosecution, the appellant is entitled to be acquitted. In my opinion, the Magistrate was justified in rejecting that story. An "At Home" which caused the appellant to believe that fifteen cases of brandy, besides other drinks, would be necessary to entertain his guests must have been a function on a very large scale. The appellant has not stated whose wedding it was that was being honoured with this "At Home." As the Magistrate points out, there should have been available at least one of the guests who attended the function and who would say approximately how many guests were present and that brandy was served to them. It also appears to be highly improbable that there should have been such a gross miscalculation leading to a surplus of no less than a dozen cases of brandy at a ceremony where other intoxicants besides brandy must surely have been served.

Who is the philanthropist who having twelve cases of brandy on his hands would sell them "below cost?" The Magistrate has come to the conclusion that this liquor was purchased for no other purpose than for a resale at great profit. With that view I am in agreement. I, therefore, hold that the sale having been established, the appellant has failed to bring himself within the provisions of section 17 (*d*) and his defence fails.

I affirm the conviction and sentence which is not severe when it is realized that the appellant is a black marketeer who was detected in the act. The appeal is dismissed.

Conviction affirmed.

Proctors: *S. Kanagarajah*, for accused.

Present: Nagalingam, A.J.

PERERA vs. AGIDA HAMY AND TWO OTHERS

Application for Revision in C. R. Colombo, 94,410 (528)
Argued and Decided on: 3rd December, 1946.

Revision—Court of Requests—Order refusing amendment of plaint—Can the Supreme Court set it aside by way of revision—Civil Procedure Code, section 753.

Held: (i.) That section 753 of the Civil Procedure Code does not prescribe the scope of or put a limitation on the powers of this Court to deal with an application in revision.

(ii.) That the limitation that is imposed by this section is as regards the order the Court may pass, namely, if it could not have passed a particular order on appeal then, such an order could not be made even if the matter be brought before it by way of revision.

Per NAGALINGAM, A.J.—Where a party receives notice " subject to objection at the trial," it means that he has no objection to the amendment being allowed subject to any objection that may be taken at the trial as a result of the amendment being allowed.

Cases referred to : Sabapathypillai vs. Arumugasamy 27 C.L.W. 5-

Colvin R. de Silva, with *K.C. de Silva* for plaintiff-petitioner.
G. T. Samarawickreme, for first and third respondents.
S. R. Wijayetilleke, for second defendant-respondent.

NAGALINGAM, A.J.

This is an application by the plaintiff to revise an order of the learned Commissioner refusing an amendment to the plaint.

A preliminary objection was taken by Mr. Samarawickreme to the application on the ground that under section 753 of the Civil Procedure Code it was only where a matter could have been brought up by way of appeal that it could be dealt with in revision, and that as there was no appeal from an interlocutory order in the Court of Requests, application by way of revision did not lie. I do not think that section 753 is capable of such a narrow interpretation as that contended for. The words of the section relied upon by learned Counsel for the first and third defendants deal with the nature of the order that may be made in revision and not with the question of the circumstances in which an application for revision may be made ; the words are : " ..... and may upon revision..... *pass any judgment or make any order* which it might have made had the case been brought before it in due course of appeal instead of by way of revision." The words underlined by me if taken note of can only lead to the conclusion that they do not prescribe the scope or put a limitation on the powers of this Court to deal with an application in revision. The limitation that is imposed by this clause is as regards the order the Court may pass, namely, if it could not have passed a particular order on an appeal then such an order could not be made even if the matter be brought before it by way of revision. The case of *Sabapathippillai vs. Arumugasamy* in 1944 (27 Ceylon Law Weekly 5) has been cited as supporting the proposition contended for but I have little doubt, as expressly stated in the judgment itself, the observations of Soertsz, J., must be confined to the facts of the case before him. That was a case where even if an appeal had been preferred this Court could have given no relief and it was held that on revision the Court could not act otherwise. I, therefore, over-rule the preliminary objection.

In regard to the merits of the application itself, it would appear that the plaintiff filed his plaint on 9th March, 1944, claiming relief against all the defendants upon a cause of action which is set out in paragraph 3 of the plaint as the wrongful and unlawful prevention by the defendants of the flow of water *into* the plaintiff's land by blocking the water-course. The plaintiff states that the word " into " is incorrect and that the words " out of " should be substituted therefor as only then his cause of action would be set out correctly. The defendants filed two separate answers and in both answers they have expressly stated that the plaintiff was making an attempt to find ways and means of draining out the water from Wilkoladeniya which gets filled with water during the rainy season, and clearly establish that they appreciated quite properly the cause of action upon which the plaintiff came into Court. Admittedly, even at the inspection when the learned Commissioner visited the land the only topic of discussion was not whether the plaintiff's field became dried and uncultivable because the flow of the water into the field had been stopped but whether as a result of the water being prevented from flowing out of the plaintiff's field, the field became water-logged and thereby became uncultivable. The plaintiff sought to amend his plaint by motion dated 22nd January, 1945, by substituting the words " out of " for the word " into " in paragraph (3) of his plaint. The Proctor for the first and third defendants received no notice " subject to any objection at the trial." The Proctor for the second defendant had received notice " subject to any objection." Where a party received notice " subject to objection at the trial," it means that he has no objection to the amendment being allowed subject to any objection that may be taken at the trial as a result of the amendment being allowed. The motion was never dealt with although a date was given for its consideration. The plaintiff states that he was under the impression that the motion had been allowed. Various steps were taken in the case from time to time without the question of amendment being dealt with and the case was set down for trial on 16th October, 1946. On 4th October, 1946, the plaintiff filed a motion asking that the motion of amendment dated 22nd January, 1945, be allowed. After hearing arguments the learned Commissioner refused the application.

It is quite obvious to my mind that the parties well knew from the commencement, however imperfect the language the plaintiff used in his plaint may have been, that the wrong in respect

of which the plaintiff came into Court claiming damages was the blocking of the outlet from his field thereby preventing the water from flowing out of his field. In view of this circumstance alone the amendment should have been allowed. More so, in the Court of Requests where in regard to amendments, there is special provision in section 816 of the Code which lays down that the Court should allow pleadings to be amended at any time before trial if substantial justice can be promoted thereby.

I would set aside the order of the learned Commissioner and allow the application to amend the plaint. The plaintiff will be entitled to the costs of appeal and of the inquiry in the lower Court.

Application allowed.

Proctors : *W. M. J. Fernando* for plaintiff-petitioner.
H. A. Abeywardena for 1st-3rd defendants-respondents.
N. J. S. Cooray for the 2nd defendants-respondent.

Present : NAGALINGAM, A.J.

In the matter of the application for bail in M. C. Negombo, Case No. 49,097 (501).

Argued and Decided on : 5th December, 1946.

Bail—Questions for consideration on an application for.

Held : That the fact that an offence is of frequent occurrence in a particular area and that the accused persons may repeat such offence is not a ground for refusing bail.

H. W. Jayawardene, for petitioners.
G. P. A. Silva, C.C., for Attorney-General.

NAGALINGAM, A.J.

This is an application for bail in respect of the first and second accused in this case. The charge against them was laid on 5th August, 1946. They surrendered to Court on 15th August, 1946, and since that date they have been on remand. Several applications were made to the learned Magistrate on their behalf. Although at various previous stages one could have agreed that the refusal of the learned Magistrate to accede to the applications was justifiable, it does not appear to me that sufficient grounds exist now to refuse these two accused bail. It is true that the fourth accused was arrested on 14th November, 1946. In view of the circumstance that these two accused have been on remand for over three months after they had surrendered to Court, the fact that the proceedings are yet pending should not by itself stand in the way of their application being considered having regard only to the matters that should properly be taken into consideration on an application of this nature. The questions for consideration by a Court are : firstly, whether the accused are likely to abscond ; secondly, whether they are likely to tamper with the evidence of witnesses and thirdly, the nature of the offence with which they are charged and the penalty that would be imposed on them, should they be found guilty.

The learned Magistrate does not appear to have viewed the application for bail with due regard to these considerations but has really taken into consideration a factor which it is not for the judicature but for the legislature to look into. The learned Magistrate makes the comment that the " condition of the people in that area is one of suspense and mental strain " because of the frequent occurrence of cases of gang robbery by night and that these accused persons may repeat their offence but I do not think that it is a consideration which can be seriously considered in a Court of law. I think in the circumstances the two accused should be admitted to bail and I direct the Magistrate to so admit them in such sums as he considers adequate.

Bail allowed.

Proctor : *T. B. Carron* for the petitioners.

Present : JAYETILEKE, J.

ATTORNEY-GENERAL vs. FRANCIS.

S. C. No. 721—*M. C. Colombo, No.* 11,250.
Argued on : 8th October, 1946.
Decided on : 25th October, 1946.

Defence (Miscellaneous) Regulations—Charge under Regulation 17 (1)—*Expiry of the regulation pending trial—Can trial be proceeded with—Interpretation Ordinance Section 6 (3).*

Held : (i. That the question, whether proceedings can be taken upon a statute which has expired, is purely one of construction.

(ii.) That, in the absence of a provision that offences committed before the expiry of a regulation can be dealt with as though the expiry had not taken place, no charge based on such regulation pending at the time of such expiry can be proceeded with thereafter.

(iii.) That, section 6 (3) of the Interpretation Ordinance does not apply to written laws that have expired.

Cases referred to : *Stevenson vs. Oliver* (1841) 8 M. & W. p. 234, 151 English Reports Page 1024.

H. H. Basnayake, K.C., Attorney-General with *Ameer, C.C.*, and *H. Deheragoda, C.C.*, for Attorney-General, appellant.

S. Nadesan with *Colvin R. de Silva* and *K. C. de Silva*, for accused-respondent.

JAYETILEKE, J.

This is an appeal by the Attorney-General against an order made by the Magistrate discharging the accused on December 6, 1945. The accused was charged with having committed an offence under regulation 17 (1) of the Defence (Miscellaneous) Regulations punishable under Regulation 52 (3) of the regulations. The trial of the accused was postponed on five occasions and was eventually taken up on March 3, 1946. On that date Counsel for the accused contended that the regulation under which the accused was charged had expired, and, therefore, no proceedings could be taken upon it. The prosecuting Inspector admitted that the regulation had expired and stated, that, in the circumstances, he could not proceed with the trial. Thereupon the Magistrate discharged the accused. At the argument before me the learned Attorney-General contended that though Regulation 17 (1) had expired (1) the accused could be dealt with under Regulation 52 which was continued in force; (2) the accused could be proceeded against as the offence was committed whilst the regulation was in operation.

In order to examine these contentions it is necessary to state the relevant provisions of the law. The Defence (Miscellaneous) Regulations, 1939, were made by the Governor by virtue of the powers vested in him by section 1 of the Emergency Powers (Defence) Act 1939. The provisions of that Act other than the section mentioned in paragraph 3 were extended to Ceylon by the Emergency Powers (Colonial Defence) Order-in-Council, 1939. Section 11 of the Act, which is one of the sections the provisions of which were not extended to Ceylon reads :—

> 11. (1) Subject to the provisions of this section this Act shall continue in force for the period of one year beginning with the date of the passing of this Act, and shall then expire :
>
> Provided that if at any time while this Act is in force, an address is presented to His Majesty by each house of Parliament praying that this Act should be continued in force for a further period of one year from the time at which it would otherwise expire, His Majesty may by Order-in-Council direct that this Act shall continue in force for that period.
>
> (2) Notwithstanding anything in the preceding subsection, if His Majesty by Order-in-Council declares that the emergency that was the occasion of the passing of this Act has come to an end, this Act shall expire at the end of the day on which the Order is expressed to come into operation.
>
> (3) The expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done.

The Emergency Powers (Defence) Act of 1940 extended the operation of the Act of 1939 for a period of one year and the Emergency (Colonial Defence) (Amendment) Order-in-Council, 1940, extended the Act of 1940 to Ceylon. Thereafter by various Acts and Orders-in-Council the Act of 1939, was continued in force in England and in Ceylon up to February 24, 1946 ; The Emergency Laws (Transitional Provisions) Act, 1946, made provision for the continuation of certain defence regulations until December 31, 1947, notwithstanding the expiry of the Emergency Powers (Defence) Acts of 1939 to 1945. The Emergency Powers (Transitional Provisions) (Colonies, etc.) Order-in-Council, 1946, gave the Governor power to provide for the continuation in force of any Defence Regulations having effect in Ceylon, notwithstanding the expiry of the Emergency Powers (Defence) Acts 1939 to 1945. In pursuance of that power the Governor on February 21, 1946, made the Emergency Laws (Transitional Provisions) Order, 1946,

whereby he provided that the Defence Regulations specified in paragraph 1 of the schedule shall be continued in force until December 31, 1947. Regulation 17 (1) has been omitted from that schedule but Regulation 52 has been included in it. Regulation 52 is the general regulation which provides penalties for any breach of the regulations. It says that if any person contravenes or fails to comply with any Defence Regulation he shall be guilty of an offence against that regulation. It does not create any new offence but it gives general power to punish any infraction of any regulation by fine or imprisonment. It seems to me that it cannot stand alone but it must be read with a regulation which has full force and effect. Presumably, it has been continued in force because it provides penalties for breaches of the regulations that are continued in force. I am of opinion that after the expiry of Regulation 17 (1) there was no longer any offence against it for which a penalty could be imposed under Regulation 52. The second limb of the learned Attorney-General's argument is based on certain observations made by Parke, B. and Alderson, B. in *Stevenson vs. Oliver* (1841) 8 M. & W. pp. 234 and 151 English Reports Page 1024 at p. 1027.

Parke, B. said :—

" With respect to the vested interests of those persons who held warrants as assistant-surgeons in the navy or army, the intention was that all who were such, either at the time of the passing of the Act, or at any time before the 1st of August, 1826, should be in the same position, with respect of their right to practise as apothecaries as if they had been in actual practice as such before the 1st of August, 1815. I am the more disposed to think thus, on the ground that the penalties given by this Act would probably survive its expiration, and that persons who violated its provisions might afterwards be punished in the way pointed out. If it were not so, any person who had violated those provisions within six months prior to the expiration of the Act, would not be liable to punishment at all. It, is, however, unnecessary to decide that point : it is enough to say that we think those who were qualified by being assistant-surgeons in the navy before the 1st of August, 1826, retained that qualification notwithstanding the expiration of that statute."

Alderson, B. said :—

" It seems to me that those persons who, during the year for which the last act was to continue in force, or previous to that period had obtained rights under it, had obtained rights which were not to cease by the determination of the act, any more than where a person commits an offence against an act of a temporary nature, the party who has disobeyed the Act during its existence as a law is to become dispunishable on its ceasing to exist."

The appeal in that case turned upon the interpretation of section 4 of 6 Geo.4.c 133 which enacted that every person who held a commission as surgeon in the army should be entitled to practise as an apothecary without having passed the usual examination. The act was a temporary one and it expired on August 1, 1826. It was contended that a person, who, under the act, was entitled to practise as an apotehcary, would lose his right after August 1, 1826. But it was held that such a person would not be deprived of his right. The observations quoted above were made in a case in which the Court had to consider whether on the construction of the particular enactment the privilege of practising which was given by it continued notwithstanding its expiration. The question whether proceedings can be taken upon a statute which has expired is purely one of construction. Parke, B. said in the course of his judgment—" if an Act expires the duration of its provisions is a matter of construction," (1841) 8 M. & W. pp. 234 and 151 English Reports Page 1024 at p. 1027.

The effect of the expiration of a temporary statute is very clearly stated by Craies in his treatise on Statute Law (3rd edition) at p. 342 :—

" As a general rule, and unless it contains some special provisions to the contrary, after a temporary Act has expired no proceedings can be taken upon it, and it ceases to have any further effect. Therefore, offences committed against temporary Acts must be prosecuted and punished before the Act expires, and as soon as the Act expires, any proceedings which are being taken against a person will *ipso facto* terminate."

It must be noted that section 11 (3) of the Emergency Powers (Defence) Act, 1939, which provided that the expiry of the Act shall not affect the operation thereof as respects things previously done or omitted to be done was not extended to Ceylon. In the absence of a provision that offences committed before the expiry of Regulation 17 can be dealt with as though the expiry had not taken place I am of opinion that the charge cannot be sustained. Section 6 (3) of the Interpretation Ordinance (Chapter 2) does not apply to written laws that have expired.

I would, accordingly, dismiss the appeal.

Appeal dismissed.

Proctors : *A. Padmanathan* for accused-respondent.

IN THE COURT OF CRIMINAL APPEAL

Present: HOWARD, C.J. (President), CANNON, J. & DE SILVA, J.

REX vs. HERAS HAMY & TWO OTHERS

Appeals Nos. 5-7 of 1946—S.C. No. 68—M.C. Gampaha No. 24265
Argued on: 11th February, 1946.
Decided on: 25th February, 1946.

Court of Criminal Appeal—Conviction for attempted murder—Death of injured man before trial—Cause of death unconnected with injuries caused—Statements of injured man as to how he came by his injuries—When admissible as part of res gestae—*Failure on the part of trial judge to indicate to the jury possible basis for a lesser offence—Common intention—Directions not sufficiently clear—Evidence Ordinance, sections* 6 *and* 32—*Court of Criminal Appeal Ordinance, section* 5 (1), *proviso.*

The three appellants were convicted of (*a*) attempted murder (*b*) causing simple hurt.

It was in evidence that the injured man was admitted to hospital on 3-7-44 suffering from a fracture of the parietal bone ; that he was discharged from hospital on 14-9-44, after his fracture was healed ; that on 24-9-44 he was again admitted to hospital suffering from bed sores ; that he died on the morning of 23-10-44 ; that the post-mortem revealed that death was due to septic absorption due to bed sores.

It was contended for the appellant that a statement made by the injured man (deceased at the time of trial) to the Headman, to the effect that the appellants assaulted him, should not have been admitted and its admission had caused substantial miscarriage of justice.

A further objection was taken to the admission of a similar statement made by the injured man to his son, who, in the course of giving evidence in support of the 2nd count (of causing simple hurt to himself) stated that on hearing cries he ran to his father who was lying fallen and on questioning him as to who assaulted him, mentioned the names of the three accused as his assailants. The assault on the son took place within one fathom from his father.

Held : (i.) That the statement of the deceased to the Headman was inadmissible under section 32 of the Evidence Ordinance. Nor was it admissible under section 6 as it did not form part of the *res gestæ*.

(ii.) That having regard to the evidence in the case the court was satisfied that no substantial miscarriage of justice had resulted from the admission of such statement.

(iii.) That the statement of the deceased to his son was inadmissible under section 32 of the Evidence Ordinance, but was admissible under section 6 as forming part of the *res gestæ*.

(iv.) That as the trial judge in his charge suggested that the accused or anyone of them may by reason of self-induced intoxication have been incapable of forming a murderous intention he should have pointed out, that (*a*) if the jury thought that there was no murderous intention but merely knowledge that their acts were likely to cause death, the offence was one only of attempted culpable homicide not amounting to murder (*b*) that if knowledge was not established the offence was one of voluntarily causing hurt.

(v.) That as it appeared from the charge that the directions on common intention did not make it clear to the jury that to convict all the accused of the offence of attempted murder, each one of them at the time of the assault was actuated by a common intention not only to beat the injured man, but also to cause his death, or such bodily injuries as were sufficient to cause death, the conviction for attempted murder should not be allowed to stand.

Cases referred to : *The King vs. Samarakoon Banda* (44 N.L.R. 169.)
Nga Ba Min vs. Emperor (1935) A.I.R. Rangoon 418.
Imperatrix vs. Rudra (1901) 25 Bom 45.
Queen vs. Appuhamy (1 S.C.R. 59.)
R. vs. Haddy (1944) 1 All. E.R. 319.
King vs. Bellana Vitanage Eddin (41 N.L.R. 345.)

S. C. E. Rodrigo, for 1st accused-appellant.
2nd accused-appellant in person.
M. M. Kumarakulasingham, for 3rd accused-appellant.
H. H. Basnayake, Acting Attorney-General with *Jansze, C.C.*, for the Crown-respondent.

HOWARD, C.J.

The accused appeal from their convictions by the Commissioner of Assize and Jury of the offences of attempted murder and causing simple hurt. After conviction each of them was sentenced to seven years' rigorous imprisonment on the first count and one year's rigorous imprisonment on the second count, the sentences to run concurrently. Three grounds of appeal have been taken by Counsel for the appellants as follows :—

(*a*) That the statement made by Godaudage Sedris Naide to D. S. Jayawardene was hearsay and inadmissible in evidence. That in consequence of the admission of this evidence there had been a substantial miscarriage of justice and the conviction cannot be allowed to stand.

(*b*) That the Commissioner failed to invite the attention of the Jury to the possible verdicts of attempted culpable homicide and grievous hurt.

(*c*) That the Commissioner failed to invite the attention of the Jury as to whether the

appellants had a common intention to kill Godaudage Sedris Naide.

With regard to (*a*) it would appear from the evidence that D. S. Jayawardene, the Headman of Kalukondayawa, about 12 noon on the 3rd July, 1944, the day of the offence received a complaint from one Richard, a witness for the Crown. After recording this complaint the Headman proceeded to the scene where he found G. S. Naide lying injured on a messa in his own house. The Headman spoke to him and he said that the three appellants assaulted him. G. S. Naide was admitted to the General Hospital the same day suffering from a fracture of the parietal bone. He was at the General Hospital until the 18th July when he was transferred to the Angoda Hospital. He stayed at Angoda till the 14th September, 1944, when he was discharged. On the 21th September, 1944, he was admitted to the General Hospital, Colombo, suffering from bed sores. He died at 5-30 a.m. on the 23rd October, 1944. With regard to the cause of his death Dr. S. Thurairetnam says that he was unable to trace the exact cause of G. S. Naide's death, that he had an old depressed fracture, that the fracture had healed and that he did not die of that injury. Dr. Sinnadurai, the Judicial Medical Officer, held the post-mortem examination and he was of opinion that G. S. Naide's death was due to septic absorption due to bed sores. In his charge to the Jury the learned Commissioner stated as follows :—

> "There is another line of evidence, but most unintelligently the Police fail to have Sediris' statement recorded while he was alive, in the proceedings of this case. It is a deplorable example of officiousness. There are two people to whom Sediris made statements. He made his first statement to his son, Subaneris, when Subaneris went up to him when he came back from the headman and ran up to his father, and he said these three men hit him, naming the three accused. Again when the Headman went to the spot he spoke to the injured man and the injured man said it was these three accused. That evidence appears to be hearsay evidence and therefore inadmissible, but that is not so. Those were statements made by a man now dead regarding the circumstances relating to his death, and that is a matter that is admissible."

In the course of the argument we have been referred to sections 32 and 6 of the Evidence Ordinance (Cap. 11). The first part of section 32 is worded as follows :—

> "Statements, written or verbal of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense, which under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :—
>
> (1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question."

It is contended by Counsel for the appellants that, as the death of G. S. Naide had, according to the medical testimony, no connection with the injury he stated he had received at the hands of the appellants, it was not a "statement made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in a case in which the cause of that person's death comes into question." The acting Attorney-General has contended that the bed sores from which G. S. Naide died were the result of his having to lie in bed consequent on the injuries he received on the 3rd July and hence the injuries so received were the primary cause of his death. We do not think this argument is tenable. The connection between the bed sores and the lying in bed consequent on the injuries received on the 3rd July was not proved and even if proved, the connection would be too remote to make the statement relevant. The cases of *The King vs. Samarakoon Banda* (44 N.L.R. 169) and *Nga Ba Min vs. Emperor* (1935) A.I.R. (Rangoon) 418 cited by the Attorney-General are not in our opinion in point. In the Ceylon case it was held that the dying declaration of B was admissible under section 32 (1) in a case where the accused was charged with the murder of A in the course of which he inflicted fatal injuries on B. The statement by B gave the circumstances in which he met with his death and which also brought A to the scene. This statement related to a circumstance of the transaction which resulted in B's death and was therefore admissible. In the Rangoon case the deceased died from abscess of the brain as the result of injuries, received in the course of a robbery at her house, becoming septic. It was held that a statement of the deceased before her death regarding the circumstances of the robbery was relevant under section 32 (1) even though death was caused remotely by the wounds received at the robbery. In his judgment in this case Dunkley, J. distinguished the facts from those in *Imperatrix vs. Rudra* (1901) 25 Bom 45. In that case a person who received wounds during a dacoity made a statement before death. The medical evidence was that this person died of pneumonia aggravated by a stab wound, but there was no evidence as to how the pneumonia was aggravated by the stab and no explanation as to how the opinion was formed that the pneumonia was aggravated by the injury. In these circumstances it was held that the statement should not have been admitted. In the present case as there is no proved connection between the bed sores and the fracture the facts are more

in line with the Bombay than the Rangoon case. In our opinion, therefore, the statement was not admissible under section 32.

The Attorney-General, however, further contends that if not admissible under section 32 (1) the statement was admissible under section 6. This section is worded as follows :—

> " Facts which though not in issue are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places."

In regard to this contention our attention was invited to the case of the *Queen vs. Appuhamy* (1 S.C.R. 59). The facts in that case were that a Police Constable coming to the spot found the deceased lying on the road with a fractured skull which, according to the medical evidence, was the result of a blow or fall. In reply to the Constable the deceased said " Appuhamy assaulted me." It was held that this statement is, as part of the *res gestæ*, admissible in evidence in support of the contention that the injury the deceased had received was the result of an assault and not of a fall. It is, however, clear from a perusal of a report of this case that the Court were of opinion that the name of the assailant should not have been admitted in evidence, and that the statement as to the assault was admitted as part of the *res gestæ* because it was a charge of assault laid by the deceased. We do not think that the statement made to the Headman by G. S. Naide formed part of the *res gestæ*. A further point has arisen with regard to the evidence of Subaneris, the son of G. S. Naide. He states that hearing cries on returning home, he ran and saw his father lying fallen. He spoke to his father and asked him who had assaulted him and his father said that Herath, Sethan and Themis had done so. Then Herath came to him and said " I will tell you who assaulted him " and gave him a blow on the head. Then Sethan struck him with a club on the head and Themis struck him on the back of the head. This assault, which was the subject of the second charge against the three accused, took place within one fathom from his father. It was maintained by Counsel for the appellants that the statement of G. S. Naide to Subaneris was inadmissible. We think it was inadmissible under section 32 (1), but was admissible as part of the *res gestæ* under section 6 of the Evidence Ordinance.

The Attorney-General has called in aid the proviso to section 5 (1) of the Criminal Appeal Ordinance and contended that even if the statement to the Headman was inadmissible, there has been no miscarriage of justice, inasmuch as on the evidence it cannot be said that the Jury could or would have arrived at any other verdict. In this connection our attention was invited to the case of *R. vs. Haddy* (1944) 1 All England Reports 319. In this case the proviso to section 4 (1) of the Criminal Appeal Act 1907 was considered. This proviso is worded similarly to the proviso to our section.

The Court of Criminal Appeal held that, upon the true construction of the proviso to the section, the Court is entitled to give effect to the proviso if it is satisfied that no reasonable Jury, properly directed, would or could have given any other verdict than that which was in fact given and no substantial injustice has been done. The Attorney-General contends that having regard to the evidence of Ensa, Subaneris, Sarohamy and Richard no reasonable Jury could have arrived at any other verdict. Sarohamy is a witness who went back on the statement she made to the Magistrate and Crown Counsel was allowed to treat her as hostile. Her testimony was so full of contradictions that no reasonable Jury could place any reliance on it. The case therefore depended on the view the Jury formed of the testimony of Ensa, Subaneris and Richard. The first accused went into the witness box and denied that he took any part in the assault. Neither the second nor third accused tendered any evidence. It is unfortunate that the learned Commissioner in his charge to the Jury has somewhat emphasized the statement made by G. S. Naide to the Headman. But at the same time we do not think, having regard to the evidence of Ensa, Subaneris and Richard, and the fact that the 1st accused's alibi was unsupported and that no evidence was called by the other two accused any reasonable Jury would, if the statement of G. S. Naide to the Headman had not been admitted, have come to another conclusion. There has been, therefore, no substantial miscarriage of justice by reason of the admission of this statement.

With regard to (*b*), at page 23 of the charge to the Jury the learned Commissioner has suggested that the accused or any one or more of them may, by reason of self-induced intoxication have been incapable of forming a murderous intention. In such circumstances the Jury were told that the offence was not attempted murder, but attempted culpable homicide not amounting to murder. But nowhere in the charge is there any reference to the fact that, if the Jury thought there was no murderous intention but merely knowledge that their acts were likely to cause death the offence was one only of attempted culpable homicide not amounting to murder. And again if knowledge

was not established the offence was one of voluntarily causing grievous hurt. In fact on p. 22 of the charge the learned Commissioner told the Jury that if the prosecution failed to prove any of the ingredients indicated to them, it was their bounden duty to acquit the accused. The Jury were, therefore, given no option. They must either find the accused guilty of attempted murder or acquit them. We are of opinion that there was a basis for a finding on Count 1 of a lesser offence than attempted murder. Following the *King vs. Bellana Vitanage Eddin* (41 N.L.R. 345) the learned Commissioner should have put this alternative to the Jury.

With regard to (*c*) we think that the learned Commissioner's directions on common intention are open to criticism so far as the facts in the present case are concerned. At p. 15-16 of the charge the following passage occurs :—

> " So, gentlemen, here if the evidence irresistibly leads you to the inference that these three accused on that day were armed, were present at the spot, and in pursuance of a common intention to give Sediris a beating and that when the son Subaneris came up, turn on him also in pursuance of the common intention, it matters not whose hand inflicted which blow. That is the law with regard to common intention.
>
> " Now, gentlemen, what has the prosecution to prove in this case. First of all, the prosecution must prove beyond reasonable doubt that on this day Sediris and Subaneris were assaulted ; secondly, they must prove beyond reasonable doubt that these three accused were present at the spot ; they will next have to prove that the three accused were actuated by the common intention in the sense in which I have described it to you, and they will also have to prove that in pursuance of that common intertion, murderous intention under count 1, or, with the intention or knowledge under count 2, they made an attack on the father and the son. If the prosecution succeed in establishing all these ingredients to your satisfaction beyond reasonable doubt, then, the case for the prosecution would be proved. If not, the case for the prosecution will not be proved, and remember that on any point, if there is a reasonable doubt, vou must give the accused the benefit of that reasonable doubt."

The learned Commissioner states that it does not matter who inflicted the blow if the evidence leads to the inference that the accused were armed, were present and in pursuance of a common intention to give G. S. Naide a beating, it matters not whose hand inflicted the blow. Later the Commissioner says that the prosecution must prove that the three accused were actuated by a common intention in the sense in which he described it to the Jury and also that in pursuance of that common intention, murderous intention under Count 1 or with intention or knowledge under Count 2. There seems to be some confusion in this passage and the Jury may well have been in some doubt as to whether the common intention amounting in law to a murderous one that the prosecution had to establish was an intention to give Sediris a beating. It should have been clear to the Jury that to convict all of the accused of the offence of attempted murder each one of them at the time of the assault was actuated by a common intention not only to beat, but also to cause his death or such bodily injuries as were sufficient to cause his death.

Having regard to the failure of the learned Commissioner to put the alternative to a conviction on Count 1 to the Jury and the unsatisfactory treatment of what amounts to common intention, we set aside the convictions and sentences of all three accused on Count 1 and substitute therefor convictions for intentionally causing grievous hurt under section 317 of the Penal Code. In respect of this count we sentence each accused to 5 years' rigorous imprisonment to run concurrently with the sentence of 1 year's rigorous imprisonment imposed under Count 2.

Convictions varied.

Present: NAGALINGAM, A.J.

DARLIS vs. RAJENDRA, A.G.A., MATARA

S.C. No. 1116—*M.C. Matara No.* 62865.
Argued on: 16th December, 1946.
Decided on: 18th December, 1946.

Public Servant—Obstruction to—Search of accused's house to ascertain whether rice or paddy hoarded—Authority to search granted by Deputy Food Controller under Regulation 2 A of Food Control Regulations 1938 *and* 1943*—Resistance by accused—Charges under sections* 183 *and* 344 *of Penal Code—Legality of such authority.*

Held : (i.) That Regulation 2 A of the Food Control Regulations 1938 and 1943 does not empower the issue of an authority to inspect and search premises for the purpose of ascertaining whether there is any hoarding of a controlled article.

(ii) That the Regulation authorises the search of such places or premises as those to which the controlled article has been transported or removed, not any or all places generally.

(iii.) That an attempt to search premises for controlled articles hoarded under such an authority is illegal and could be lawfully resisted.

Cases referred to : *Gnananda Thero vs. Village Headman of Medakotuwa* (1946, 47 N.L.R. 188).

L. A. Rajapakse, K.C., with *C. J. Ranatunga* and *Vernon Wijetunga*, for accused-appellant.

J. G. T. Weeraratne, C.C., for Attorney-General.

NAGALINGAM, A.J.

The appellant in this case has been convicted under sections 183 and 344 of the Penal Code of having obstructed a public servant in the discharge of his public functions and with having used criminal force on him in the execution of his duties as such public servant and has been sentenced to undergo imprisonment for a term of six months on each count, the sentences to run concurrently.

The case for the prosecution is that a Food Control Field Assistant went to search the house of the accused with a view to discovering whether paddy or rice was hoarded in the house of the accused and, while the Field Assistant was engaged in examining certain bags which he suspected contained paddy or rice, he was obstructed by the accused and certain others from discharging his duties and criminal force was also used on him to prevent him from carrying out his functions.

On appeal the point is taken on behalf of the accused that the Field Assistant had no legal right and was vested with no lawful authority to enter the house of the accused and make the alleged search and that as his entry was not only unlawful but illegal the accused was entitled, even if he did so, to resist the Field Assistant from carrying out acts which he was not empowered by law to do.

The Field Assistant who was supported by the Deputy Food Controller for the area, who is also the Assistant Government Agent, asserted that he was empowered to make the search by reason of the authority conferred on him by the three documents granted to him by the Deputy Food Controller. These documents were produced in evidence marked P1, P2 and P2a. The date on which the accused is alleged to have committed the offence is set out in the charge sheet as 19-2-46 and there is no error in regard to that date. The document P1, however, which was produced by the Field Assistant, is one bearing date 23-5-46, and the appellant rightly contends that document P1 cannot in any way be relied upon by the prosecution to justify an entry made on 19-2-46. The document P1, therefore, is of no assistance to the prosecution. The document P2a is one which has been issued to the Field Assistant on 18-12-45, but it purports to be an authority granted by the Assistant Government Agent by virtue of the powers vested in him by section 4 of the Defence (Paddy Cultivations) Regulations published in Government Gazette No. 9077 of 3-2-43. It is pointed out that these regulations were rescinded on 27-9-43 by new Regulations published in Government Gazette No. 9176 of that date. It is, therefore, manifest that when in December, 1945, the Assistant Government Agent issued letter of authority P2a, he purported to act under non-existent Regulations and therefore the authority P2a was bad and conferred no powers of search on the Field Assistant.

The prosecution, therefore, has to fall back upon document P2 dated 18-12-45 in order to establish the lawfulness of the entry and search. This document is stated to have been issued by the Deputy Food Controller by virtue of powers vested in him " by rules (strictly speaking regulations) 2 (1), 3 of Part B and 2A of the Food Control Regulations 1938 and 1943 " made under section 5 of the Food Control Ordinance Cap. 132. The Food Control Regulations, 1938, framed under sub-section 5 of the Food Control Ordinance are set out in the 1940 Supplement, Vol. III, at page 154. It is in three sections lettered A, B and C. It is conceded that the reference to these Regulations is to those under section B. The Regulations under head B have been amended by the Defence (Food Control) (Special Provisions No. 3) Regulations, 1943, and it is necessary to consider these Regulations to ascertain whether the powers conferred by document P2 on the Field Assistant are within the enabling powers vested in the issuing authority. The powers granted may be divided into three parts, (1) to inspect or search vehicles suspected to be conveying any controlled foodstuffs (2) to seize such foodstuffs transported or removed in contravention of any order for the time being in force (3) to inspect and search any premises in which controlled foodstuffs are suspected to be stored in contravention of any order for the time being in force and to seize such foodstuffs. It is unnecessary for the purpose of this appeal to consider heads (1) and (2).

The only question is whether the rules relied on confer on the Assistant Government Agent power to confer authority as set out in (3) to inspect or search any premises for any controlled articles and to seize such articles. Regulation 2 (1) relates to the transport or removal of the controlled articles in a vehicle or vessel and is

the basis for the authority embodied under head (1). Regulation 3 is the source of the authority conferred under head (2) and Regulation 2 (A) is said to be the foundation of the issue of the authority under head (3). The charge sheet shows that the search was in pursuance of the authority conferred under head (3), for it specifies the function performed by the Field Assistant when he was obstructed as " while searching a house for hoarding of rice." Regulation 2 (A) runs as follows :—

> " Where a Food Controller or peace officer has reason to suspect that any cattle, food or article of food has been transported or removed to any place or premises in contravention of any order for the time being in operation, the Food Controller or any Peace Officer or any other person authorised thereto in writing by the Food Controller may enter, inspect and search such place or premises."

It would be noticed that this regulation does not empower the search of any premises for discovering whether there has been hoarding or any rice of the controlled articles. But what it does empower is that where there is reason to suspect that a controlled article has been transported or removed to any place or premises, then the place or premises to which the controlled article may have been removed may be entered, inspected and searched. It has been contended that the existence of a controlled article in a house would presuppose the transport or removal of that article thereto and therefore a search of the house would be in order. There are two objections to this argument. In the first place, when the Regulation refers to the controlled article having been transported or removed it must necessarily mean that the removal or transport was at a point of time in sufficient proximity to the time at which the entry or search of the place where the article has been removed to is attempted to be made. To my mind, it is clear that under this Regulation it would be an unjustifiable act for an authorised person to make a search of premises on the footing, to take an extreme case, that the removal or transport to the premises had been effected a year earlier. What particular period of time would be regarded as sufficiently close to the date of removal or transport to justify a search under this Regulation would depend upon the particular facts of each case and also depend upon a number of factors. Secondly, in the present case, however, the Field Assistant did not purport to enter or make search of the premises on the footing that any controlled article had been transported or removed into the premises. It cannot therefore be said that Regulation 2 (A) empowered the issue of the authority under head 3 to inspect and search premises for the purpose of ascertaining whether there is any hoarding of a controlled article. The authority P2, therefore, is one which did not empower the Field Assistant to make a search of the accused's premises for investigating if any controlled article had been hoarded. In this view of the nature of the authority it must follow that the attempted search of the premises was illegal and that the accused was entitled to resist and prevent a search from being made.

There is another matter which has been argued before me and in regard to which I would wish to make some observations, and that is whether even if the authority had been in the express terms of Regulation 2 (A) such authority could have been issued in general terms, that is to say, empowering the search not of any particular place or premises but of such places or premises as the Field Assistant or other authorised person may decide to search. There is a marked difference in the language used not merely in analogous Regulations but in these Regulations themselves in regard to the nature of the power conferred on a person who is authorised to make a search. For instance, the language that is used in Regulation 2 (1) in regard to the authority to be conferred on a person empowered to search is different from that used for a similar purpose under Regulation 2 (A). Under Regulation 2 (1) the words are " where the Food Controller or a Peace Officer or any person authorised thereto in writing by the Food Controller has reason to suspect," that is to say, where either the Food Controller suspects or a Peace Officer suspects, or where a person authorised in writing to perform the functions under this Regulation by the Food Controller has reason to suspect, then each of those persons may take such steps as are permitted under it. The point to be stressed is that it would be sufficient for the purpose of this Regulation that the person authorised has reason to suspect, and it is immaterial whether the person who issues authority entertains any suspicion or not. Now, if one examines the language of Regulation 2 (A) it would be found that the person or persons upon whose suspicion action could be taken under this Regulation are the Food Controller or a Peace Officer and not any person authorised by either of them, and where either the Food Controller or a Peace Officer has reason to suspect, then either of them may authorise any other person to enter and search the place or premises. It must also be noted that the authority should be in writing. The authority, therefore, should show on the face of it that the person issuing the authority to inspect or search has reason to suspect and that in pursuance of his suspicions he issues the authority, and it is also necessary that his suspicion

must be with regard to the transport or removal of any controlled article to some particular place or places or premises and that the authority that is issued must empower the person authorised to inspect such place or places or premises to which the issuing authority has reason to believe the controlled article has been removed or transported. It would not be a proper exercise of the functions of the power conferring authority to empower a subordinate officer or other person to make search of all or any places generally, as it is only to inspect *such* places or premises as those to which the controlled article has been transported or removed that the Regulation authorises the search.

A similar view was taken in an allied matter in the case of *Gnananda Thero vs. Village Headman of Medakotuwa* (1946, 47 N.L.R. 188) where Soertsz, J. held that it was irregular for a competent authority to have issued in blank a requisition form enabling a subordinate officer to fill it with a view to requisitioning paddy, which was the controlled article dealt with in that case. It is unnecessary to stress the fact that these Regulations curtail very considerably the right a subject has of excluding the unwarranted interference with the privacy of his home, and where the Legislature has taken special precautions to vest the exercise of a discretion in a particular class of persons and not in others, it would be manifestly wrong to permit a subordinate officer to enter houses at his own discretion uncontrolled by that of a higher authority.

The appeal is, therefore, entitled to succeed, and I allow the appeal and acquit the accused.

Appeal allowed.

Proctors : *Stanley Pereira* for the appellant.

IN THE PRIVY COUNCIL

Present : Lord Normand, Sir Madhavan Nair and Sir John Beaumont

EDDED CO-OPERATIVE SOCIETY, LTD. (Appellant) vs. LEVI GEFFEN (Respondent)

Appeal No. 32 (from Palestine)
Decided on : 10th October, 1946.

Evidence Ordinance, section 92—Document signed by one of the parties—Is it a written agreement—Can oral evidence be led to prove intention different from that expressed in document.

Held : That a document signed by one party is not a written agreement within the meaning of section 92 of the Evidence Ordinance, and, oral evidence, therefore, is admissible to show that the real intention of the parties was different from the language of the document.

Phineas Quass, for appellant.
H. Goitein and *E. Dennis Smith*, for respondent.

Sir John Beaumont

This is an appeal from the judgment of the Supreme Court of Palestine sitting as a Court of Appeal dated 30-11-1943, reversing the judgment of the District Court of Tel Aviv dated 30-6-1943, and ordering judgment to be entered for the respondent for L. P. 500 with cost.

In the year 1940, the appellants wished to acquire the majority of the shares in a company called Abir Company, Ltd. The respondent was one of the shareholders in that company, and the appellants thought that he could influence other shareholders. Accordingly an agreement was entered into between the appellants and the respondent, the terms of which are to be found in a letter from the appellants to their solicitor, Dr. Ishayevitz, which was admittedly shown to the respondent. The letter is Ex. D-2, and contained the following provision :—

> "We hereby instruct you in your capacity as our advocate to communicate to Mr. Levi Geffen on our behalf that after we shall have procured the majority of shares in the Abir Co., Ltd., either in our name or in the name of a trustee on our behalf, we shall pay him an amount of L. P. 250 for his help in procuring the majority of these shares."

After some other provisions not now material to be stated, the letter continued :

> "We shall pay him a further amount of L. P. 250 after completion of all the matters between ourselves and the Cohenstak Brothers who are the owners of the remaining shares in the above company."

It is not now in dispute that the amount which became payable under this letter was L. P. 500.

On 7-11-1941, a memorandum of agreement, which is Ex. D-1, was entered into between the parties whereby the appellants agreed to pay the respondent L. P. 201 for his shares in the Abir Co., Ltd., and the respondent agreed to perform

various services in connection with such company and the transfer of its shares to the appellants.

On 28-11-1941, Dr. Ishayevitz on behalf of the appellants paid to the respondent by cheque the sum of L. P. 100, and the respondent signed a document (the draft of which had been prepared by Dr. Ishayevitz), described as an agreement between himself and the appellants, which is Ex. D-6. In that document the parties confirmed that the agreement was in addition to the agreement signed by the parties on 7-11-1941 and that the consideration stated in such last mentioned agreement was a merely formal consideration, and the agreement now being stated then contained the following paragraph :—

> " The parties hereby confirm that the true consideration for the aforesaid shares and for all the other undertakings of Geffen in the agreement of 7-11-1941, is L. P. 1000 and the Egged shall pay this amount by cheque to the order of Geffen drawn on the Anglo-Palestine Bank, Tel Aviv No. 57353, 12951 and Geffen hereby confirm the receipt of this cheque."

On the same date, *i.e.*, 28-11-1941, but after the interview at which the cheque was handed over, the respondent wrote to Dr. Ishayevitz a letter, which is Ex. P-2. The letter was headed " without prejudice," but it was given in evidence by the respondent without objection and he was cross-examined upon it. The said letter contained 3 paragraphs. which are material :—

> " (1) My rights in Abir, Ltd., are 10 per cent. of the selling price of the whole business. Therefore I have to receive from Egged 10 per cent. of the sum paid for example Konstock family received (50 per cent. = L. P. 5600) that means a sum of L. P. 1120.
>
> (2) In addition to the above sum, there is due to me a further L. P. 500 the sum which you promised to pay me—you and Egged and bound yourselves to pay in accordance with the letter of 15-3-1940, which was deposited with you as trustee.
>
> (3) On the basis of all the promises and according to your request in the office of Dr. Bernard Joseph, Jerusalem, and out of complete confidence, I signed all documents which were handed to me for signature without any dispute or argument and without even examining them and that was in order to lighten the work of the Egged people and not to hurry on the conclusion of the business. Among the other promises you authorised me to make promise to others and that must be carried out."

No written answer was sent for this letter.

In the suit giving rise to this appeal, the respondent sued for L. P. 500 due under the agreement of 15-3-1940 being Ex. D-2. The defence of the appellants was that they were under no liability in law to pay to the plaintiff the amount claimed by him, but that nevertheless the appellants did pay to the respondent on 28-11-1941, the sum of L. P. 500 as if they were liable to do so.

Both the lower courts held that the debt due under Ex. D-2, was legally payable, and their Lordships see no reason to differ from this view. The only real question calling for decision in this appeal is whether the monies due under Ex. D-2 were paid on 28-11-1941 being included in the L. P. 1000 paid on that date, as the appellants allege ; or whether the L. P. 1000 included only the price of the respondent's shares and the value of services to be rendered by him under the agreement of 7-11-1941, as alleged by the respondent and expressly stated in Ex. D-6.

At the trial the appellants' evidence was to the effect that at the interview on 28-11-1941 between Dr. Ishayevitz and the respondent, when the cheque for L. P. 100 was given, Dr. Ishayevitz wrote at the bottom of Ex. D-2 a memorandum which now appears thereon in the following terms :—

> " I hereby confirm that I have received from Egged the sum of L. P. 500 mentioned in the contract. I received the amount in the sum of L. P. 100 referred to in the agreement between me and Egged of this date in consideration for my share in Abir, Ltd."

It was the appellant's case that the respondent signed this memorandum and that thenceforth Ex. D-2 with the memorandum remained on the file in the office of Dr. Ishayevitz and at some subsequent date the respondent managed to secure possession of Ex. D-2 and obliterated his signature on the memorandum by putting stamps over it. It may be noted that no fraud or forgery by the respondent was pleaded. The respondent's case was that after reading the memorandum on Ex. D-2 he refused to sign it.

The trial Court held that the forgery alleged by the appellants had not been proved, but the Court found that the respondent had agreed to sign the said memorandum and pretended to sign it. They held therefore that the L. P. 500 sued for had been paid, and dismissed the plaintiff's suit. In appeal the Supreme Court held that once the charges of forgery failed, the trial Court erred in allowing oral evidence to be adduced to show that the real intention of the parties was different from the plain and unequivocal language of the agreement, Ex. D-6, and that it was not competent for the appellant to challenge this document by oral evidence.

Their Lordships are not prepared to go as far as the Supreme Court. The document Ex. D-6 was signed by one of the parties and is not therefore, a written agreement, and their Lordships have not been referred to any provision in the law of Palestine which would render the evidence tendered at the trial inadmissible. But in their

Lordships' view the evidence provided by the written documents far outweighs in cogency the conflicting and in many respects unsatisfactory, verbal evidence tendered at the trial. Exhibit D. 6 states in clear terms that the L. P. 1000 was paid as consideration for the respondent's shares in Abir, Ltd., and for his other undertakings in the agreement of 7th November, 1941. The letter Ex. P. 2 written by the respondent on the same date suggests that at that time he was disposed to challenge the price paid for his shares, a position which he has not persisted in, but the letter makes it perfectly plain that L. P. 500 was, in the respondent's view, still due to him under Ex. D-2. If L. P. 1000 was to include the L. P. 500 payable under Ex. D-2 it would have been easy to have said so in Ex. D-6 which was drafted by Dr. Ishayevitz. It is suggested that the appellants were anxious that their arrangement with the respondent for securing his services in connection with the acquisition of shares in Abir, Ltd., should not be made public. Even if this be so Ex. D-6 could have been expressed to include any monies payable under the agreement of 15th March, 1940, without mentioning the services for which such monies were payable.

Their Lordships are quite unable to appreciate the finding of the trial Court that the respondent agreed to sign, and pretended to sign, the memorandum at the foot of Ex. D-2. Once the allegation of fraudulent manipulation by the respondent with his signature on the said memorandum failed, it seems to follow that the memorandum was not in fact signed by the respondent, and Dr. Ishaveyitz could see this for himself.

It is idle to suggest that Dr. Ishayevitz was deceived by the respondent pretending to execute the memorandum or that he would have been satisfied to accept an agreement to sign a document which if it was to be signed at all should have been there and then. Moreover if the cheque for L. P. 1000 was handed over on the terms that the respondent should sign the memorandum on Ex. D-2 it is strange that Dr. Ishayevitz did not demand the return of the cheque when the respondent refused to sign, and made no attempt to stop payment of the cheque. Nor did he take any action when he received the letter Ex. P. 2 written on the same date in which the respondent made a claim wholly inconsistent with the suggestion that he had signed a receipt for the L. P. 500 due under Ex. D-2.

In Their Lordships opinion the appellants have failed to prove that the monies payable under Ex. D-2 were paid on 11th November, 1941, as alleged, and the respondents suit is entitled to succeed. On this finding it is unnecessary to consider whether the charges of fraud and forgery set up at the trial were open upon the pleadings. Their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellants must pay the respondent's costs of this appeal and his costs in both the Courts in Palestine.

Appeal dismissed.

Solicitors for Appellant: T. L. Wilson & Co.
Solicitors for Respondent: Bartleet & Gluckstein.

IN THE COURT OF CRIMINAL APPEAL

Present: Keuneman, S.P.J. (President), Wijeyewardene, J. & Dias, J.

REX vs. K. MUTTU

Appeal No. 45/1946 *and Application No.* 166/1946—*S.C.* 2/*M.C. Mallakam* 28356.
Argued on: 7th and 8th November, 1946.
Decided on: 11th November, 1946.

Court of Criminal Appeal—Indictment for murder—Plea of self-defence—Failure of trial Judge to comment on matters vital to defence—Misdirection—Remarks prejudicial to accused.

The appellant was indicted with murder by shooting but was convicted of culpable homicide not amounting to murder—jury indicating that he exceeded the right of private defence—None of the prosecution witnesses saw the shooting but the appellant admitted causing the two injuries on the deceased which according to expert evidence had been caused by gunshots fired from 70 and 10-15 feet respectively. The appellant further stated that he set out to go to Point Pedro with a gun when the deceased came with a sword calling on him to stop. Appellant hurried away to escape and at the same time loaded his gun. He warned the deceased and when deceased was about 46 feet fired the 1st shot. The deceased continued to come on and when appellant found he could not retreat any further owing to a deep ditch, he fired the 2nd shot (fatal) at a distance of 6 to 10 feet, as he feared he would be killed. The learned trial judge (*a*) failed to comment on the expert evidence which would have furnished the jury with the range at which each of the shots was fired,

(*b*) inadvertently made an error in stating the distance at which the 2nd shot was fired leaving a possible impression that the shot was fired at a distance three times as great as the actual distance,

(*c*) failed to point out that the further retreat of the appellant was prevented by the deep ditch.

Held : (i.) That these amounted to misdirections on a matter vital to the defence and the conviction could not be allowed to stand.

(ii.) That, when an accused had been indicted separately with the murder of another person on the same day and acquitted after trial, a reference to such " murder," by the trial judge in his charge without pointing out to the jury that he had been acquitted, may cause considerable prejudice in the minds of the jury against the accused.

F. A. Hayley, K.C., with *H. Wanigetunga* and *T. A. de S. Wijesundera*, for accused-appellant.
T. S. Fernando, C.C., for the Crown.

KEUNEMAN, S.P.J., (President),

The accused appeals against a conviction for culpable homicide not amounting to murder. The Jury on being questioned by the Trial Judge said they held that the accused had exceeded the right of private defence.

The deceased had received two gunshot injuries. The first consisted of nine pellet marks spread over the left side of the chest. The pellets had barely penetrated the skin, and the expert evidence for the prosecution established that the shot was fired at extreme range, viz. over 70 feet. The second injury consisted of a hole 3 inches by 1½ inches, where the wadding and the shots had gone in as a solid column just above the right nipple, two of the slugs had made exit wounds in the back and others were embedded in the back of the chest. The expert evidence established that the shot was fired from not less than 8 feet or more than 15 feet.

The accused admitted that he had caused these injuries, but pleaded that he had acted in the exercise of the right of private defence. He stated that he had set out with his gun to go to Point Pedro. He saw the deceased man coming with a sword and calling on him to stop. The accused ran or hurried away in order to escape, and at the same time loaded his gun. He warned the deceased and when the deceased was some distance away—about 46 feet—fired the first shot at the deceased. That shot did not stop the deceased who continued to come on. The accused still retreated, at the same time warning the deceased not to come near him. The accused was unable to retire further because he reached a deep ditch or pit. So when the deceased came on with the sword the accused fired the fatal shot, at a distance of 8 to 10 feet. This was done because the accused feared he would be killed.

I may also add that the prosecution called no actual eye-witness of the shooting, but there was evidence that shortly before the event the deceased was not carrying a sword. It is most likely that the Jury accepted the story of the accused. Mr. Hayley contended that there were certain misdirections by the Trial Judge which probably misled the Jury into thinking that the accused had exceeded the right of private defence. In the first place he contended that the Trial Judge did not deal with the expert evidence called by the prosecution, and said that that evidence corroborated the evidence of the accused. He urged that it was very important that the shots had been fired one at extreme range and the other at very close quarters. Also the failure to comment on the expert evidence resulted in the fact that the Jury were not informed of the range at which each of the shots was fired. In addition to this the Trial Judge inadvertently made an error in stating the distance at which the second shot was fired. In one part of the charge the Judge speaks of the accused " standing far off with the sword in hand "—which is hardly an accurate description of what occurred. Later he said—" Consider the distance the deceased was at the time—at least 8 to 16 *yards*." Still later he said " At least the deceased was about 10 *yards* away and he fired the fatal shot." " The deceased could hardly strike the accused with a sword at that distance..... The accused might well have taken other steps ; he could have run off, or fired at his legs. Why fire at a vital part of the body like the chest or the upper part of the body ? " It is true that at one stage the Trial Judge made the distance " 8 or 9 feet away " but this he did in presenting the accused's version of what happened, and he did not add that the expert evidence supported that.

We think there is substance in the contention that the Jury may have been confused by the charge, and may have been under the impression that the shot was fired at a distance three times as great as the facts demonstrated. Also the Trial Judge did not point out that the further retreat of the accused was prevented by the deep ditch or pit, according to the accused's story. The omission to mention this fact may have affected the minds of the Jury.

In our opinion these are misdirections relating to a very vital matter. The distance at which

the fatal shot was fired was of the utmost significance and had an immediate bearing on the question whether the accused exceeded the right of private defence or not. Had the correct facts been put to the Jury, we think they may well have considered that the accused had justification for firing as he did, with fatal results. It is difficult for us now to reconcile the verdict of the Jury with the facts as established in the case.

Our attention has also been drawn to another matter. It was in evidence that a woman Manickam had also met her death by gun shot injuries on this occasion. The accused had been tried for the murder of Manickam and had been acquitted. The Trial Judge referred to the fact that " there were two persons murdered on this day " and asked the Jury to eradicate from their mind that the accused had killed the other person Manickam. " You should not take into consideration that he murdered another person on that day, and you must not therefore think he is a very bad man." The use of the word " murder " in this connection was not justified, and the Trial Judge failed to point out that the accused was found not guilty of the murder of Manickam. Unfortunately the Trial Judge returned to this matter again in the latter part of his charge. " Why was the woman about ? Was she also trying to injure the accused ? Why was she killed ? Was it because she would be the only witness if she remained alive ? "

We are of opinion that these remarks of the Trial Judge probably caused considerable prejudice in the minds of the Jury against the accused, and were not justified. For these reasons we are of opinion that the conviction in this case cannot stand. We therefore set aside the conviction and sentence and acquit the accused.

Accused acquitted.

Proctor : *I. W. A. Samuel* for accused-appellant.

IN THE COURT OF CRIMINAL APPEAL

Present : SOERTSZ, A.C.J. (President), WIJEYEWARDENE, J. & DIAS, J.

REX vs. M. G. P. FERNANDO

Appeal No. 46 *of* 1946 *with Application No.* 170 *of* 1946, *S.C. No.* 88—*M.C. Chilaw No.* 27953.
Argued and Decided on: 18th November, 1946.

Court of Criminal Appeal—Charge of attempt to murder—Verdict of voluntarily causing grievous hurt—Failure on the part of trial Judge to direct that a verdict of causing grievous hurt on sudden and grave provocation possible—Alteration of conviction.

The appellant was charged with the offence of attempt to murder. The jury's verdict was that he was guilty of voluntarily causing grievous hurt. Further the jury indicated that in their opinion there was " latent provocation." The learned trial judge failed to direct that it would be possible for them to return a verdict of causing grievous hurt on grave and sudden provocation.

Held : That in the circumstances, the conviction should be altered to one under section 326 of the Penal Code and that a sentence of two years' rigorous imprisonment would be sufficient.

A. H. C. de Silva, for the appellant.
H. A. Wijemanne, C.C., for the Crown.

SOERTSZ, A.C.J.

This is a case in which the appellant appeals against a conviction of causing grievous hurt entered against him. The charge preferred against him was that he attempted to commit the murder of the injured man, his brother. The learned trial Judge in the course of his charge to the jury dealt adequately with the charge of attempt to commit murder and with the charge of attempt to commit culpable homicide not amounting to murder. He indicated to the jury sufficiently that for the constitution of the offence of attempt to commit murder a murderous intention is essential and he went on to say that if that murderous intention was not sufficiently established in their view it was open to them to consider whether the case was more properly one of attempt to commit culpable homicide not amounting to murder on the ground that the assailant knew or ought to have known that what he was doing was likely to cause death. He also told them that even if they found a murderous intention it was nevertheless open to them to return a verdict of culpable homicide not amount-

ing to murder if they found grave and sudden provocation. The verdict of the jury indicates clearly, we think, that in their view there was neither a murderous intention nor the requisite knowledge for the constitution of the offence of attempt to commit culpable homicide not amounting to murder, because the verdict they returned was one of voluntarily causing grievous hurt. Having returned that verdict, they went on to say that in their opinion there was " latent provocation." It is rather difficult for us to speculate here and now as to what exactly the foreman of the jury meant when he used the words " latent provocation." Provocation of whatever degree or quality it might have been still was provocation and seems to indicate to us that what the jury meant to convey somewhat artlessly was that they thought that the injury was caused on provocation. That might have been more clearly expressed by the jury, we think, if the learned trial Judge had directed them that in the circumstances of this case it would be relevant to consider whether the attack upon the injured man was an attack delivered by the accused on grave and sudden provocation in which case he would have directed them that it would be possible for them to return a verdict of causing grievous hurt on grave and sudden provocation. In other words, the existence of such an offence was not brought to the attention of the jury.

In all the circumstances of this case we think that the conviction should be altered and that a conviction should be entered under section 326 of the Penal Code and on the facts of this case we think it will be sufficient in respect of that offence to sentence the appellant to a term of 2 years' rigorous imprisonment.

Conviction and sentence altered.

Proctor : *Basil E. Pinto* for the appellant.

IN THE COURT OF CRIMINAL APPEAL

Present : KEUNEMAN, S.P.J. (*President*), JAYETILEKE, J. AND DIAS, J.

REX *vs.* K. PUNCHIRALA

Appeal No. 44 *of* 1946 (*with leave obtained*) *S. C.* 29—*M. C. Anuradhapura, No.* 18933
Argued and Decided on : 7th October, 1946

Court of Criminal Appeal—Appeal from sentence.

Held : That, where a plea of culpable homicide not amounting to murder was accepted, and the evidence recorded by the Magistrate indicated that the accused exceeded his right of self-defence and that he fatally injured the paramour of his mistress when trying to break into his house, a sentence of four years' rigorous imprisonment would be adequate.

H. Wanigatunga, for the accused-appellant.
H. A. Wijemanne, C.C., for the Crown.

KEUNEMAN, S.P.J.—

The only question that arises for consideration is the sentence imposed upon the accused. A plea was accepted by the learned trial Judge of culpable homicide not amounting to murder and the trial Judge imposed a sentence of 12 years' rigorous imprisonment upon the accused. We have looked into the record and find that the only evidence recorded in the Magistrate's Court against the prisoner is that of his mistress. According to the story of the mistress the accused woke her up and said : " Thieves are coming, I am prepared, do not talk. Then the thief opened the shutter and put his head in. Then my husband who was standing by the side of the wall gave two heavy blows with P 2. The thief got behind. Accused also got out and assaulted the thief in the shed. He assaulted this time with P 2. I was in the compound when the accused struck the thief with P 2. The thief tripped on something which I do not know and fell on the plank. Then accused threw P 2 on the compound and cut him with a katty. The thief died." That was her statement in examination-in-chief and this immediately raises for the accused person the defence of the exercise of the right of private defence. If this evidence is to be accepted, the accused acted in defence of himself and his mistress, protecting their persons and their property. Now, it is in evidence that the deceased man had come there carrying a gun. That is a fact that also must be taken into account. No doubt also arises from this statement that the accused exceeded the right of private defence.

That is one aspect of the matter. In her cross-examination the mistress of the accused said: "I was on terms of intimacy with deceased. He visits me in the night without the knowledge of accused. My husband did not know this intimacy. Deceased lives in a village 12 miles away. Whenever deceased came he brought gun P 4." Now, this does raise or suggest another possible defence which may have been developed at the trial, namely, that this accused was taking direct action against the paramour of his mistress who was trying to break into the house.

It is not quite clear on what footing the plea of culpable homicide not amounting to murder was accepted, but whatever view we take it appears to me that the sentence of 12 years' rigorous imprisonment is excessive. In all the circumstances, while affirming the conviction, I set aside the sentence of 12 years' rigorous imprisonment and substitute therefor a sentence of 4 years' rigorous imprisonment.

Sentence varied.

Present : NAGALINGAM, A.J.

JOSLIN FERNANDO vs. CHARLES APPUHAMY

S. C. No. 1397—*M. C. Negombo No.* 46847.
Argued on : 10th December, 1946.
Decided on : 17th December, 1946.

Maintenance—Application for—Promise of marriage on paternity being imputed—Corroboration.

When the defendant in a maintenance action, on paternity being imputed to him, does not protest, but makes a promise of marriage.

Held : That this statement furnishes the best corroboration of the mother's testimony as regards paternity.

Cases referred to :—*Bebi vs. Tidiyas Appu* (1914, 18 N. L. R. 81).
Parvathy vs. Chellappah (1916, 3 C. W. R. 87).

No appearance.

NAGALINGAM, A.J.

This was an application by the mother of an illegitimate child for an order for maintenance against its putative father. The learned Magistrate while observing that he had no reason to disbelieve the evidence of the petitioner and her uncle which established that the child was born to the defendant refused the application on the ground that there was no corroboration in any material particular of the evidence of the mother by independent testimony. The learned Magistrate quite correctly states that the statement alleged to have been made by the applicant to her uncle about six months after conception to the effect that the defendant was the father of the child is not corroborative evidence as the statement was not made at or about the time when the conception took place. But there is other evidence which affords ample corroboration of the testimony of the mother in regard to the paternity of the child.

In the case of *Bebi vs. Tidiyas Appu* (1914, 18 N. L. R. 81) an admission as to paternity made by the defendant to the Police Headman was held to be not only admissible evidence but was the evidence which furnished the corroborative testimony of the mother's evidence. The case of *Parvathy vs. Chellappah* (1916, 3 C. W. R. 87) is an authority for the proposition that where the defendant was seen living in the house of the mother of the child and this was deposed to by a witness other than the mother, that evidence was held to be sufficient corroboration of the evidence of the mother as regards the paternity of the child. In the present case the defendant himself gave no evidence and the Magistrate, as stated earlier, expressly states that he sees no reason to disbelieve the applicant or her uncle. The uncle in giving evidence specifically stated that when he learnt that the applicant was pregnant to the defendant and saw the latter in the applicant's house he spoke to him and remonstrated with him. The defendant thereupon told him that he was going to marry the applicant. It seems to me that where the defendant on paternity being imputed to him does not protest but makes a promise of marriage his statement furnishes the best corroboration of the mother's testimony as regards paternity. Further there is the evidence of the uncle that he has seen the defendant in the applicant's house on several occasions even after the birth of the child and that the child was maintained by the applicant. I am therefore of the opinion that the applicant's testimony has

been corroborated on material particulars by the evidence of the uncle and that she is entitled to have an order of maintenance for the child made in these proceedings.

I set aside the order of the learned Magistrate and direct that the defendant pay to the applicant a sum of Rs. 25 per month from the date of application. The petitioner will also be entitled to costs of the proceedings in the lower Court.

Set aside.

Proctors : *Edirisinghe*, for applicant.
Herbert de Silva, for respondent.

Present: NAGALINGAM, A.J.

REX vs. MANUEL COORAY

4th Western Circuit.
S.C. No. 66—M.C. Kalutara No. 40170.
Argued on: 7th November, 1946.
Decided on: 17th *November*, 1946.

Criminal Procedure Code, section 172—*Statement of accused to Headman—Likelihood of it being sole evidence to establish accused's presence at scene of offence—Failure to include such statement in indictment—Application to amend, by including such statement—Prejudice to accused—Matters to be taken into consideration.*

Held: That an application to amend the indictment, by including in the list of productions the statement made by the accused to the Village Headman and referred to in the lower court, should be allowed, although such statement is likely to be the only evidence available to the prosecution to establish that the accused was at the scene of the offence.

Cases referred to :—*Queen vs. Sinno Appu* (1885, 7 S. C. C. 51.)

H. A. Wijemanne, C.C., for the Crown.
M. Rafeek, for accused.

NAGALINGAM, A.J.

This was an application by Crown Counsel to amend the indictment by including in the list of productions the statement made by the accused to the Village Headman. Learned Counsel for the defence at first stated that he left it to Court. I was, however, disinclined to accede to the application inasmuch as it was stated that although the fact of a statement having been made by the accused to the Village Headman had been referred to in the lower Court, no attempt was made either in that Court or when the Indictment was prepared in the Attorney General's Department to have that statement put in as a production. It then transpired that the Prosecution would very likely have to depend solely upon this statement of the accused in order to establish that he was at the scene of the offence and without that statement there was a likelihood of there being no evidence to show that the accused had any hand in regard to the commission of the offence upon which he has been indicted.

Learned Counsel for the defence then stated that he objected to the amendment being allowed as it would materially prejudice the accused in his defence. While it is true that if the amendment is allowed the result would be to bring home to the accused more readily the charge preferred against him, that is not the kind of prejudice that should be taken into account in considering whether an application to amend should be allowed or not. In an old case, *Queen vs. Sinno Appu* (1885, 7 S.C.C. 51) Lawrie, J. expressed himself thus in regard to the consideration that should properly govern the exercise of the discretion by the Court in dealing with an application to amend the indictment :—

> " The Judge should be ready to listen to, and willing to adopt any amendment which will have the effect of convicting the guilty or of acquitting the innocent."

It is true that this case was prior to the Criminal Procedure Code but the terms of section 172 of the Code are very wide in regard to the powers conferred on a Court in regard to amendment of an indictment and I think in this case where the amendment is intended to place before the Court a statement made by the accused himself the discretion of the Court should be exercised in favour of the application to amend.

I have therefore made order allowing the application.

Application allowed.

Present: NAGALINGAM, A.J.

JAYAWARDENE vs. SARUSUDEEN

S.C. No. 1274—*M.C. Gampola No.* 11166.
Argued and Decided on : 11th December, 1946.

Criminal Procedure—Absence of material witness for defence though served with summons—Intimation to court after close of prosecution—Application for postponement on that ground—Refusal by Magistrate—Is it justifiable.

After the prosecution was closed, the defence intimated to court that a material witness for the defence was absent, though served with summons, and made an application to court for a postponement of the trial on that ground. The Magistrate refused the application.

Held : That in the circumstances, the refusal to postpone was justified.

Per NAGALINGAM, A.J.—

"As a matter of procedure in Courts, where a party is not ready for trial owing to the absence of a material witness, the fact should be brought to the notice of the Court before the case is taken up for trial, and not after the prosecution is closed."

E. F. N. Gratiaen, K.C., for accused-appellant.
E. P. Wijetunga (Jnr.), C.C., for Attorney-General.

NAGALINGAM, A.J.

The accused in this case has been convicted of selling a pound of Bombay onions for 65 cents, a price in excess of the maximum retail price of 17 cents per pound, in breach of the Price Control Order in regard to this commodity, and has been sentenced to pay a fine of Rs. 250. The appeal from the conviction and sentence is based on the ground that after the conclusion of the case for the prosecution, when the accused was called upon for his defence, the Proctor appearing for him applied for a postponement on the ground that a material witness by the name of Schulling was not present though served with summons.

It would appear that the case had been set down for trial on no less than four previous dates. As early as 25th May, 1946, the accused filed a list of witnesses in which the name of witness Schulling did not appear but on the list filed on 2nd July, 1946, that is to say two days prior to the date of trial, the name of this witness was included and summons was taken out and was reported served on 3rd July, 1946 ; but the witness was absent on the date of trial, namely 4th July, 1946. I do not think that the learned Magistrate is correct in his observation that there is nothing to show that all reasonable efforts were made to secure the presence of this witness in Court on that date. The most that an accused person can do in order to secure the attendance of a witness is to take out summons and have it served on him. While one may not agree with this observation of the Magistrate, the question still remains as to whether the Magistrate was right in refusing the application for a postponement. It is quite obvious that if Schulling was a material witness as he is said to be, the Proctor for the accused should have realised and the accused on his part should have brought to the notice of the Proctor that the witness was not present in Court and the Proctor should thereupon have, before the trial commenced, intimated to the Magistrate that the witness summoned was absent and that he was, therefore, not ready for trial. Had the Proctor for the accused made the application for postponement before the trial commenced, the Magistrate may very well have acceded to the application, but where no application is made at the commencement of the trial but is made after the whole case for the prosecution is closed the application for postponement may not receive favourable consideration, for in such a case where the case for the prosecution has been closed, it is possible to lead on a subsequent day evidence which would enable the defence merely to take advantage of any weakness in the prosecution case.

As a matter of procedure in Courts where a party is not ready for trial owing to the absence of a material witness, the fact should be brought to the notice of the Court before the case is taken up for trial and not after the prosecution is closed.

I think, therefore, in all the circumstances of the case, the Magistrate was right in refusing to allow the postponement. In this view the appeal fails and is dismissed.

Appeal dismissed.

Proctor : *E. G. Jonklaas* for the appellant.

Present: JAYETILEKE, J.

BABBU SINGHO vs. JOSEPH, INSPECTOR OF POLICE

S.C. No. 1385—*M.C. Panadura* 35285.
Argued and Decided on: 18th March, 1946.

Criminal Law—Charge of cattle theft—Failure of the prosecution witness to refer to description of animal in the charge.

Held : That, where the only evidence for the prosecution in a case of cattle theft was that the " head of cattle described in the charge sheet " was removed by the accused without a reference to the details given in the charge, the conviction could not be sustained.

G. P. J. Kurukulasuriya, for accused-appellant in the appeal and for the petitioner in the application.

A. C. Alles, C.C., for the Attorney-General in the appeal.

JAYETILEKE, J.

The accused was charged with the theft of a bull branded සා වා රැ belonging to one Waddu-wage Ratnapala of Kanawela. The only eye-witness was one Magilin. She said that the head of cattle described in the Charge Sheet was tied in a land called Welikalawatte and that she saw the 1st accused untie and remove the animal. It is difficult to say whether she saw the Charge Sheet or whether she knew the description of the animal in the Charge Sheet. The probability is that she was asked the question whether she saw the head of cattle described in the Charge Sheet tied in Welikalawatte, and she said 'yes.' The evidence does not show that the animal belonged to Ratnapala, nor does it show that the animal bore the brand marks සා වා රැ

It seems to me that the evidence in this case has been led in an extremely slipshod manner. Upon the evidence on record it is not possible to sustain the conviction.

I would set it aside and acquit the accused.

Conviction set aside.

Proctors : *E. F. B. Suriyabandara*, for accused-appellant.

Present: NAGALINGAM, A.J.

UTHUMALEBBE & ANOTHER vs. MUHAIYATHEEN BAWA

S.C. No. 221—*C.R. Kalmunai No.* 279
Argued on: 19th November, 1946.
Decided on: 27th November, 1946.

Muslim Law—Father's donation of property to minor—Possession by father—Can it be regarded as possession by minor.

Held : That in Muslim Law, where a father donated property to a minor, possession by the father must be deemed to be possession of the minor, who is entitled to reckon such possession in establishing prescriptive title.

Cases referred to : *Affefudeen vs. Periatamby* (1911) 14 N.L.R. 14.
Abdul Rahim vs. Hamidu Lebbe et al. (1926) 28 N.L.R. 136.
Razeeka et el. vs. Mohamed Sathuck (1931) 33 N.L.R. 176.

C. E. S. Perera, for defendants-appellants.
C. Renganathan, for plaintiff-respondent.

NAGALINGAM, A.J.

The plaintiff instituted this action for a declaration of title to 6/11 share of an allotment of land described in the schedule to the plaint. Admittedly the land belonged to one Meera Lebbe Saibu Lebbe. He died leaving two sons and seven daughters. Two of the sons and two of the daughters conveyed their interests in the land in dispute to the plaintiff who is the wife of one of the sons, and the plaintiff on this basis prefers her claim. Her claim is resisted by the 2nd defendant who is also a daughter of Meera Lebbe Saibu Lebbe on the footing that the land in question had been donated to her by her father and that she had also acquired title by prescription. The 1st defendant is the husband of the 2nd defendant. The 2nd defendant has been unable to produce the deed of gift in her

favour although she stated in her evidence that to her knowledge a deed was executed by her father in her favour and that the deed was in existence at the date of her father's death and that it had been taken possession of by the plaintiff's husband who was her elder brother and that he had not handed it over to her as a result of some ill-feeling between the parties. She further states that although attempts had been made to trace the deed she had been unsuccessful in her attempts. The learned Commissioner properly holds that there is no proof that the land was gifted to her. The 2nd defendant, however, gave testimony—and her testimony has been accepted on this point by the learned Commissioner and has not been challenged in appeal—that the father " had dowried lands and residing gardens to all his daughters." The learned Commissioner further finds that Saibu Lebbe " had really set apart the land in dispute for the 2nd defendant." The foundation for this finding is furnished by Deed D1 of 8th October, 1930 by which Saibu Lebbe gifted a portion of land immediately to the North of the land in dispute to another of his daughters, namely, one Mariankandu. In that deed of gift the donor in describing the land gives the boundary on the South as " the share of garden granted to Kulanthaiummah " who is the 2nd defendant. It would appear to have been contended before the learned Commissioner that this description at any rate furnishes a starting point for prescription as the description of the boundary clearly indicates that he had prior to the date of that gift granted the land in dispute to the 2nd defendant. The learned Commissioner in regard to this aspect of the matter holds that as the father was living on the land in dispute along with the 2nd defendant who was a minor at the date of the deed of gift to Mariankandu and, therefore, at the date of the gift to her as well, the 2nd defendant cannot count the period of possession by the father till his death which took place in 1937. The learned Commissioner however finds that from the date of the 2nd defendant's marriage which took place about a year after her father's death she was exclusively and adversely possessing the land in dispute as her property. This view of the learned Commissioner is contested.

The parties are admittedly Muslims and the question is whether the 2nd defendant can claim the benefit of the father's possession after the date on which there is proof of signification by him of his having granted the land to the 2nd defendant. The 2nd defendant having been a minor prior to 1930, the date of the Deed D1, and there being no suggestion that either the 2nd defendant or anyone on her behalf made a purchase of the land in question from the father, the father's grant must needs have been a gift. Strictly speaking, under Muslim Law no deed of conveyance as known to us is necessary to make a donation even of real property, but in Ceylon even Muslims are bound by the Prevention of Frauds Ordinance which requires that a conveyance of immovable property should be notarially executed. But it does not follow, as was argued, that before prescription can commence it should be proved that a valid deed of conveyance was in fact executed. It is difficult if it is shown that even if there was nothing more than an oral gift the donee entered upon possession of the land gifted and had adverse and exclusive user for the prescriptive period.

It is clear law that where a Muslim father donates his property to his minor child, no transmutation of possession is necessary, and the possession by the father should be regarded as possession by him on behalf of the donee. Tyabjie (2nd ed. Sec. 400) lays down the proposition thus :—

> " Where the father or grandfather (or some other person entitled to be the guardian of the property) of a minor or person of unsound mind having a real and *bona fide* intention to make a gift makes a declaration of gift in favour of the said minor or person of unsound mind and the subject of the said gift is (at the time of the declaration) in the possession of the said father or grandfather (or other guardian) or of some person on his behalf, the gift is complete without any transfer of the possession of the subject of the gift ; the declaration of gift having in law the effect of transforming the possession of the donor on his own behalf into possession on behalf of the donee as the guardian of the property of the donee."

Ameer Ali (4th ed. page 123) states the law as follows :—

> " The gift is completed by the contract and it makes no difference whether the subject of the gift is in the hands of the father or in that of a depository (on behalf of the father). When a father makes a gift of something to his infant son, the infant by virtue of the gift becomes proprietor of the same provided the thing given be at the time in the possession of the father or of any person who stands in the position of trustee for the father because the possession of the father is tantamount to the possession of the infant by virtue of the gift and the possession of the trustee is equivalent to that of the father."

This principle has been consistently followed in our courts : *Affefudeen vs. Periatamby* (1911) 14 N.L.R. 14 ; *Abdul Rahim vs. Hamidu Lebbe et al.* (1926) 28 N.L.R. 136 ; *Razeeka et al. vs. Mohamed Sathuck* (1931) 33 N.L.R. 176.

Once, therefore, it is established that the father had donated the property to the minor, though not effectually by a notarial deed, it must necessarily follow from the authorities cited that possession by the father must be deemed to be possession of the infant, and if this be so, the

infant or minor is entitled to fall back upon the period of possession by the father during her minority. Applying these principles to the facts of the present case the possession by the father from 1930 to 1937 must be regarded as possession by the 2nd defendant, and the period of that possession can legitimately be added to the period of subsequent possession by her after her father's death. The total of this period is certainly over ten years and would enable the 2nd defendant to acquire title by prescription. I, therefore, hold that the 2nd defendant has acquired a title by prescription to the land in dispute.

I set aside the judgment of the learned Commissioner and enter decree dismissing the plaintiff's action with costs both in this court and the court below.

Set aside.

Present: WIJEYEWARDENE, J. & CANEKERATNE, J.

HASSAN VS. MUTHUWAPPA

S.C. No. 77-0—*D.C.* (*Inty.*) *Colombo No.* 15916.

Argued on: 12th December, 1946 and 13th January, 1947.
Decided on: 29th January, 1947.

Probate or letters of administration—Should it be stamped—Civil Procedure Code, Section 547.

Held : That due stamping of a grant of probate or of letters of administration required under section 547 of the Civil Procedure Code has been rendered unnecessary since the passing of the Estate Duty Ordinances.

S. J. V. Chelvanayagam, with *A. C. Nadarajah*, for plaintiff-appellant.
C. Thiagalingam, with *C. Chellappah*, for defendant-respondent.
H. W. R. Weerasooriya, C.C., for the Attorney-General on notice from this Court.

CANEKERATNE, J.

Some years ago the defendant and one Mohamed Sheriff carried on, as partners, the business of a restaurant called the Colombo Buhari Hotel. The plaintiff as the administrator *de bonis non* of the estate of Mohamed Sheriff, who is said to have died on April 9, 1941, applied to the Court in this action to wind up the business and affairs of the partnership, for an order on the defendant to render an account and pay the sum found due on the accounting. After sixteen issues had been framed the plaintiff led evidence and closed his case ; the defendant then raised an issue relating to the competency of the plaintiff to maintain the action on the ground that the letters of administration had not been duly stamped. This is an appeal from the decision of the trial Judge refusing to proceed with the action until the inventory has been amended by the plaintiff.

It appears that a grant of administration in respect of the estate of the deceased was originally made to one Mohamed Cassim and he included in the inventory a half share of the business called the Colombo Buhari Hotel, the value of which he estimated at Rs. 768·12. The contention of the defendant, below and in this court, as stated by his counsel, has been that the duty paid by the administrator was in fact insufficient to cover the property claimed in this action, in as much as the relief claimed is estimated by the plaintiff at Rs. 40,000, not at Rs. 768·12, and that the letters of administration were not duly stamped and the plaintiff was therefore debarred by the provisions of section 547 of the Civil Procedure Code (Ch. 86 of the Legislative Enactments of Ceylon) from maintaining this action. Counsel for the appellant contended that the provisions of the section were no bar to the maintenance of the action. As the question in dispute was one of importance to the public the court expressed a desire to hear the views of the Attorney-General; Crown Counsel appeared on behalf of the Attorney-General at the adjourned hearing and advanced the view that the regulation prescribing due stamping of the instrument cannot now be applied and that it has been repealed.

One who desires to obtain a grant of representation to the estate of a deceased person has a right to make an application to the District Court which has territorial jurisdiction over the place where the intestate died. On the relevant facts being proved—such as the death of the intestate, the leaving of property by him, the right of the applicant to make the application, etc.—the Court would, as a general rule, make an order in his favour. The legislature may qualify this general right by imposing conditions : one such condition was imposed by the Stamp

Ordinance of 1871 for the purpose of obtaining the proper and full duty exigible on the property and estate of the deceased in Ceylon : a Court was debarred from making a grant of letters of administration until it obtained an affidavit from the applicant or some other competent person that the property and estate of the intestate are of the value of a certain sum to be therein specified to the best of the deponent's knowledge, information and belief (section 29 of Ordinance No. 23 of 1871).

The Code of Civil Procedure was passed in 1889 and the Stamp Ordinance which was then in force was Ordinance No. 23 of 1871. The Code of Civil Procedure came into operation on August 1, 1890, but before that date the Legislature enacted a new Stamp Ordinance, Ordinance No. 3 of 1890, which also came into operation on August 1, 1890. Sections 24 to 30 of that Ordinance deal with probates and letters of administration. While these sections substantially repeat the language used in sections 29 to 35 of the repealed Ordinance, the Legislature made one important alteration ; the power of cancelling the stamps representing the amount of duty was taken away from the District Court issuing the grant. Section 29 provides that the Judge shall transmit the amount of the stamp duty paid into Court by the applicant to the Commissioner of Stamps, together with the letters of administration, who shall cause the instrument to be duly stamped and return it to the Judge. In 1909 the legislature substituted Ordinance No. 22 of 1909 in place of the Stamp Ordinance of 1890. The provisions relating to testamentary duties are found in Ch. 7 of this Ordinance which consists of sections 68 to 73. Section 68 contains provisions similar to those of section 24 of the earlier ordinance ; it shows that probate or letters of administration will not be granted except on an affidavit of property setting out the approximate value of the estate. Sections 69 and 70 contemplate the possibility of overpayment and overpayment of probate duty on that affidavit and its proper adjustment (these sections correspond to sections 25 and 26 of the Ordinance of 1890 and sections 30 and 31 of the Ordinance of 1871) ; underpayment is made an offence as regards an executor or administrator under certain circumstances (Section 73 of the Ordinance of 1909 which corresponds to section 29 of the Ordinance of 1890 and to Section 34 of the Ordinance of 1871.)

Estate Duty was introduced by Ordinance No. 8 of 1919 ; it was to be calculated at the proper rate on the value of the estate as set forth in the statement delivered by the executor if the Commissioner of Stamps was satisfied with it—otherwise on the estimate made by an assessor (Section 22 (1)). The duty is then assessed ; on payment of the duty or on proper security for its payment having been given the Commissioner of Stamps issues a certificate ; sub-section (4) of Section 23 provides that no probate or letters of administration are to be issued by a District Court unless and until such certificate has been filed. The Ordinance repealed Sections 68 to 73 of the Stamp Ordinance of 1909 and the portion referring to duty on probate and letters of administration as contained in Part 3 of Schedule B of the Ordinance. Ordinance No. 8 of 1919 was repealed in 1935 (Ordinance No. 51 of 1935).

The present ordinance relating to estate duty is Ordinance No. 1 of 1938, (Ch. 187 of the Legislative Enactments). It provides that the executor of every deceased person shall deliver to the Commissioner of Estate Duty a declaration of property containing a full and true statement of particulars relating to the total estate of the deceased including the value thereof (Section 29, sub-section 1). An assessor may at any time, whether the declaration has been delivered or not, assess the estate duty payable and shall issue to the person or persons whom he considers liable to such duty a notice of assessment (Section 32) : the duty becomes due on the date specified in the notice (Section 44 (1)) ; power is given to the Commissioner to allow the duty to be paid by sixteen half-yearly instalments in certain cases (Section 48 (1)), the person liable to pay must furnish security to the satisfaction of the Commissioner (sub-section 2). The Commissioner issues a certificate of payment to the executor when he had paid or secured to his satisfaction the payment of all estate duty for which he is liable (Section 49). Section 52 provides that no probate or letters of administration shall be granted by the Court until the Commissioner has issued the certificate abovenamed and the certificate has been filed in Court.

Probate Duty (the same provision applies to the duty payable on letters of administration) was a stamp tax payable on the value of the estate of a deceased by means of a stamp on the affidavit of value which every person applying for a grant of representation to the estate of a deceased person was required to make as to the particulars and value of the estate of the deceased to whose estate he sought representation, and no grant of representation could be made by a Court till the affidavit has been received. After the amount payable as probate duty has been assessed the legal representative pays it into Court and the Court sends it together with the probate (or letters) to the Commissioner of Stamps.

The Commissioner causes stamps of the proper value to be affixed to the instrument and cancelled (see Sections 3 (10) of the Stamp Ordinance of 1909).

Section 547 of the Civil Procedure Code states thus :—" No action shall be maintainable for the recovery of any property.....belonging to or included in the estate or effects of any person dying testate or intestate.....where such estate or effects amount to or exceed in value the sum of Rs. 1,000 unless grant of probate or letters of administration duly stamped shall first have been issued to some person or persons as executor or administrator of such testator or intestate." The sum of Rs. 2,500 was substituted later for the sum of Rs. 1,000.

Estate duty is, according to the Ceylon Ordinance, a first charge on all the property of the deceased (Section 26 (1)); it is a sum payable by a person accountable be he executor (part A of a sub-section 4) or person other than the executor (part *b*). It does not seem to be a stamp duty. It was stated in the course of the argument by counsel for the appellant (and the form of the probate and letters issued in cases which have come before this Court shows that this is correctly stated) that no stamp is now affixed to the probate or letters. There is no provision now for affixing stamps on the instrument ; an applicant for probate or letters now pays directly the amount assessed as estate duty to the Commissioner by tendering money, or perhaps a cheque, and the Commissioner issues a certificate ; the court grants probate or letters after the certificate has been filed in Court.

The provision relating to the due stamping of the probate (or letters) was complementary to the provisions of the Stamp Ordinance ; that Ordinance required a tax to be paid in a particular way. So long as there was in existence a statutory enactment providing for the affixing of stamps on a probate (or letters) and for the instrument being duly stamped, there would be no difficulty in construing the expression " duly stamped " used in Section 547. Since 1919 no provisions relating to the affixing or cancellation of stamps are to be found in any statutory enactment ; all the reasons which imposed an obligation on the applicant to tender the amount of probate to the court and a duty on the Commissioner of Stamps to cause the proper stamps to be affixed and cancelled have wholly ceased to operate. Reason is the soul of the Law and when the reason of any particular law ceases so does the Law itself (see Brooms Legal Maxims, 10th edition, page 110). Legislation has thus rendered unnecessary the provisions relating to the due stamping of a probate or letters of administration. It would be impossible to apply such a provision to an instrument, on which no stamps are affixed, granted since the coming into operation of the Estate Duty Ordinance without doing considerable violence to the language used.

The order of the trial Judge is set aside ; the respondent will pay the costs of the hearing in the District Court and the costs of appeal to the appellant.

WIJEYEWARDENE, J.

I agree.

Set aside.

Proctors : *S. Ratnakaram* for the appellant.
S. Seyed Ahamed for the respondent.

(*IN THE COURT OF CRIMINAL APPEAL*)

Present : CANNON, J. (PRESIDENT), JAYETILEKE, J. & DE SILVA, J.

REX vs. H. PUNCHI BANDA AND TWO OTHERS

Applications Nos. 66-68 *of* 1946—*S. C. No.* 19/*M. C., Kandy* 17,203.
Argued and Decided on : 14th May, 1946.

Court of Criminal Appeal—Indictment for murder—Several accused—Statement to Magistrate by one accused implicating others—Admissibility of such statement at trial.—Assigned Counsel—Conflict of defences during trial—Assignment of separate Counsel—Prejudice to accused—Duties of assigned Counsel when defences appear to conflict.

Held : (i.) That a statement, made by a co-accused to the Magistrate in the course of his inquiry implicating the other accused ; could be taken into consideration by the jury, where such co-accused gave evidence reaffirming in effect the statement made to the Magistrate, provided that the Judge gave a proper direction to them on the question of corroboration.

(ii.) That where several accused, charged with murder, were defended by one assigned counsel and one of the accused, contrary to instructions given to his counsel, got into the witness-box and gave evidence implicating the other accused, whereupon the court assigned his defence to another counsel, such accused could not be said to have been unrepresented till the 2nd counsel took over.

Per CANNON, J.—" This seems an appropriate occasion to mention the duties of assigned Counsel when Counsel is assigned to represent two or more accused in the same case whose defences conflict. We think that if the defences of such accused have conflicted at any stage, even though the accused endeavour to reconcile them when they are in consultation with assigned Counsel, nevertheless assigned Counsel should bring to the notice of the Registrar of the Court the fact, that, the defences have at some stage conflicted in order that the Registrar may advise the Judge to have the accused separately represented.

H. Wanigatunge, for the first and second accused-appellants.
M. M. Kumarakulasingham, for the third accused-appellant.
T. S. Fernando, C. C., for the Crown.

CANNON, J.

The case for the Crown was that the three appellants went to a house in their village on the 15th of December, 1944, which was inhabited by an elderly man named Kira and a little girl aged seven, named Laisa, whose death was the subject of this trial, that they went there for the purpose of theft as Kira was reputed to be a miser and that when Kira offered resistance they murdered him and, further, murdered the little girl in order that she should not be a witness against them. The Jury found all three accused guilty of murder. In considering the points raised on behalf of the appellants it is necessary to recount something of the events that preceded the trial and of the conduct of the trial. The accused were not arrested until the 29th of January and on the 31st, each expressed a wish to make what has been called a confession to the Magistrate. The first and second accused's so called confession took the form of a total denial of any knowledge of what had happened. The third accused alleged that the other two had murdered the little girl and that he, though one of the party of three which went to the house, was not a party to any killing, that he went there merely to steal and did so under duress of the other two. Obviously, then, the defences of the first and second accused were in conflict with that of the third. At the trial, however, all three accused were represented by one Counsel, and the statements which the three accused had made to the Magistrate were tendered in evidence by the prosecution. The attitude of the defence to the evidence of these statements is shown by the cross-examination of the two Police Officers, whom it was suggested had endeavoured to persuade each of the accused to make a statement implicating the other two on the promise that if he did so he would be released, and, further, that the first and second accused declined to do so but the third accused gave way and signed a statement which was dictated to him by one of Police Officers, The cross-examination, therefore, shows that although their defences were in conflict before the trial, at the trial they were unified and in fact identical, the damaging statement by the third accused being accounted for by the suggestion that it was a false statement made by him for promise of rewards. We are not deciding whether in making these defences the accused were wisely advised. What we have to determine is whether they or any of them were prejudiced by what happened subsequently at the trial. At the conclusion of the Crown case the defence was opened by Counsel for the accused stating that the three accused intended to make statements from the dock and the first and second accused thereupon did so, both alleging that they had been asked by the Police to make statements implicating the other two in return for their release. When it came to the third accused's turn to make his statement, he is recorded to have said : " I wish to get into the witness-box and give evidence on affirmation." He did so and the shorthand note, after recording a few sentences of evidence, reads as follows :—" (Note —Mr. Gnanasekeram is not examining the witness)."

At this stage :—

Court to Mr. Gnanasekeram (Counsel for the accused) : Do you wish him to give evidence in this way ?

Mr. Gnanasekeram : He has taken me by surprise.

Court : It is very unusual for an accused who is appearing by Counsel to take the case out of his Counsel's hands.

Mr. Gnanasekeram : As far as I am concerned, my Lord, he wanted to make a statement from the dock. I do not know the nature of the evidence he is going to give. I shall have to follow it.

Court to Mr. Wijemanne (Crown Counsel) : What do you suggest ?

Crown Counsel : I do not know whether he can be restrained from giving evidence. He is at perfect liberty to give evidence.

The third accused then continued to give evidence and it would appear from the record that he examined himself. It is a very intelligent statement in which he admits having made the statement to the Magistrate to which I have already referred and, further, he admitted that that statement was a true statement. The shorthand transcript proceeds :

Court to Mr. Gnanasekeram : You will have time to consider your position with regard to this accused, bearing in mind the fact that you are defending all three of them. It is difficult to do so. During the adjournment you can consider what questions you wish to put to this accused.

The presiding Judge apparently was prompted to make this observation because the nature of the third accused's evidence was in contradiction of

the nature of the defences which had been put forward up to that time he went into the witness box. On the next day the proceedings opened as follows, according to the transcript :

Court to Jury : Mr. Gnanasekeram informs me that the evidence given by the third accused yesterday afternoon came as a complete surprise to him and that he anticipated that the third accused would make a statement from the dock more or less on the lines as that made by the first accused and the second accused. It is quite obvious, of course, that if Mr. Gnanasekeram had realised when he undertook this defence that the third accused was going to adopt this attitude, then he could not possibly have appeared on behalf of all these accused their defences are irreconcilable—in other words, the third accused has said something in the witness-box which implicates the first and second accused, and therefore Mr. Gnanasekeram has been placed in an extremely awkward position. In these circumstances I have asked Mr. Carthigesu to undertake for the rest of the case the defence of the third accused. Mr. Carthigesu appeared in the lower Court and therefore is familiar with the facts of this case and no injustice will be done to the third accused by his appearing for him instead of Mr. Gnanasekeram. Mr. Gnanasekeram, on the other hand, will now be able to devote his attention solely to the conduct of the defence of the first and second accused. I thought I would just explain that to you."

From that stage Mr. Carthigesu conducted the defence on behalf of the third accused. The Jury, however, found all three accused guilty of murder.

For the first and second accused it is pointed out that the Judge omitted to give any direction to the Jury as to the relevance of the evidence of the statement which the third accused had made to the Magistrate, viz., that it should not be taken into account in considering the cases of the first and second accused and Mr. Wanigatunge contends that that omission prejudiced the cases of the first and second accused. This omission may have been vital to the conviction of the first and second accused but for the fact that the third accused gave evidence re-affirming in effect the statement he had made to the Magistrate and that evidence was, of course, evidence which the Jury could take into consideration against the first and second accused provided that the Judge gave them a proper direction on the question of corroboration, which in fact the Judge did. Therefore, as Mr. Fernando submits, the point, in these circumstances, becomes one merely of academical interest.

For the third accused it is submitted that he took the case out of the hands of his Counsel when he went into the witness-box and from that time he was not represented by Counsel, who, it is pointed out, did not examine him, and Mr. Kumarakulasingham submits that in thus entering upon what was perhaps the most important part of his defence he was without the assistance of Counsel contrary to the practice of the Court which gives an accused person in a capital case the option of having Counsel assigned to defend him. This submission depends on a question of fact, viz., whether or not the third accused was represented when he gave evidence. We have given very careful consideration to that point. It will be noted that in the record his Counsel said when replying to the Judge on the matter of the third accused giving evidence : " I wish to follow it." This would suggest that he had not retired from representing the third accused, but rather was going to conduct the case to the best of his ability, having regard to what the third accused had said. We agree with the submission of Mr. Fernando that it was not until after the third accused had completed his evidence-in-chief that his Counsel had any idea of retiring from the case and we cannot hold that because the third accused went into the witness-box after having agreed to adopt the advice of his Counsel not to go into the witness box that he thereby ceased to be represented by his Counsel. We are of opinion, therefore, that he was represented by Mr. Gnanasekeram up to the moment when Mr. Carthigesu took over. We do, however, think that it would have been the better course for the Judge to have adjourned the case when the third accused went into the witness-box to enable his Counsel to re-consider his position, but we are of opinion that even had that course been followed the Jury could have come to no other conclusion in view of the amply adequate independent evidence implicating all three accused in the crime. The applications are therefore refused.

This seems an appropriate occasion to mention the duties of assigned Counsel when Counsel is assigned to represent two or more accused in the same case whose defences conflict. We think that if the defences of such accused have conflicted at any stage, even though the accused endeavour to reconcile them when they are in consultation with assigned Counsel, nevertheless assigned Counsel should bring to the notice of the Registrar of the Court the fact that the defences have at some stage conflicted in order that the Registrar may advise the Judge to have the accused separately represented.

Applications refused.

END OF VOL. XXXIII.