The Ceylon Law Weekly

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VOLUME XXXIV

WITH A DIGEST

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DIGEST

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Held : Quashing the proceedings and award, that the District Judge has to be satisfied in his own mind that the petition discloses a trade dispute as defined in the order.

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Held : (i.) That the Controller of Textiles, in making an order under Regulation 62 of the Defence (Control of Textiles) Regulations 1945, acts judicially, and is a "person or tribunal" within the meaning of section 42 of the Courts Ordinance.

(ii.) That the Supreme Court has jurisdiction to issue a mandate in the nature of a writ of *certiorari* on the Textile Controller to question the correctness of such order.

(iii.) That the "ejusdem generis" rule cannot be applied in the interpretation of the words "or other person or tribunal" in section 42 of the Courts Ordinance.

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(ii.) That where it is shown that the Controller's mind was tainted with bias, he has acted without jurisdiction and an application for a *certiorari* to quash an order made in such proceedings should be allowed.

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(ii.) That an application for relief to the court that passed such *ex parte* decree should be made before the Supreme Court is moved to interfere.

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Held : (i.) That, where the plaintiff knows that the defendant is in prison, he must ascertain the prison in which the defendant is confined and serve summons in the manner indicated by section 68 of the Civil Procedure Code,

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(ii.) That, where substituted service was not affixed to the last known place of abode as directed by Court, such service was bad and a judgment entered on such service should be set aside.

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A landlord took out writ against his tenant (1st respondent) for ejecting him. The 2nd respondent claiming to be a sub-tenant of 1st respondent obstructed the Fiscal and a consequent application under section 325 of the Civil Procedure Code was compromised, the respondents agreeing to deliver possession on a specified date and not to sublet to a third party in the meantime. On failure to deliver possession as agreed, writ was re-issued when the 3rd respondent, claiming a share of the premises on a deed of purchase, resisted deliveryof possession. A second application, under the said section 325 made on that ground was dismissed by the learned Commissioner after inquiry, as he thought that the claim under the deed was a *bona fide* one. The landlord appealed.

There was acceptable evidence to the effect (*a*) that the sub-letting to the 2nd respondent was a nominal one and the 1st respondent continued to carry on the business at the premises even when the 2nd respondent obstructed the Fiscal; (*b*) that the 3rd respondent was managing the said business even when the 2nd respondent was regarded as sub-tenant; (*c*) that the 3rd respondent was a servant of the 1st respondent, who even at the date of inquiry was visiting the shop almost daily; (*d*) that on the said deed 3rd respondent acquired title *inter alia* to a 1/24th share of the premises for Rs. 7,000 and that the vendee had agreed to dispense with search; (*e*) the 3rd respondent did not take the slightest interest in regard to the transaction, but it was the 1st respondent who was present and gave instructions and who paid the money.

Held : That in the circumstances, the deed produced by the 3rd respondent was obtained in his favour by the 1st respondent with a view to resist the attempts to obtain delivery of possession by the landlord.

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(ii.) That a transferee from such improver is entitled to compensation for such improvements from the *fidei commissaries.*

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Building contract—Provision for payment of liquidated damages for delay in completion—Does this provision operate where the builder or contractor fails to complete the building.

A building contractor was sued for damages on the following provision in the agreement for failure to complete the building :—

"22. If the contractor fails to complete the works by the date named in Clause 21 or within any extended time to which he may become entitled under these presents and if the Architects shall certify in writing on or before the date of issue of their certificate for the last payment to which the contractor may become entitled hereunder that the works could reasonably have been completed by the said date or within the said extended time, then the contractor shall pay or allow to the employers the sum of Rs. 500 per month as agreed and liquidated damages and not by way of penalty for every month beyond the said date or extended time, as the case may be, during which the works shall remain unfinished, and such damages may be deducted from any moneys due or which may become due to the contractor."

Held : That the agreement to pay liquidated damages under this clause can only operate where the builder or contractor in fact completes the building, and has no application where he does not complete the building.

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Co-operative Societies

Co-operative Society—Action against, by dismissed manager of its stores, who was also a member, to recover deposit—Defence that plaintiff misappropriated moneys of society and dispute should have been referred to Registrar—Is plaintiff's claim barred by section 45 (b) *and* (c) *of Co-operative Societies' Ordinance,* (*chap.* 107).

The plaintiff, who was a member of the defendant Co-operative Society was appointed the manager of its stores. His services were dispensed with after some time. This action was instituted by the plaintiff to recover a sum of Rs. 250 being a part of his security deposited with the defendant.

The defendant pleaded (i.) that the plaintiff had misappropriated a sum of Rs. 1,370.12 and that the plaintiff's claim be set off against this sum.

(ii.) that the plaintiff's claim was barred by the provisions of section 45 (*b*) and (*c*) of the Co-operative Societies' Ordinance, chap. 107.

On a preliminary issue based on (ii.) the Commissioner dismissed plaintiff's action with costs.

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Held : (i.) That in the absence of evidence to show what the functions of the plaintiff as manager of the stores were, or what authority he had to bind the Society, the plaintiff cannot be considered to be an officer of the society within the meaning of section 45 (*c*) of the Co-operative Ordinance (chap. 107).

(ii.) That the claim of the Society against the Manager of its Stores for misappropriating moneys of the society cannot be said to be a dispute between the society and one of its members within the meaning of section 45 (*b*) of the same Ordinance.

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Co-operative Societies Ordinance (Cap. 107)—*Section* 45—*Scope of section.*

Held : That a dispute between a society registered under the Co-operative Societies Ordinance and one of its members in regard to a transaction not resulting from membership is outside the scope of section 45 of the Ordinance.

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Court of Criminal Appeal—Joinder of three charges of murder in one indictment—Desirability of such joinder—Permissibility—Criminal Procedure Code, section 179 (1) *and* 180 (1)—*Discretionary power of the Judge.*

The accused-appellant was convicted on three charges of murder included in one indictment. Before the trial commenced counsel for the accused objected to the joinder, but the trial Judge allowed it as the evidence in the case was so interwoven that it was difficult to separate the three charges. It was argued in appeal that the joinder was not permissible, and that, even if permissible, it should not have been allowed in the particular case as it caused prejudice to the accused.

Held : (i.) That the practice of including more than one charge in an indictment for murder is not a desirable one ; but

(ii.) That on the facts of the present case, the joinder was legally permissible either under section 179 (1) or under section 180 (1) of the Criminal Procedure Code, and that the permission of such joinder was a matter within the discretion of the trial Judge.

REX vs. A. PEDRICK SINGHO 5

Evidence—First complaint of an offence—When admissible—Criminal Procedure Code, section 121—*Evidence Ordinance, sections* 32 *and* 157—*Court of Criminal Appeal Ordinance, section* 5, *proviso to*—

Held : (i.) That the 1st information given under section 121 of the Criminal Procedure Code is admissible under section 157 of the Evidence Ordinance provided (*a*) that the information is not based on hearsay, unless hearsay matter is relevant to explain conduct, (*b*) that the informant is called as a witness, except when tendered under section 32 of the Evidence Ordinance.

(ii.) That as no substantial miscarriage of justice to the accused had occurred, the appeal should be dismissed under the proviso to section 5 of the Court of Criminal Appeal Ordinance.

REX vs. RAMU KARTHIGESU *alias* CHELLIAH ... 10

Appeal against sentence—Charges relating to matters arising out of the same transaction—Punishment—Penal Code, section 67.

The two appellants were convicted under six counts for offences committed in the course of the same transaction. The sentences imposed were ordered to run consecutively, but the total of the sentences did not exceed the total which could have been passed for the most serious of those offences.

On appeal against the sentences the court expressed the view that it would be better in such cases to make sentences run concurrently and varied the sentences giving effect to the opinion of the presiding Judge that the accused merited a sentence of at least ten years.

REY vs. R. P. D. HOTHA & ANOTHER ... 11

Indictment for murder—Plea of self-defence—Charge to the jury—Absence of direction on intention referred to in Exception 2 *to section* 294 *of the Penal Code.*

Held : (i.) That the "intention" referred to in Exception 2 to section 294 of the Penal Code is a special kind of intention and its meaning should be adequately explained to the jury.

(ii.) That where the jury were not given the opportunity of considering its special meaning and when it appears that in bringing a verdict of murder the jury could well have had the impression from the charge that, if they found in fact, more harm was done than necessary for the purpose of defence, the proper verdict was that of murder, and not culpable homicide not amounting to murder, the latter verdict should be substituted for the former.

REX vs. G. L. KIRINELIS 13

Verdict of Murder—Presence of facts disclosing basis for plea of grave and sudden provocation—Failure of Trial Judge to direct jury to consider such plea—Substitution of lesser offence.

The evidence disclosed elements of a plea based on the fact that the applicant had lost his power of self-control by reason of grave and sudden provocation. The learned Judge in his charge referred to this plea in dealing with the possible defences available to the applicant, but failed to ask the jury to consider the facts and decide thereon. The jury by a majority of 5 to 2 brought in a verdict of murder.

Held : That in the circumstances, the conviction of murder should be set aside and a conviction for

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culpable homicide not amounting to murder should be substituted therefor.

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Indictment for murder—Counsel assigned for defence—Absence of retained counsel at trial—Failure to give adequate explanation of such counsel's absence —Trial ordered to be proceeded with—Defence conducted by assigned counsel—Conviction—Validity—Miscarriage of Justice.

The accused was indicted with murder and counsel was assigned for his defence. When the case was taken up for trial counsel said to have been retained by the accused was absent presumably because the trial date had been advanced and no good cause was shown why retained counsel, if any, was absent. The trial proceeded, assigned counsel representing the accused, who was convicted of culpable homicide not amounting to murder.

Held : That in the circumstances, it could not be said that the accused did not have a fair and proper trial.

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The accused was indicted with attempt to murder and his defence was that he inflicted the injuries on the deceased in self-defence.

The jury returned after considering their verdict (which was a 5 to 2 one) and on being questioned by the clerk of the Assize as to whether the accused was guilty or not of attempted culpable homicide not amounting to murder the Foreman answered "No." They were then asked whether the accused was guilty of a lesser offence, and the answer was "he has exceeded the right of private defence." The Court then said "Then do you find him guilty," and the Foreman replied "definitely not."

Thereupon the Court having explained that if the accused exercised the right of private defence and did not exceed the right, then he is not guilty, but if he exceeded the right of private defence he is guilty, asked the jury to retire again. On their return after reconsideration they replied that they were unanimous that the accused was guilty on the ground that he "exceeded the right of private defence to a certain extent." The Court accepted this verdict and the accused was sentenced.

Held : That the verdict was a puzzling one and that since the jury found that occasion for self-defence arose, it could not be said having regard to the injuries inflicted, that the accused exceeded his right of private defence.

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Verdict guilty of murder—Evidence disclosing elements of defence of grave and sudden provocation—Failure on the part of trial Judge to give adequate direction thereon.

Held : That where in the absence of an adequate direction by the learned trial Judge to the jury on the defence that the act was committed when the accused had lost his power of self-control by reason of grave and sudden provocation, when the elements of such defence was disclosed in the evidence, the conviction for murder cannot stand and a verdict of culpable homicide not amounting to murder should be substituted.

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Conviction for murder—Direction to jury by trial Judge not to consider verdict of culpable homicide—Misdirection.

The four appellants were convicted of murder. The defence was that the second accused inflicted some injuries on the deceased in the exercise of the right of private defence, and that later some other persons—not the other accused—came and joined in the attack on the deceased. The learned trial Judge asked the jury to consider whether any of the accused were guilty of murder or of voluntarily causing grievous hurt. Further he said that the verdict of culpable homicide not amounting to murder did not arise for consideration in this case.

Held : That, in the circumstances, the learned trial Judge's direction to the jury that they should not consider the verdict of culpable homicide amounted to a misdirection.

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Criminal Procedure

Charge of contravening Price Order—Conviction after revocation of order—Validity of conviction—Interpretation Ordinance, Section 6 (3).

Where a person was charged with an offence committed while a Price Order made under the Control of Prices Ordinance was in force but was convicted after the revocation of such Order.

Held : That the conviction was in order in view of section 6 (3) of the Interpretation Ordinance.

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Charge of theft joined with alternative charge of disposing the stolen property—Is such joinder bad.

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KARUNARATNE VS. INSPECTOR OF POLICE, BAMBALAPITIYA 104

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Evidence for prosecution—Contradictions not on material points—Magistrate acquitting accused without calling on defence.

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At the summary trial of several accused on a charge of house-breaking and theft under the provisions of section 152 (3) of the Criminal Procedure, the Magistrate appeared to have read a statement of one of the accused recorded earlier by another Magistrate under section 134 of the Criminal Procedure Code, in which one of the accused implicated the others. This Statement was not produced at the trial. The Magistrate convicted the accused who appealed.

The Supreme Court set aside the convictions and sent the case back for non-summary proceedings.

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Sections 148, 150, 151, 151B, 187, 189 *and* 297—*Evidence of witness recorded before framing of charge —Not recorded* de novo *after framing of charge—Can such evidence be acted upon in reaching a decision—Evidence Ordinance, section* 167.

Held: That evidence recorded in the presence of the accused before a charge is framed, and not recorded *de novo* after the framing of the charge, should not be used in reaching a decision against the accused.

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The accused was charged with housebreaking by night under section 443 of the Penal Code. After the evidence and addresses the Magistrate reserved his order. On the day on which order was to be delivered the Magistrate charged him afresh under section 450 of the Penal Code and after tendering the witnesses for cross-examination convicted the accused under section 450.

Held: (i.) That as there were no facts admitted or proved at the first trial to show that the accused had committed an offence under section 450 of the Penal Code, the learned Magistrate was not justified in framing a new charge under section 193 (1) of the Criminal Procedure Code.

(ii.) That in order to maintain a charge under section 450 of the Penal Code the prosecution must prove not only that the accused was found in a house but that he failed to give a satisfactory account of himself.

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Section 172 (1)—*Accused charged with certain offences—Prosecution evidence disclosing only abetment of such offences—Acquittal of accused without amending charges.*

Where an accused person was charged with certain offences under the Penal Code, and the evidence for the prosecution disclosed that the accused only incited others to commit the said offences and the Magistrate acquitted the accused on the ground that the charge was not established.

Held: (i.) That as the evidence disclosed offences under sections 100 and 107 of the Penal Code, the Magistrate should have, without acquitting the accused, amended the charges under section 172 (1) of the Criminal Procedure Code.

(ii.) That the offence of criminal intimidation is not triable by a Magistrate summarily if the threat is to cause death or grievous hurt.

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Held: (i.) That whether a person is or is not an accomplice is not a question of law, but one of fact for decision in each case.

(ii.) That where a decoy acts like an ordinary customer, and without tempting the accused to commit the offence, or abetting or instigating its commission, the accused commits the offence, such a decoy cannot be regarded as an accomplice, although being interested in the conviction of the

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accused or the reward he hopes to obtain, his evidence should be accepted with care and caution.

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Defence (Compensation) Regulations—Requisitioning of land—Claim for compensation—Claim referred to Tribunal under the Defence (Compensation) Regulations—Jurisdiction of Tribunal to determine compensation—Validity of Defence (Compensation) Regulations—Defence (Miscellaneous) Regulation 34.

The Defence (Compensation) Regulations, 1941, and Defence (Miscellaneous Regulation 34 were, on the expiry on February 24, 1946, of the Emergency Powers (Defence) Acts, 1939 and 1940, continued in force by a Governor's Order under the Emergency Laws (Transitional Powers) (Colonies, etc.) Order in Council, 1946, subject, in the case of Defence (Miscellaneous) Regulation 34, to certain modifications. This regulation as modified discontinued the right to take possession of lands after February 24, 1946, but provided for the continuance of the retention of the possession of lands possession of which had already been taken and enabled the competent authority to use for certain specified purposes the lands, possession of which had been retained.

The petitioner's land was requisitioned on January 15, 1944, and a dispute as regards compensation was referred to a Tribunal under the Defence (Compensation) Regulations. The petitioner moved for a Writ of Prohibition on the Tribunal and urged—

(1) that the Tribunal had no jurisdiction to act as the Defence (Compensation) Regulations were *ultra vires* of the powers conferred on the Governor by section 1 of the Emergency Powers (Defence) Acts, 1939 and 1940 as adapted, modified and extended to Ceylon ; and

(2) that even if the Regulations were *intra vires*, the Tribunal had no jurisdiction to determine the compensation in respect of the possession of the land from February 24, 1946, as those Regulations governed the compensation payable in respect of the taking possession and retention of any land in the exercise of " emergency powers " as defined in Regulation 17, and that possession of the land in question was retained from February 24, 1946, not under the Regulations made under the Defence Acts but under a regulation brought into operation by a Governor's Order.

Held : (i.) That the Defence (Compensation) Regulations were *intra vires* of the powers conferred on the Governor.

(ii.) That the Tribunal had jurisdiction to award compensation in respect of the possession of the land from February 24, 1946.

VERON RAJAPAKSA VS. THE TRIBUNAL OF APPEAL *et al* 52

Defence (Purchase of Foodstuffs) Regulations.
See Penal Code 63

Divorce

Permanent alimony to wife—Order made by consent of parties—Subsequent application to modify order under section 615 *of the Civil Procedure Code—Has the Court jurisdiction to grant such application.*

Held : That where an order for payment of permanent alimony was entered of consent, such order cannot be varied later under Section 615 of the Civil Procedure unless such variation had been agreed upon in the consent decree.

ROWLANDS VS. ROWLANDS 98

Essential Services

Essential Services (Strikes and Lockouts) Order, 1942. Jurisdiction of Tribunal.
See Certiorari 22

Evidence

Admissibility of " tiue copy " of a copy of original power of Attorney.
See Power of Attorney 1

Admissibility of first complaint of offence.
See Court of Criminal Appeal 10

Burden of proof—Maintenance—Marriage admitted but faternity denied.
See Maintenance 21

In proceedings under section 400 of Penal Code.
See Penal Code 33

Evidence Ordinance

Section 85—Power of Attorney executed by purdanishin lady.
See Power of Attorney 1

Sections 32 and 157.
See Court of Criminal Appeal 10

Section 167.
See Criminal Procedure Code 59

Section 112—*Meaning of the word " access "—Observations by Privy Council in an Indian case—Effect—Maintenance Ordinance, (Cap.* 76,) *section* 4 *—Wife living in adultery—Burden of proof.*

Held : (i.) That the observations by the Privy Council in *Karapaya Servai vs. Mayandi* A.I.R. (1934) P.C. 49* regarding the interpretation of the word " acess " in section 112 of the Evidence Ordinance are not mere *obiter dicta*, but embody a decision overruling *Jane Nona vs. Leo* reported in 25 N.L.R. 241.

(ii.) That the burden of proving that the wife is living in adultery, disentitling her to receive an allowance from her husband under section 4 of the Maintenance Ordinance (Chap. 76), is on the husband, if he asserts it.

VELUPILLAI SELLIAH VS. SINNAMMAH ... 97

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Fidei Commissum

Fidei commissum property—Improvements by purchaser.
See Compensation for Improvements 68

Food Control

Food Control Ordinance and Regulations—Supply of rice to persons resident on estate—Dismissed labourer remaining on estate—Must Superintendent supply such person with rice ?

Held : (i.) That a Superintendent of an estate is the distributor of supplies of rice to all persons resident on the estate.

(ii.) That a person who is resident on the estate, though not a labourer, is entitled to such supply of rice.

WATSON VS. RAMIAH KANGANY 4

Forest Ordinance

Charge for offences under—Accused acquitted—Disposal of timber seized in connection with such offences.

Held : That on the acquittal of the accused of certain offences under the Forest Ordinance, timber seized in connection with the accusation should be delivered to them and that an order for the delivery of the timber to the Crown cannot be made.

CROOS *et al* VS. SELVADURAI, FOREST RANGER ... 61

Fraud

See Paulian Action 73

Guardian

Appointed by father of minor by deed—Should courts interfere.
See Habeas Corpus 71

Habeas Corpus

Habeas Corpus—Minor brought up by petitioner since infancy after mother's death—Appointment of respondent as guardian and curator by father by notarial deed—Should the Court interfere with such appointment after father's death.

Held : That when by a notarial deed the father of a minor had appointed a guardian and curator in regard to the person and property of the minor, the Court should not interfere with such appointment except for good reasons.

IN *re* LESLIE MARK ANTHONY 71

Housing and Town Improvement Ordinance

Sections 5, 7, 19 and 108.
See Land Acquisition Ordinance 46

Inheritance

See under Kandyan Law

Insolvency

Proof of debts—Can a creditor prove a debt due from an Insolvent after certificate had been granted—Insolvency Ordinance, section 93.

Held : That it is open to a creditor of an Insolvent to prove his debt after the grant of certificate to such Insolvent, provided he obtains from the Court a sitting for the proof of the debts after due notice thereof has been given in the Government Gazette and in such other manner as the Court may direct.

IBRAHIM BAI VS. HERFT 24

Interpretation Ordinance

Section 6 (3).
See Criminal Procedure 51

Jurisdiction

Court of Requests—Action for damages for wrongful possession of half share of land admittedly worth over Rs. 300—Preliminary issue on jurisdiction—Decision in plaintiff's favour—Award of damages—Appeal—Power of Supreme Court to order transfer to District Court—Should objection to jurisdiction and raising preliminary issue be regarded as an application to transfer—Courts Ordinance, section 75 and 79.

The plaintiff sued the defendant in the Court of Requests for damages in a sum of Rs. 290 for wrongful possession of a half share of a land admittedly worth over Rs. 300. Objection was taken to the monetary jurisdiction of the Court and a preliminary issue was raised on that ground. The Commissioner, on the authority of 31 N.L.R. 152, held in favour of the plaintiff and awarded damages on the ground that plaintiff had prescribed to a half share of the land. The defendant appealed.

Held : (i.) That on the facts of the case, it is just and fair that it should be tried by the District Court.

(ii.) That it is open to the Supreme Court on an appeal to order the transfer of the proceedings under section 79 of the Courts Ordinance for the purpose.

PERERA VS. WIJESINGHE & ANOTHER ... 12

Of Tribunal under Essential Services (Strikes and Lockouts) Order, 1942.
See Certiorari 22

Of Court to grant application for modification of order for alimony.
See Divorce 93

Of Court to determine application to set aside *ex parte* order.
See Civil Procedure 102

Of Court in action for specific performance of agreement.
See Trusts 107

Kandyan Law

Inheritance to acquired property—Married woman dying intestate and issueless.

Held : That on the death of a Kandyan married woman, intestate and issueless, leaving a brother and two sisters, her acquired property passed to the brother and sisters in equal shares.

UKKU BANDA & OTHERS VS. TIKIRIBANDA & OTHERS 38

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Inheritance—Rights of woman marrying in deega *after father's death.*

Held : That a woman who (prior to the Kandyan Law Amendment Ordinance 37 of 1938) married in *deega* after her father's death forfeited her rights to the paternal inheritance.

DINGIRI MAHATMAYA & TWO OTHERS VS. KIRI BANDA 62

Land Acquisition Ordinance

Sections 21 *and* 22*—Land situated between street lines defined under Housing and Town Improvement Ordinance—Compulsory acquisition—Market value—Meaning of and how to determine—Housing and Town Improvement Ordinance, Sections* 5, 7, 19 *and* 108*—Their effect.*

A strip of land situated between street lines defined by the Colombo Municipality under section 19 (4) of the Housing and Town Improvement Ordinance, and forming a part of a larger land was acquired under the Land Acquisition Ordinance. The value of the strip was in dispute.

Held : (i.) That the market value in Section 21 of the Land Acquisition Ordinance is the price which a willing vendor might be expected to obtain in the open market from a willing purchaser.

(ii.) That the fact that the owner of the strip acquired owns other lands in the neighbourhood is irrelevant for the purpose of ascertaining its market value.

(iii.) That such fact is the foundation for a claim for damage for severance and other injurious affection to his other property under heads (*b*) and (*c*) of section 21 of the Land Acquisition Ordinance.

(iv.) That the value of improvements standing on such land and any loss of income derived therefrom should be included in the market value.

(v.) That the cases of the *Government Agent, Western Province vs. Archbishop* (16 N.L.R. 395) and the *Government Agent, Kandy vs. Marikar Saibo* (6 S.C.D. 36) were wrongly decided.

(vi.) That the effect of sections 5 and 7 of the Housing and Town Improvements Ordinance is to ensure that no purchaser would buy land between street lines with a view to building upon it and not to render such land sterile and valueless.

(vii.) That such land can be used for any purpose which does not involve the erection of a building.

(viii.) That section 19 (1) of the Housing and Town Improvement Ordinance is concerned with the lines of what is physically a street and not with the land between street lines which is not a street.

THE MUNICIPAL COUNCIL OF COLOMBO VS. LETCHIMAN CHETTIAR 46

Landlord and Tenant

See also under Rent Restriction Ordinance.

Tenant occupying co-owned property—Transfer pending partition action to one co-owner of interests which might accrue by final decree to others—Covenant that full rent should be paid to such co-owner—Request to tenant to pay by co-owners transferring in pursuance of such covenant—Does this create a new tenancy—Duty of tenant when there are several landlords.

Held : (i.) That where a tenant in possession of co-owned property is requested in pursuance of a covenant among co-owners to pay the whole of the rent to one of them to whom the others had transferred, pending partition proceedings in respect of such property, their right, title and interest, which shall accrue to them under the final decree, no new tenancy is created.

(ii.) That in the case of a plurality of landlords it is the duty of the tenant to pay each of them his or her share of the rent.

NAZAAR & TWO OTHERS VS. HASSIM ... 91

Liquidated Damages

See under Damages.

Lunacy

Lunatic defendant—Decree entered against him—Decree holder purchasing land and transferring to *bona fide* purchaser—Can transfer be set aside.

See Sale 79

Maintenance Ordinance

Section 4.

See Evidence Ordinance 97

Mandamus

Mandamus—Writ of—Employer and employee—Interdiction of employee—Application to compel reinstatement and payment of arrears—Is writ available.

Held : That relief by way of a writ of *mandamus* is not available to a party to a contract of service to compel the performance by the other party of obligations arising out of such contract.

PERERA VS. COLOMBO MUNICIPAL COUNCIL & ANOTHER 7

Maintenance

Defendant admitting marriage but denying paternity—Burden of proof.

On an application for maintenance by the wife, the defendant admitted marriage, but denied paternity on the ground that the applicant was living in adultery. Thereupon the Magistrate ruled that the burden was on the defendant to prove that the applicant was living in adultery and that he was not the father of the child.

Held : That the Magistrate erred in law in calling upon the defendant to establish his case before the applicant's case was placed before the court.

UKKUMENIKA VS. VIDANE 21

Master and Servant

Mandamus to compel performance of obligations arising out of contract.

See Mandamus 7

Minor

Guardian appointed by father by deed. Should Court interfere.

See Habeas Corpus 71

Misdirection

See under Court of Criminal Appeal.

Misjoinder of Charges

See Criminal Law 104

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Mortgage

Mortgage—Bond put in suit—Mortgagor and his transferee parties—Transferee dead at time of action—Compromise with alleged legal heir of transferee and mortgagor—Transfer of hypothecated property to mortgagees—Decree dismissing suit—Finding by Court that alleged legal heir of transferee not entitled to convey rights under Mortgage Bond—Do they revive—Rights of mortgagees—When can Court declare such rights revived.

The defendants, who were mortgagees under a mortgage bond put the bond in suit making the mortgagor and his transferee (as puisne encumbrancer) parties. The transferee was dead at the date of the action and on the footing that one K was his lawful heir, the mortgagees compromised the mortgage suit with the said K and the mortgagor by obtaining a transfer of their rights in the hypothecated property and decree was entered accordingly dismissing the suit.

In the present action the plaintiffs sued the defendants for a declaration of title and the Court held that as K was not the lawful heir of the said mortgagor's transferee the defendants were not entitled to the property in question. It was then contended for them that their rights under the mortgage bond revived.

Held : (i.) That before the claim to have the rights under the mortgage bond revived, the decree dismissing the mortgage action must first be got out of the way.

(ii.) That a declaration that such rights revived cannot be made in proceedings to which the mortgagor is not a party.

GUNAWATHIE VS. KUMARAPPAN CHETTIYAR ... 19

Motor Car Ordinance

Section 85 (7)—Obstruction to traffic—When can a person be said to be obstructing traffic.

Held : (i.) That where it is shown that the driver of a motor car drove his vehicle along a highway keeping well to his left and after taking stock of the traffic on the road and satisfying himself that there was no other traffic which would be impeded by his taking a turn across the highway, crosses the highway at a moderate or even slow speed, he cannot be said to be obstructing traffic.

(ii.) That where a motorist crosses causing some slight obstruction to the other traffic, he could not be said to be guilty of obstructing traffic within the meaning of section 85 (7) of the Motor Car Ordinance.

JAYA RAJAH VS. ABEYGUNAWARDENE, INSPECTOR OF POLICE 36

Notary

Declaration by, of due execution of deed. Is proof of Notary's signature necessary.
See Power of Attorney 1

Partition

Partition action—Party to interlocutory decree in representative capacity—Can he intervene thereafter to claim rights personally.

Held : That a party to proceedings and to the interlocutory decree in a partition action in a representative capacity is entitled to intervene up to the date of final decree as regards his personal rights.

GUNASEKERA VS. ARTHUR DE ZOYSA ... 57

Partition—Co-owner erecting new house on common land—Possession for over ten years—Does mere possession mature into prescriptive title to building and soil covered thereby—Co-owners, members of one family—Necessity to lead strong evidence of exclusive possession to establish prescription—Can undivided portion of larger corpus be partitioned.

Held : (i.) That, where a co-owner erects a new building on the common land and remains in possession thereof for over ten years, he does not acquire a prescriptive right to the building and the soil on which it stands as against the other co-owners merely by such possession.

(ii.) That where the co-owners are members of one family very strong evidence of exclusive possession is necessary to establish prescription.

(iii.) That the partition of an undivided portion of a larger *corpus* cannot be allowed.

DIAS ABEYSINGHE VS. DIAS ABEYSINGHE & TWO OTHERS 69

Paulian Action

Deed of transfer pending a claim for unliquidated damages against transferor—Action to set aside such deed after obtaining decree for damages—Fraud and collusion—Can such action be maintained.

Held : That a Paulian action is available to a person, who having obtained a decree on a claim for unliquidated damages against another, impugns a deed of transfer by the latter on the ground that it was executed fraudulently and collusively, although at the time of its execution such claim for unliquidated damages was pending.

PUNCHI APPUHAMY VS. SEDERA & ANOTHER ... 73

Penal Code

Section 294—Meaning of " intention."
See Court of Criminal Appeal 13

Section 400—Cheating—Damage or harm to person deceived—Nature of proof required to constitute offence.

The accused was convicted under section 400 of the Penal Code for having deceived R. Muttusamy, Proctor and Notary, by falsely representing to him that certain premises, which the accused hypothecated under a bond attested by the said R. Muttusamy as Notary, were free from all encumbrances, when in fact the accused had by a prior mortgage bond hypothecated the same premises with another.

It was in evidence that the said Muttusamy had taken every step that a careful Notary would take to protect his clients' interests in spite of the representations of the accused. As the earlier bond had not been registered its existence could not be discovered.

There was no evidence of any damage or harm to the Notary.

Held : (i.) That the conviction could not be sustained as the possibilities of damage or harm to the Notary in mind or reputation in consequence of the representation by the accused were too remote.

(ii.) That to constitute the offence of cheating under section 400 of the Ceylon Penal Code, the damage or harm contemplated therein is damage or harm which must be the necessary consequence

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of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom.

De Alwis vs. Selvaratnam 33

Sections 203a *and* 183—*Offence under Purchase of Foodstuffs Regulations—Transporting rice without permit—Arrest without warrant of persons so transporting—Escape from custody—Can such escape be basis of a criminal charge.*

Held : That in the absence of a provision of law declaring that offences under Defence (Purchase of Foodstuffs) Regulations are cognizable offences, the arrest of persons accused of offences under such regulations without a warrant is illegal, and the escape by such persons or their rescue from custody cannot be made the subject of criminal charge under section 220A or section 183 of the Penal Code.

Jainudeen Mohamed Sheriff & Others vs. T. S. Bongso, S. I. Police 63

Sections 443 and 450.
See Criminal Procedure Code 66

Sections 369 *and* 394—*Charge of theft and retaining stolen property—When liability of accused person to give explanation arises—Doubt as to whether such property can be said to be recently stolen—Effect—Evidence of Police witnesses that explanation given to them by accused unsatisfactory in their opinion—Effect of such evidence.*

Held : (i.) That the liability of a person accused of dishonestly retaining stolen property to give an explanation only arises when the prosecution has led admissible and relevant evidence, which if believed would establish the necessary ingredients of the offence.

(ii.) That where there is room for doubt whether the property can be said to be "recently" stolen property, the presumption of theft arising from the possession of recently stolen property cannot be drawn.

(iii.) That the court should not act on the evidence of police witnesses who merely state that the explanation given by the accused was in their opinion unsatisfactory, without confronting the accused with the statement recorded by them, if inconsistent with the evidence given by him in court.

Solomon Peter de Silva vs. Perera, S. I. Police 105

Power of Attorney

Power of Attorney—Execution by purdanishin lady behind purdah while notary stood outside—Is it entitled to presumption under section 85 of the Evidence Ordinance.

Deed attested in British India—Declaration of due execution by notary attesting—Is evidence necessary to prove signature of notary or identity of executant. Evidence—True copy of a copy of original Power of Attorney not issued by Registrar-General of Ceylon, but by a Registering Officer under the Indian Registration Act, 1908—*Is it admissible without evidence of due execution.*

Held : (i.) That a power of attorney executed by a purdanishin lady behind the purdah, while the notary stood outside the purdah, could not be regarded as a power of attorney (executed before a notary) entitled to the presumption under section 85 of the Evidence Ordinance.

(ii.) That, where there is a declaration by the notary attesting a deed in British India to the effect, that such deed was duly executed, an affidavit or other evidence verifying the signature of the notary, or the identity of the executant is unnecessary.

(iii.) That a document (not being a certified copy issued by the Registrar-General of Ceylon under the Powers of Attorney Ordinance,) purporting to be a "true copy" of a copy of an original power of attorney, copied by a registering officer in a book kept under the Indian Registration Act 1908, without evidence of its execution and genuineness, is inadmissible in evidence.

Sreenivasaraghava Iyengar vs. Jainambeebee Ammal & Others 1

Principal and Agent

See under Agency.

Quo Warranto

Person elected as member of Village Committee while interested in contract with Committee—Village Communities Ordinance (*Cap.* 198) *sections* 13, 15 (3), 19 (*a*) *and* 36.

The respondent, who was the only candidate nominated for election to a certain ward of a Village Committee, was duly declared elected on nomination day. On this day he was interested in a contract with the Village Committee. Before the respondent's term of office commenced, he had executed the contract.

Held : (i.) That as the Village Committee is a corporation, the respondent was interested in a contract with the Committee on nomination day and was disqualified for election ;

(ii.) That the fact that the disqualification was not raised on nomination day does not preclude the making of an application in the Supreme Court.

James vs. Fernando 27

Rent Restriction Ordinance

Section 8, *proviso* (c)—*Action by sub-lessee to eject tenant—Tenancy commenced under owner—Payment of rent to lessee—Is lessee entitled to eject on the ground of premises reasonably required for lessees' occupation—Rights of a lessee.*

The plaintiff, a sub-lessee, sued the defendant, who had been a tenant under the owner prior to the lease for ejectment on the ground that the premises were reasonably required for his personal occupation and to commence and carry on a trade. The defendant had paid rent to the plaintiff prior to the action.

Held : (i.) That the plaintiff is not entitled to eject the defendant inasmuch as the plaintiff took the lease with notice of the occupation of the prior lessee.

(ii.) That for the purpose of section 8 proviso (c) of the Rent Restriction Ordinance "landlord" must be defined as one who is entitled not only to receive rent, but as one who has a *jus in re* in regard to the premises.

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(iii.) That where the ordinary meaning and grammatical construction of the language of a statute leads to a manifest contradiction of the purpose of the enactment, a construction may be put upon it which modifies the meaning of the words.

SAHUL HAMEED vs. ANNAMALAY 29

Res Judicata

See Thesawalamai 57

Restitutio in integrum

See Civil Procedure Code 9

Revision

Revision—Application by accused whose appeals were previously dismissed—Same relief asked for—Allegation that judgment was pronounced per incuriam—*Can the Court entertain such application.*

Where applications in revision were made by two accused, whose appeals were previously dismissed, alleging that the opinions expressed by the appeal Court in the judgment were made *per incuriam.*

Held : That, where the object of an application in revision was in fact to re-argue a case already decided, the Court cannot and should not entertain such application.

EHAMBARAM & ANOTHER vs. RAJASURIYA ... 65

Sale

Execution Sale—Decree against defendant adjudged lunatic at time of decree—Purchase by decree-holder at sale in execution—Later transfer to bona fide *purchaser—Can such transfer be set aside.*

Held : That a deed in favour of a *bona fide* purchaser of property sold in execution of a decree against a defendant, who had been adjudged a lunatic at the time the decree was entered, cannot be set aside merely on the ground that such decree and subsequent orders thereon were null and void.

S. APPUHAMY & ANOTHER vs. RAMASAMY PILLAI'S DAUGHTER, THAILAMMAH ... 79

Execution Sale—Obstruction to Fiscal's Surveyor—Liability of person obstructing.
See Damages 96

Security for costs

See Civil Procedure Code 63

Sentence

When sentences should be concurrent and not consecutive.
See Court of Criminal Appeal 11

Summons

Service of when defendant in jail.
See Civil Procedure Code 9

Thesawalami

Action for pre-emption—Prior 247 *action in respect of same land against plaintiff and another—Failure of plaintiff to claim in reconvention right to pre-empt—Is the claim* resjudicata.

The plaintiff claimed the right to pre-empt certain lands which he alleged the 1st defendant transferred to the 2nd defendant in derogation of his (plaintiff's) rights.

The plaintiff and another, having obtained judgment against the 1st defendant in an earlier action, caused the Fiscal to seize the lands in question. The defendant preferred a claim which was dismissed, resulting in a 247 action against the plaintiff and his co-decree holder, who unsuccessfully contended, that the deed on which the claim was based was executed in fraud of creditors. The plaintiff did not pray by way of reconvention for a declaration of his right to pre-empt in that action.

Held : (i.) That the failure to counter-claim in the 247 action the right to pre-empt cannot be deemed to be a bar to the present action.

(ii.) That the cause of action that gives right to an action to pre-empt is entirely independent and totally unconnected with the cause of action giving rise to a 247 action.

MURUGESU OF PUTTUR vs. THAMBIPILLAI & ANOTHER 57

Transfer

Of land by deed—Non-notarial agreement by vendee to retransfer—Enforceability.
See Trusts 107

Trusts

Transfer of land by notarial deed—Contemporaneous non-notarial agreement by vendee to retransfer land to vendor—Refusal by vendee to retransfer—Enforceability of non-notarial agreement—Trusts' Ordinance sections 5 *and* 83—*Jurisdiction.*

The plaintiff transferred a certain land worth more than Rs. 300 to the defendant for Rs. 250 by deed. At the time of the execution of the deed, the defendant signed a non-notarial agreement agreeing to retransfer the land to the plaintiff within two years on payment of the said Rs. 250 and the expenses incurred in connection with the deed. The plaintiff tendered the sum as agreed but the defendant refused to retransfer the land. The facts showed that when the deed was executed, it was never intended by either party that the defendant should hold the land as absolute owner but only until such time as his debt was repaid.

Held : (1) That the informal agreement was enforceable as it would enable the defendant to effectuate a fraud if it were shut out.

(2) That though the land was worth more than Rs. 300, the court had jurisdiction as plaintiffs' cause of action was for specific performance of an agreement and was below Rs. 300 in value.

ELIYA LEBBE vs. ABDUL MAJEED ... 107

Village Communities Ordinance (Cap. 198)

Sections 13, 15 (3), 19 (*a*) and 36.
See Quo Warranto 27

Words and Phrases

" Abode "
See Civil Procedure Code 9

" Access "
See Evidence Ordinance 97

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Present : WIJEYEWARDENE AND DIAS, J.J.

SREENIVASARAGHAVA IYENGAR vs. JAINAMBEEBEE AMMAL AND OTHERS

S. C. No. 152/1945—*D. C.* (*Inty.*) *Nuwara Eliya*, 1589

Argued on : November 26, 28 and 29, 1946
Decided on : January 6, 1947

Power of Attorney—Execution by purdanishin lady behind purdah while notary stood outside—Is it entitled to presumption under section 85 *of the Evidence Ordinance.*

Deed attested in British India—Declaration of due execution by notary attesting—Is evidence necessary to prove signature of notary or identity of executant.

Evidence—True copy of a copy of original Power of Attorney not issued by Registrar-General of Ceylon, but by a Registering Officer under the Indian Registration Act, 1908—*Is it admissible without evidence of due execution.*

Held : (i.) That a power of attorney executed by a purdanishin lady behind the purdah, while the notary stood outside the purdah, could not be regarded as a power of attorney (executed before a notary) entitled to the presumption under section 85 of the Evidence Ordinance.

(ii.) That, where there is a declaration by the notary attesting a deed in British India to the effect, that such deed was duly executed, an affidavit or other evidence verifying the signature of the notary, or the identity of the executant is unnecessary.

(iii.) That a document (not being a certified copy issued by the Registrar-General of Ceylon under the Powers of Attorney Ordinance,) purporting to be a "true copy" of a copy of an original power of attorney, copied by a registering officer in a book kept under the Indian Registration Act 1908, without evidence of its execution and genuineness, is inadmissible in evidence.

Cases referred to :—

Hira Bibi et al vs. Ram Hiri Lal et al (1925) 52 Indian Appeals 362.
Satish Chandra Mitra vs. Jogendra Nath Mahalanobis et al (1917) All-India Reporter (Calcutta) 693.
In re Goff's Estate, Siddal vs. Nicholson (1866) 14 Law Times Reports 727.
Lanktree vs. Molesworth.
Salimatul Fatima alias Bibi Horasaini vs. Kaylashpoti Narian (1890) 17 Calcutta 903.

N. Nadarajah, K.C., with *L. A. Rajapaksa, K.C.*, and *Cyril E. S. Perera*, for substituted plaintiff-appellant.

Dodwell Goonewardene, for first, second and third respondents (original plaintiffs).

H. V. Perera, K.C., with *S. Nadesan*, for 17th to 19th and 28th to 33rd and 40th added parties and 10th to 16th and 21st substituted defendants.

WIJEYEWARDENE, J.

The plaintiff instituted this action for the partition of a property in Nuwara Eliya. The seventh to sixteenth defendants filed answer stating that the beneficial interests in the land were vested in them and that the plaintiffs had only a share of the legal interest. They prayed for a dismissal of the plaintiffs' action and for judgment in reconvention against the plaintiffs directing them "to execute such deeds in favour of the seventh to sixteenth defendants as may be necessary for the better manifestation of the title of the seventh to the sixteenth defendants."

The District Judge dismissed the plaintiffs' claim for partition and ordered them to execute deeds as pleaded for in the answer in favour of the seventh to the sixteenth defendants. This Court set aside that judgment and ordered a decree of partition to be entered (*vide* 39 New Law Reports 105). There was then an appeal to His Majesty in Council (*vide* 41 New Law Reports 297). The Order in Council restored the decree of the District Court and directed that "the plaintiffs-respondents, on receiving the amount agreed to as being, or found on enquiry, in accordance with such directions as the said Supreme Court may give, to be, the share of the partnership assets due to one Pavana Ibrahim Saibo, ought to execute to the defendants a conveyance of the shares of the land claimed in this suit."

On an application made by the plaintiffs for the enforcement of the Order of the Privy Council this Court made order on April 1, 1942, giving the necessary directions to the District Court of Nuwara Eliya.

On December 12, 1942, the petitioner-appellant moved the District Court for an order substituting him in place of the plaintiffs. He pleaded that the plaintiffs had conveyed to him all their interests in the action by deeds S 1 of December

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14, 1940, and S 3 of November 17, 1942. The present appeal is from the order of the District Judge refusing that application.

The deed S 1 has been executed by the plaintiffs through their attorney A.S.A. Rahim alleged to have been appointed under the power of attorney S 2 of December 14, 1940. The Deed S 3 has been executed by the plaintiffs through A. K. Mohamed Cassim who claims to have been appointed under a power of attorney of October 7, 1942. A copy of that power of attorney purporting to be a true copy issued under the hand of the Sub-Registrar of Paranavaisam has been produced and marked S 4.

The Counsel for the contesting defendants contended :—

(*a*) that there was no proof of the due execution of the power of attorney S 2 by the plaintiffs ;

(*b*) that the deed S 1 did not assign any interest in the action to the petitioner ;

(*c*) that S 4 was not admissible in evidence ;

(*d*) that there was no assignable interest in the action, as the contesting defendants' Counsel intimated at the inquiry before the District Judge that those defendants did not desire to have the deeds executed by the plaintiffs in their favour.

The power of attorney S 2 purports to have been executed by the three plaintiffs at Tanjore on December 14, 1940. It does not appear to have been registered under the Indian Registration Act, 1908.

I find on S 2 the alleged thumb impression of the first plaintiff and the alleged signatures of the second and third plaintiffs. Then follow two declarations by a Notary Public of Tanjore. The first declaration is to the effect :—

> " I certify that I have satisfied myself on examining (at the residence of the plaintiffs) this 14th day of December, 1940, Jainambeebee Ammal (first plaintiff) who is a Gurtha lady with the aid of (a lady) that the power of attorney has been voluntarily executed by the said Jainambeebee Ammal who purports to be one of the principals and whose identity has been proved by inspection behind the purdah by (A) and (B)."

The second declaration of the Notary reads :—

> " Executed in my presence this 14th day of December, 1940, by P. E. Mohamed Cassim (third plaintiff) and P. E. Mohamed Sheriff (second plaintiff) whose identity is proved by (C) and (D)."

A comparison of the two declarations satisfies me that S 2 was not executed by Jainambeebee Ammal in the presence of the Notary. I do not think that a power of attorney executed by a purdanishin lady behind the purdah while the Notary stood outside the purdah could be regarded as a power of attorney executed before the Notary for the purpose of attracting to itself the presumption under section 85 of the Evidence Ordinance. In this connection I would refer to the following observations made by Lord Darling in *Hira Bibi et al vs. Ram Hiri Lal et al* (1925) 52 Indian Appeals 362 in considering a somewhat similar question :—

> " Hira Bibi is a purdanishin lady. The evidence shows, beyond contest, that, when Hira Bibi signed the mortgage bond, not one of the persons who signed as witnesses was present or saw her sign it. She was behind the purdah. Anant Prasad, her son, took this deed, and others inside the purdah. He came and told those outside, and out of sight of Hira Bibi, that she had signed the deed. After this all those signed whose names appear as witnesses. The learned Judges from whose judgments this appeal is brought have themselves declared that this is wholly insufficient to comply with the statute relating to the due execution and attestation of such a document as this mortgage bond.......... The mortgage deed here in question was not, in a legal sense, attested ; for it was merely signed by persons who professed to be witnesses to its execution, although in truth and in fact they were not so."

It was argued by the appellants' Counsel that we should take into consideration the fact that the first plaintiff who was noticed to shew cause against the substitution did not do so and that Mr. Advocate Goonewardene who appeared for her at the appeal agreed to the application being allowed. I presume that this argument is based on section 70 of the Evidence Ordinance. Assuming that the conduct of the first plaintiff may be taken as an " admission " it has to be noted that section 70, enacts only that " the admission of a party to an attested document of the execution by himself shall be sufficient proof of the execution *against him*." The " admission " therefore in this case may be sufficient proof against Jainambeebee Ammal of the execution by her on S 2 in the presence of the two witnesses but not against the petitioners (*vide Satish Chandra Mitra vs. Jogendra Nath Mahalanobis et al* (1917) All India Reporter (Calcutta) 693. I may add that no oral evidence was led at the inquiry about the execution of S 2 by any of the plaintiffs. I would, therefore, hold that the petitioner has failed to prove the execution of S 2 by the first plaintiff.

S 2 purports to have been executed by the second and third plaintiffs in the presence of two witnesses and a Notary Public. There is a declaration to that effect by the Notary who signed it and affixed his seal. I do not think it necessary for the petitioner to tender an affidavit or lead any evidence verifying the signature of the Notary as this document has been executed in British India (*vide In re Goff's Estate, Siddal vs. Nicholson* (1866) 14 Law Times Reports 727) ; nor is an affidavit of the identity of the executant necessary (*vide In the Goods of Mylne* (1905) Indian Law Reports 33 Calcutta 625). I would also

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refer to the unreported case of *Lanktree vs. Molesworth* (S. C. No. 120 ; D. C. (Final) Trincomalee 13/2,257 ; S. C. Minutes of February 16, 1940)*. In that case a power of attorney executed before a Notary of the City of London and two witnesses and an authentication by the Notary were produced before the District Judge who refused to act on it in the absence of any evidence of the identity of the executant. In a short judgment this Court set aside the order of the District Judge, " having regard to the fact that it has been the practice of this Court to accept documents witnessed and authenticated in that manner." I shall, therefore, presume under section 85 of the Evidence Ordinance that S 2 has been duly executed by the second and third plaintiffs.

I have read the deed S 1 carefully and I am unable to say that S 1 conveys the interest of the second and third plaintiffs under the Order in Council.

I shall now consider the position with regard to S 4. Not being a certified copy issued by the Registrar-General of Ceylon under the Powers of Attorney Ordinance, the petitioner cannot avail himself of the presumptions under section 8 of that Ordinance. It purports to be a " true copy " of a copy of the original power of attorney copied by a registering officer in a book kept under the Indian Registration Act, 1908. There is no evidence to show that S 4 has been compared with the original. I may also add that no oral evidence has been led before the District Judge regarding the execution of the power of attorney by the plaintiffs. The signatures which purport to be copies of the signatures of the second and third plaintiffs are in Tamil characters while the second and third plaintiffs have signed S 2 in English characters. In the absence of any explanation this fact involves in some doubt the genuineness of the original of S 4. The fact that the original of S 4 has been registered is not in itself sufficient proof of its execution (*vide Salimatul Fatima alias Bibi Horasaini vs. Kaylashpoti Narian* (1890) 17 Calcutta 903). S 4 shows that the power of attorney was not executed before any of the persons referred to in section 85 of the Evidence Ordinance. It appears to have been executed before two witnesses. S 4 does not come under section 78 (6) as the original has been executed in British India and not in a foreign country. It is therefore not necessary to discuss the question whether it complies with the other requirements of that section. Then remains the question whether it is admissible under section 82. To establish its admissibility under that section it has to be proved first that S 4 would have been admissible in England or Northern Ireland in proof of the due execution of the power of attorney without proof of its authentication. The question of the admissibility of a document in England must be determined by reference to any particular Statute governing the case, (*e.g.*, Births and Deaths Registration Act, 1836 (6 and 7 William iv., Chapter 86), Indian Marriages Act 1851, (14 and 15 Victoria, Chapter 40) and, in the absence of such a Statute, by reference to the general provisions of section 14 of 14 and 15 Victoria, Chapter 99. No English Statute applicable to documents of the nature of S 4 executed in India has been cited to us. I do not think that S 4 comes under section 14 of 14 and 15 Victoria, Chapter 99 since that section does not refer to certified or examined copies issued in India.

The Evidence (Foreign Dominion and Colonies) Act 1933, 23 George v., Chapter 4 enables Orders in Council to be made applying the Act to India so as to enable official copies of a register in India to be admissible in evidence in England. No such Order in Council referring to the Indian Registration Act, 1908, has been brought to my notice.

For these reasons I hold that it has not been proved that S 3 has been executed under a power of attorney duly executed by the plaintiffs.

In view of my findings on the above points it is not necessary for me to express an opinion on the last point raised by the Counsel for the respondents.

I would dismiss the appeal with costs.

DIAS, J.

I agree.

Appeal dismissed.

Present : HOWARD, C.J. AND SOERTSZ, J.

MOLESWORTH vs. LANKTREE, A.G.A.

* *S. C. No.* 120—*D. C.* (*Inty.*) *Trincomalee, No.* 2,257

Argued and Decided on : 16th February, 1940

H. V. Perera, K.C., with *N. K. Choksy* and *Miss Metha*, for the appellant.

D. W. Fernando, C.C., for the Attorney-General.

HOWARD, C.J.

Having regard to the fact that it has been the practice in this court to accept documents witnessed and authenticated in this manner, the appeal is allowed. There will be no order as to costs.

SOERTSZ, J.

I agree.

Appeal allowed.

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Present : WIJEYEWARDENE, J.

WATSON vs. RAMIAH KANGANY

S. C. No. 661—*M. C. Hatton No.* 7890.
Argued on : 17th and 27th September, 1946.
Decided on : 15th October, 1946.

Food Control Ordinance and Regulations—Supply of rice to persons resident on estate—Dismissed labourer remaining on estate—Must Superintendent supply such person with rice?

Held : (i.) That a Superintendent of an estate is the distributor of supplies of rice to all persons resident on the estate.

(ii.) That a person who is resident on the estate, though not a labourer, is entitled to such supply of rice.

L. A. Rajapakse, K.C., with *S. P. Wijewickreme*, for the accused-appellant.
M. M. Kumarakulasingham, for complainant-respondent.
A. C. M. Ameer, Crown Counsel, as *amicus curiae.*

WIJEYEWARDENE, J.

The accused was charged with having refused to sell or issue supplies of rice to Ramiah on December 15, 22 and 29, 1945, in breach of Regulation 4 (1) in Part II. (Head E) made under the Food Control Ordinance and published in the Gazette No. 8397 of September 27, 1938.

The Magistrate convicted the accused and sentenced him to pay a fine of Rs. 150.

The accused has been the Superintendent of Ythanside Estate, Kotagala, from August, 1942. Ramiah has been on that estate from about 1940. In September, 1945, the accused informed Ramiah and three others that he would not employ them any longer as supervising kanganies but they could do " any other labourer's work including pruning ". The accused took this step as the Estate Agents desired that the number of supervising kanganies on the estate should be reduced. Though the other three kanganies accepted the proposal made by the accused, Ramiah insisted that he should be continued as supervising kangany.

On October 20, 1945, the accused decided not to give work to Ramiah unless he agreed to work as a labourer and Ramiah ceased to work from that day. However, the accused tried again to persuade Ramiah to work on the estate as a labourer and as Ramiah persisted in his attitude that he would not work except as a supervising kangany, the accused dismissed him on November 20, 1945, and forwarded his discharge certificate and rice token card to the Deputy Controller of Labour. The Deputy Controller of Labour returned those documents to the accused on December 21, 1945, as the question of Ramiah's dismissal was under consideration in certain proceedings before the Deputy Controller. Ramiah continued to remain on the estate and live with his wife who was a labourer on the estate.

The question that has to be decided is whether in these circumstances Ramiah was a person resident on the estate, to whom the accused was bound under Regulation 4 (1) to supply rice on the dates mentioned in the charge. That Regulation enacts :—

> " The superintendent of every estate shall be the distributor of such supplies to all persons resident on that estate and shall sell or issue such supplies to such persons in accordance with the provisions of this Part."

Ramiah was living on the estate in December, 1945. The right of a husband to live in the cooly line with his wife who is a labourer on the estate is recognised by section 23A of the Estate Labour (Indian) Ordinance which reads :

> " Where on any estate, housing accommodation is provided by the employer for any labourer who is living with his or her spouse on that estate, the employer shall provide a separate room for such labourer and his or her spouse and shall not compel them to share such room with any person other than a child of such labourer or of his or her spouse."

Moreover, no action has even been filed in Court by the accused to eject Ramiah from the estate. Regulation 4 (1) does not require that the person " resident " on the estate should be a labourer on the estate. I may refer in this connection to the definition of " Estate " given in Regulation 4 in Part III. (Head F)—

> " ' Estate ' means any land of which ten or more acres are actually cultivated and on which not less than forty persons are usually resident whether or not such persons are actually employed on the land in any capacity............"

I hold, therefore, that Ramiah was a person whom the accused was bound to supply with rice in December, 1945.

In imposing a fine of Rs. 150 the learned Magistrate remarked that " there was no *bona fides* in the action of the accused " as he failed to follow the advice given to him by the Deputy

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Commissioner of Labour with regard to the supply of rice to Ramiah. On a careful consideration of all the aspects of the case I find it difficult to infer a lack of *bona fides* on the part of the accused from the mere fact that he did not agree with the Deputy Controller of Labour on that point. The accused appears to have thought that there was no such legal obligation to supply rice and foodstuffs to Ramiah after the dismissal, as he did not think a superintendent of an estate would be saddled with the burden of distributing food supplies to persons whom he regarded as lawfully dismissed from the estate.

I do not think that this is a case which calls for more than a nominal fine.

I uphold the conviction but reduce the fine to Rs. 20.

Sentence varied.

Proctors : *A. J. M. de Silva* for the accused-appellant.
J. M. D. Smith for the complainant-respondent.

(*IN THE COURT OF CRIMINAL APPEAL*)

Present : HOWARD, C.J. (PRESIDENT), CANNON, J. & JAYETILEKE, J.

REX vs. A. PEDRICK SINGHO

Application No. 73 *of* 1946—*S. C. No.* 3/*M. C. Panadura* 36200.
Argued on : 27th and 28th May, 1946.
Decided on : 10th June, 1946.

Court of Criminal Appeal—Joinder of three charges of murder in one indictment—Desirability of such joinder—Permissibility—Criminal Procedure Code, sections 179 (1) *and* 180 (1)*—Discretionary power of the Judge.*

The accused-appellant was convicted on three charges of murder included in one indictment. Before the trial commenced counsel for the accused objected to the joinder, but the trial Judge allowed it as the evidence in the case was so interwoven that it was difficult to separate the three charges. It was argued in appeal that the joinder was not permissible, and that, even if permissible, it should not have been allowed in the particular case as it caused prejudice to the accused.

Held : (i.) That the practice of including more than one charge in an indictment for murder is not a desirable one ; but

(ii.) That on the facts of the present case, the joinder was legally permissible either under section 179 (1) or under section 180 (1) of the Criminal Procedure Code, and that the permission of such joinder was a matter within the discretion of the trial Judge.

Per HOWARD, C.J.—" The use of the word ' may ' and not ' should ' in both sections 179 (1) and 180 (1) is an indication that such a discretionary power exists............

" In the present case the facts of the three murders were so interwoven as to constitute a series of facts forming one transaction. If the trials had been separate, evidence of the murders not forming part of the indictment would have been admissible............ The fact that the accused person is charged with more than one murder is certainly a factor which will be present to the minds of the Jury. But as that evidence was admissible, it cannot be said that the accused was prejudiced."

Cases referred to :—

Rex vs. Davis (26 Criminal Appeal Reports 95).
Rex vs. Large (27 Criminal Appeal Reports 65).
King vs. Senanayake (20 N. L. R. 83).
Emperor vs. Afsaruddi Naseraddi (40 Criminal Law Journal of India 1939, p. 290).
Fauja vs. Emperor (20 Criminal Law Journal of India 1919, p. 353).
The King vs. Wickremasinghe (36 N. L. R. 135).
Rex vs. Arnolis Perera (28 N. L. R. 461).
Pakala Narayana Swami vs. King Emperor (1939) (1 All England Report, p. 396).

Mackenzie Pereira, with *K. A. P. Rajakaruna*, for applicant.
H. H. Basnayake, Solicitor-General, with *T. S. Fernando, Crown Counsel*, for the Crown.

HOWARD, C.J.

The appellant appeals from his conviction on three charges of murder. These three charges were included in one indictment. Before the trial commenced counsel for the appellant objected to the joinder of three charges of murder in one indictment. After hearing argument on both sides the trial Judge made the following order :—

" Crown Counsel states that the evidence in the case is so interwoven that it is difficult to separate the charge of homicide in respect of one person from the other charges, principally because the question of motive is centred round the man Odiris and the finding of blood-

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stains in the shed of the accused and on the hammer cannot be so dissociated so as to prove that the blood found there was the blood of the first person killed, or the second person killed, or of the third person. I was trying to find whether it was possible to have the trial confined to the charge of murder of one person, but in these circumstances I think I ought to allow the Crown to proceed with the trial on the indictment framed."

On appeal counsel for the appellant has taken the point that such joinder is not permissible and, if permissible, should not have been allowed in this particular case as it caused prejudice to the appellant. Reference has been made to the cases of *Rex vs. Davis* (26 Criminal Appeal Reports 95) and *Rex vs. Large* (27 Criminal Appeal Reports 65). In the first of these cases Lord Hewart, L.C.J. in giving the judgment of the Court at pages 95 and 96 stated as follows :—

" In our opinion it is not accurate to say that the joinder of the two counts in this case was fatal, and indeed, when one looks at the facts of the two charges, it is apparent that together they may well be regarded as substantially one transaction. If there had been two separate indictments, it would have been easy and proper for the prosecution on the trial of one indictment only to tender evidence relating to the whole of the matter. None the less, I repeat that in the opinion of the Court the joinder of two murders in one indictment is undesirable. The matter is one for the judicial discretion, and the fact that there were two counts in the indictment in the present case does not in the least invalidate the conviction."

In the second case it was held that no other count ought to be included in an indictment for manslaughter. It will be observed that, although the practice of joining more than one charge of murder in the same indictment was deprecated, it was not held to be illegal. Moreover Lord Hewart stated that it was one for judicial discretion. In that particular case the two charges together were regarded by the Lord Chief Justice as substantially one transaction and he stated that, if there had been two separate indictments, it would have been easy and proper for the prosecution on the trial of one indictment only to tender evidence relating to the whole matter. In our opinion the principle formulated by Lord Hewart applies to the present case. The practice of including more than one charge in an indictment for murder is not a desirable one. If one charge only had been included the Crown might, as the three charges were substantially one transaction, have tendered evidence relating to the whole matter. Section 179 (1) of the Criminal Procedure Code, however, permits the joinder on the ground that the offences were of the same kind and had been committed by the same person within a space of twelve months and were not more than three in number. Authority for this is to be found in the case of *King vs. Senanayake* (20 N. L. R. 83). The corresponding section in the Indian Criminal Procedure Code section 234 is worded similarly to section 179 (1) of our Code. In *Emperor vs. Afsaruddi Naseraddi* (40 Criminal Law Journal of India 1939, p. 290) it was held that two charges of murder may be legally tried together under section 234 of the Criminal Procedure Code. *Fauja vs. Emperor* (20 Criminal Law Journal of India, 1919, p. 353) is a decision to the same effect. Section 180 (1) of the Criminal Procedure Code also permits the joinder on the ground that the offences constituted one series of acts so connected together as to form the same transaction. We think that these murders did form one transaction.

The next question that arises is whether the appellant was in fact prejudiced by the joinder of these three charges and the learned Judge should have directed that only one charge should be included in the indictment. It has been contended by the Solicitor-General that a Judge has no power to direct separate trials. We cannot accept that contention. In the *King vs. Senanayake* (supra) it was held by Wood Renton, C.J. that it is always open to the Court, on the application of an accused person against whom section 179 (1) of the Criminal Procedure Code is being applied, to order that the trials should be separate, and any possible hardship may be obviated in that way. The use of the word " may " and not " should " in both sections 179 (1) and 180 (1) is an indication that such a discretionary power exists. The power of a Judge to order separate trials and the exercise of his discretion in so doing was also considered in the case of *The King vs. Wickremasinghe* (36 N. L. R. 135). In his judgment in that case Maartensz, J. at p. 136 stated as follows :—

" It was held by Ennis, A.C.J., and Wood Renton, C.J. in the cases referred to that it was always open to the Courts on the application of an accused person to direct separate trials. But I do not think separate trials should be ordered merely because of the possibility that a Judge or Jury might suspect each of them must be true. Such an argument could be addressed to this Court in every case in which three charges are combined at one trial in pursuance of the provisions of section 179 of the Code. And there would be no purpose in retaining the section in the Statute Book. In my judgment there must be more substantial grounds for directing separate trials than that contained in the argument I have dealt with. I have read through the depositions and I am of opinion that accused will not be prejudiced by the three charges being tried together."

In the present case the facts of the three murders were so interwoven as to constitute a series of facts forming one transaction. If the trials had been separate, evidence of the murders not forming part of the indictment would have been admissible. It is true that the Jury might suspect each of them to be true, but that, as pointed out by Maartensz, J. in *The King vs. Wickremasinghe* (supra), is not a substantial reason for ordering separate trials. The fact that the accused person

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is charged with more than one murder is certainly a factor which will be present to the minds of the Jury. But as that evidence was admissible, it cannot be said that the accused was prejudiced.

Various other points have been raised by Mr. Mackenzie Pereira on behalf of the appellant. He has contended that the Crown have not established the cause of death in the case of the deceased, Lucihamy. We think that the finding of the canvas tied round the neck of the deceased coupled with the doctor's evidence establishes the cause of death.

Mr. Pereira has also maintained that the attention of the Jury should have been invited to the question as to whether the witness Guneris was an accomplice. Inasmuch as there was no evidence that Guneris was an accomplice, we think that this contention is without substance.

Mr. Pereira has also argued that the learned Judge ought not to have allowed the witness Peter to depose to (*a*) the purpose of the visit of the deceased Odiris; (*b*) the undertaking of the deceased Themis to return to the witness on a specified date. Both relate to facts prior to the transaction which resulted in their respective deaths. Accordingly, it is submitted that the direction to the Jury on this aspect of the case cannot be supported. In this connection Mr. Pereira referred to *Rex vs. Arnolis Perera* (28 N. L. R. 461). Having regard, however, to the decision of the Privy Council in *Pakala Narayana Swami vs. King Emperor* (1939) (1 All England Report, p. 396) the decision in Arnolis Perera can no longer be regarded as good law. The evidence of Peter with regard to the purpose of the movements of Odiris and Themis was therefore admissible.

No point of substance arises in regard to the other questions raised by Mr. Pereira.

For the reasons I have given the application for leave to appeal is dismissed.

Application dismissed.

Present : NAGALINGAM, A.J.

PERERA VS. COLOMBO MUNICIPAL COUNCIL AND ANOTHER

Writ of Mandamus against the Colombo Municipal Council and the Local Government Service Commission.

Application No. 358.
Argued on : 16th January, 1947.
Decided on : 21st January, 1947.

Mandamus—Writ of—Employer and employee—Interdiction of employee—Application to compel reinstatement and payment of arrears—Is writ available.

Held : That relief by way of a writ of *mandamus* is not available to a party to a contract of service to compel the performance by the other party of obligations arising out of such contract.

Cases referred to :—

Rex vs. Bank of England (2 B & Ald. 622).

N. E. Weerasooriya, K.C., with *N. Kumarasingham*, for petitioner.
H. V. Perera, K.C., with *E. B. Wickremanayake*, for 1st respondent.
N. Nadarajah, K.C., with *Walter Jayawardene*, for 2nd respondent.

NAGALINGAM, A.J.

This is an application by the petitioner who was employed as a dispensary medical officer under the 1st respondent, the Colombo Municipal Council, for a writ of *mandamus* on the Council and on the Local Government Service Commission, the 2nd respondent, to compel them to reinstate the petitioner in the post held by him from which he had been interdicted and to pay him arrears of salary from the date of his interdiction till reinstatement.

The respondents take the objection that a writ of *mandamus* does not lie in the circumstances disclosed by the applicant's petition. The facts which give rise to this petition are : The petitioner was appointed Dispensary Medical Officer under the 1st respondent on 14th June, 1939, the terms of employment being set out in an agreement of that date filed of record. One of the terms of employment is stated to be that if the employee should seriously misconduct himself in his office it would be competent for the Council to declare his appointment at an end and to dismiss the officer. On or about 19th September, 1945, the then Acting Commissioner of the Council in consequence of certain representations made to him

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against the petitioner in regard to the latter's conduct as Dispensary Medical Officer interdicted the petitioner from service and took steps under certain standing orders of the Council to have charges framed against him and to have the charges investigated by a committee of five members of the Council. The Committee concluded its investigations on or about 12th February, 1946, but before it could submit its report to the Council the functions of the Council in regard to the appointment of, disciplinary action against, and dismissal of its servants became vested in the 2nd respondent, the Local Government Commission, which perforce had to commence proceedings *de novo* in regard to the investigation of the charges framed against the petitioner. The petitioner while complaining of delay in regard to the inquiry of the charges framed against him avers that he has been paid only half salary from the date of his interdiction and that as no final decision has been arrived at in regard to the charges framed against him even after the lapse of a considerable period since his interdiction he makes his application for the writ to secure his reinstatement.

On these facts it would be manifest that the object of the application is to compel the performance by the respondents of certain obligations arising between the petitioner and the respondents out of the contract of service entered into by the petitioner with the 1st respondent. That the petitioner is merely an employee or a servant of the 1st respondent there can be no doubt and there can be equally little doubt that the neglect or refusal on the part of the respondent Council to pay the petitioner his salary in full or to reinstate him in his office is a breach of a duty not of a public but of a private character.

Short in "*Informations, Mandamus* and *Prohibition*" page 227) lays down that one of the principal general rules governing the issue of a writ of *mandamus* is that "the applicant must have a legal right to the performance of some duty of a public and not merely of a private character". In support of this proposition he cites a passage from Lord Hardwick's judgment in the case of *Rex vs. Wheeler* referred to therein from which I shall quote an excerpt :

> "The reason why we grant these writs is to prevent a failure of justice and for the execution of the common law or of some Statute or of the King's Charter ; *and never as a private remedy.........* now here there don't appear to be any failure of justice, *but only a dispute about a private right.*"

A passage from Bailey, J.'s judgment in *Rex vs. Bank of England* (2 B & Ald. 622) is also cited :

> "The Court never grants this writ except for public purposes and to compel performance of public duties."

The most familiar examples of the issue of a writ of *mandamus* in our Courts is in regard to the refusal of a Judge of an inferior Court to exercise jurisdiction or against a public officer neglecting or refusing to fix a day for nomination of candidates to a local body or to take the necessary subsequent steps. Certainly the petitioner's counsel has not been able to cite an instance where this writ has been invoked to assist a party to secure private remedy.

Having regard to this aspect of the matter alone, therefore, there cannot be any doubt that the application cannot be acceded to ; but there is another equally fatal objection to the application, and that, to use the language of Short (page 227) is that—

> "There must be no other effective lawful method of enforcing the right."

In the case of *re Barlow* (30 L. J. Q. B. 271) the proposition is thus stated :—

> "It is well settled that where there is a remedy equally convenient, beneficial and effectual, a *mandamus* will not be granted. This is not a rule of law but a rule regulating the discretion of the Court in granting writs of *mandamus.*"

To the same effect is the dictum of Patteson, J. in *ex parte Robbins* (7 Dowl. 568) :

> "The Court will never grant a *mandamus* to enforce a general law of the land which may be enforced by action."

The interdiction and the payment of half salary to the petitioner is either in accordance with the terms and conditions though not express but implied governing the employment by the Council of its officers or it is not. If the latter, it has not been gainsaid that the employee has not the right to institute an ordinary civil action to enforce his remedies against the Council and in fact to claim continuing damages if the interdiction was unlawful till reinstatement. Recourse, therefore need not be had to the issue of a writ of *mandamus* which is a high prerogative writ and which is issued only where no other specific means of securing relief exists.

In view of the foregoing, it follows that the application fails, and is therefore, dismissed with costs.

Application dismissed.

Proctors : ? for the Petitioner.
D. L. & F. de Saram for the 1st respondent.
Trevor de Saram for the 2nd respondent.

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Present : SOERTSZ, A.C.J.

MEERALEVVAI vs. SEENITHAMBY

Application for Restitutio-in-integrum *in C. R. Batticaloa* 1014 (518).
Argued on : 27th, January 1947.
Decided on : 17th, February 1947.

Summons—Service of, when defendant in jail—Plaintiff's duty—Failure to affix substituted service to last known place of abode as directed—Meaning of the term " abode "—Civil Procedure Code, sections 68, 808 *and* 839—Restitutio-in-integrum.

Held : (i.) That, where the plaintiff knows that the defendant is in prison, he must ascertain the prison in which the defendant is confined and serve summons in the manner indicated by section 68 of the Civil Procedure Code.

(ii.) That, where substituted service was not affixed to the last known place of abode as directed by Court, such service was bad and a judgment entered on such service should be set aside.

Per SOERTSZ, S.P.J.—The word " abode " is a word of wide connotation. It includes both places of temporary stay and of habitual residence. In the former class, for instance, would be what the well-known phrase calls " the abodes of pain " and a jail or prison would, I suppose, be an abode of pain.

C. T. Olegasegaram, for the defendant-petitioner.
C. Renganathan, for the plaintiff-respondent.

SOERTSZ, S.P.J.

It is unfortunate that this action which was instituted nearly seven years ago and in which decree was entered in July, 1941, has to be re-opened, but there is no alternative.

It is common ground that when this action was instituted, the defendant was in jail and continued to be there till decree was entered against him and the sale in execution took place. Section 68 of the Civil Procedure Code which is made applicable to cases in Courts of Requests by section 808 of the C. P. C. provides that—

> " If the defendant be in jail, the summons shall be delivered by the Fiscal to the officers in charge of the jail in which the defendant is confined, and such officer shall cause the summons to be served on the defendant. The summons shall be returned through the Fiscal to the Court from which it is issued with a statement of the service endorsed thereon, and signed by the officer in charge of the jail."

In this case the plaintiff sought to serve summons through the officer in charge of the Mahara Jail, but the report was that the defendant was not in that jail. The defendant was required to give further particulars to enable the Fiscal to have summons served. He, thereupon, asked for summons to be served through the officer in charge of the Kandy, Mahara, Welikada and Jaffna Prisons. He was directed to give any one correct address. He did not do that, but he submitted an affidavit and asked for substituted service by affixing the summons on the last known place of abode. This was allowed and the summons was affixed on some part of the house in which the defendant lived when he was free.

In my opinion this substiuted service was bad, firstly because in a case like this where the plaintiff himself knows that the defendant is in prison he must ascertain the particular prison in which the defendant is confined and serve summons on him in the manner indicated by section 68 of the Code. If the plaintiff is diligent, this is an easily ascertainable fact ; secondly, the substituted service was bad in that it was not affixed to the last known place of abode as was directed, for according to the plaintiff himself the last known place of abode was the Mahara Jail. The word " abode " is a word of wide connotation. It includes both places of temporary stay and of habitual residence. In the former class, for instance, would be what the well-known phrase calls " the abodes of pain " and a jail or prison would, I suppose, be an abode of pain.

I set aside the order made by the Commissioner and remit the case for a date to be fixed for the defendant to file answer or to admit the plaintiff's claim. Under section 839 of the Civil Procedure Code, I make order that if the defendant admits the claim, he be given two months' time from that date to pay the amount due to the plaintiff with costs. If he fails to do that, I direct that the costs of these proceedings shall abide the final order of the Commissioner and will be in his discretion.

Order set aside.

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(*IN THE COURT OF CRIMINAL APPEAL*)

Present : Cannon, J. (President), Jayetileke, J. & Canekeratne, J.

REX vs. RAMU KARTHIGESU *alias* CHELLIAH.

Appeal No. 14 *of* 1946 *with Application No.* 29 *of* 1946—*S. C. No.* 9/*M. C. Chavakachcheri* 22,852.
Argued on : 9th & 10th April, 1946.
Decided on : 10th April, 1946.

Evidence—First complaint of an offence—When admissible—Criminal Procedure Code, section 121 *—Evidence Ordinance, sections* 32 *and* 157—*Court of Criminal Appeal Ordinance, section* 5, *proviso to*—

Held : (i.) That the 1st information given under section 121 of the Criminal Procedure Code is admissible under section 157 of the Evidence Ordinance provided (*a*) that the information is not based on hearsay, unless hearsay matter is relevant to explain conduct, (*b*) that the informant is called as a witness, except when tendered under section 32 of the Evidence Ordinance.

(ii.) That as no substantial miscarriage of justice to the accused had occurred, the appeal should be dismissed under the proviso to section 5 of the Court of Criminal Appeal Ordinance.

Per Cannon, J.—" By the proviso to section 5 of the Court of Criminal Appeal Ordinance, this Court may dismiss this appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused, and the proviso assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt, convict."

Cases referred to :—

Rex vs. Haddy (1944 K.B. 442.)
Stirland vs. The Director of Public Prosecutions (1944 H.L. 315.)

H. W. Thambiah, with *M. M. Kumarakulasingham*, for the accused-appellant.
T. S. Fernando, Crown Counsel, for the Crown.

Cannon, J.

The appellant was convicted of voluntarily causing grievous hurt to one N. Kandiah by shooting him in the thigh with a shot gun. The main question for this Court to decide is whether certain evidence was of a hearsay nature and prejudicial to the appellant.

The questioned evidence consists of the information given by one V. Kandiah to the headman. This was as follows :—

> " S. Velan told me and Vairamuthu that Kandiah told him that while Kandiah of Allalai went, a short while ago, to his tobacco garden for watching, E. Karthigesu *alias* Chelliah of Allalai who was one of those in the said garden breaking the leaves of tobacco plants shot at Kandiah on his thigh. I came here because Vairamuthu asked me to fetch you. I did not go to the spot and come here ; I know nothing more."

The effect of this statement is that the informant himself knows nothing about the shooting but that Kandiah, the injured man, told S. Velan and Vairamuthu that the accused shot him. Further, the informant depends for this information on S. Velan, not on Kandiah, the injured man. It is what has been termed " double hearsay."

The Crown, having elicited this hearsay evidence from the vidane, then proceeded to call the informant V. Kandiah to say that he had conveyed this hearsay information to the headman. In our opinion, this information was not admissible nor was the evidence of the informant. The rule for the admissibility of what have become known as " First Complaints," that is to say, first informations, given under section 121 of the Criminal Procedure Code, may be said to be this : First of all, the information must not be based on hearsay, unless the hearsay matter is relevant to explain conduct ; secondly, the informant must be called as a witness. I am referring to the evidence as being admissible under section 157 of the Evidence Ordinance. The second condition which I have mentioned could not be complied with if the evidence were tendered under section 32 of the Evidence Ordinance. It is clear that the information in this case does not comply with these conditions. The question we have to consider then is whether the admission of this evidence prejudiced the trial of the accused. In order to do so, it is necessary to examine the course that the trial took.

For the accused, it is pointed out that the shooting took place at night, and that the identity was said to have been by the aid of an electric torch ; and, further, that the presiding Judge did not direct the Jury on the inadmissibility of this information. Moreover, it was pointed out that no statement by either the injured man or another witness named Paramu, who purported to be an eye-witness, was taken on the day of the shooting. It was, therefore, contended that when the Jury were deciding whether or not they

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could accept the evidence of the injured man and Paramu, they might have been influenced by the evidence that, according to the inadmissible information, the injured man had told Velan that the accused was the man who shot him. On the other hand, the shooting by the accused was deposed to by two eye-witnesses, namely, the injured man and Paramu, and the medical evidence showed that the shooting must have taken place at close range within a few yards—within 6 to 10 yards. There was also evidence that one Muttiah had seen accused with a gun the same evening. Furthermore, no evidence was called by the defence to contradict this evidence which was given by the prosecution ; and, further, although the Judge did not direct the Jury on the matter, he did not suggest that the offending passage in any way corroborates the evidence of the injured man ; in fact, he did not mention the offending passage at all. Ought this Court, then to allow the appeal ?

By the proviso to section 5 of the Court of Criminal Appeal Ordinance, this Court may dismiss this appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused, and the proviso assumes a situation where a reasonable Jury, after being properly directed, would, on the evidence properly admissible, without doubt, convict. We feel that that is an assumption that may, having regard to the course the trial took, be safely made in the present case. In point are the cases *Rex vs. Haddy* (1944) K. B. D., p. 442 and *Stirland vs. The Director of Public Prosecutions* House of Lords (1944). The appeal is, therefore, dismissed and the application for leave to appeal on the facts refused.

Appeal dismissed.

(*IN THE COURT OF CRIMINAL APPEAL*)

Present : CANNON, J. (PRESIDENT), JAYETILEKE, J. AND CANEKERATNE, J.

REX vs. R. P. D. HOTHA AND ANOTHER

Applications 44-45 *of* 1946—*S. C. No.* 39/*M. C. Dandagamuwa*, 15,961.

Argued on : 10th and 11th April, 1946.
Decided on : 11th April, 1946.

Court of Criminal Appeal—Appeal against sentence—Charges relating to matters arising out of the same transaction—Punishment—Penal Code, section 67.

The two appellants were convicted under six counts for offences committed in the course of the same transaction. The sentences imposed were ordered to run consecutively, but the total of the sentences did not exceed the total which could have been passed for the most serious of those offences.

On appeal against the sentences the court expressed the view that it would be better in such cases to make sentences run concurrently and varied the sentences giving effect to the opinion of the presiding Judge that the accused merited a sentence of at least ten years.

M. M. Kumarakulasingham, for accused-appellants as amicus curiae.

CANNON, J.

The appellants were indicted under six counts, namely, (1) being members of an unlawful assembly, the common object of which was to commit theft or robbery ; and the remaining counts were that, in these circumstances they, under count (2), were armed with deadly weapons; under count (3), used violence ; under count (4), committed house-breaking by night, having made preparations for causing hurt to the occupants of the house ; under count (5), having made preparations for hurting the occupants, did voluntarily cause grievous hurt to one Jumbuwa ; and, under count (6), committed robbery of cash and property value Rs. 1,552 belonging to the man, Jumbuwa. The Jury found the second accused guilty on all counts and the first accused guilty on all counts excepting counts (2) and (3).

The presiding Judge passed sentences on the first accused of 3 months, 4 years, 3 years and 3 years' rigorous imprisonment on counts (1), (4), (5) and (6) respectively, on the second accused, he passed sentences on counts (1) to (6) respectively of 3 months, 6 months, 6 months, 4 years, 3 years' and 3 years rigorous imprisonment. He ordered that these sentences should run conse-

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cutively and, therefore, the total period to be served by the first accused was 10 years and 3 months, and, by the second accused, 11 years and 3 months.

An interesting point has been raised by Mr. Kumarakulasingham for the appellants as a ground for their appeal against the sentence. He submits that the indictment is prolix in so far that some of the offences charged constitute part of other offences which have been separately charged, and that therefore the sentences passed for such offences should have been made concurrent and not consecutive. In support of this submission, he cites section 67 of the Penal Code, the first paragraph of which reads :

> "Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided."

It seems to me that the Judge, when he directed that the sentences should be consecutive, had no intention of acting against the principle that, where the charges relate to matters arising out of the same transaction, the total of the sentences passed should not exceed the total which could be passed for the most serious of those offences. This is apparent when one remembers that count (5) carries a sentence of 20 years, and counts (4) and (6) one of 14 years each. Without deciding the point which has been riased by Mr. Kumarakulasingham, we are inclined to the opinion that it would be better in such cases to make the sentences concurrent, and this Court proposes to follow that course in this case by availing itself of the power to change or enhance the sentences given by the Court of Criminal Appeal Ordinance, section 5 (3). The sentences will be varied as follows :—Those passed on counts (1), (2) and (3) will stand. Those passed on counts (4), (5) and (6) will be changed in each case to a sentence of 10 years' rigorous imprisonment, but all the sentences will run concurrently. This variation, while giving effect to the Presiding Judge's opinion that the accused merited a sentence of at least 10 years, also recognises the merits of the point raised by Counsel for the appellants, who incidentally each gets a remission of a relatively small part of his sentence—the first accused benefits by 3 months, and the second accused by 15 months.

The appeal against the sentence is therefore allowed to the extent of this variation. The application for leave to appeal against the convictions is refused.

Sentences varied.

Application for leave to appeal against convictions refused.

Present : SOERTSZ, A.C.J.

PERERA vs. WIJESINGHE AND ANOTHER

S. C. No. 98—*C. R. Panadura No.* 10360.
Argued on : 27th January, 1947.
Decided on : 19th February, 1947.

Court of Requests—Action for damages for wrongful possession of half share of land admittedly worth over Rs. 300—Preliminary issue on jurisdiction—Decision in plaintiff's favour—Award of damages—Appeal—Power of Supreme Court to order transfer to District Court—Should objection to jurisdiction and raising preliminary issue be regarded as an application to transfer—Courts Ordinance, sections 75 and 79.

The plaintiff sued the defendant in the Court of Requests for damages in a sum of Rs. 290 for wrongful possession of a half share of a land admittedly worth over Rs. 300. Objection was taken to the monetary jurisdiction of the Court and a preliminary issue was raised on that ground. The Commissioner, on the authority of 31 N. L. R. 152, held in favour of the plaintiff and awarded damages on the ground that plaintiff had prescribed to a half share of the land. The defendant appealed.

Held : (i.) That on the facts of the case, it is just and fair that it should be tried by the District Court.

(ii.) That it is open to the Supreme Court on an appeal to order the transfer of the proceedings under section 79 of the Courts Ordinance for the purpose.

Per SOERTSZ, A.C.J.—" When the defendant pleaded as he did and took objection to the jurisdiction of the Court of Requests and raised an issue questioning that jurisdiction, he in effect applied for a transfer of the case."

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H. V. Perera, K.C., with *Kingsley Herat*, for the defendant-appellant.
H. W. Jayewardene, with *G. T. Samarawickrema*, for the plaintiff-respondents.

SOERTSZ, S.P.J.

In this action, the plaintiffs claiming to be entitled to a half share of a certain land, and alleging that the defendant was in wrongful possession of that share, sued to recover Rs. 290 as damages sustained by them on account of this wrongful possession, together with interest thereon. The defendant in his answer, averred that the plaintiffs were not entitled to any share of the land, and that the land belonged, in its entirety, to him. He prayed for the dismissal of the plaintiff's action. It is admitted that a half share of this land is worth over Rs. 300 and a preliminary question arose whether the Court of Requests had jurisdiction to try the case in view of the fact that although the amount claimed as damages was under Rs. 300, the question of title to interests in land worth over Rs. 300 was involved by the defence set up in the answer.

The Commissioner relying on the Divisional Bench ruling in the case of *Heen Banda vs. Aluvihare* (31 N. L. R. 152) held that the Court had jurisdiction and proceeded to try the case and gave judgment for the plaintiffs in a certain sum on account of damages on the ground that the plaintiffs had acquired a prescriptive title to the half share that they claimed of the land.

In my view, this action although, ostensibly, one for damages was, in reality, an action in which "the title to, interest in, or right to the possession of a land" was in dispute. But, I am bound by the ruling I have referred to and I must accept the decision given by the Commissioner on the question of jurisdiction. It is, however, open to me by virtue of the proviso to section 79 of the Courts Ordinance, to order that the whole proceeding be transferred to the District Court of Panadura. Section 79 enacts as follows :

> "Where in any proceeding before any Court of Requests any defence or claim in reconvention of the defendant involves matter beyond the jurisdiction of the Court, such defence or claim in reconvention shall not affect the competence or duty of the Court to dispose of the matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such claim in reconvention :
>
> "Provided always that in such case it shall be lawful for the Supreme Court, or any Judge thereof, if it shall be thought fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred from the Court in which it shall have been instituted to some Court having jurisdiction over the whole matter in controversy ; and in such case the record in such proceeding shall be transmitted by the clerk of the Court to the Court to which by such order the proceeding shall be so transferred ; and the same shall thenceforth be continued and prosecuted in such Court as if it had been originally commenced therein."

In the circumstances and on the facts of this case I think it just and fair that it should be tried in the District Court. When the defendant pleaded as he did and took objection to the jurisdiction of the Court of Requests and raised an issue questioning that jurisdiction, he in effect applied for a transfer of the case.

Parties will of course take the steps necessary for enabling the case to be tried by the District Court. I set aside the judgment and decree entered by the Commissioner. All costs incurred up to date will be costs in the cause and will abide the final result and such order in regard to them as the District Judge may make.

Set aside and sent to District Court.

IN THE COURT OF CRIMINAL APPEAL

Coram: KEUNEMAN, S.P.J., (President), WIJEYEWARDENE, J. AND JAYETILEKE, J.

REX vs. G. L. KIRINELIS

Application No. 162 *of* 1946—*S,C.* 27/*M.C. Colombo* 8673.
Argued on : 24th and 25th September, 1946.
Decided on : 1st October, 1946.

Court of Criminal Appeal—Indictment for murder—Plea of self-defence—Charge to the jury—Absence of direction on intention referred to in Exception 2 *to section* 294 *of the Penal Code.*

Held : (i.) That the "intention" referred to in Exception 2 to section 294 of the Penal Code is a special kind of intention and its meaning should be adequately explained to the jury.

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(ii.) That where the jury were not given the opportunity of considering its special meaning and when it appears that in bringing a verdict of murder the jury could well have had the impression from the charge that, if they found in fact, more harm was done than necessary for the purpose of defence, the proper verdict was that of murder, and not culpable homicide not amounting to murder, the latter verdict should be substituted for the former.

F. A. Hayley, K.C., with *S. Saravanamuttu and Rajakaruna*, for accused-appellant.
H.A. Wijemanne, C.C., for the Attorney-General.

KEUNEMAN, S.P.J.

The accused was convicted of murder. The principal matter argued in this application was whether the learned Trial Judge gave a proper direction to the Jury. The defence of the accused was that he had acted under grave and sudden provocation. On that the Trial Judge gave the Jury a full and adequate direction. The Trial Judge however went further and put before the Jury the defence that the accused was acting in the exercise of the right of private defence. Counsel for the accused does not appear to have raised this defence, but the trial Judge very properly dealt with this matter also because the evidence led by the accused indicated this defence as well.

The Trial Judge quoted to the Jury the terms of section 294, Exception 2, of the Penal Code which runs as follows :—

"Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence."

and stated—

"Then I would say a word or two, although Crown Counsel, from his point of view quite properly, did not refer to the matter, and that is with regard to the other possible plea of self-defence, because the accused himself gave his evidence in those terms. He said he was struck and kicked and he fell, and then he was afraid ; the implication of that appears to be that he was afraid he might be either injured or even killed and, therefore, acted in self-defence.

"Now, in short, Gentlemen of the Jury, the right of private defence may be put in this form. Every human being is entitled to defend his body against any offence affecting the human body. You and I are entitled to defend ourselves against any attack on our bodies, but that right is subject to two exceptions. It is necessary for me to invite your attention to one, and that exception says that in the course of defending yourself against an offence affecting your body you must not do more harm than is necessary for the purpose of defending yourself. In other words, if I attack you in some way you cannot take the occasion to cause me wanton harm ; you must cause me such harm as is necessary for you to defend yourself.

"I mean, looking at it reasonably, you cannot expect a man to measure and weigh his retaliation very accurately, but on a reasonable view you must not exceed the limits placed by the law ; that is to say, you must not do more harm than you need for the purpose of defending yourself. In this case, Gentlemen of the Jury, if the accused was struck and kicked and he fell there was certainly an offence against his body ; then the only question is whether in defending himself he kept within the law or whether he exceeded it ; in other words, did he do more harm than was necessary to defend himself."

And the learned Judge further said—

"Therefore in order to come within that exception the accused must satisfy you that he was kicked and struck and dealt with in that way, and that in retaliating as he did he was not doing more harm than was necessary for the purpose of such defence.

"To sum up then in regard to this part of the case, in order to find the accused guilty of culpable homicide not amounting to murder you must be satisfied reasonably that at the time he caused the death of the deceased man he had lost his power of self-control by grave and sudden provocation,—it is not every provocation but grave and sudden provocation.

"Secondly, if you prefer to consider his case under the plea of self-defence, in order to find culpable homicide not amounting to murder you must be satisfied that an occasion arose for him to defend himself and that in defending himself in the way he did defend himself he cannot reasonably be said to have done more harm than was necessary to have defended himself.

"If you are in doubt as to whether he is entitled to the exception either on the ground of grave and sudden provocation or on the ground of only exceeding the right of self-defence, the benefit of the doubt must be given to the prisoner. You will find him guilty of murder if you are satisfied that he caused the death of the deceased with the intention of causing death or with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death, and that there wasn't either of these mitigating circumstances, that is to say, that there was nothing that could reasonably be said to amount to grave and sudden provocation sufficient to deprive a man of ordinary temper to use his power of self-control, or that there was no occasion for the accused to defend himself at all, or that if there was such an occasion to defend himself, that he inflicted more harm than was necessary to inflict ; in other words, that his retaliation—in the words of the Lord Chancellor—or his resentment was not in proportion to the provocation."

It was argued that this direction indicated or may have been understood by the Jury to indicate that if the accused did more harm than was necessary for the purpose of defence the verdict of culpable homicide not amounting to murder was not available, and that the Trial Judge failed to tell the Jury that it was only when the accused had an *intention* of doing more harm than was necessary for the purpose of defence that the offence of murder was made out.

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We have considered the language used by the Trial Judge. The Jury may have understood that if the accused in fact exceeded the right of private defence he was to be convicted of the offence of murder,—and they would never have applied their minds to the question whether the accused had an *intention* to do more harm than was necessary for the purpose of defence. This *intention* is a special intention, and has not been explained to the Jury.

In commenting on the corresponding section of the Indian Penal Code (section 300, exception 2) Gour in his Penal Law of India (para 2855) says—

> " It is only when the right conferred by section 96-105 (*i.e.* the sections relating to private defence) is *exceeded* that there is room for its operation. And even then it does not apply indiscriminately to all cases. For in the first place the rule postulates the exercise in good faith of the right of private defence, and this implies that there can be no mitigation under it if the enforcement of the right is used merely as a pretext for committing murder. This accounts for the other requirement of the clause, namely, that the excessive harm caused must be unintentional. The combined effect of these two requisites is that in order to earn the clemency of the rule the harm caused must have been caused solely with the intention of private defence. It must not be maliciously excessive nor vindictively unnecessary."

The illustration given in the section of the Ordinance supports this view.

In the present case the Jury were not given the opportunity of considering the special kind of *intention* contained in section 294 Exception 2, and they could well have had the impression from the charge that, if they found *in fact* that more harm was done than was necessary for the purpose of defence, the proper verdict was that of murder and not culpable homicide amounting to murder. We do not think the direction given was a proper or adequate direction. Further, it cannot be said that had the proper direction been given the Jury must necessarily have returned the same verdict. No doubt the Jury have rejected the defence that the accused acted under grave and sudden provocation, and that finding tells strongly against the story of the accused and his witness. It is also the case that the only defence urged by counsel for the accused was grave and sudden provocation. But the Trial Judge rightly put before the Jury the fact that the right of private defence also arose and had he not done so there would have been a misdirection.

The elements necessary to establish these two defences were different, and we do not think it is possible for us to say in this case that, had the Jury been adequately instructed as to the law, they could not have come to the conclusion that the accused was only guilty of culpable homicide not amounting to murder in that he exceeded the right of private defence.

For these reasons we have already set aside the verdict of guilty of murder and substituted therefor the verdict of guilty of culpable homicide not amounting to murder, and have imposed on the accused a sentence of eight years' rigorous imprisonment.

Verdict and sentence varied.

Present: CANEKERATNE, J.

MEERA LEBBE vs. THE VANNARPONNAI WEST CO-OPERATIVE SOCIETY LTD.

S.C. No. 247—*C.R. Jaffna No.* 16599.
Argued on: 14th February, 1947.
Decided on: 27th February, 1947.

Co-operative Society—Action against, by dismissed manager of its stores, who was also a member, to recover deposit—Defence that plaintiff misappropriated moneys of society and dispute should have been referred to Registrar—Is plaintiff's claim barred by section 45 (b) *and* (c) *of Co-operative Societies' Ordinance,* (*chap.* 107).

The plaintiff, who was a member of the defendant Co-operative Society was appointed the manager of its stores. His services were dispensed with after some time. This action was instituted by the plaintiff to recover a sum of Rs. 250 being a part of his security deposited with the defendant.

The defendant pleaded (i.) that the plaintiff had misappropriated a sum of Rs. 1,370·12 and that the plaintiff's claim be set off against this sum.

(ii.) that the plaintiff's claim was barred by the provisions of section 45 (*b*) and (*c*) of the Co-operative Societies' Ordinance, chap. 107.

On a preliminary issue based on (ii.) the Commissioner dismissed plaintiff's action with costs.

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Held : (i.) That in the absence of evidence to show what the functions of the plaintiff as manager of the stores were or what authority he had to bind the Society, the plaintiff cannot be considered to be an officer of the society within the meaning of section 45 (*c*) of the Co-operative Ordinance (chap. 107).

(ii.) That the claim of the Society against the Manager of its Stores for misappropriating moneys of the society cannot be said to be a dispute between the society and one of its members within the meaning of section 45 (*b*) of the same Ordinance.

Cases referred to : *Wasudeo vs. Registrar* 1946, 33 A.I.R. Bombay, 346.
Morrison vs. Glover 4, Exch. 430.
Municipal Permanent Investment Building Society vs. Richards 39, Chancery Div. 372.
Naraniya Iyar vs. Co-operative Urban Bank Ltd., 1936, A.I.R. Mad. 81.

C. Chellappah, for plaintiff-appellant.
H. W. Thambiah, for defendant-respondent.

CANEKERATNE, J.

This is an appeal from the decision of the Commissioner of Requests, Jaffna, who made order dismissing the plaintiff's action for the recovery of a sum of Rs. 250, part of the security deposited by him with the defendant, and interest thereon. The defendant is a Co-operative Society. It appears, according to what was stated at the argument, to purchase articles such as rice, foodstuffs and other things and sell them to its members. The plaintiff, who was a member of the Society, was appointed the Manager of the Stores of the defendant about May, 1943 and functioned as Manager for some time : his services were dispensed with on September 1, 1944. This action was instituted by him on May 12, 1945.

The defence originally was that the plaintiff had misappropriated a sum of Rs. 1,370·12 and that the defendant was entitled to set off against the claim of the plaintiff : by an amendment the Society pleaded that the action was barred by the provisions of paragraph (*b*) and paragraph (*c*) of sub-section (1) of section 45 of the Co-operative Societies Ordinance (Ch. 107). The Commissioner came to the conclusion that the plaintiff was an officer of the society because he was the manager : as it was conceded that the plaintiff was a member of the society, he seemed to take the view that sub-paragraph (*b*) also applied.

Counsel for the appellant submitted, in the first place, that the dispute was not between the plaintiff *qua* member and the Society—on this point he relied on the language used in the section. Counsel for the respondent maintained the contrary by making use of the same language. Counsel for the appellant argued, secondly, that the plaintiff was not an officer of the society. I was referred by him to several cases which I do not propose to discuss. These are cases in which a particular person was held not to be an officer for the purpose of a particular statutory enactment or under particular circumstances—it is to be observed that none of these cases considers the position of a manager of a store, I fail to see how they help the plaintiff. Counsel for the respondent tried to support the views advanced by the trial Judge on this point. Since the conclusion of the argument counsel for the appellant drew my attention to the decision in *Wasudeo vs. Registrar* 1946, 33 A.I.R. Bombay, 346.

The appeal relates to questions arising primarily under section 45, sub-section 1 of Ch. 107. The sub-section provides that " if any dispute touching the business of a registered society arises......(*b*) between a member, past member or......and the society, its Committee or any officer of the society, or (*c*) between the society or its Committee and any officer of the society...... such disputes shall be referred to the Registrar for decision." It is necessary to show that there is a dispute between the parties concerned. To show that there is a dispute within the purview of the Registrar it is necessary to show that it is one touching the business of the society—secondly, it must arise between a member and the society or between the society and any officer of the society. A clause has been added at the end of the first paragraph—" a claim by a registered society for any debt or demand due...... whether such debt or demand be admitted or not, shall be deemed to be a dispute touching the business of the society within the meaning of this sub-section." It provides that certain claims which do not in fact come within the expression " dispute touching the business " shall be deemed to be disputes—it artificially enlarges the ambit of the expression used in the earlier part.

It will be convenient to deal first with the second question. A society has to carry on its business by its agents. It would be bound by a contract made by some person acting under the express or implied authority of the Company. Ordinarily one would assume that the directors have express authority to act on the Society's behalf. Who is a person acting on the implied authority of the society must depend upon the rules of the society or upon other circumstances. There is no evidence to show what the functions of the Plaintiff as Manager of the Stores were or

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what authority he had to bind the company. In the absence of such evidence I do not think that the plaintiff can be considered to fall within the class of persons referred to in paragraph (*c*) above.

The decision in *Wasudeo vs. Registrar* 1946, 33 A.I.R. Bombay, 346 adopts the view taken in a Madras case that the word "Officer" in section 51 of the Madras Co-operative Societies Act would not mean Officers past and present. The language used in this section is substantially the same as in the section 45 (1) of Ch. 107—"If any dispute......arises—(*b*) between a member......and the society—(*c*) between the society ......and any officer, agent...... of the company." The reasons the Judge gave were that there were two instances of particular reference being made to past officers and past members. In Ch. 107 also there is one instance of past officers being referred to (section 35, sub-section 4): also an instance which a past member is referred to (sub-para (*b*) of section 45).

The first question deals with a dispute between a member and the society. A member would be liable to pay any money due on the shares allotted to him, likewise the purchase price of any articles purchased by him. His liability to pay certain other sums is referred to in the earlier sections—debts and outstanding demands (sections 20 & 21).

In *Morrison vs. Glover* 4 Exch. 430, a building society had had lent money to a member on a mortgage and the member covenanted to observe and fulfil the rules of the society and to pay the rent reserved by the lease: the society sued in respect of breaches of the covenant: the Court held that some part of the plaintiff's claim was not a matter in dispute between the society and the defendant as a member, but only as mortgagor, the society was not bound to refer to arbitration the subject matter of the action. Thereafter a consolidating statute was passed in 1874 and this was amended in 1884. The position then seems to have been as follows:—"The effect was that substantially the law has been brought back to the state in which it was before the Act of 1874 but with this addition—that any society may expressly provide by rules that disputes shall be referred to arbitration which could not be referred prior to the Act of 1874." (*Municipal Permanent Investment Building Society vs. Richards* 39, Chancery Div. 372.) In that case a claim by the society against its officer for misappropriating and keeping in his hands moneys of the society was held not to be a dispute between the society and a member thereof in his capacity as a member. This case was referred to in the judgment in *Naraniya Iyar vs. Co-operative Urban Bank Ltd.*, 1936, A.I.R. Mad. 81, the Madras case which is referred to in the decision of *Wasedeo vs. Registrar* 1946, 33 A.I.R. Bombay, 346. Following the decision in (*Municipal Permanent Investment Building Society vs. Richards* 39, Chancery Div. 372, the Judge in the Madras case took the view that the dispute in question therein concerned none of the actions or claims of the defendants as members but only their actions as directors.

It would be straining the language of the Legislature far beyond its natural meaning if one were to hold that the claim of the society upon the manager of its stores for misappropriating moneys of the society is a dispute between the society and one of its members within the meaning of the enactment.

The appeal is allowed with costs and the case sent back for trial on the other issues.

Appeal allowed and case sent back.

Proctors: *C. C. Somasegram* for plaintiff-appellant.
J. Patrick for defendant-respondent.

Present: KEUNEMAN, J. & CANEKERATNE, J.

MOHAMED vs. WIJEWARDENA

S. C. No. 232—*D. C.* (*F*) *Colombo No.* 14579 *M.*
Argued on: 19th, 20th and 21st February, 1947.
Decided on: 26th February, 1947.

Building contract—Provision for payment of liquidated damages for delay in completion—Does this provision operate where the builder or contractor fails to complete the building.

A building contractor was sued for damages on the following provision in the agreement for failure to complete the building:—

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"22. If the contractor fails to complete the works by the date named in Clause 21 or within any extended time to which he may become entitled under these presents and if the Architects shall certify in writing on or before the date of issue of their certificate for the last payment to which the contractor may become entitled hereunder that the works could reasonably have been completed by the said date or within the said extended time, then the contractor shall pay or allow to the employers the sum of Rs. 500 per month as agreed and liquidated damages and not by way of penalty for every month beyond the said date or extended time, as the case may be, during which the works shall remain unfinished, and such damages may be deducted from any moneys due or which may become due to the contractor."

Held: That the agreement to pay liquidated damages under this clause can only operate where the builder or contractor in fact completes the building, and has no application where he does not complete the building.

Cases referred to :—*British Glanzstoff Manufacturing Co. Ltd. vs. General Accident, Fire and Life Assurance Corporation Ltd.*, L. R. (1913). A. C. 143

H. V. Perera, K.C., with *C. Thiagalingam*, for defendant-appellant.
N. Nadarajah, K.C., with *Ivor Misso*, for plaintiff-respondent.

KEUNEMAN, J.

This is an action for damages on an alleged breach of a building contract. The plaintiff alleged that the defendant, the builder, had without justification stopped the execution of the works and failed to proceed with and complete the same. Plaintiff claimed as damages :

(1) Rs. 4,000 from the date of the alleged breach until date of action at the rate of Rs. 500 per month ; and

(2) Rs. 2,651·25 being the balance due out of an advance of Rs. 6,000 with interest at 5 per cent. less the sum of Rs. 3,723·75 being for the work done by the defendant.

The defendant raised various defences to the plaintiff's claim and counter-claimed on various grounds in the sum of Rs. 2,035·76.

The District Judge as regards plaintiff's claim (1) awarded him Rs. 3,000, and as regards claim (2) Rs. 1,587·66, making a total of Rs. 4,587·66.

The principal matter which was argued before us related to plaintiff's claim (1). The only issue framed regarding damages was Issue 5 as amended viz. :

"Has defendant become liable under clause 22 of the contract to pay plaintiff as agreed and liquidated damages Rs. 500 per mensem for every month the work remains unfinished after 21-5-42."

The defendant in fact agreed to complete the buildings ready for occupation by 21-5-42. This was under clause 21.

Clause 22 of the agreement P1 runs as follows :--

"22. If the contractor fails to complete the works by the date named in Clause 21 or within any extended time to which he may become entitled under these presents and if the Architects shall certify in writing on or before the date of issue of their certificate for the last payment to which the contractor may become entitled hereunder that the works could reasonably have been completed by the said date or within the said extended time, then the contractor shall pay or allow to the employers the sum of Rs. 500 per month as agreed and liquidated damages and not by way of penalty for every month beyond the said date or extended time, as the case may be, during which the works shall remain unfinished, and such damages may be deducted from any moneys due or which may become due to the contractor."

It has been argued by appellant's counsel that this clause can only operate where the builder or contractor in fact completes the building, and has no application where he does not complete the work. It is clear that under clause 23 of P1 the Architect for various reasons set out in that clause can make a fair and reasonable extension of time for completion, and this right of giving an extension of time is referred to in clause 22. The latter clause appears to contemplate a stage in the proceedings when the issue of the Architect's certificate for the last payment to the contractor had become due. The Architect at this stage has to consider whether the delay in completion is unjustified, or whether some extension of time is to be given to the contractor, and his decision will have a bearing on the damages to be claimed from the contractor. I am inclined to think that clause 22 has in view a stage when the building has been completed and all that remains to be done is to make the "last payment".

At this stage the Architect has to take into consideration the fact that the work has not been completed by the appointed date and to determine whether that date should be extended in consequence of the delay being occasioned by one or other of the matters referred to in clause 23. If the Architect decides that the time is to be extended, then the Architect fixes the date of the extension and the contractor becomes liable to pay "as agreed and liquidated damages" at the rate of Rs. 500 per month for the period beyond the date so extended during which the building remains unfinished. I think it follows that the claim for agreed and liquidated damages under clauses 22 can only arise when the contractor has completed the building.

I may add that clauses 22 and 23 in P1 are in all material particulars the same as the corresponding clauses of the Form of Contract pub-

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lished by the Royal Institute of British Architects —see *Creswell's Law relating to Building and Building Contracts*, 2nd Edition, page 281.

Our attention had been drawn to the decision of the House of Lords in *British Glanzstoff Manufacturing Co., Ltd., vs. General Accident, Fire and Life Assurance Corporation Ltd.*, L. R. (1913) A. C. 143. Here the appellants claimed as part of their damages for breach of contract a sum of liquidated damages in respect of the non-completion of the contract within the stipulated time. The House of Lords held that upon the construction of clauses 24 and 26 the clause as to liquidated damages applied only where the contractors had themselves completed the contract and did not apply where the control of the contract had passed out of their hands, in this case by the bankruptcy of the contractors.

Unfortunately the report does not clearly shew the terms of the clauses 24 and 26. But *Halsbury's Laws of England* (Hailsham Edn.) vol. III., p. 283, para. 517 seems to give to this decision general application. " A provision for payment of liquidated damages for delay in completion unless otherwise expressly provided for, applies only when the contractor himself completes, and does not apply to completion by the employer after suspension of the work by the contractor ".

In the present case clause 22, in my opinion, directly favours the application of the principle enunciated. In point of fact the owner of the premises at no time had the work completed, and at any rate as far as the plaint was concerned appeared to contemplate a payment of Rs. 500 a month to herself in perpetuity. I have accordingly come to the conclusion that the decree for Rs. 3,000 in reference to claim (1) by the owner cannot be sustained.

It has been argued for the respondent that in any event the plaintiff was entitled to some damages in this case in consequence of the refusal of the builder to complete the contract. It is of course possible that the owner may have had a claim to unliquidated damages which he may have maintained. But I do not think we can entertain the argument in this appeal. In the first place the damages were restricted under issue 5 to the agreed and liquidated damages under clause 22. Further, there has been no proof whatever that unliquidated damages have been incurred, and no opportunity has been afforded to the defendant to set out his defence to such a claim.

In view of my decision of these points it is unnecessary to consider the arguments of the appellant that the time limit set out in the contract has been enlarged or abrogated either by the alleged new works in respect of piling ordered by the plaintiff, or by reason of frustration arising in consequence of D15, *i.e.*, Government Gazette Extraordinary of February 21, 1942, forbidding the commencement or continuation of building operations except under the authority of a permit granted by the Controller.

The appellant has also contested the finding of the District Judge as regards claim (2) of the plaintiff. I do not think there is any substance in this.

In all the circumstances I delete the figure of Rs. 4,587·66 which the defendant has been ordered to pay the plaintiff and substitute therefor the figure of Rs. 1,587·66.

As regards costs, the defendant-appellant will have the costs of this appeal, and the plaintiff-respondent will have the costs of the Court below in the Rs. 1,587·66 class.

Decree varied.

CANEKERATNE, J.
I agree.

Proctors : *Samarasinghe* and *de Silva* for defendant-appellant.
H. A. Abeywardena for plaintiff-respondent.

Present : DIAS, J. & NAGALINGAM, A.J.

GUNAWATHIE vs. KUMARAPPAN CHETTIYAR

S. C. No. 373—*D. C. Kegalle* 2857.
Argued on : 20th November, 1946.
Decided on : 29th November, 1946.

Mortgage—Bond put in suit—Mortgagor and his transferee parties—Transferee dead at time of action—Compromise with alleged legal heir of transferee and mortgagor—Transfer of hypothecated property to mortgagees—Decree dismissing suit—Finding by Court that alleged legal heir of transferee not entitled to convey rights under Mortgage Bond—Do they revive—Rights of mortgagees —When can Court declare such rights revived.

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The defendants, who were mortgagees under a mortgage bond put the bond in suit making the mortgagor and his transferee (as puisne encumbrancer) parties. The transferee was dead at the date of the action and on the footing that one K was his lawful heir, the mortgagees compromised the mortgage suit with the said K and the mortgagor by obtaining a transfer of their rights in the hypothecated property and decree was entered accordingly dismissing the suit.

In the present action the plaintiffs sued the defendants for a declaration of title and the Court held that as K was not the lawful heir of the said mortgagor's transferee the defendants were not entitled to the property in question. It was then contended for them that their rights under the mortgage bond revived.

Held : (i.) That before the claim to have the rights under the mortgage bond revived, the decree dismissing the mortgage action must first be got out of the way.

(ii.) That a declaration that such rights revived cannot be made in proceedings to which the mortgagor is not a party.

Per NAGALINGAM, A.J.—It is, however, only necessary to point out that if they have any rights those rights are conserved by section 16 of the Mortgage Ordinance and without any such declaration in their favour by a Court of law they would be vested with that right by virtue of the enactment itself.

Cases referred to : *Silva vs. Silva* (1909, 13 N. L. R. 33).
Mudalihamy vs. Mudianse and Kalubanda (1920, 2 Ceylon Law Recorder, 64).
Kandappa Chettiar vs. Ramanayake (1936, 38 N. L. R. 33).

H. V. Perera, K.C., with *H. W. Jayawardene*, for defendants-appellants.
C. R. Gunaratna, for plaintiffs-respondents.

NAGALINGAM, A.J.

An interesting question under the law of mortgage arises on this appeal. The plaintiffs instituted this action for a declaration of title to an allotment of land described in the schedule to the plaint. It is common ground that one Peruma was the former owner of the land in question. He by deed P3 of 1930 transferred it to one Siripina who is said to have died in 1931. One question in issue between the parties was as to who the heirs of Siripina were, the plaintiffs contending that as daughter and widow of the deceased person they were the legitimate heirs to his estate while the defendants denying the alleged relationship of the plaintiffs to the deceased asserted that the deceased's heir was his mother, one Komali.

The learned Judge has found, and it has not been challenged, that the plaintiffs are the lawful heirs of the deceased Siripina and that the title to the property has now vested in them. It is alleged by the defence, however, that Peruma had prior to his sale to Siripina executed a mortgage bond bearing No. 650 of 22nd January, 1929, in favour of the defendants whereby he hypothecated *inter alia* the land in question. The bond itself has not been produced by the defendants but the plaintiffs appear to have tacitly accepted the fact of the execution of the aforesaid mortgage bond. The defendants put the bond in suit in case No. 19505 of D. C. Kurunegala on 24th August, 1938, making *inter alia* the mortgagor, Peruma, and the puisne encumbrancer Siripina parties defendants. It should be noted that Siripina was dead at that date. No legal representative had been appointed to his estate and in fact no summons was ever reported served on him as it could never have been. But the defendants proceeded to compromise the mortgage suit with the mortgagor and with Komali, the mother of Siripina, on the footing that she was the lawful heir to the estate ; as a result of the compromise decree was entered dismissing the defendants' action.

In this state of facts the defendants claim that notwithstanding the dismissal of their action upon the mortgage bond their rights thereon revived inasmuch as the compromise which led to the dismissal of the action was based upon the belief that the deed of conveyance executed by Peruma and Komali of the land in question conveyed good title to them which in fact it did not in view of the circumstance that Komali has now been ascertained to be not the legal heir to the estate of Siripina. In regard to this question the learned Judge did not record a specific finding. On appeal the argument has been confined to a discussion of the question as to whether the rights of the defendants revived upon the mortgage bond and if so whether they are entitled to a declaration in these proceedings that the rights of the plaintiffs to the land are subject to the rights of the defendants under the mortgage created in their favour by the bond.

Two cases were cited at the bar in order to show that the bond could be considered to have revived :—*Silva vs. Silva* (1909, 13 N.L.R. 33.) This was a case where the mortgagor transferred the mortgaged property to the mortgagee during the pendency of a valid seizure effected on the property, the seizure rendering the transfer ineffectual. The mortgagee instituted a suit

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upon the mortgage bond ignoring the execution of the transfer in his favour, and it was held that the rights under the mortgage bond revived inasmuch as the transfer was void. *Mudalihamy vs. Mudianse & Kalubanda* (1920, 2 Ceylon Law Recorder page 64), where the facts were similar except that the deed of conveyance was rendered invalid by reason of an action for partition pending at the date of conveyance, There too it was held that the rights of the mortgagee upon the mortgage bond revived notwithstanding the void conveyance executed in his favour.

It has been urged that the principle underlying these two cases would be applicable or in any event could be executed so as to include the present case. There is a vital distinction between those cases and the one before me now. Those were cases of voluntary novation and the principle underlying was that where the novation was not real but merely nominal no novation could be said in fact to have taken place and the rights under the bond revived, or more properly, the bond was never novated. It has also to be noted that the bond was held to be revived as between the parties thereto and not as against a third party. Here there has been a compulsory novation and it is sought to have the bond revived as against a stranger to it. The bond has been sued upon and the rights in respect of it have got merged in the decree entered, and different considerations therefore apply. The decree must first be got out of the way before the claim to have the bond considered revived can be entertained. No argument has been put forward to show that the decree itself is bad; so that the question really resolves itself into this: What are the rights of a mortgagee who having sued upon his bond and obtained a decree finds that the decree is of no avail against a puisne encumbrancer?

Prior to the Mortgage Ordinance Cap. 74, where a mortgagee failed to make a puisne encumbrancer a party to the hypothecary action it was held that no further action could be brought upon the bond. But section 16 of the Mortgage Ordinance was specifically enacted to grant relief in such a case and it provides that a mortgagee may bring more than one action to enforce all or any of his remedies under a mortgage bond. In *Kandappa Chettiar vs. Ramanayake* (1936, 38 N.L.R. 33), it was expressly held that more than one hypothecary action may be instituted upon a mortgage bond. The resultant position, therefore, is that if a mortgagee considers that he has not been able to secure to himself all the remedies available to him under a mortgage by reason of a hypothecary action instituted by him proving abortive it would be open to him to file another action. But I do not wish to be understood as saying that in the circumstances disclosed in this case where the action upon the bond has been dismissed I express any opinion as to whether the defendants can bring a second action or not. It is, however, only necessary to point out that if they have any rights those rights are conserved by section 16 of the Mortgage Ordinance and without any such declaration in their favour by a Court of law they would be vested with that right by virtue of the enactment itself.

Besides the person most affected by a declaration that the rights under the bond have revived would be the mortgagor himself, but the mortgagor is no party to these proceedings and in his absence and without giving him an opportunity of being heard no such declaration can be made. On this ground too the defendants' application must fail.

I would therefore dismiss the appeal with costs.

DIAS, J.
I agree.

Appeal dismissed.

Proctors : *G. Athurupana* for the appellant.
Ashley Peris for the respondent.

Present: NAGALINGAM, A.J.

UKKUMENIKA vs. VIDANE

S.C. No. 735—*M.C. Nuwara-Eliya No.* 217
Argued and Decided on: 18th December, 1946.

Maintenance—Defendant admitting marriage but denying paternity—Burden of proof.

On an application for maintenance by the wife, the defendant admitted marriage, but denied paternity on the ground that the applicant was living in adultery. Thereupon the Magistrate ruled that the burden was on the defendant to prove that the applicant was living in adultery and that he was not the father of the child.

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Held : That the Magistrate erred in law in calling upon the defendant to establish his case before the applicant's case was placed before the court.

S. P. Wijewickreme with *Lucian Jayatileke*, for defendant-appellant.
Barr Kumarakulasingham with *K. C. de Silva*, for applicant-respondent.

NAGALINGAM, A.J.

This is an appeal by the defendant in a maintenance case from an order of the learned Magistrate ordering him to pay a sum of Rs. 20 for the wife and Rs. 10 for a child.

Counsel for the appellant has confined himself to arguing a point of law as to whether the procedure adopted by the Magistrate was correct in this instance and if not whether the proceedings are not vitiated thereby.

It would appear that when the applicant tendered the plaint she was examined by the learned Magistrate, in the absence of the defendant. When the defendant appeared, apparently he was questioned and he admitted that the applicant was his wife but denied the paternity of the child in respect of which maintenance was claimed. He further stated that he was not prepared to take his wife back on the ground that she was living in adultery. On that date of trial the learned Magistrate appears to have treated the case more or less as a civil proceeding between the parties and in view of the fact that the defendant admitted marriage and denied paternity on the ground of adultery held that the burden was on him to prove that the wife was living in adultery and that he was not the father of the child. It is contended that the approach to the whole case thus made by the Magistrate has not only no sanction in law but has resulted in causing prejudice to the defendant. Under section 2 of the Maintenance Ordinance Chapter 76 there are certain facts which must first be established by the applicant before an order for maintenance can be made against the defendant; firstly, that the defendant has sufficient means and secondly, that he either neglects or refuses to maintain his wife and thirdly, that the child in respect of whom maintenance is claimed is the child of the defendant. The mere neglect or refusal on the part of the defendant does not necessarily enable the Magistrate to make an order against the defendant. He must be satisfied that the refusal or neglect was not upon sufficient cause. Again no order can be made against a defendant as section 4 of the Ordinance states expressly that a wife who makes an application for an order against the husband must be one who is not living in adultery and must not be living separately from her husband by mutual consent. All these facts have to be first established by the wife and the learned Magistrate was therefore in error in calling upon the defendant to establish his case before the applicant's case was placed before Court in accordance with law. Learned Counsel for the respondent has sought to contend that no prejudice has been caused to the defendant as a result of his being called upon to establish his defence first, but I am not prepared to say that no prejudice in fact has been caused to the defendant. For these reasons I would allow the appeal, set aside the order of the Magistrate and remit the case for trial to be proceeded with before another Magistrate.

Appeal allowed.

Proctors : *A. J. M. de Silva*, for the appellant.
Thambinayagam, for the respondent.

In the matter of an application for a Mandate in the nature of a writ of Certiorari against S. S. J. Gunasekera a Tribunal appointed under the provisions of the Essential Services (Avoidance of a Strikes and Lockouts) Order, 1942 (*No.* 619)

Present : SOERTSZ, S.P.J., KEUNEMAN, J. & CANEKERATNE, J.

LIPTONS LTD. vs. GUNASEKERA

Argued on : 11th, 12th & 13th February, 1947.
Decided on : 7th March, 1947.

Certiorari—Essential Services (Avoidance of Strikes and Lockouts) Order, 1942—*Jurisdiction of Tribunal.*

The Commissioner of Labour, acting under paragraph 6 of the Essential Services (Avoidance of Strikes and Lockouts) Order, 1942, referred a petition to the District Judge stating that he was satisfied that the petition related to a trade dispute. A preliminary objection was taken before the District Judge that the petition did not disclose a trade dispute. The District Judge held that the Commissioner's decision *ipso facto* conferred jurisdiction on the Tribunal to inquire into the matter, and made an award.

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Held : Quashing the proceedings and award, that the District Judge has to be satisfied in his own mind that the petition discloses a trade dispute as defined in the order.

Cases referred to : *Brown & Co., Ltd., vs. Roberts* 47 N. L. R. 529, 33 C. L. W. 48.

H. V. Perera, K.C., with *E. G. Wickremanayake*, for the petitioner.
S. Nadesan, with *G. Thomas*, for the respondent (the President of the Ceylon Mercantile Union).
Walter Jayewardene, Crown Counsel, as *amicus curiae.*

SOERTSZ, S.P.J.

This is an application for a writ of Certiorari to quash the award made by a District Judge to whom the Controller of Labour referred a petition that had been presented to him, admittedly, by a competent person, for the settlement of the matters raised in the petition, the Controller stating in his letter which accompanied the petition that he was satisfied that the petition declared a trade dispute and that he was, therefore, referring it, for necessary action.

When the matter came up before the District Judge to whom it has been thus referred, Counsel appearing on behalf of the respondent took the objection that the question raised in the petitioner's petition did not disclose a " trade dispute" within the meaning of the definition of that term in the Essential Services (Avoidance of Strikes and Lockouts) Order, 1942, and Counsel invited the Tribunal to consider his objection by way of a preliminary issue but the District Judge took the view that his jurisdiction had been determined for him when the Controller of Labour referred the petition to him on the footing that he, the Controller, was satisfied that it disclosed a trade dispute. The District Judge dealt with this objection to his jurisdiction as follows :—

> " In an earlier trade dispute which was referred to this Tribunal a similar preliminary objection was taken and I held there that once the Commissioner of Labour had exercised his judgment and found that the matter in the petition referred to a trade dispute, such decision *ipso facto* conferred jurisdiction on this Tribunal to inquire into the matter and make an award and that this Tribunal could not challenge the judgment of the Commissioner of Labour."

In my opinion, this is a grave misconception on the part of the District Judge of his powers and functions in a matter of this kind. If that view were to prevail, it would mean that the important question whether there is a trade dispute or not can be decided without the party respondent being heard in regard to that question, and that would be subversive of the fundamental rule that enjoins that the party concerned be heard—" *Audi alteram partem* ". The definition of trade dispute in the order is of such a nature that it is hardly to be expected that to all minds it will convey the same meaning. Rather, it may be said in regard to it that " *Quot homines tot sententiae* ", and, therefore, parties to a dispute are entitled to have the benefit of the view of all the persons that are empowered by law to reach a view as to whether the dispute is a trade dispute. The rule under which the Controller referred the petition to the Tribunal is rule 6 (2). That rule says that :

> " On receipt of any such petition, the Controller shall if he is satisfied that the petition relates to a trade dispute transmit the petition to the District Judge."

Rule 7 goes on to say :

> " A District Judge may hear such evidence as he may deem necessary for the investigation of any *trade dispute* referred to him for settlement under the preceding paragraph of this order but shall not be bound by the rules of evidence."

A District Judge is required to investigate " any *trade dispute* referred to him, " that is to say a trade dispute so defined in the order and not any dispute that to the mind of the Controller appears to be a trade dispute. In other words, the District Judge has to be satisfied in his own mind that it is a trade dispute within the meaning of the definition, that comes up for investigation. It may, no doubt, happen that a dispute which the Controller erroneously considers to be a trade dispute appears to the District Judge himself to be a trade dispute. That is not to the point for the power to decide a question does not mean the power to decide it rightly but the power to decide it in a judicial manner, that is to say, without surrendering his judgment to the view of some other party. In the case of *Brown & Co., Ltd., vs. Roberts* 47 N. L. R. 529, Dias, J. observed as follows :—

> " Once the Controller has satisfied himself 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 (that is to say the Tribunal in that instance) had any option but to proceed."

With due deference, I do not agree with that view at all for the reasons I have already given. In my view, when the respondent took the objection that the matter referred for investigation did not relate to a trade dispute, it became the duty of the District Judge to consider the question whether there was a trade dispute and to give his decision thereon, for his power to proceed further depended on his finding that there was a trade dispute and not upon the declaration of the Controller that he was satisfied that there is a trade dispute. To put it in other words, a necessary condition for the Controller to derive

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the power necessary for his transmitting the petition to a District Judge is that he should be satisfied that it disclosed a "trade dispute"; and for the District Judge to investigate and settle the matter he, in turn, must be satisfied that there is a trade dispute and not any other kind of dispute that has been referred to him.

The District Judge having refused to deal with the question in that way, was not competent to make the award he made. In this view of the matter, it is not necessary to consider the other questions that were raised and discussed at the hearing. I would quash the proceedings and award.

KEUNEMAN, J.
I agree.

CANEKERATNE, J.
I agree.

Proceedings and award quashed.

Proctors : *Julius & Creasy* for petitioner.
W. Rajasingham for respondent.

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

IBRAHIM BAI vs. HERFT

In the matter of the Insolvency of H. A. DEUTROM of Kandy ....*Insolvent.*

Action No. I. 3 *District Court of Kandy—S. C. No.* 77.
Argued and decided on : 6th March, 1942.

Insotvency—Proof of debts—Can a creditor prove a debt due from an Insolvent after certificate had been granted—Insolvency Ordinance, section 93.

Held : That it is open to a creditor of an Insolvent to prove his debt after the grant of certificate to such Insolvent, provided he obtains from the Court a sitting for the proof of the debts after due notice thereof has been given in the Government Gazette and in such other manner as the Court may direct.

N. Nadarajah, K. C., with *H. W. Thambiah*, for creditor-appellant.
No appearance for respondent.

SOERTSZ, J.

This is an appeal by one Ibrahim Bai, who professing to be a Creditor of the Insolvent in a sum of Rs. 1,560 sought to prove that debt in the course of an insolvency case. He made his application on 4th April, 1941. The learned District Judge refused to allow this application on the ground that it was too late for him to move to prove a debt in view of the fact that a certificate in the 3rd class had been granted to the Insolvent. The learned Judge appears to have taken the view that once a certificate is granted there is in effect a termination of the insolvency proceedings and that thereafter it was not open to anyone to come in claiming to prove a debt.

This view appears to me to be unsupported by the law. Section 93 is relied on by Counsel for the appellant as enabling his client to come in at any time to prove his debt. This view is supported by the commentary in "Archbold on Bankruptcy," page 192, 1865 Edn. The comment is made on a provision upon which our own Insolvency Ordinance is based. It is to this effect. "By rule 53, every sitting held for making a dividend of a bankrupt estate, shall be a sitting for proof of debts and the notice of such sitting in the London Gazette shall express that debts may be proved at such sitting. Therefore, there is no time, in fact, limited for proving; if the creditor proves at any time before final dividend is declared, he will be entitled to his dividend, and even where a creditor through accident omits to prove at the final dividend, he will be permitted to prove but without disturbing any payments made by the Assignee, and placing the creditors not paid in the same situation as if the creditor had originally proved."

It seems clear, therefore, that it is open to the appellant to prove the debt he seeks to prove provided he obtains from the Court a sitting for the proof of the debts after due notice thereof has been given in the Government Gazette and in such other-manner as the Court may deem fit.

The appeal is, therefore, allowed and the case is remitted for that purpose. There will be no costs of appeal.

DE KRETSER, J.
I agree.

Appeal allowed.

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Present: NAGALINGAM, A.J.

JOHN SINGHO vs. BEETAN SINGHO & OTHERS

S. C. No. 196—*C. R. Colombo No.* 88972
Argued on: 4th December, 1946.
Decided on: 15th January, 1947.

Civil Procedure Code, sections 325 *and* 326—*Application under, by landlord for resisting Fiscal by tenant's agent claiming to be sub-tenant—Compromise by parties—Agreement to give possession on specified date—Failure to give possession—Re-issue of writ—Obstruction by tenant's servant claiming rights on deed of purchase*—Bona fides *of transaction.*

A landlord took out writ against his tenant (1st respondent) for ejecting him. The 2nd respondent claiming to be a sub-tenant of 1st respondent obstructed the Fiscal and a consequent application under section 325 of the Civil Procedure Code was compromised, the respondents agreeing to deliver possession on a specified date and not to sublet to a third party in the meantime. On failure to deliver possession as agreed, writ was re-issued when the 3rd respondent, claiming a share of the premises on a deed of purchase, resisted delivery of possession. A second application under the said section 325 made on that ground was dismissed by the learned Commissioner after inquiry, as he thought that the claim under the deed was a *bona fide* one. The landlord appealed.

There was acceptable evidence to the effect (*a*) that the sub-letting to the 2nd respondent was a nominal one and the 1st respondent continued to carry on the business at the premises even when the 2nd respondent obstructed the Fiscal; (*b*) that the 3rd respondent was managing the said business even when the 2nd respondent was regarded as sub-tenant; (*c*) that the 3rd respondent was a servant of the 1st respondent, who even at the date of inquiry was visiting the shop almost daily; (*d*) that on the said deed 3rd respondent acquired title *inter alia* to a 1/24th share of the premises for Rs. 7,000 and that the vendee had agreed to dispense with search; (*e*) the 3rd respondent did not take the slightest interest in regard to the transaction, but it was the 1st respondent who was present and gave instructions and who paid the money.

Held: That in the circumstances, the deed produced by the 3rd respondent was obtained in his favour by the 1st respondent with a view to resist the attempts to obtain delivery of possession by the landlord.

N. Nadarajah, K.C., with *H. W. Jayawardene*, for plaintiff-appellant.
S. W. Jayasuriya, with *C. Chellappah*, for 1st defendant-respondent.
H. W. Thambiah, with *T. Paramsothy*, for 2nd defendant-respondent.
L. A Rajapakse, K. C., with *T. Paramsothy*, for 3rd defendant-respondent.

NAGALINGAM, A.J.

This case furnishes a typical example of the case with which a tenant can hold his landlord at bay for a period of years notwithstanding that the Court has entered a decree in favour of the landlord for ejectment of the tenant. The Plaintiff-appellant instituted this action for rent and ejectment against the 1st respondent, his tenant, as early as 1st February, 1943. After trial, on 17th March, 1943, judgment was entered against the tenant directing his ejectment from the premises. The tenant preferred an appeal and execution proceedings were stayed in consequence. On 1st March, 1944, the appeal was dismissed. The landlord took out writ of ejectment and on 3rd March, 1944 the Fiscal's officer who went to deliver possession was obstructed by the 2nd respondent who claimed to be a sub-tenant under the 1st respondent. The landlord made an application under section 325 of the Civil Procedure Code and that application was compromised between the parties whereby it was agreed that the two respondents should deliver over possession of the premises to the landlord on 31st August, 1944 and that they should not in the meantime sublet the premises to a third party. Possession not having been delivered in terms of the adjustment, the landlord made application on 2nd September, 1944 for writ of ejectment and after inquiry writ was allowed but was returned by the Fiscal unexecuted on 26th September, 1944 on the ground that the 3rd respondent had resisted the writ officer in his attempts to deliver over possession. The landlord was again driven to make an application under section 325 of the Civil Procedure Code, which is the present application. The application was filed as early as 30th September, 1944. After inquiry the learned Commissioner dismissed the application on 23rd March, 1945, holding that the 3rd respondent in resisting the Fiscal acted not at the instigation of either of the other two respondents, but independently on his own in the exercise of a right claimed by him *bona fide* under a deed of purchase executed in his favour by a person alleged to have title to a share of the premises.

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The learned Commissioner has found affirmatively that the resistance offered by the 2nd respondent on 3rd March, 1944 was at the instigation of the 1st respondent and that the alleged subletting of the premises by the 1st respondent to the 2nd respondent was, to use the learned Commissioner's language, "a blind to enable the 1st respondent to carry on the business." The learned Commissioner, however, found himself unable to arrive at a similar view in regard to the conduct of the 3rd respondent, but, I regret I cannot share the difficulties which beset him and constrained him to take a contrary view. Admittedly, the evidence given by the 3rd respondent clearly establishes that the alleged subletting to the 2nd respondent was a nominal one and that it was the 1st respondent who carried on the business even after the alleged transaction and even at the date when the 2nd respondent obstructed the Fiscal from delivering possession on March, 1944. According to the evidence of the 2nd respondent, it was the 3rd respondent who had the management of the business during the time that he was regarded as the sub-tenant of the 1st respondent. It is in evidence that the 3rd respondent was a servant of the 1st respondent and that the 1st respondent yet visits the shop almost daily. It is true that the 3rd respondent did produce deed 3R1 of 10th August, 1944, showing that he had acquired title to a 1/24 share *inter alia* of the premises in question and that no less than a sum of Rs. 7,000 had been paid as consideration. It is significant that although the transaction was of such large magnitude, search was dispensed with, and what is more, the evidence of the notary who attested the deed, which has not been considered by the learned Commissioner, proves that the 3rd respondent, the vendee, was never present to give instructions or even to pay the money or at any time in connection with the execution of the deed of sale but that it was the 1st respondent who was present and that it was he who paid the money.

It has been argued that the 1st respondent attended to the transaction on behalf of the 3rd respondent out of a sense of gratitude to an old employee whose welfare was dear to his heart and that the employer's conduct should not be invested with any taint of self-interest. It has also been urged that if the transaction was one which was intended for the benefit of the 1st respondent himself, he would probably not be so foolhardy as to invest such a large sum as Rs. 7,000 in the name of one who stands in relationship to him as only a paid servant. Though, no doubt, the second ground urged may at first sight appear to have some merit in it, nevertheless when one takes into consideration the simple expedient of having a non-notarial document executed so as to safeguard the interest of the beneficial owner, little or no risk can be really said to be run by having the deed executed in favour of the servant, but no explanation has been suggested that would carry conviction to one's mind as to why a person in the position of a servant who, if his story be true, was investing his accumulated savings of a life-time in the purchase of a property should act with such indifference as not to take the slightest interest in regard to the transaction. The evidence of the plaintiff shows that even at the date of inquiry, that is to say, after the execution of the deed the first respondent was yet in the premises conducting the business.

In these circumstances, the probabilities are preponderatingly in favour of the plaintiff's contention that the deed produced by the 3rd respondent was one obtained in his favour by the first respondent with a view to continue to baulk all attempts of the plaintiff to obtain possession of the premises. It must be remembered that had the 1st respondent obtained the deed of conveyance in his own favour he could even then not have hoped to have been able to resist the plaintiff from obtaining possession of the premises. It is, therefore, easy to see why the first respondent had perforce to obtain the deed in favour of a third party, and who better than a trusted servant, especially if he be one who but for the assistance of the employer would be incapable of doing anything even for himself? I, therefore, reach the conclusion that the resistance offered by the third respondent was at the instigation of the first respondent. The second respondent appears to me to have been a tool in the hands of the first respondent just as the third respondent now is, and I am satisfied that the second respondent has no interest and takes no part in the present obstruction presented by the 3rd respondent.

I, therefore, make order that the 3rd respondent be committed to jail for a term of 30 days and that the Fiscal be directed to place the judgment creditor in possession of the property. As there is no evidence of obstruction by the 1st respondent I make no order against him, but the 1st and 3rd respondents will jointly and severally pay to the plaintiff the costs of the proceedings had in the Court below and of the appeal. The 2nd respondent will bear his own costs.

Appeal allowed.

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Present : NAGALINGAM, A.J.

JAMES vs. FERNANDO

Application for Writ of Quo Warranto *against U. Suramanis Fernando.—No.* 424.
Argued on : 16th December, 1946.
Decided on : 19th December, 1946.

Quo warranto—*Person elected as member of Village Committee while interested in contract with Committee—Village Communities Ordinance* (*Cap.* 198) *sections* 13, 15 (3), 19 (*a*) *and* 36.

The respondent, who was the only candidate nominated for election to a certain ward of a Village Committee, was duly declared elected on nomination day. On this day he was interested in a contract with the Village Committee. Before the respondent's term of office commenced, he had executed the contract.

Held : (i.) That as the Village Committee is a corporation, the respondent was interested in a contract with the Committee on nomination day and was disqualified for election ;
(ii.) That the fact that the disqualification was not raised on nomination day does not preclude the making of an application in the Supreme Court.

Per NAGALINGAM, A.J.—(*a*) " In one sense every petitioner who impugns the election of a candidate may be said to be actuated by malice or ill-will towards the candidate but unless it can be shewn that the malice has its origin in something other than a desire to ensure a fair and proper election such as vindictiveness arising from animosity engendered by extraneous circumstances, the malice would be no ground for setting aside the election."

(*b*) " The respondent took his seat on 4th July, 1946, and the application was presented within two months of that date. I do not think that a period of less than two months can be said to constitute undue delay in instituting these proceedings."

Cases referred to : *Karunaratne vs. Government Agent, Western Province* (1930, 32 N. L. R. 169).
Mendis Appu vs. Hendrick Singho (1945, 46 N. L. R. 126).
Rex vs. Wakelin (1 B. & AD. 50).
Rex vs. Whitwell (1792, 5 Term Rep. 85)
Rex vs. Jones (1873, 28 Law Times 270)
In *re* Armstrong 1856, 225 L.J.Q.B. 238)

N. E. Weerasooriya, K.C., with *H. A. Koattegoda*, for the applicant.
S. C. E. Rodrigo, for the respondent.

NAGALINGAM, A.J.

This is an application for an information in the nature of a *quo warranto* calling upon the Respondent Suramanis Fernando to shew by what right he claimed to hold the office of member for Mahagama North Ward of the Village Committee area of Gangaboda Pattu.

The circumstances upon which the Petitioner relies to found his application are as follows :—

On 9-4-46 the Assistant Government Agent received nomination papers for election of members to the several wards of the Village Committee and the Respondent was the only candidate nominated for the Mahagama North Ward and was therefore declared duly elected on that day. It is alleged by the petitioner that the respondent had entered into three separate contracts dated 9-3-46, 24-4-46, and 10-5-46 to repair certain *edandas* or foot-bridges across certain *elas* or water courses within the area of the said Village Committee. On the date the respondent was nominated and declared duly elected the first contract, namely the one of 9-3-46 was still subsisting and remained unexecuted. The other two contracts, it will be noticed, are subsequent in date to that of his election.

The petitioner contends that as the respondent was interested in a contract with the Village Committee at the date of his nomination and election, he was disqualified from being so nominated or elected by reason of the provisions of section 13 of the Village Communities Ordinance Cap. 198 (Ordinance No. 60 of 1938) which declares that every person of either sex who is entitled to vote at the election of members for any of the wards of the village area shall be deemed to be qualified for election as the member for any ward of that area if such person, *inter alia*, is not, either directly or indirectly, except as a shareholder in an incorporated company, interested in any contract entered into by any person with the Village Committee of that area. The petitioner also relies upon the fact that after

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the election of the respondent he was interested in the other two contracts and that by virtue of section 19 of the Ordinance the respondent must be deemed to have vacated his seat, for the section provides that any member of a Village Committee shall be deemed to vacate a seat *ipso facto* if he, *inter alia*, ceases to be qualified as required by section 13. These are the two grounds upon which the petitioner rests his case.

The respondent while not disputing that he had entered into the contracts referred to, takes up the position that as his election was for membership of a new Village Committee that was to function from 1st July, 1946, his contract with the Village Committee that was going out of office on 30th June, 1946, does not operate as a disqualification within the meaning of either section 13 or 19 (*a*), especially as he had executed all his contracts before the date when he was expected to assume or could have assumed office. And he goes further and says that assuming that the petitioner's objection is good he is entitled to resist the petitioner's application upon three other grounds, (*a*) that no objection to his nomination on the ground of his not having the necessary qualification having been taken before the Assistant Government Agent on the date of nomination, his alleged disqualification cannot be made the subject of proceedings in this Court, (*b*) that the petitioner is actuated by malice in making this application and (*c*) that there has been undue delay in preferring this application.

To deal with the main contention, it is obvious that it is based upon a fallacy : to say that the Village Committee elected from time to time for definite periods are distinct and separate bodies and that the contract with one has no bearing in regard to the qualification necessary for election to a subsequent Village Committee is altogether erroneous. To put the argument of the respondent in another way, the argument is that there is no continuity of existence of a Village Committee, but that a new Village Committee comes into existence on the expiry of the period for which members are elected at any one election. That a Village Committee is a corporation with perpetual succession is expressly enacted by section 36 of the Ordinance, and though the composition of the membership of a Village Committee may change from time to time, the Village Committee as a body has a continuous existence without loss of its individuality as a body at any period or time. The contract, therefore, was with the Village Committee of Gangaboda Pattu which was the identical Village Committee both at the dates the various contracts were entered into and at the date when the respondent was to have taken his seat as a member. It would, therefore, be correct to say that the respondent was interested in the contract dated 9-3-46 with the Village Committee at the date of his nomination, though this observation will not apply to the other two contracts which were entered into after the election of the respondent. Having regard to the contract of March, 1946, the respondent would, therefore, be one who could not be deemed to have been qualified for election. In view of the conclusion I have reached on this question it is unnecessary for me to consider the objection based upon section 19.

The next question for consideration is whether the respondent's contention that the fact of his disqualification not having been urged before the Assistant Government Agent, the petitioner cannot be permitted to raise that objection in these proceedings is sound. Reliance is placed upon section 15 (3) which provides that nomination papers delivered by or on behalf of a candidate should be scrutinised by the Government Agent who should also dispose of objections raised against any candidate on the ground that he is not qualified to be elected or nominated. The section further provides that the decision of the Government Agent shall be final and conclusive.

Maartensz, A.J. had occasion to consider the analogous provisions under the earlier Ordinance No. 9 of 1924 in *Karunaratne vs. Government Agent, Western Province* (1930, 32 N.L.R. 169) and he arrived at the view that although the applicant was present at the election and raised no objection he was not precluded from making an application to this Court. Wijeyewardene, J. considered section 15 (3) of the present Ordinance in regard to a similar objection taken before him in the case of *Mendis Appu vs. Hendrick Singho* (1945, 46 N.L.R. 126) and arrived at a similar result and expressed himself as in agreement with the views expressed by Maartensz, A.J. In view of these decisions it is unnecessary for me to enter upon a discussion of section 15 (3) in regard to the argument advanced before me as I respectfully agree with the views expressed in these decisions.

It has, however, been argued by the respondent that while the decision of Maartensz, A.J. may be supported in view of the language of the earlier Ordinance which sets out the disqualification of a member rather than the qualification as in the present Ordinance, his reasoning cannot be applied to the provisions of the present Ordinance. It is pointed out that under Ordinance 9 of 1924, section 18 declares that a person shall be dis-

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qualified to be elected unless he had certain qualifications, but that under the present Ordinance a person is not declared to be disqualified but on the contrary is deemed to be qualified for election if he has certain qualifications ; but it is to be noted that in regard to a candidate who may be interested in a contract, the qualification is put in the negative, for it is provided that a person shall be deemed to be qualified for election if such person is not interested in a contract. This qualification may be expressed as a disqualification by transposing the negative to the word "qualified," when it will read as "a member shall be deemed to be disqualified if such person is interested in any contract," I do not think that the difference in language was intended to bring about an alteration in the law on the point. I, therefore, hold that it is competent to the petitioner to take this objection to the respondent's qualification in these proceedings. The next point for determination is whether the allegation that the petitioner is actuated by malice is a sufficient ground to refuse the relief claimed by the petitioner. Beyond the bare statement that the petitioner is actuated by malice there are no facts from which the Court can infer that the petitioner is in point of fact actuated by malice. In one sense, every petitioner who impugns the election of a candidate may be said to be actuated by malice or ill-will towards the candidate but unless it can be shewn that the malice has its origin in something other than a desire to ensure a fair and proper election such as vindictiveness arising from animosity engendered by extraneous circumstances, the malice would be no ground for setting aside the election. Vide *Rex vs. Wakelin* (1 B & AD. 50). I do not think there is any substance, therefore, in this objection either.

There remains for consideration the next ground urged by the respondent, and that is that there has been undue delay in making the application. It was conceded that unless and until the respondent took his seat, an information in the nature of *quo warranto* would not lie. Vide *Rex vs. Whitwell* (1792, 5 Term Rep. 85), *Rex vs. Jones* (1873, 28 Law Times 270) and In *re* Armstrong 1856, 225 L.J.Q.B. 238). The respondent took his seat on 4th July, 1946 and the application was presented within two months of that date. I do not think that a period of less than two months can be said to constitute undue delay in instituting these proceedings.

In the result, I find that the respondent was disqualified at the date of his nomination and election and that he had no right to take his seat as a member of the committee. I would therefore make the rule absolute and declare the election of the respondent null and void. The respondent will pay to the petitioner the costs of these proceedings.

Rule made absolute.

Present: NAGALINGAM, A.J.

SAHUL HAMEED vs. ANNAMALAY

S.C. No. 187—*C.R. Matale No.* 8909.
Argued on: 29th November, 1946.
Decided on: 18th December, 1946.

Rent Restriction Ordinance, section 8, *proviso* (c)—*Action by sub-lessee to eject tenant—Tenancy commenced under owner—Payment of rent to lessee—Is lessee entitled to eject on the ground of premises reasonably required for lessees' occupation—Rights of a lessee.*

The plaintiff, a sub-lessee, sued the defendant, who had been a tenant under the owner prior to the lease for ejectment on the ground that the premises were reasonably required for his personal occupation and to commence and carry on a trade. The defendant had paid rent to the plaintiff prior to the action.

Held : (i.) That the plaintiff is not entitled to eject the defendant inasmuch as the plaintiff took the lease with notice of the occupation of the prior lessee.

(ii.) That for the purpose of section 8 proviso (c) of the Rent Restriction Ordinance "landlord" must be defined as one who is entitled not only to receive rent, but as one who has a *jus in re* in regard to the premises.

(iii.) That where the ordinary meaning and grammatical construction of the language of a statute leads to a manifest contradiction of the purpose of the enactment, a construction may be put upon it which modifies the meaning of the words.

Cases referred to : *Caledonian Rail Co. vs. North British Rail Co.* (1881, 6 A.C. 114 at 122).
Raman vs. Perera (1944, 46 N.L.R. 133) and *Edmund Appuhamy vs. Samarasekera* (1945, 46 N.L.R. 310).
Allis vs. Sigera (1897, 3 N.L.R. 5) and *Silva vs. Silva* (1913, 16 N.L.R. 315).

S. R. Wijayatilake, for plaintiff-appellant.
H. W. Thambiah, for defendant-respondent.

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NAGALINGAM, A.J.

This appeal raises a difficult question of law under the Rent Restriction Ordinance No. 60 of 1942. The defendant had been for a number of years and was at the dates material to this action a monthly tenant of certain premises bearing No. 668 (Old) Trincomalie Street, Matale, under the owner thereof, one Chelliah, at a monthly rental of Rs. 20. By indenture of lease P1 of 11th December, 1944 Chelliah leased the premises for a term of five years commencing from 1st January, 1945 to one Sainudeen Lebbe who by deed P2 of 2nd January, 1945 subleased the premises to the plaintiff for the entire term of his lease. The rental reserved both under the lease P1 and under the sub-lease P2 was the same amount that the defendant was paying under the monthly tenancy, namely, a sum of Rs. 203, with the difference that six months' rent had been paid in advance in each case at the execution of the lease or sub-lease. The plaintiff by virtue of the sub-lease in his favour continued to recover the monthly rents from the defendant from January, 1945 till date of action. On 30th May, 1945 he gave notice to the defendant to quit and deliver possession of the premises to him on the ground that he " required the premises for his personal occupation to commence and carry on a trade or business." The defendant failed to quit and the plaintiff instituted this action.

The point of law that arises has been formulated in the following issue framed at the trial: " Can the lessee claim to have the tenant of the premises leased ejected under the Rent Restriction Ordinance on the ground that they are for lessee's use and occupation." The object of the Rent Restriction Ordinance is not only to restrict the increase of rent, as is expressly set out in the title, but also to prevent proceedings in ejectment being taken against the tenant by terminating the tenancy by means of a simple notice. A reading of sections 3 to 7 of the Ordinance makes it plain that the rental of premises in areas to which this Ordinance applies cannot be increased excepting within certain limits prescribed by those sections. In other words, the right of a landlord to fix the rent of premises he lets in his absolute discretion is taken away from him. Section 8 of the Ordinance makes a further inroad into the rights of the landlord by curtailing very considerably his right to terminate the tenancy of the tenant. He could only do so if he could establish the existence of certain specified grounds set out in the section. The ground that need be examined for the purpose of this appeal is the following, viz., that " the premises are in the opinion of the Court reasonably required for occupation as a residence for the landlord or any member of the family of the landlord and for the purpose of his trade, business, profession, vocation or employment."

The plaintiff contends that whatever the object of the Legislature may have been in enacting this Ordinance, the rights of parties are to be determined according to the plain meaning of the language used by the Legislature. Resort is had to the definition given in section 16 of the term " landlord," which says that " in relation to any premises, the term landlord means the person for the time being entitled to receive the rent of such premises," and it is said that after the execution of the sub-lease in his favour the plaintiff became entitled to receive the rent of these premises from the defendant and in fact did so for a period of six months prior to date of action and that therefore the plaintiff is the defendant's landlord in accordance with the definition and that the plaintiff is therefore one who is entitled to establish that the premises are reasonably required for the purpose of his trade or business, and hence to claim ejectment of the defendant from the premises on this ground. It would be obvious that if this contention is upheld the result would be to render the provisions of section 8 designed to safeguard the interests of the tenant a dead letter, for while a landlord may not in his proper person be able to institute an action for ejectment of his tenant on the ground that the premises are required not for himself but for a friend or relative of his, he could achieve his object by executing a lease in favour of the friend or relative, who would be able to claim ejectment by establishing that they required the premises for their own occupation.

Mazwell (9th edition, page 198) states the rule of construction that would be applicable to circumstances such as these as follows :—

> " Where the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment or to some inconvenience or absurdity, hardship or injustice presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence."

Lord Selbourne expresses a similar view in the case of *Caledonian Rail Co. vs. North British Rail Co.* (1881, 6 A.C. 114 at 122) :—

> " The mere literal construction of a statute ought not to prevail if it is opposed to the intentions of the Legislature as apparent by statute and if the words are sufficiently flexible to admit of some other construction by which that intention can be better effectuated."

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Though the term " landlord is no doubt given the definition set out above in the Ordinance, it is important to bear in mind that the definition is qualified by the words " unless the context otherwise requires, ". In regard to the provisions of sections 3 and 7 of the Ordinance dealing with the control of rents, I have little doubt that the term " landlord " must be given its meaning as in the definition and that it would debar a person even in the position of the plaintiff from charging a higher rent than that permitted by these sections. The same interpretation may be placed on the terms even in regard to the several provisions of section 8 other than proviso (*c*). But in regard to the construction of proviso (*c*) the definition of the term " landlord " as given in the Ordinance cannot be invoked, for otherwise the undoubted result, as shown above, would be to defeat the very object the Ordinance had in view in enacting this section.

The question, therefore, arises: What then is the proper meaning to be attached to the term " landlord " in proviso (*c*)? It has been said that a purchaser of the premises from the landlord has been permitted to avail himself of the benefits conferred by this section and reference is made to the cases of *Raman vs. Perera* (1944, 46 N.L.R. 133) and *Edmund Appuhamy vs. Samarasekera* (1945, 46 N.L.R. 310) in both of which a purchaser from the previous owner instituted the action for the ejectment of the tenant on the ground that the premises were reasonably required for his occupation. In the first case the purchaser failed to secure relief but in the second he succeeded, but in neither of the cases was any question raised as regards the capacity of the purchaser to maintain the action. These cases, therefore, cannot strictly be regarded as authority for the *proposition* that a purchaser is entitled to the benefit of the provisions of sections Proviso (*c*) but it is not without interest to note that in South Africa under the Rents Acts which are intended to secure the same objects as our Ordinance, it has been held that a purchaser from the previous owner who has received rent from the tenant and has been accepted by him as landlord is entitled to take advantage of similar provisions which enable the landlord to terminate the tenancy by proof that the premises are reasonably required for the personal occupation of himself. (Vide Wille: Landlord and Tenant, 3rd edition, page 40). The position in Ceylon too would appear to be the same, for under our law a purchaser of land which is subject to a lease succeeds to all the rights of the vendor on the lease without a special assignment of it by the latter to the former. See *Allis vs. Sigera* (1897, 3 N.L.R. 5) and *Silva vs. Silva* (1913, 16 N.L.R. 315). But the case of a lessee of premises which are already subject to a lease or in the possession of a tenant is very different from that of a purchaser. Such a lessee has no rights excepting that of receiving rents as against the previous lessee or tenant. Wille (page 14) says :—

> " The owner of property which is subject to a lease conferring real rights on the tenant has obviously no title to grant an effective lease in favour of another person over the property or a portion of it for any period of time covered by the lease."

and the principle is also enunciated in the maxim " A hiring goes before a subsequent hiring." The lessee who obtains possession of the premises has a real right, a *jus in re*, while the lessee who does not possess and who takes the lease with notice of the fact that a prior lessee is in occupation has only a *jus in personam*. See Wille pp. 126-131.

In the present case, the defendant was already in occupation as a tenant and he had a real right to the property, while the plaintiff who took a sub-lease with notice of the fact that the defendant was in occupation of the premises has no *jus in re*, and it seems to me that for the purpose of section 8 proviso (*c*) of the Ordinance a landlord must be defined as not only one who is entitled to receive the rent but as one who has a *jus in re* in regard to the premises. The proposition stated thus would also furnish an adequate reason for holding that a purchaser is entitled to the benefit conferred by section 8 provision (*c*) for a purchaser is himself one who has a *jus in re*. In South Africa the question as to whether a second lessee or tenant is entitled to claim the benefit of the provisions of the corresponding section does not seem to have arisen, for though, as set out earlier, Wille refers to the case of a purchaser, he does not refer to the case of a subsequent lessee as against a first lessee.

I am, therefore, of opinion that the plaintiff is not entitled to take advantage of the benefits conferred by section 8 proviso (*c*) on a landlord in seeking to eject the defendant. The plaintiff's action was therefore rightly dismissed. For these reasons, the appeal fails and is dismissed with costs.

Proctors : *S. P. Wijetilake*, for the appellant.

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IN THE COURT OF CRIMINAL APPEAL

Present: HOWARD, C.J. (President), KEUNEMAN, J. AND CANNON, J.

REX vs. PREMARATNE

Application 12 *of* 1947—*S.C.* 95/*M.C. Panadura* 40687.
Argued on: 24th February, 1947.
Decided on: 3rd March, 1947.

Court of Criminal Appeal—Verdict of Murder—Presence of facts disclosing basis for plea of grave and sudden provocation—Failure of Trial Judge to direct jury to consider such plea—Substitution of lesser offence.

The evidence disclosed elements of a plea based on the fact that the applicant had lost his power of self-control by reason of grave and sudden provocation. The learned Judge in his charge referred to this plea in dealing with the possible defences available to the applicant, but failed to ask the jury to consider the facts and decide thereon. The jury by a majority of 5 to 2 brought in a verdict of murder.

Held : That in the circumstances, the conviction for murder should be set aside and a conviction for culpable homicide not amounting to murder should be substituted therefor.

Cases referred to : *Mancini vs. Director of Public Prosecutions* (28 Criminal Appeal Reports p. 73).

H. V. Perera, K.C., with *K. A. P. Rajakaruna* and *Sri Perera*, for the applicant.
T. S. Fernando, C.C., with *E. L. W. de Zoysa, C.C.*, for the Crown.

HOWARD, C.J.

The Applicant was found guilty of the offence of murder by a majority verdict of five to two. Mr. H. V. Perera on his behalf, whilst not complaining that the Jury have rejected the plea put up by the Applicant at his trial that he was exercising the right of private defence, maintains that the learned Judge has not properly put before the Jury the defence that the Applicant committed the act when he had lost the power of self-control by reason of grave and sudden provocation. The learned Judge before dealing with the facts in this particular case dealt with the possible defences available to the Applicant. On page 9 of the record he says that " it may be urged that it is possible to say in this case that there was grave and sudden provocation." On page 10 he again refers to this defence and again on page 13. The learned Judge then goes on to deal with the facts in the case, and having done so asks the Jury to consider those facts so far as the defence based on the exercise of the right of private defence is concerned. The Jury, however, is not asked to consider the facts and decide whether a defence based on the fact that the Applicant had lost his power of self-control by reason of grave and sudden provocation. In *Mancini vs. Director of Public Prosecutions* (28 Criminal Appeal Reports p. 73) Viscount Simon, L.C., states as follows :—

> " To avoid all possible misunderstanding, I would add that this is far from saying that in every trial for murder, where the accused pleads Not Guilty, the Judge must include in his summing-up to the Jury observations on the subject of manslaughter. The possibility of a verdict of manslaughter instead of murder only arises when the evidence given before the jury is such as might satisfy them as the judges of fact that the elements were present which would reduce the crime to manslaughter, or at any rate might induce a reasonable doubt whether this was, or was not, the case."

The Crown in this case put before the Jury the evidence of two eye-witnesses, Eradias and Rodrigo. Eradias, a boutique keeper, stated that it was a moonlight night and the Applicant was seated in his boutique when the deceased came in and addressed the Applicant saying " Are you Banda ? " Eradias told the deceased not to have any discussion in the boutique. The deceased left the boutique and the Applicant followed and said something which could not be heard. The deceased then came close to the Applicant saying " Tho—what did you say ? " The deceased raised his hand but before he could hit the Applicant, the latter stabbed him with a knife several times. The evidence of Eradias was corroborated by that of Rodrigo, who also stated that the deceased when he came into the boutique approached the Applicant who was seated, in a threatening manner. The majority of us consider that the evidence of these two witnesses is such as might satisfy the Jury as the judges of fact that the elements were present which would reduce the crime to culpable homicide not amounting to murder. In these circumstances we set aside the conviction for murder and substitute a conviction for culpable homicide not amounting to murder. In respect of this offence we pass a sentence of 15 years' rigorous imprisonment.

Verdict and sentence varied.

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Present: HOWARD, C.J.

DE ALWIS vs. SELVARATNAM

S.C. No. 454—*M.C. Colombo No.* 48955.
Argued on: 25th February, 1947.
Decided on: 3rd March, 1947.

Cheating—Penal Code, section 400—Damage or harm to person deceived—Nature of proof required to constitute offence.

The accused was convicted under section 400 of the Penal Code for having deceived R. Muttusamy, Proctor and Notary, by falsely representing to him that certain premises, which the accused hypothecated under a bond attested by the said R. Muttusamy as Notary, were free from all encumbrances, when in fact the accused had by a prior mortgage bond hypothecated the same premises with another.

It was in evidence that the said Muttusamy had taken every step that a careful Notary would take to protect his clients' interests in spite of the representations of the accused. As the earlier bond had not been registered its existence could not be discovered.

There was no evidence of any damage or harm to the Notary.

Held : (i.) That the conviction could not be sustained as the possibilities of damage or harm to the Notary in mind or reputation in consequence of the representation by the accused were too remote.

(ii.) That to constitute the offence of cheating under section 400 of the Ceylon Penal Code, the damage or harm contemplated therein is damage or harm which must be the necessary consequence of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom.

Cases referred to : *Mojey & Others vs. Queen-Empress* (Indian Decisions, 17 Calcutta 606).
Christinahamy vs. Inspector of Police (47 N.L.R. p. 382).
R. V. Bastian & Others (2 Balasingham's Reports p. 93).
R. V. Bastian vs. Fernando (15 N.L.R. at p. 109).
King vs. Perera (2 Balasingham's Notes of Cases p. 58).

L. A. Rajapakse, K.C., with *E. D. Cosme* and *E. O. F. de Silva*, for the 1st accused-appellant.
E. H. T. Gunasekera, Actg. S.G., with *J. G. T. Weeraratne, C.C.*, for the complainant-respondent.

HOWARD, C.J.

The accused was convicted of cheating, an offence punishable under section 400 of the Penal Code, and sentenced to six months' rigorous imprisonment. The exact wording of the charge was as follows :—

> "You did at Hultsdorf, Colombo, on 26th September, 1941, being the first accused, deceive one R. Muttusamy, Proctor and Notary, by falsely representing to him that the premises described in the schedule to mortgage bond No. 2123 dated 26th September, 1941, attested by him, the said R. Muttusamy as Notary, were free from all encumberances whatsoever, whereas in truth and in fact, the said premises were on the 26th September, 1941, subject to a mortgage created by you in favour of one F. V. L. Drieberg of Borella, and fraudulently induce the said R. Muttusamy to attest the said deed No. 2123 in his capacity as Notary Public which the said Notary would not have done had he not been so deceived and which act was likely to cause damage or harm to the said R. Muttusamy in body, mind, reputation or property and that the said 1st accused abovenamed did commit an offence punishable under section 400 of Chapter 15 of the Penal Code."

It has been contended on behalf of the Appellant that the representation alleged to have been made by the Appellant to Muttusamy did not induce the latter to attest the deed and that Muttusamy would have attested the deed even if it had not been for the representation of the Appellant. It is also maintained that it has not been established that the act was likely to cause damage or harm to Muttusamy in body, mind, reputation or property. In finding the Appellant guilty of the offence the Magistrate states that it is idle to suggest that because Muttusamy has not in fact suffered any harm, or damage, the act of the Appellant was not likely to cause damage to Muttusamy in mind, reputation or property. Counsel for the Appellant contends that the possibilities contemplated by the Magistrate were too remote and the facts do not constitute an offence under the section. In this connection he has referred me to the case of *Mojey & Others vs. Queen-Empress* (Indian Decisions, 17 Calcutta 606) The headnote of this case is as follows :—

> "To constitute the offence of cheating under section 415 of the Indian Penal Code the damage or harm caused or likely to be caused to the person deceived in mind, body, reputation, or property must be the necessary consequence of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom.
>
> "Where therefore certain persons were charged under section 419 of the Indian Penal Code, one with personating another person before a Registrar, and the others with abetting such personation and causing the Registrar trar to register a divorce under the provisions of Bengal

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Act of 1876 with the wife of the personated person, and where the lower Courts convicted the accused under that section, holding that as such registrations were voluntary and a source of gain to the Registrar harm was caused to the Registrar in mind and reputation by registering false divorces as well as by losing his fees in the future through persons being less likely to avail themselves of his services, and that therefore an offence under the section had been committed.

"Held: that the possibilities contemplated by the lower Courts were too remote; that the facts did not constitute an offence under the section; and that the conviction must thereafter be set aside."

At p. 609 it is stated in the judgment that it is clear that the petitioners deceived the Registrar and it is clear that they thereby induced him to register the fictitious deed of divorce—a thing he would not have done unless he had been so deceived. The judgment then goes on to state that in the opinion of the Court this act of registering the fictitious deed did not cause nor was it likely to cause damage or harm to the Registrar in body, mind, reputation or property. It is also stated in the judgment that the damages or harm must be the necessary consequence of the act done by reason of the deceit practised or must be necessarily likely to follow therefrom. The possibilities contemplated by the Magistrate, namely that the Registrar suffers not only in registration, but also by losing his fees in future through people declining to avail themselves of his offices, were too remote to be within the contemplation of the Statute. The conviction was, therefore, set aside. In my opinion it is not possible to distinguish the facts in the present case from those in *Mojey vs. Queen-Empress.* Assuming that the Appellant deceived Muttusamy and thereby induced him to attest the mortgage deed a thing he would not have done unless he had been deceived, did such act cause or was it likely to cause damage or harm to Muttusamy in body, mind, reputation or property? There was no proof of damage or harm to body or property. Can it be said that there was damage or harm to mind or reputation? So far as reputation is concerned Muttusamy took every step that a careful Notary would take to protect the interests of his clients. I do not think damage or harm to reputation have been established. The possibilities of damage or harm to mind or reputation were in my opinion too remote to be in the contemplation of the Ordinance. I would also refer to my decision in the case of *Christinahamy vs. Inspector of Police* (47 N.L.R. p. 382). This was a case in which the prosecution was based on the alleged damage to the reputation of a Magistrate by an act of representation on the part of the accused.

In coming to this conclusion I have not lost sight of the decision in the case of *R. V. Bastian & Others* (2 Balasingham's Reports p. 93). In this case the accused was charged with attempting to cheat a Notary by personation and it was held that the question whether the act would cause damage to the mind and reputation of the Notary was rightly left to the Jury. The case of *R. V. Bastian vs. Fernando* (15 N.L.R. at p. 109) in the following passage:—

"As regards the first count on the indictment, the count was the same as in *Rex vs. Bastian et al* (1902) 2 Bal. 93), and I there held it was a question for the Jury whether it was likely or possible that the Notary would be injured in mind or reputation. There is no evidence, however, given by the Notary here to prove that such a personation would affect his reputation, although I have very little doubt that it might have done so with the Registrar-General, if not with the respectable public, if the personation had succeeded and had been subsequently repudiated by the accused. I hesitate, to interfere, therefore, with the finding of the District Judge on that count."

In *Rex vs. Bastian* it would appear that the Notary affected gave evidence to prove that such a personation would affect his reputation. There is no evidence by Muttusamy to the effect that the act of the accused in this case would affect his reputation. The case of Bastian and Fernando was considered in The *King vs. Perera* (2 Balasingham's Notes of Cases p. 58) which was another case of personation. All these cases relate to cheating by personation and I can well understand that a Notary would suffer in mind and reputation if he had been deceived by such an act. In the present case, however, Muttusamy took every precaution and I am of opinion that the cases in question are not relevant when consideration is given to the act with which the accused is charged. I think I must follow *Mojey vs. Queen-Empress.*

The conviction is therefore set aside.

Conviction set aside.

Proctors: *V. Samarasekere* for the appellant.

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IN THE COURT OF CRIMINAL APPEAL

Present: Howard, C.J. (President), Keuneman, J. and Jayetileke, J.

REX vs. PERERA

Appeal No. 4 *of* 1946—*S.C.* 18/*M.C. Chilaw* 25873
Decided on: 11th February, 1946.

Court of Criminal Appeal—Indictment for murder—Counsel assigned for defence—Absence of retained counsel at trial—Failure to give adequate explanation of such counsel's absence—Trial ordered to be proceeded with—Defence conducted by assigned counsel—Conviction—Validity—Miscarriage of Justice.

The accused was indicted with murder and counsel was assigned for his defence. When the case was taken up for trial counsel said to have been retained by the accused was absent presumably because the trial date had been advanced and no good cause was shown why retained counsel, if any, was absent. The trial proceeded, assigned counsel representing the accused, who was convicted of culpable homicide not amounting to murder.

Held : That in the circumstances, it could not be said that the accused did not have a fair and proper trial.

Cases referred to : *Galos Hirad & Another vs. Rex* (28 C.L.W. 97).
Rex vs. Woodward (60 T.L.R. 114).

A. H. C. de Silva, with *Ananda Pereira*, for appellant.
E. H. T. Gunasekera, C.C., for the Crown.

Howard, C.J.

The Appellant in this case, charged with the offence of murder, was found guilty by a majority verdict of six to one of the offence of culpable homicide not amounting to murder. The main ground of appeal is that the appellant has not received a fair trial by reason of the fact that the date of trial of the case was advanced and his Counsel was not able to be present. The case was taken up for trial by the learned Judge on the 9th November, 1945. The record on page 1 is as follows :—

> " When the case is taken up Mr. Raja, assigned Counsel for the accused, intimates to Court that the accused has informed him that he has retained Counsel and since the case was originally fixed for hearing on Monday, the 12th instant, but has been advanced for today he has not been able to inform his Counsel of the change in dates and consequently his Counsel is not present.
>
> " The Court informs Counsel that since he is there to watch the interests of the accused the case must go on.
>
> " The accused pleads not guilty to the charge, and adds that his Counsel has not been able to be present today in view of the fact that this case has been advanced and he has not been able to inform his Counsel of the change in dates."

Mr. Raja, assigned Counsel, appeared for the appellant on the 9th November and on the 12th and 13th November. On the latter day the Jury gave their verdict. It does not appear from the record that the name of the Counsel, who the appellant anticipated would appear and conduct his defence, was disclosed to the Court. The case was originally fixed for trial on the 12th November, but Counsel did not appear before the Court on that day or on the 13th to carry on with the conduct of the defence and explain to the Court that he had been briefed and for some good cause had been unable to appear when the trial commenced on the 9th November. Nor has any statement from Counsel or assigned Counsel been placed before this Court explaining these matters. In spite of the lack of material put before us, Counsel for the appellant asks us to say that, because the appellant anticipated that this particular Counsel would appear and conduct his defence and did not do so, there has been such a miscarriage of justice as to invalidate the trial. There is no evidence before the Court that Counsel had been briefed. Nor is there any explanation as to why Counsel if briefed could not appear on the 9th. Nor even assuming that he was unable to appear on the 9th why he did not appear on the 12th, the day on which the case had originally been set down for trial. No authority for the setting aside of the verdict in such circumstances has been brought to our notice. In *Galos Hirad & Another vs. Rex* (28 C.L.W. 97) the appellants were convicted in British Somaliland of the offence of murder and in accordance with the provisions of section 3 (1) of the Poor Persons' Defence Ordinance, 1939, were assigned a Counsel permanently practising at Aden and the only person enrolled to practice in British Somaliland. The

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hearing of the appeal was fixed for 22nd June, 1942, and the proper authorities had been instructed to arrange for a passage for Counsel. But owing to shipping difficulties, they failed to obtain a passage which would enable him to reach Hargeisa, the place of hearing of the appeal, on or before the date of hearing. On the 22nd June, 1942, the Appeal Court Judge proceeded with the hearing without making any inquiry with regard to the absence of Counsel or as to the date when he might be expected to arrive. He heard short statements by the appellants and dismissed the appeals. It was held by the Privy Council as follows :—

"(i) That the provisions of a statute as regards the right of a convicted person are not of a merely directory character.

(ii.) That the necessity for an assignment of counsel for the purpose of conducting an appeal involves the necessity of seeing that it will be possible for the counsel to be present at the hearing.

(iii.) That the failure to grant an adjournment of the hearing to enable counsel to be heard has resulted in the appeal not being effectively heard."

The facts in *Galos Hirad vs. Rex* do not bear comparison with those in the present case. In giving the judgment of the Court in *Galos Hirad vs. Rex* Lord Maugham said the appellants would probably be illiterate and therefore completely unable to make any criticism on the written judgment even if they could read it. The appeal was heard without the appellants having the assistance of any Counsel. In the present case Mr. Raja who had been assigned appeared for the appellant. In *Galos Hirad vs. Rex* it was manifest to Their Lordships of the Privy Council that Counsel assigned for the appellants was unable to reach the Court in time to conduct the appeal without any default on his part. In the present case there is nothing before the Court to make it clear that Counsel had been briefed and if briefed why he could not appear if not on the 9th at any rate on the 12th and 13th. We are therefore of opinion that the principles formulated in the Privy Council case have no application to the facts of the present case. The case of *Rex vs. Woodward* (60 T.L.R. 114) was also brought to our notice. In that case an accused person who had been assigned Counsel under the Poor Prisoners' Defence Act 1939 claimed at the beginning of the case the right to conduct his own defence. The Court of Criminal Appeal held that he was entitled to do so and quashed the conviction. We do not, for the reasons I have given, consider that the absence of the particular Counsel, appellant maintained was expected to appear, affords any valid ground for holding that the appellant has not had a fair and proper trial.

We are, moreover, of opinion that the other grounds of appeal are without substance. For the reasons I have given the appeal is dismissed.

Appeal dismissed.

Present: NAGALINGAM, A.J.

JAYA RAJAH vs. ABEYGUNAWARDENE, INSPECTOR OF POLICE

S.C. No. 1374—*M.C. Colombo South No.* 6231.

Argued on: 12th December, 1946.

Decided on: 17th December, 1946.

Motor Car Ordinance, section 85 (7)—*Obstruction to traffic—When can a person be said to be obstructing traffic.*

Held : (i.) That where it is shown that the driver of a motor car drove his vehicle along a highway keeping well to his left and after taking stock of the traffic on the road and satisfying himself that there was no other traffic which would be impeded by his taking a turn across the highway, crosses the highway at a moderate or even slow speed, he cannot be said to be obstructing traffic.

(ii.) That where a motorist crosses causing some slight obstruction to the other traffic, he could not be said to be guilty of obstructing traffic within the meaning of section 85 (7) of the Motor Car Ordinance.

F. A. Hayley, K.C., with *B. D. Gandevia*, for accused-appellant.

J. G. T. Weeraratne, C.C., for Attorney-General.

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NAGALINGAM, A.J.

The charge against the accused in this case is that he did drive a motor car from a highway into a place which is not a highway in such a manner as to obstruct other traffic on the highway in breach of section 85 (7) of the Motor Car Ordinance. He was found guilty and sentenced to pay a fine of Rs. 50 (Fifty).

The main ground that has been urged in appeal on his behalf is that an analysis of the evidence led on behalf of the prosecution reveals that the accused's version of how the accident which has given rise to this prosecution is entitled to prevail over the version given by either of the two prosecution witnesses who themselves speak to the circumstances attending the accident though in parts of their testimony they are in conflict with each other. Briefly the facts are that the accused was driving from the direction of Colombo towards Nugegoda along the High Level Road at about 1 o'clock on the afternoon on the day in question keeping well to his left and that as he approached the junction of Francis Place with the High Level Road he drove his car across the High Level Road to turn into Francis Place; while his car was yet on the High Level Road close to the junction of Francis Place, a naval truck driven from the direction of Nugegoda towards Colombo came and banged into the left side of the accused's car.

The case for the accused is that he is a frequent user of this part of the road, that he came along the High Level Road and before taking the turn he looked right ahead of him as far as he could, that is to say, up to the bend of the Road which is now proved to be about 85 feet from the junction of Francis Place according to the architect, Gonzal, and seeing no traffic he slowly drove across the centre of the road and got on to the right of the road and while his car was yet on the main road but almost close to the imaginary right hand edge of the road at the junction his attention was attracted by the noise by the naval truck getting into a skid at a distance of 55 feet away from him and as he looked he saw the truck come towards him on the skid and strike against his car. Admittedly, the road was wet after the rains.

The two witnesses for the prosecution are the driver of the naval truck, one Banda, and one Lt. Post who was seated by the driver. According to Lt. Post, the truck was driven from the direction of Nugegoda towards Colombo and as he came from the direction of Nugegoda towards the bend, that is to say, the bend 85 feet away from the junction of Francis Place, he noticed a lorry coming from the opposite direction, that is to say, the same direction as the one that was being taken by the accused. He further says that as he reached the bend he saw three private cars following the lorry and that the last of the three cars was on his side of the road, apparently turning into Francis Place.

If Lt. Post's evidence, which the learned Magistrate accepts, is to be acted upon, there can be little doubt that at a distance of 85 feet from the junction of Francis Place he had noticed the car of the accused turn and get on to its right side of the road. Two facts emerge very clearly from this evidence of Lt. Post. One is that the driver of his truck if he kept a proper look out must have seen from a distance of 85 feet the accused's car take the turn across the road and the second is that the accused had begun to take his turn into Francis Place while yet the truck was 85 feet away from the junction. The driver, however, says that he noticed the car only when he was five yards away from it but in view of Lt. Post's evidence that one could see for a distance of 35 yards from Francis Place towards the direction of Nugegoda and the more reliable evidence of the architect Gonzal that a distance of 85 feet only is visible from Francis Place, it is not possible to reconcile the driver's evidence that he noticed the accused's car only when he was five yards away from it.

It is probably well to set out here another major factor in regard to which there is conflict between Lt. Post and driver Banda. According to Lt. Post, when the brakes were applied by driver Banda the truck skidded into the first of the civilian cars and bounded off it into the car driven by the accused. The driver made no mention of a skid to the Police. At the trial, though the driver admitted that his truck was involved in a skid, he makes no mention of his truck skidding into and bouncing off another car before it banged into the accused car. Now, if one examines Post's evidence on this point, it is clear to see that the first car into which the truck skidded must have been some distance away from the accused's car for the lengths of the cars and the distances they were apart from each other must be taken into account; therefore when the truck skidded into that first car the brakes must have been applied not at a distance of five yards as the driver says from the accused's car but very much further away, and that is more in keeping with the accused's testimony that it was at a distance of something like 55 feet. That the accused drove his car at a moderate speed is testified to by Post himself. Banda, on the other hand, says he drove his truck at about 20 to

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25 miles an hour and the evidence shows that from the bend already referred to, to the junction of Francis Place the road descends steeply and the truck would, therefore, have had a tendency to gain speed. One can then very well understand how the application of brakes on the vehicle that was driven at a fairly fast speed would create conditions favourable to a skid.

The question for decision is whether where the driver of a motor car sees no vehicle ahead of him for a distance of 85 feet and turns carefully from a highway into a road which is not a highway he is guilty of obstructing traffic. The term "Obstructing traffic" must necessarily be a relative term having regard to the conditions of the traffic on the road at any specified point of time. When a motorist attempts to get from one side of the road to the other he must, where the road carries a large volume of traffic, necessarily cause obstruction to other traffic to some extent, unless, of course he crosses the road at a spot on either side of which there is no bend for a distance and at a moment of time when there is no traffic to be seen during the whole of the time taken by him in crossing from one side of the road to the other. I do not think that where a motorist crosses the road causing some slight obstruction to the other traffic he could be said to be guilty of obstructing traffic within the meaning of section 85 (7) of the Motor Car Ordinance. In fact the Legislature has foreseen the difficulties that would otherwise arise and in section 86 provides that notwithstanding anything contained in section 85, it shall be the duty of the driver of every motor car on a highway to take such action as may be necessary to avoid any accident. It would be advantageous also to note that the term "obstructing traffic" is defined in the Ordinance itself in section 176 thereof as follows :- "Obstructing traffic includes any wilful act or unreasonable use of a highway which is likely to cause any risk of accident or damage to traffic on the highway or to impede the free movement of traffic in any manner required or permitted by law on the highway." If attention is directed to this definition having regard to the facts of this case it would be seen that unless it could be established that the accused used the highway unreasonably and that he was likely thereby to cause risk of accident or damage to traffic on the highway he could not be said to have obstructed traffic. I think where it is shown as in this case that the driver of a motor car drove his vehicle along a highway keeping well to his left and after taking stock of the traffic on the road to a distance of 85 feet and satisfying himself that there was no other traffic which would be impeded by his taking a turn across the highway crosses the highway at a moderate or even slow speed, he cannot be said to be obstructing traffic, for on any other reasoning he could never cross the road.

The accident in this case must be attributed, as both Lt. Post and driver Banda say, to the fact that the truck skidded, for both the witnesses are agreed that the accident could otherwise have been avoided. Again, in fact, it is not the case for the prosecution that there was not sufficient room for the truck to have negotiated in safety the car of the accused though the learned Magistrate has taken the view that owing to the presence of other traffic on the road the naval truck could not have passed the vehicle of the accused. But this view of the Magistrate is opposed to the express testimony given as I said, by the driver and the witness Post. It is therefore plain on these facts that the accident in which the truck and the accused's car were involved was due not so much not to any lack or care on the part of the accused in driving his car from the highway into Francis Place but to the circumstances that at the speed at which the truck was driven on a road that was admittedly wet the application of brakes produced a skid to which alone the accident should be attributed.

In view of the conclusion reached by me I would allow the appeal and acquit the accused.

Appeal allowed.

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

UKKU BANDA & OTHERS vs. TIKIRIBANDA & OTHERS

S. C. No. 4/*D. C.* (*Inty.*)—*D. C. Kegalle No.* 3008.
Argued on: 28th October, 1946.
Decided on: 31st October, 1946.

Kandyan Law—Inheritance to acquired property—Married woman dying intestate and issueless.

Held : That on the death of a Kandyan married woman, intestate and issueless, leaving a brother and two sisters, her acquired property passed to the brother and sisters in equal shares.

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Cases referred to : *Dingiri Menika vs. Appuhamy* (6 N.L.R. 133).
Dullewe vs. Dullewe (5 Leader L.R. 39).
Menikhamy vs. Suddana (28 N.L.R. 266).

H. V. Perera, K.C. with *E. A. P. Wijeratne*, for 3rd and 4th defendants-appellants.

N. Nadarajah, K.C. and *N. E. Weerasooriya, K.C.* with *E. S. Amarasinghe*, for plaintiff-respondent.

KEUNEMAN, S.P.J.

The only matter argued in this appeal relates to a question of inheritance under the Kandyan law. K. M. Kirihamy Vel Vidhane, the original owner of the premises with which we are concerned, gifted the premises by P2 of 1872 to his wife Ukku Menika, his daughter Punchi Menika who was married in *binna*, and his son Appuhamy. Kirihamy had two other daughters, Dingiri Menika and Ran Menika, who were married in *diga* and dowried. Punchi Menika died issueless, and the matter for our decision is whether the one-third share which she obtained under deed P2 passed to her brother Appuhamy alone or to Appuhamy and the two sisters Dingiri Menika and Ran Menika. The District Judge decided that Appuhamy alone inherited this share, and the 3rd and 4th defendants appeal from that finding. Mr. Perera depends upon the following passage from Sawer's Digest of Kandyan Law at page 17—under Chapter 2 relating to succession to movable property :—

> " An unmarried daughter acquiring property and dying intestate, her property goes to her mother, failing the mother, to the father ; and failing the father, to her brothers and sisters of the whole blood—if there be but one such brother the whole goes to him, if there are several brothers they shall share equally ; failing brothers and sisters of the whole blood, to the brothers and sisters uterine of the half blood......"

(N.B.—We are not concerned with the further steps in the devolution of the property on failure of these heirs).

> " The assessors unanimously state that the mother is the heiress to the acquired property, of all kinds, of her children dying unmarried and without issue, and that the same is entirely at her disposal. But should she die intestate, the property would go to the brothers and sisters of the whole blood equally, and failing them to brothers and sisters of the half blood uterine.
>
> " The assessors are of opinion that land as well as moveable property, acquired by an unmarried woman dying intestate without issue, would follow the above rules of succession ; but *paraveny* property would go to the nearest male relations only on that side of the house from which she inherited."

I may add that we are not concerned with the Note in Sawer which reveals a difference of opinion among the Chiefs—for that difference relates to the later steps in the devolution of property with which we are not dealing ; that is, on the failure of the classes of heirs we have mentioned. In the present case there is no dispute that the property was the acquired property of Punchi Menika, and the problem is not complicated by any claim on behalf of her father or her mother or her husband, and we can act upon the footing that these persons had predeceased Punchi Menika.

Mr. Nadarajah for the respondent has stressed the fact that the passage cited expressly applies to an unmarried woman. But I do not think that a different order of succession applies in the case of the death of a married woman intestate and issueless, whether the woman was married in *binna* or *diga*, subject to any claim which may be available to the husband of the woman. No authority on the precise point we have to determine has been cited to us, but I think the passage can also be applied to the case of a married woman. The passage appears to apply to the case of succession to females.

Mr. Nadarajah also draws attention to the phrase " if there be but one such brother the whole goes to him, if there are several brothers they shall share equally " and argued that this is an indication that the brother or brothers are preferred to the sister or sisters. I do not think there is substance in this argument. The previous words " failing the father to the brothers and sisters of the whole blood " are clear words indicating that both brothers and sisters of the whole blood are to succeed, and no distinction is made between sisters married in *binna* and sisters married in *diga*.

The intention is made clearer by Sawer's Note at the end of the paragraph—" but Mullegama Dissawe.........are of opinion that brothers and sisters of the whole blood share equally their deceased sister's property...... The Chiefs now all concur in this opinion that the sexes should share equally up to paternal uncles and aunts." Then the following words are added—" Child dying intestate, acquired property goes—

1. to the mother
2. to the father
3. brothers and sisters of the whole blood."

It is also to be noticed that in the case of the mother acquiring property from the children and thereafter dying intestate, the acquired property

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goes to " the brothers and sisters of the whole blood equally." I do not think that the word " brother " excludes sister in the phrase mentioned by Mr. Nadarajah. The distinction drawn with regard to " *paraveny* property " also strengthens that view.

Our attention has been drawn to the fact that a different rule of succession applies to the case of a male dying intestate and issueless and leaving brothers and sisters. In that case it has been held that the brothers are to be preferred to the sisters: see *Dingiri Menika vs. Appuhamy* (6 N.L.R. 133), *Dullewe vs. Dullewe* (5 Leader L.R. 39), and *Menikhamy vs. Suddana* (28 N.L.R. 266) I may say that the point was decided, not without hesitation, and a sharp distinction was drawn between succession to a brother and succession to a sister. In fact the passage on which Mr. Perera depends was cited in opposition to the argument which was eventually maintained. I have examined the passage on which the decision in these cases was made (Sawer p. 13) Sawer first dealt with the rights of the father and the mother respectively in the property of " a person dying childless." The rule enunciated in this connection applied to both males and females. But the latter part of the passage related to the rights of brothers and sisters " " in their deceased brother's acquired property," and in this it is quite clear that Sawer was dealing with the case of a Kandyan man dying intestate and issueless. From the language used by Sawer in this respect it was inferred that where a man died leaving brothers and sisters, the brothers were to be preferred to the sisters whether married in *binna* or in *diga*. I do not think this passage in Sawer has any application to the present case.

The argument on behalf of the 3rd and 4th defendants must prevail, and I accordingly set aside the judgment appealed from. The shares to which the parties are entitled on this footing are not in dispute. I declare the parties entitled to the following shares :—

Plaintiff—8/18 shares
1st and 2nd defendants—1/18 share
3rd defendant—4/18 share
4th defendant—4/18 share
5th defendant—1/18 share.

The appellants are entitled to the costs of appeal against the plaintiff, but the plaintiff is entitled to half the costs of partition *pro-rata*. The order of the District Judge as regards the plantation and the house will stand. Interlocutory decree for partition will be entered accordingly.

CANAKERATNE, J.
I agree. *Appeal allowed.*

Present: KEUNEMAN, J. & JAYETILEKE, J.

DHAMMARATANA vs. ISTAVIRA

S. C. No. 390—*D. C. F. Matara No.* 16531.
Argued on : 14th, 15th and 23rd October, 1946.
Decided on : 25th October, 1946.

Buddhist Law—Temporary occupation of room in temple by pupil priest with permission of Viharadhipathy—Refusal to leave—Persistent assertion of right to remain—Does such conduct render pupil liable to be ejected from temple.

Where a Buddhist priest entered into temporary occupation of a room in the temple with the permission of his tutor, the Viharadhipathy, but later persisted in his occupation of the room and refused to leave it though requested

Held : That such Buddhist priest has by his conduct rendered himself liable to be ejected from the temple, premises.

Cases referred to : *Piyadassa vs. Devamitta* (23 N.L.R. 24).
Dhammajoti vs. Tikiri Banda (4 S.C.C. 121).

H. V. Perera, K.C. and *L. A. Rajapakse, K.C.* with *S. W. Jayasuriya*, for plaintiff-appellant.
N. Nadarajah, K.C. with *V. Wijetunge*, for defendant-respondent.

KEUNEMAN, S.P.J.

The plaintiff is the controlling Viharadhipathi of the Agrabodhi Vihare at Weligama. He alleged that the defendant who was his pupil had been disobedient and disrespectful to him, and further was in wrongful and forcible possession of the premises known as the *Poyage*. The plaintiff asked that the defendant be ejected

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from the premises of the temple. The defendant denied the allegations in the plaint. A number of issues were framed, and after trial the District Judge dismissed the plaintiff's action with costs.

Except for one matter which I shall presently mention the District Judge has not definitely held whether, the acts of disobedience and disrespect were actually done by the defendant. For instance, evidence was called by the plaintiff to show that the defendant on one occasion took a plate of rice and was about to dash it on the head of the plaintiff, and also other acts of disrespect were spoken to. All that the District Judge says on this part of the case is " The relationship between the plaintiff and the defendant had deteriorated; acts and counter-acts have been done but how, why and when this state of affairs started is not disclosed by the evidence." " This finding is not helpful and the District Judge would have been well advised to hold definitely what acts, if any, were done by the defendant and under what circumstances. It is fair, however, to mention that none of the ' counteracts ' are charged against the plaintiff personally.

As the case stands at present, however, we have no help from the District Judge to decide the degree of blame attaching to the defendant as regards these matters.

There is one matter, however, which is clear. The defendant, at first with the permission of the plaintiff, occupied the room in the temple known as the *Poyage*. This has been described as the confessional room of the priests. In this room at the season of ' Wass ' the priests perform a *Poya Kerima* " ceremony—which is a sort of mutual confession. There can be little doubt that thereafter the defendant claimed a right of exclusive occupation of that room, with the result that the *Poya-Kerima* ceremony could not be held. The defendant, though often requested so to do, refused to leave the *Poyage* and kept the key of the *Poyage* in his possession. Even at the trial he stated that he was not prepared to leave the *Poyage*, and maintained that the plaintiff asked him to leave the *Poyage* without a cause and gave instances of other priests who had occupied the *Poyage* before him.

There can be no doubt that the defendant is making an untenable claim, and in doing so is defying the authority of his tutor, the Viharadhipathi.

In *Piyadassa vs. Devamitta* (23 N.L.R. 24) a predecessor of the Maha Nayake or High Priest of the Malwatte Vihare had granted to the defendant in that dispute an informal document authorising him to put up a new building in the temple premises and to use such building as a permanent residence for himself and his pupils. The defendant put up the building at his own expense and after the death of his tutor claimed the right to continue in possession of that house. In this connection Sampayo, J. pointed out that the informal document was insufficient to create an interest in the property, and doubted whether in any event the High Priest had a right to create an interest which was to last beyond his own tenure of office ; and added—" The first defendant in the next place, falls back upon the general principle that property is common to the entire priesthood and that an individual priest cannot be ejected therefrom. The principle was stated by Cayley, C.J. in *Dhammajoti vs. Tikiri Banda* (4 S.C.C. 121) as follows :—A Buddhist priest cannot be ejected from a Buddhist vihara except for some personal cause irrespective of the rights of property." " There is no doubt about this Buddhist law...... This right of the priesthood, however, surely does not mean that an individual priest can select for himself a particular place in the vihare independently of the chief incumbent and against his wishes. I think that any persistent assertion and insistence on any such alleged right is a ' personal cause ' for which he may properly be asked to leave. Such conduct would amount to contumacy, and in the exercise of ecclesiastical disclipine and order the incumbent has, I think, sufficient authority even to eject the offending priest."

This applies with equal or greater force to the present case. It is true that the defendant entered the *Poyage* with the permission of the plaintiff, but it is clear that the permission applied only to a temporary occupation and that that defendant persists in his occupation of the *Poyage* and refuses to leave the room though requested so to do. In the words of Sampayo, J. the defendant has been guilty of " contumacy " and has rendered himself liable to be ejected from the temple premises. In this case however it is not necessary to go so far, and the plaintiff is not unwilling to take an order of ejectment of the defendant merely from the *Poyage*.

In all the circumstances, I set aside the judgment of the District Judge and enter judgment for the plaintiff, declaring him entitled to possession of the room known as the *Poyage*. The plaintiff will be put in possession of the said room and the defendant will be ejected therefrom. The plaintiff will be entitled to costs in the court below and in appeal.

JAYETILEKE, J. *Appeal allowed.*

I agree.

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Present: Howard, C.J., Keuneman, J., Wijeyewardene, J., Canekeratne, J. & Nagalingam, A.J.

MOHAMED THASSIM vs. THE CONTROLLER OF TEXTILES

Application for a Writ of Certiorari *against the Controller of Textiles* (167).
Argued on: 5th March, 1947.
Decided on: 27th March, 1947.

Certiorari—*Writ of, against Textile Controller—Cancellation of textile licences acting under Regulation* 62 *of the Defence (Control of Textiles) Regulations,* 1945—*Jurisdiction of Supreme Court to issue such writ—Courts Ordinance, section* 42—*Interpretation of words* " *or other person or tribunal* " *and according to law—Applicability of* ejusdem generis *rule and English Law.*

Held : (i.) That the Controller of Textiles, in making an order under Regulation 62 of the Defence (Control of Textiles) Regulations 1945, acts judicially, and is a " person or tribunal " within the meaning of section 42 of the Courts Ordinance.

(ii.) That the Supreme Court has jurisdiction to issue a mandate in the nature of a writ of *certiorari* on the Textile Controller to question the correctness of such order.

(iii.) That the " ejusdem generis " rule cannot be applied in the interpretation of the words " or other person or tribunal " in section 42 of the Courts Ordinance.

(iv.) That the words " according to law " in section 42 of the Courts Ordinance should be interpreted to mean according to English Law.

Per Howard, C.J.—" In my opinion it is clear that the Legislature intended that, although the general words follow particular words, the general words are to be construed generally. In this connection it must also be borne in mind that although the words ' District Court, Commissioner, Magistrate ' constitute a particular genus the various types of writ have no common factor or genus. One cannot issue the writ of *quo warranto* to a Court, whilst a writ of *certiorari* issues only to persons exercising judicial functions. A *mandamus* issues to those exercising administrative functions and not generally to Courts from whose decisions other remedies by way of appeal are provided."

Cases referred to : *Magnhild (S.S.) vs. McIntyre Bros. & Co.* (1920) 3 K.B. 321.
Larsen vs. Sylvester (1908) A.C. 295.
Dankoluwa Estates Coy., Ltd. vs. The Tea Controller (42 N.L.R. 197).
Wijesekera vs. Assistant Government Agent, Matara (44 N.L.R. p. 533).
De Silva vs. De Silva (21 C.L.W. 41).
Goonasingha vs. De Kretser (46 N.L.R. 107).
R. vs. Woodhouse (1906) 2 K.B. 507.
Liversidge vs. Sir John Anderson (1942) A.C. 206.

H. V. Perera, K.C. with *C. Suntharalingam* and *Anton Muttukumaru,* for the Petitioner.

H. H. Basnayake, K.C., Acting Attorney-General with *Walter Jayawardene, C.C.* and *H. Deheragoda, C.C.*, for the respondent.

Howard, C.J.

The question raised in this case has been referred under section 51 of the Courts Ordinance (Cap. 6) to a Bench of five Judges. It arises as a preliminary point out of an application for a mandate in the nature of a Writ of *Certiorari* against the Controller of Textiles. On the hearing of this application the Acting Attorney-General took the preliminary objection that the Supreme Court cannot grant the application as he contends that the Controller of Textiles is not " a person or a tribunal " within the meaning of section 42 of the Courts Ordinance when he exercises functions under Regulations 62 of the Regulations published in the Government Gazette No. 9388 of the 28th March, 1945. The Acting Attorney-General has raised the same contention before this Court. He maintains further that the jurisdiction of this Court is not so extensive as that of the English Courts.

In his petition the petitioner complains that the Controller of Textiles has acted without jurisdiction in making an order revoking all the licences in his hand. This order was made under Regulation 62 of the Defence (Control of Textiles) Regulations, 1945, which is worded as follows :—

> " Where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer, the Controller may cancel the textile licence or textile licences issued to him."

In view of the contention put forward by the Attorney-General we have given very careful consideration to the phraseology employed by

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the legislature in section 42 of the Courts Ordinance, the first paragraph of which is worded as follows :—

> " The Supreme Court or any Judge thereof, at Colombo or elsewhere, shall have full power and authority to inspect and examine the records of any court, and to grant and issue, according to law, mandates in the nature of writs of *mandamus, quo warranto, certiorari, procedendo*, and prohibition, against any District Judge, Commissioner, Magistrate, or other person or tribunal."

The remaining part of the section vests in the Supreme Court or a Judge thereof certain powers in regard to the inspection of records and the transfer of causes. The Attorney-General has in regard to the interpretation of this provision of the law made two points as follows :—

> (*a*) The words " according to law " must be interpreted as meaning " according to the law of Ceylon " and in view of such meaning no reference to the law of England is permissible ;
>
> (*b*) The words " or other person or tribunal " must be read as " ejusdem generis " with the words " District Judge, Commissioner, Magistrate."

With this interpretation the Attorney-General contends that the Mandates referred to in the section can only be issued to tribunals vested with similar procedure as and functioning in like manner to a District Judge, Commissioner, or Magistrate. The Attorney-General maintains that they must enjoy semi-judicial functions. The first point to consider is whether an *ejusdem generis* interpretation must be given to the words " or other person or tribunal." The doctrine of " *ejusdem generis* " was examined by McCardie J. in the case of *Magnhild* (*S.S.*) *vs. McIntyre Bros. & Co.* (1920) (3 K.B. 321). In his judgment the learned Judge cites some passages from Maxwell on the Interpretation of Statutes. I do not think I can do better than invite attention to certain extracts from the 7th edition. At pp. 284-285 the learned author says :—

> " But the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words. In other words, it is to be read as comprehending only things of the same kind as those designated by them, unless, of course, there be something to show that a wider sense was intended."

At pp. 288-289 he says :—

> " Of course, the restricted meaning which primarily attaches to the general word in such circumstances is rejected when there are adequate grounds to show that it has not been used in the limited order of ideas to which its predecessors belong. If it can be seen from a wider inspection of the scope of legislation that the general words, notwithstanding that they follow particular words, are nevertheless to be construed generally, effect must be given to the intention of the Legislature as gathered from the larger survey."

Again on p. 290 he says :—

> " The general principle in question applies only when the specific words are all of the same nature. Where they are of different genera the meaning of the general word remains unaffected by its connection with them."

McCardie, J. in his judgment, after citing the passages from Maxwell referred to the complexity of the rule. At p. 330 he cited the following passage from the judgment of Lord Loreburn, L.C., in *Larsen vs. Sylvester* (1908 (A.C. 295) :—

> " Those words follow certain particular specified hindrances which it is impossible to put into one and the same genus."

McCardie, J. on the same page states that the rule of *ejusdem generis* cannot be applied unless there be some broad test for the ascertainment of genus. So far as he could see the only test seemed to be whether the specified things which precede the general words can be placed under some common category. He then proceeds to examine the question as to whether in the case before him a genus could be found and on p. 332 says :—

> " Upon the best consideration I can give to this case, I come to the view that the *ejusdem generis* rule does not here apply. I cannot create a genus (whether scientific or otherwise) out of the specific words. I see no common or dominating feature of such words."

The Attorney-General in developing his line of argument has placed considerable reliance on the judgment of Soertsz, J. in *Dankoluwa Estates Coy., Ltd. vs. The Tea Controller* (42 N.L.R. 197). In that case the learned Judge held that an order made by the Tea Controller under section 15 (1) of the Tea Control Ordinance is one made by him in an administrative or ministerial capacity and the Tea Controller, not being under a duty to act judicially when he made the order, is not amenable to the writ of *certiorari*. The fact that the Tea Controller was not exercising any function of a judicial character was the basis of this decision. At p. 206-207 the learned Judge, however, stated as follows :—

> " Section 42 of the Courts and their Powers Ordinance which gives jurisdiction to the Supreme Court to issue mandates in the nature of writs of *mandamus*, *quo warranto*, *certiorari*, &c., expressly adopts the view expressed in these and other English cases, for it provides for the issue of these writs " against any District Judge, Commissioner, Magistrate or *other person or tribunal*." " Other person or tribunal," in this

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context must, in accordance with the *ejusdem generis* rule, be understood to mean person or tribunal under a duty to act judicially."

The question as to whether the *ejusdem generis* rule was to be applied in the interpretation of section 42 of the Courts Ordinance does not appear to have been argued and in any event the application of such doctrine in that case was merely an obiter dictum. Another case relied on by the Attorney-General is that of an application for a Writ of Prohibition, 18 *N.L.R.* 334. It was held in this case that the Supreme Court has no jurisdiction to issue a mandate in the nature of a Writ of Prohibition to a Court Martial. In this argument the Attorney-General argued that the words " other person or tribunal " must be construed to refer to a person *ejusdem generis* with a District Judge, Commissioner, etc. In his judgment holding that the mandate could not issue to a Court Martial, Wood Renton, C.J. did not uphold the contention of the Attorney-General that the *ejusdem generis* doctrine applied, but held that the proviso to section 4, (now section 3), of the Courts Ordinance and the provisions of section 46 (now section 42) viewed in their entirety excluded the idea that a Writ of Prohibition to a Court Martial could have been intended by the Legislature. It is true that De Sampayo, A.J. in his judgment did find that the *ejusdem generis* rule applied. The relevant passage is on page 339 and is worded as follows :—

" It is clear to my mind that it refers to persons and tribunals *ejusdem generis* with District Judges, Commissioners, and Magistrates, and that the Courts here contemplated are the Courts established in the Island (to use the words of section 5 of the former Ordinance and section 4 of the latter Ordinance) " for the ordinary administration of justice," and not Courts Martial, which exercise not an ordinary but an extraordinary jurisdiction under circumstances of paramount necessity of State. This is made more clear by the structure of the entire provision."

Although holding the *ejusdem generis* rule applied De Sampayo, A.J. emphasised the fact that Courts Martial do not exercise an ordinary jurisdiction but an extraordinary jurisdiction under circumstances of paramount necessity of State. Moreover, that it was inconceivable that, if such extraordinary Courts as Courts Martial were intended to be affected, they would not have been mentioned specifically by name. The judgments in the Court Martial and Tea Controller cases were considered by De Kretser, J. in *Wijesekera vs. Assistant Government Agent, Matara* (44 N.L.R. p. 553) and so it would appear by Wijeyewardena, J. in *De Silva vs. De Silva* (21 C.L.W. 41). In the second of these cases it was argued that the Court had no power to issue a mandate in the nature of a Writ of *Quo Warranto* against the respondent as he was not one of the persons mentioned in section 42 of the Courts Ordinance. The learned Judge was not prepared to assent to dicta in certain judgments " that the other person or tribunal " mentioned in the section referred to are intended to mean person or tribunal under a duty to act judicially. In the case against the Assistant Government Agent, Matara, De Kretser, J. doubted the correctness of the interpretation put on the word " other person " by Soertsz, J. To sum up the position, it would appear that the authority for this interpretation is an *obiter dictum* by Soertsz, J. and an expression of opinion by one of the Judges in the Court Martial case. On the other hand to hold that the doctrine of *ejusdem generis* applies will in my opinion render the first part of section 42 meaningless. The section as enacted in Ordinance No. 1 of 1889 did not specifically vest the Supreme Court with the power to issue Mandates in the nature of the writ of *quo warranto*. In the matter of the *election of a member for the Local Board of Jaffna* (1 *Appeal Court Reports* 128) it was held that the Supreme Court had no such power. This case was decided in 1907 and by Ordinance No. 4 of 1920 the law was amended by including in section 42 the words " quo warranto." This is a writ that does not issue to a person acting judicially, but is used to question the validity of elections. If the *ejusdem generis* rule applies and the writ can only issue to a tribunal functioning similarly to a District Court, Commissioner or Magistrate the writ can never issue and the Legislature must be assumed to have inserted in the law a provision having no operative effect. It is true that writs of *certiorari* only issue to persons exercising judicial or *quasi* judicial powers, but writs of *mandamus* issue to persons who are exercising administrative powers. They have been and are frequently issued in Ceylon. If, however, by the application of the *ejusdem generis* rule they can only issue to judicial officers then the practice followed over a number of years by the Courts in issuing such writs has no legal authority. In my opinion it is clear that the Legislature intended that, although the general words follow particular words, the general words are to be construed generally. In this connection it must also be borne in mind that although the words " District Court, Commissioner, Magistrate " constitute a particular genus the various types of writ have no common factor or genus. One cannot issue the writ of *quo warranto* to a Court, whilst a writ of *certiorari* issues only to persons exercising judicial functions. A *mandamus* issues to those

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exercising administrative functions and not generally to Courts from whose decisions other remedies by way of appeal are provided.

There now remains for consideration the interpretation of the words " according to law " which appear in section 42 of the Courts Ordinance. The Attorney-General contends that these words must be construed in a strictly limited sense to mean " according to Ceylon Law." Moreover, that although recourse to English Common Law and English decisions is not infrequent in the interpretation applied by the Ceylon Courts this provision being Statutory must be deemed to refer only to the law of Ceylon and with such an interpretation he maintains that the law as compared with English law limits the power of the Courts to issue mandates in the nature of the writs mentioned in the section. I cannot agree with this contention. The writs specified in the section are unknown to Roman Dutch and Ceylon law and without calling in aid English law the mandates could not issue and the Legislature must be deemed to have enacted a meaningless provision. The Courts of Ceylon have also held that the words " according to law " in section 42 directs the Courts to issue the writs according to English law, *vide* the following passage from the judgment of Creasy, C.J. reported at p. 125 of Grenier's Reports :—

" The writ of *certiorari* is one well-known to the English law, and it cannot be doubted that when this clause bids us issue these writs of *Mandamus*, *Certiorari*, *Procedendo* and Prohibition " according to law," it bids us to issue these writs according to English Law ; and it gives these writs validity according to English Law, the only law to which such writs were known. As to the power to issue those writs, we are in a position similar to that of the Court of Queen's Bench in England and of the Judges of that Court. By *Certiorari* the superior Court can (among other things) bring before it the proceedings of any inferior Court, can quash them if substantially wrong, and can order in its discretion what course shall be taken as to their subject matter."

Again, De Kretser, J. in his judgment in *Wijesekere vs. Assistant Government Agent, Matara* at p. 538 stated as follows :—

" It seems to me that section 42 is drafted compendiously, and was intended to give the fullest powers to this Court and not to limit its powers. The writs mentioned were writs known to the English law, and we have hitherto gone to that law for direction and guidance. The section seems, in the first part, to give this Court (1) authority to inspect and examine the records of any Court and (2) to grant and issue, according to law, mandates in the nature of writs of *mandamus*, *quo warranto*, *certiorari*, *procedendo* and prohibition. What did the Ordinance mean by the phrase " according to law ? " It must only mean, in the circumstances the English law ; that means that the writs would issue in the circumstances and under the conditions known to the English law. These would include the persons against whom the writs would issue."

In applying English Law in regard to mandates it would appear that the application of such law has never been challenged either in the Courts in Ceylon or by the Judicial Committee of the Privy Council. In this connection I would invite attention to the fact that in the appeal to the Privy Council in *Goonasingha vs. De Kretser* (46 N.L.R. 107) their Lordships' judgment proceeded on the assumption that English law was applicable.

Once again I would refer to the principle stated by Maxwell. I think the restricted meaning of " person or tribunal " must be rejected because there are adequate grounds to show that the words have not been used in the limited order of ideas to which their predecessors belong. A larger survey indicates the intention of the Legislature to which effect must be given. In this connection I have not been unmindful of the latter part of section 42 in regard to inspection of records and transfer of cases nor of the fact that De Sampayo, A.J. in the Court Martial case held that the section conferred, not separate powers, but one power to do several things, which are all mentioned *uno flatu* : namely to inspect records, issue mandates, and transfer cases. The powers conferred in the latter part of the section would not be operative in the case of the Textile Controller. But having regard to what must have been the intention of the Legislature as to the issue of mandates, the fact that the latter half of the section cannot be applied to various tribunals and persons must not in my opinion limit the operation of the first part of the provision. One other question requires consideration. In Robertson's book on Civil Proceedings by and against the Crown (1908) edition p. 127 a writ of *Certiorari* is stated to be the ordinary process by which the High Court brings up for examination the acts of bodies of inferior jurisdiction. Such bodies need not be such as are ordinarily considered to be Courts, nor need such acts be strictly judicial acts ; the only limitation is that such acts must not be purely ministerial acts. In this connection see *R. vs. Woodhouse* (1906) 2 K.B. 507.

Is, therefore, the Textile Controller when he uses his powers under Regulation 62 under any duty to act judicially or are his powers purely administrative ? The fact that he can only act when he has " reasonable grounds " indicates that he is acting judicially and not exercising merely administrative functions. It is true there is no appeal from his decision, nor are there

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provisions in regard to the keeping of records and the procedure to be followed. In spite of the absence of such provisions the duty to act judicially remains and having regard to the English law mandates in the nature of a writ of *certiorari* will lie. In my opinion the decision of the House of Lords in *Liversidge vs. Sir John Anderson* (1942) (A.C. 206) is not applicable. The following passage from the judgment of Lord Maugham appears at pp. 219-220 :—

> " My Lords, I think we should approach the construction of regulation 18B of the Defence (General) Regulations without any general presumption as to its meaning except the universal presumption, applicable to Orders in Council and other like instruments, that, if there is a reasonable doubt as to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention. My Lords, I am not disposed to deny that, in the absence of a context, the *prima facie* meaning of such a phrase as " if A. B. has reasonable cause to believe " a certain circumstance or thing, it should be construed as meaning " if there is in fact reasonable cause for believing " that thing and if A. B. believes it. But I am quite unable to take the view that the words can only have that meaning. It seems to me reasonably clear that, if the thing to be believed is something which is essentially one within the knowledge of A. B. or one for the exercise of his exclusive discretion, the words might well mean if A. B. acting on what he thinks is reasonable cause (and, of course, acting in good faith) believes the thing in question."

Lord Maugham subsequently held that the Court could not go into the question as to whether the Secretary of State had acted on " reasonable cause " because the latter can decline to disclose the information on which he has acted on the ground that to do so would be contrary to the public interest and that this privilege of the Crown cannot be disputed. No such plea could be put forward by the Textile Controller in this case.

For the reasons given the preliminary objection that this Court has no jurisdiction is overruled and the case is remitted for hearing by a single Judge. There will be no order as to costs which will abide the result of such hearing.

Preliminary objection over-ruled.

IN THE PRIVY COUNCIL

Present : LORD WRIGHT, LORD PORTER, LORD UTHWATT, SIR MADHAVAN NAIR, SIR JOHN BEAUMONT

THE MUNICIPAL COUNCIL OF COLOMBO vs. LETCHIMAN CHETTIAR

PRIVY COUNCIL APPEAL No. 25 *of* 1946.

FROM THE SUPREME COURT OF CEYLON AT COLOMBO

Decided on : 28th January, 1947.

Land Acquisition Ordinance, Sections 21 *and* 22—*Land situated between street lines defined under Housing and Town Improvement Ordinance—Compulsory acquisition—Market value—Meaning of and how to determine—Housing and Town Improvement Ordinance, Sections* 5, 7, 19 *and* 108—*Their effect.*

A strip of land situated between street lines defined by the Colombo Municipality under section 19 (4) of the Housing and Town Improvement Ordinance, and forming a part of a larger land was acquired under the Land Acquisition Ordinance. The value of the strip was in dispute.

Held : (i.) That the market value in Section 21 of the Land Acquisition Ordinance is the price which a willing vendor might be expected to obtain in the open market from a willing purchaser.

(ii.) That the fact that the owner of the strip acquired owns other lands in the neighbourhood is irrelevant for the purpose of ascertaining its market value.

(iii.) That such fact is the foundation for a claim for damage for severance and other injurious affection to his other property under heads (*b*) and (*c*) of section 21 of the Land Acquisition Ordinance.

(iv.) That the value of improvements standing on such land and any loss of income derived therefrom should be included in the market value.

(v.) That the cases of the *Government Agent, Western Province, vs. Archbishop* (16 N. L. R. 395) and the *Government Agent, Kandy, vs. Marikar Saibo* (6 S. C. D. 36) were wrongly decided.

(vi.) That the effect of sections 5 and 7 of the Housing and Town Improvements Ordinance is to ensure that no purchaser would buy land between street lines with a view to building upon it and not to render such land sterile and valueless.

(vii.) That such land can be used for any purpose which does not involve the erection of a building.

(viii.) That section 19 (1) of the Housing and Town Improvement Ordinance is concerned with the lines of what is physically a street and not with the land between street lines which is not a street.

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Disapproved :—*Government Agent, Western Province, vs. Archbishop* 16 N.L.R. 395.
Government Agent, Kandy, vs. Marikar Saibo 6 S.C.D. 36.

D. N. Pritt, K.C., with *L.M.D. de Silva, K.C.*, and *R.K. Handoo* for the appellants.
C. S. Rewcastle, K.C., with *J. Chinna Durai* and *T.B.W. Ramsay* for the respondent.

Delivered by SIR JOHN BEAUMONT.

This appeal from a decree dated 17th December, 1942, of the Supreme Court of the Island of Ceylon raises certain questions as to the construction and effect of the Land Acquisition Ordinance (Chapter 203 Legislative Enactments of Ceylon) and of the Housing and Town Improvement Ordinance (Chapter 199, Legislative Enactments of Ceylon) and it will be convenient at the outset to refer to the material provisions of these enactments.

By the Land Acquisition Ordinance it is provided, so far as material, by Section 3 that whenever it shall appear to the Governor that land in any locality is likely to be needed for any public purpose it shall be lawful for the Governor to direct the Surveyor-General to examine such land and report whether the same is fitted for such purpose. By Section 5 the Surveyor-General is required to make his report and upon receipt thereof the Governor may direct the Government Agent to take order for the acquisition of the land. By Section 6 the Government Agent is required to give notice that the Government proposes to take possession of the land, and that claims to compensation from all interested in such land may be made to him. By Section 7 the Government Agent is required on the day fixed for the enquiry to enquire summarily into the value of the land, and to determine the amount of compensation which, in his opinion, should be allowed therefor, and to tender such amount to the persons interested who have attended the enquiry. Section 8 provides that in determining the amount of compensation the Government Agent shall take into consideration the matters mentioned in Section 21, and shall not take into consideration any of the matters mentioned in Section 22. Section 11 provides, so far as material, that when the Government Agent proceeds to make enquiry as aforesaid if he is unable to agree with the persons interested as to the amount of compensation to be allowed he shall refer the matter to the determination of the District Court in manner thereinafter appearing. A later Section provides that the reference to the District Court shall be heard by the District Judge and two assessors and, if the assessors do not agree, the opinion of the Judge is to prevail. Section 21 is in these terms :—" In determining the amount of compensation to be awarded for land acquired under this Ordinance, the District Judge and assessors shall take into consideration :—

(*a*) firstly, the market value at the time of awarding compensation for such land ;

(*b*) secondly, the damage, if any, sustained by the person interested at the time of awarding compensation, by reason of severing such land from his own land ;

(*c*) thirdly, the damage, if any, sustained by the person interested at the time of awarding compensation, by reason of the acquisition injuriously affecting his other property, whether movable or immovable, in any other manner, or his earnings ; and

(*d*) fourthly, if in consequence of the acquisition he is compelled to change his residence, the reasonable expenses, if any, incidental to such change."

Section 22 directs that the Judge or Assessors shall not take into consideration the matters enumerated under seven heads. The only one which may be regarded as relevant to the present appeal is the sixth :—" Any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put ". Section 26 provides that if the Government Agent, or any person interested, is dissatisfied with any award made by the Court under the provisions of the Ordinance, he may appeal therefrom to the Supreme Court.

By the Housing and Town Improvements Ordinance it is provided, so far as material :—

Section 5 :—That no person shall erect or re-erect any building within the limits administered by a local authority except in accordance with plans, drawings and specifications approved in writing by the Chairman.

Section 7 :—That (1) The Chairman shall not—

(*a*) approve any plan or specification of any building ; or

(*b*) consent to any alteration in any building, which shall conflict, or cause such building to conflict, with the provisions of this or any other Ordinance.

Section 19, so far as material, is in these terms : " (1) Every building erected or re-erected after the commencement of this Ordinance within the administrative limits of any local authority—

(*a*) shall be erected either upon the line of an existing street not less than twenty feet in width or upon the line of a new street defined or approved by the Chairman or otherwise authorised under this or any other Ordinance ; and

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(*b*) shall either abut upon the street or have all the land between at least one face of such buildings and the street reserved for the use of the building.

* * * * *

(4) The local authority may by resolution from time to time, subject to the standards prescribed by rule 8 of the Schedule, define the lines by which any existing street or any part or continuation thereof shall be bounded, and the lines so defined shall be deemed to be the lines of the street.

Where application is made for sanction to re-erect any building which projects beyond any street line so defined or to re-erect any part thereof which so projects, the Chairman may require that such buildings shall be set back to the street line: "

The Section then contains certain provisions and definitions not relevant to this appeal.

Section 108 provides that " (1) No person shall erect any masonry boundary wall or gateway—

(*a*) within the street lines of any street for which street lines have been defined ; or

(*b*) in the case of any street for which no street lines have been defined, within twenty feet of the centre of the street, unless in such case he shall have received the written permission of the Chairman."

Rule 8 of the Schedule requires that every new street intended for carriage traffic which is defined or approved by a local authority or a Board of Improvement Commissioners shall be of not less than 40 feet in width.

At all material times the respondent was the trustee and, as such, the owner of a Hindu temple known as "Palaya Kadiresan Kovil" situate in Colombo. The temple premises comprised an area of a little over 11 acres, bounded on the west by a road called Bambalapitiya Road and on the south by Vajira Road which, before the present acquisition proceedings, was of a width varying from 8 to 12 feet.

On the 8th August, 1919, the appellants, by Resolution passed pursuant to Section 19 (4) of the Housing and Town Improvement Ordinance, defined street lines for Vajira Road designed to secure a uniform width of 40 feet for such road and, in the year 1942, the appellants compulsorily acquired, under the Land Acquisition Ordinance, the land of the respondent situate within such building lines. The piece of land so acquired (which is hereinafter referred to as " the acquired strip ") was a strip of land 1,140 feet long with a width of between 28 and 32 feet and embraced an area of 2 roods, 37.2 perches, that is, just under three-quarters of an acre. It formed part of the respondent's estate before referred to.

For the land so acquired the appellants, pursuant to the provisions of the Land Acquisition Ordinance, offered, or caused to be offered, to the respondent, compensation amounting to Rs. 14500 made up as follows :—

	Rs. c.
(*a*) Tenements on the acquired strip	2,700 00
(*b*) An old boundary wall thereon ...	6,840 00
(*c*) Trees thereon	1,008 50
(*d*) The land comprising the acquired strip (token value) ...	5 00
	10,553 50
plus :—	
(*e*) 10 per cent. of Rs. 10,553.50 for compulsory purchase ...	1,055 35
(*f*) Loss of income from certain stalls placed upon the land during festivals	2,800 00
	14,408 85
(*g*) Sum added by appellant for sake of round figures	91 15
Total ...	14,500 00

Of these figures, the only one which was challenged by the respondent was the sum of Rs. 5, stated to be the value of the land acquired.

The offer of the appellants was not accepted by the respondent and, accordingly, reference was made to the District Judge under the Ordinance. On such reference the respondent claimed a sum of over Rs. 56,000 based on the contention that the acquired strip should be valued as first-class building land, it being agreed that the proper value of land of that class in the locality was Rs. 50,000 per acre. In the alternative, the defendant claimed that if no building could in law be erected on the acquired strip the compensation should be approximately Rs. 21,900.

At the hearing the Assessors differed in their opinions and the District Judge accepted the value placed on the acquired strip by the appellants. Accordingly, on the 9th March, 1942, he passed a decree that the compensation payable to the present respondent in respect of the portion of land already acquired by the present appellants and for the building,, trees, boundary wall, and loss of income from stalls was Rs. 14,500 which included 10 per cent. for compulsory purchase. The respondent was ordered to pay the costs of the appellants.

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From this decision the respondent appealed to the Supreme Court and the appeal was heard by the Chief Justice, Soertsz and Keuneman JJ.

Mr. Justice Soertsz was of opinion that the enclosing of the acquired strip between street lines did not have the effect of preventing it from being used and valued as building land, and he was impressed with what he considered to be the injustice involved in a contrary view. "It is contended ", he said, " that the effect, in law, of the laying down of this street line, was to make it impossible for a building or any part of a building to be erected on the land within that line, and that consequently, that piece of land ceased to have any market value at all, and had to lie sterile till such time as the Council should think fit to take it over as a gift or release it from this deadly incubus ". Applying the principle which had been laid down by the Supreme Court in the case of *the Government Agent, Western Province vs. Archbishop* (16 New Law Reports, 395), that, in a case in which a small strip of land of little intrinsic value, forming part of a larger estate of the owner, was acquired, the proper method of valuing it was to ascertain the market value of the entire estate and to assign to the land acquired a proper proportion of that value, he valued the whole estate of the respondent at the rate of Rs. 50,000 an acre, assigned to the acquired strip a part of the total value proportionate to its acreage, and, after making certain deductions which he thought reasonable, assessed the compensation payable to the respondent at Rs. 28,242.

The Chief Justice agreed with Mr. Justice Soertsz and, in a short judgment based his opinion on the principle followed by the Court in *Government Agent, Western Province vs. Archbishop*, and in an earlier case to the same effect *Government Agent, Kandy vs. Marikar Saibo* of which a short note appears in 6 Supreme Court Digest at page 36.

Mr. Justice Keuneman took a different view. He thought that the enclosing of the acquired strip within building lines had the effect of preventing it from being built upon and that it could not therefore be valued as building land. He did not dispute the principle laid down in *Government Agent, Western Province vs. Archbishop*, but thought that the principle could not be applied in the present case since the acquired strip had a legal restriction placed upon it in relation to building which did not apply to the rest of the land. He expressly stated that it would not be correct to value the strip as a separate entity since, on account of its shape and size, it might be of no value to a prospective purchaser. He considered, however, that the evidence which had been called for the respondent showed that a possible development of the respondent's estate would be by building houses upon it, the gardens or yards of which might include the acquired strip, and that the compulsory acquisition of such strip would deprive the respondent of this advantage. On this basis he awarded compensation amounting to Rs. 19,360.

In the result the Supreme Court passed a decree setting aside the Order of the District Court and entering judgment for the present respondent in the sum of Rs. 28,242. It was ordered that the present appellants pay to the present respondent his taxed costs of the appeal, and also one-third of his taxed costs in the District Court. From this decree the present appeal is brought.

In their Lordships' opinion the cases of *Government Agent, Western Province vs. Archbishop* and *Government Agent, Kandy vs. Marikar Saibo* were wrongly decided, and this has occasioned error throughout the proceedings in Ceylon. Section 21 of the Land Acquisition Ordinance requires the Government Agent and the Court to take into consideration first the market value of the land to be acquired at the time of awarding compensation. The market value is the price which a willing vendor might be expected to obtain in the open market from a willing purchaser. The owner of the land, who is notionally the vendor, cannot also be the purchaser, and the fact that he owns other land in the neighbourhood is irrelevant for the purpose of ascertaining the market value of the land to be acquired, though such fact is the foundation of a claim under heads (*b*) and (*c*) of Section 21, for damage for severance and other injurious affection to his other property by reason of the acquisition. The Supreme Court, in valuing the acquired strip as part of the rest of the land of the respondent which is not either actually or notionally in the market, have not ascertained the market value of the acquired strip ; they have attempted to ascertain the loss which the respondent has sustained by reason of the acquisition of the acquired strip. That method finds no warrant in the Ordinance.

Bearing in mind the terms of Section 21 of the Ordinance, it is clear that the offer by the appellants to the respondent, of Rs. 14,500 for the acquired strip, whilst it may have been justified in the result, was arrived at on a wrong basis. The value of the tenements, the wall, and the trees on the acquired strip, should have been included in the market value of such strip ; so also should the loss of income from stalls which could be placed on the land during festivals, since that is a matter which a purchaser would take into

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account if he were buying the strip. The respondent might have claimed compensation under Section 21 (*b*) for the cost of erecting a new boundary wall between his land and Vajira Road, but he did not do so. It would appear, however, from the evidence that the value placed by the appellants on the old boundary wall was really based on the cost of building a new wall.

In the District Court it was not open to the District Judge to vary the basis of the award except as claimed by the respondent and, as he rejected the respondent's claim, he had no alternative but to uphold the award.

Their Lordships are quite unable to agree with the reasoning or the conclusion of Mr. Justice Soertsz in the Supreme Court. They feel no doubt that the effect of the inclusion of the acquired strip between street lines was to prevent it from being dealt with as building land. It is true that the only express prohibition against building on land within street lines is that contained in Section 108 of the Housing and Town Improvement Ordinance, which deals only with boundary walls and gateways, but, in their Lordships' view, the effect of Section 5, which provides that no person shall erect any building within the limits administered by a local authority, except in accordance with plans approved in writing by the Chairman, and of Section 7, which prohibits the Chairman from approving any plan of any building which shall conflict with the provisions of the Ordinance, ensures that no purchaser would buy land between street lines with a view to building upon it. However, this consideration does not render the land sterile and valueless as Mr. Justice Soertsz thought. It can be used for any purpose which does not involve the erection of a building. In the case of the acquired strip, it is probable that its inclusion within street lines had little, if any, effect upon its market value since; from its size and shape, it was obviously unsuitable for development as a building site. Any claim to compensation based on loss of building value in the acquired strip would have to be made under heads (*b*) or (*c*) of Section 21 and based on evidence that the acquisition of the acquired strip has prejudiced the development of the other land of the respondent as a building estate.

Mr. Justice Keuneman, as already indicated, took a different view, and thought that the acquired strip could not be built upon. In effect, though not in terms, the basis upon which he assessed compensation was that of injurious affection to the other land of the respondent. This is a legitimate basis but in their Lordships' view, the damage assessed by the learned Judge has not been proved. A surveyor called by the respondent suggested that the respondent's land might be developed by building upon it small houses, with gardens or yards, which could embrace the acquired strip and that, in this way, the acquired strip could be made use of without being built upon, and so possessed a substantial value; and the learned Judge accepted this view. There was, however, no evidence, nor indeed any suggestion, that the respondent intended or had ever contemplated developing his land in this way. Nor was there any evidence that such development would be more advantageous than other methods of development in which buildings might be erected abutting direct on the widened Vajira Road. There was no evidence that the 11 acres bounded by the narrow Vajira Road which the respondent formerly possessed was any more valuable than the $10\frac{1}{4}$ acres bounded by a 40-foot road which the respondent will in future possess.

Their Lordships heard a long argument on behalf of the appellants as to the meaning and effect of Section 19 (1) of the Housing and Town Improvement Ordinance, the contention being that that sub-section by implication forbade building within the limits of street lines. In their Lordships' view that sub-section is concerned with the lines of what is physically a street, and not with land between street lines which is not a street. They think it unnecessary, therefore, to discuss that sub-section.

Both parties expressed their unwillingness to the remission of this case to the Authorities in Ceylon to start the proceedings *de novo* on the correct basis, and their Lordships think there would be no advantage in adopting such a course. It is probable that a fresh offer made by the appellants, founded on a correct basis, would not differ materially from the previous offer, and their Lordships can see nothing in the evidence to suggest that that offer was inadequate.

Their Lordships think that, in view of the course which the proceedings took in Ceylon, and of the fact that leave to appeal to their Lordships' Board was sought by the appellants in order to obtain a ruling as to the construction of the Ordinances involved, the fair course is to allow each party to bear his or their own costs throughout.

Their Lordships will, therefore, humbly advise His Majesty that this appeal be allowed, that the decree of the Supreme Court of Ceylon dated 17th December, 1942, be set aside and that the decree of the District Court dated 9th March, 1942, so far as it orders that the compensation payable to the respondent is Rs. 14,500, be restored. There will be no order as to costs throughout the proceedings.

Appeal allowed.

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Present : WIJEYEWARDENE, J.

MAZAHIM vs. THE CONTROLLER OF PRICES

S. C. No. 1302—*M. C. Colombo No.* 19887)

Argued on : 19th November, 1946.

Delivered on : 6th December, 1946.

Criminal law—Charge of contravening Price Order—Conviction after revocation of order—Validity of conviction—Interpretation Ordinance, Section 6 (3).

Where a person was charged with an offence committed while a Price Order made under the Control of Prices Ordinance was in force but was convicted after the revocation of such Order.

Held : That the conviction was in order in view of section 6 (3) of the Interpretation Ordinance.

Cases referred to :—*Perera vs. Johren* (1945) 46 New Law Reports 335.
Kay vs. Goodwin (1830) 6 Bingham's Reports 576.

M. M. Kumarakulasingham, for the accused-appellant.

J. G. T. Weeraratne, Crown Counsel, for the Crown.

WIJEYEWARDENE, J.

The accused was charged on July 30, 1946, with having sold 500 creamlaid envelopes for Rs. 10.50 on July 24, 1946, when, according to the Order published in the Government Gazette No. 9239 of November 19, 1944, the maximum retail price was Rs. 9. The Magistrate convicted the accused on September 6, 1946, and sentenced him to pay a fine of Rs. 400.

Mr. Kumarakulasingham contended that the conviction was wrong as the Order mentioned above was revoked on August 1, 1946, (*vide* Gazette No. 9589 of August 9, 1946) and cited *Perera vs. Johren* (1945) 46 New Law Reports 335 in support of his contention. I have examined the record in that case and I find that the facts there are clearly distinguishable from the facts in this case. The accused in *Perera vs. Johren* (supra) was charged for committing an offence on December 8, 1944, under a regulation published in Gazette No. 9166 of September 3, 1943. That regulation was repealed on May 26, 1944. This Court held that the conviction under the repealed regulation was illegal. In the present case however the accused sold the envelopes while the Order mentioned in the charge was in force.

My attention was drawn also to the following passage from the judgment of Tindal, C.J., in *Kay vs. Goodwin* (1830) 6 Bingham's Reports 576 :—

> " I take the effect of repealing a statute to be, to obliterate it as completely from the records of the Parliament as if it had never passed ; and, it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law."

The law as stated in the above passage has been modified in England by section 38 (2) of the Interpretation Act 1889 (*vide* Maxwell on Interpretation of Statutes, Eighth Edition, page 349). We have a corresponding provision in Ceylon in section 6 (3) of the Interpretation Ordinance which enacts :

> " Whenever any written law repeals either in whole or in part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected—
> (*a* ....
> (*b*) any offence committed, any right, liberty or penalty acquired or incurred under the repealed written law."

Now the Order fixing the maximum price of envelopes and the Order in Gazette No. 9589 revoking that Order was made by the Deputy Controller of Prices by virtue of the powers vested in him by section 3 of the Control of Prices Ordinance No. 39 of 1939, and would, therefore, be " written law " (*vide* Interpretation Ordinance, section 2 (v). Moreover, there is no " express provision " in the Order in Gazette No. 9589 as mentioned in 6 (3) (*b*) of the Interpretation Ordinance.

I may add also that the Order does not contain a proviso that it is to continue in force only for a certain specified time. For the reasons given by me I hold against the accused on the point of law argued before me.

I affirm the conviction but reduce the fine from Rs. 400 to Rs. 100. In default of payment of the fine the accused will undergo rigorous imprisonment for six weeks.

Conviction affirmed.

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Present : WIJEYEWARDENE, J.

VERNON RAJAPAKSA vs. THE TRIBUNAL OF APPEAL *et. al.*

In the Matter of an Application for a Mandate in the Nature of a Writ of Prohibition on the Tribunal of Appeal constituted under the provisions of Regulation 8 (2) *of the Defence (Compensation) Regulations* 1941. *Application No.* 505/1946.

Argued on : March 21, 24 & 25, 1947.
Decided on : 31st March, 1947.

Requisitioning of land—Claim for compensation—Claim referred to Tribunal under the Defence (Compensation) Regulations—Jurisdiction of Tribunal to determine compensation—Validity of Defence (Compensation) Regulations—Defence (Miscellaneous) Regulation 34.

The Defence (Compensation) Regulations, 1941, and Defence (Miscellaneous) Regulation 34 were, on the expiry on February 24, 1946, of the Emergency Powers (Defence) Acts, 1939 and 1940, continued in force by a Governor's Order under the Emergency Laws (Transitional Powers) (Colonies, etc.) Order in Council, 1946, subject, in the case of Defence (Miscellaneous) Regulation 34, to certain modifications. This regulation as modified discontinued the right to take possession of lands after February 24, 1946, but provided for the continuance of the retention of the possession of lands possession of which had already been taken and enabled the competent authority to use for certain specified purposes the lands, possession of which had been retained.

The petitioner's land was requisitioned on January 15, 1944, and a dispute as regards compensation was referred to a Tribunal under the Defence (Compensation) Regulations. The petitioner moved for a Writ of Prohibition on the Tribunal and urged—

(1) that the Tribunal had no jurisdiction to act as the Defence (Compensation) Regulations were *ultra vires* of the powers conferred on the Governor by section 1 of the Emergency Powers (Defence) Acts, 1939 and 1940 as adapted, modified and extended to Ceylon ; and

(2) that even if the Regulations were *intra vires*, the Tribunal had no jurisdiction to determine the compensation in respect of the possession of the land from February 24, 1946, as those Regulations governed the compensation payable in respect of the taking possession and retention of any land in the exercise of " emergency powers " as defined in Regulation 17, and that possession of the land in question was retained from February 24, 1946, not under the Regulations made under the Defence Acts but under a regulation brought into operation by a Governor's Order.

Held : (i) That the Defence (Compensation) Regulations were *intra vires* of the powers conferred on the Governor.
(ii) That the Tribunal had jurisdiction to award compensation in respect of the possession of the land from February 24, 1946.

Cases referred to :—*Newcastle Breweries, Limited, vs. The King* (1920) 1 King's Bench 854.
The Attorney-General vs. De Keyser's Royal Hotel, Limited (1920) Appeal Cases 508.
Liversidge vs. Sir John Anderson et. al. (1942) Appeal Cases 206.
Wijeyesekere vs. Festing (1919) Appeal Cases 646.
The Government Agent vs. Perera (1903) 7 New Law Reports 303).
Rex vs. Comptroller General of Patents, Ex Parte Beyer Products, Limited (1941, 2 King's Bench 306.)

H. V. Perera, K.C., with *D. W. Fernando*, for the petitioner.
H. H. Basnayake, K.C., *Acting Attorney-General*, with *Walter Jayewardene*, *Crown Counsel*, and *H. Deheregoda*, *Acting Crown Counsel*, for the fourth respondent.

WIJEYEWARDENE, J.

This is an application for a Mandate in the nature of a Writ of Prohibition against a Tribunal, consisting of the first, second and third respondents, appointed under Regulation 8 (2) of the Defence (Compensation) Regulations, 1941 (hereinafter referred to as the Compensation Regulations). The fourth respondent is the competent authority under the Compensation Regulations. The petitioner states that the fourth respondent is made a party to these proceedings in order to give him notice of this application.

The petitioner is the owner of Goluwapokuna Estate of the extent of nearly 1,076 acres. The competent authority appointed under the Defence (Miscellaneous) Regulations (hereinafter referred to as the Miscellaneous Regulations) took possession of the estate under Regulation 34 of those Regulations on January 15, 1944. A portion of that estate, of the extent of about 270 acres, was derequisitioned on August 15, 1946.

The competent authority could not reach an agreement with the petitioner regarding the petitioner's claim for compensation in respect of the

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requisition of the estate, and the competent authority purporting to act under Regulation 7 of the Compensation Regulations referred the dispute to the Tribunal in question.

The petitioner urges the following reasons in support of his applications :—

(a) The Tribunal has no jurisdiction to act in this matter, as the Compensation Regulations are *ultra vires* of the powers conferred on the Governor by section 1 of the Emergency Powers (Defence) Acts, 1939 and 1940, (hereinafter referred to as the Defence Acts, 1939 and 1940) as adapted, modified and extended to Ceylon by the Emergency Powers (Colonial Defence) Order in Council 1939, (hereinafter referred to as the Order in Council, 1939,) and the Emergency Powers (Colonial Defence) (Amendment) Order in Council, 1940 (hereinafter referred to as the Order in Council, 1940).

(b) Even if the Compensation Regulations are *intra vires*, the Tribunal in question has no jurisdiction to determine any matter regarding compensation in respect of the possession of the estate from February 24, 1946, as that possession is under the Regulations " modified and continued in force " by an Order of the Governor made under the Emergency Laws (Transitional Powers) Colonies, etc.) Order in Council, 1946 (hereinafter referred to as the Order in Council, 1946).

The preamble of the Defence Act, 1939, describes it as an Act passed " to confer on His Majesty certain powers which it is expedient that His Majesty should be enabled to exercise in the present emergency ; and to make further provisions for purposes connected with the defence of the Realm ". Section 1 (1) of the Act reads :—

> " Subject to the provisions of this section, His Majesty may by Order in Council make such Regulations......... as appear to him to be necessary or expedient for securing the public safety, the defence of the Realm, the maintenance of public order and the efficient prosecution of the war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community."

Sub-section (2) enacts that " without prejudice to the generality of the powers conferred by the preceding sub-section " the Regulations may authorise " the taking possession or control, on behalf of His Majesty, of any property.........". Sub-section (5) places a certain restriction on the very wide powers given in the earlier sub-sections by excluding any Regulations dealing with conscription or extending the powers of Courts Martial. Section 8 of the Act requires every Order in Council containing Regulations to be laid before Parliament and provides that within twenty-eight days of such an Order being laid before it, the Parliament may annul the Order by a resolution of the House.

Acting under section 4 (1) of the Defence Act, 1939, His Majesty in Council made the Order in Council, 1939, extending to this Island some of of the provisions of the Act including section 1 but excluding section 8 and some other sections, subject to the adaptations and modifications in the First Schedule of the Order.

The Defence Act, 1940, was passed partly for removing some of the restrictions created by sub-section 5 of section 1 of the Defence Act, 1939. That provision of the Act of 1940 was extended to Ceylon by the Order in Council, 1940.

It will thus be seen that the power of the Governor to make Regulations for Ceylon under the Orders in Council, 1939 and 1940, was, so far as it is relevant to this application, same as the power of His Majesty to make Regulations for the Realm under the Defence Acts, 1939 and 1940, subject, however, to the difference that while a Regulation made by His Majesty could be annulled by a resolution of the Parliament, a Regulation made by the Governor was not liable to be annulled by a resolution of the State Council.

The Miscellaneous Regulations and the Compensation Regulations were made by the Governor by virtue of the powers vested in him by the Orders in Council, 1939 and 1940.

Dealing with the first point of his argument the petitioner's Counsel contended that it was open to this Court to investigate whether the purpose, for which the Compensation Regulations were made, was any of the purposes referred to in section 1 of the Defence Acts, 1939 and 1940. He was prepared to concede that once that identity of purpose was established, it was not within the power of this Court to make the further investigation whether the Compensation Regulations were reasonably necessary or expedient for that purpose. He contended that, while a Regulation providing for the competent authority taking possession of the property of a subject was warranted by section 1 of the Defence Acts, it could not be said that it was necessary or expedient for any of the purposes set out in that section that the subject should be deprived of his right to make his claim for compensation in ordinary Civil Courts, especially after the cessation of hostilities. In support of his argument, he referred to certain passages in *Newcastle Breweries, Limited vs. The King* (1920), 1 King's Bench 854 and *The Attorney-General vs. De Keyser's Royal Hotel, Limited* (1920)

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Appeal Cases 508. In the former case Salter, J., who was considering the validity of Regulation 2B of the Defence of the Realm Regulations made under section 1 of the Defence of the Realm Consolidation Act, 1914, said :—

" I do not think that a Regulation which takes away the subject's right to a judicial decision, or transfers the adjudication of his claim, without his consent, from a Court of law to named arbitrators, could fairly be held to be a Regulation for securing the public safety and the defence of the Realm, or a Regulation designed to prevent the successful prosecution of the war being endangered, within the meaning of these words in the Defence of the Realm Consolidation Act, 1914."

In *The Attorney-General vs. De Keyser's Royal Hotel, Limited* (supra) the House of Lords considered the right of a person to claim compensation *ex lege* in respect of a property which was found to have been requisitioned under the Defence of the Realm Consolidation Act, 1914. In that case Lord Dunedin said :—

" It is clear that under these sub-sections (*i.e.* sub-sections 1 and 2 of section 1 of the Defence of the Realm Consolidation Act, 1914) the taking possession of De Keyser's Hotel was warranted, but there was no necessity for the public safety or the defence of the Realm that payment should not be made."

These passages have to be construed with reference to the Acts and Regulations discussed in those cases. Both these cases dealt with Regulations made under the Defence of the Realm Consolidation Act, 1914, and the Courts were considering the scope of that Act in the light of some previous Acts which were in force and were connected with the matters arising in those cases. The language of section 1 of the Defence of the Realm Consolidation Act of 1914 differs from the language of section 1 of the Defence Act, 1939. The power given by the former Act to His Majesty in Council was merely the power " to issue Regulations for securing the public safety and the defence of the Realm " and not the power as given by the latter Act " to make such Regulations.........*as appear to him* to be necessary or expedient for securing the public safety.........". These cases do not, therefore, afford much help in construing the scope of section 1 of the Defence Act, 1939.

If the contention of the petitioner's Counsel with regard to the Governor's powers is sound it must be equally sound with regard to the powers of His Majesty in Council to make Regulations under the Defence Act, 1939. The words in the Defence Act that have to be considered are :— " His Majesty may.........make such Regulations ....as appear to him to be necessary or expedient for securing the public safety, etc.". Do these words mean that it is sufficient for the validity of a Regulation if it should so appear to His Majesty, or do they mean that there should be in existence some circumstances which a Court of law would hold sufficient to make it appear to the Court that the Regulation is necessary or expedient for the specified purposes? If the contention of the petitioner's Counsel is correct, it will involve the substitution of the opinion of the Court for the view of His Majesty. I think the words show clearly that once it appears to His Majesty that a particular Regulation is necessary or expedient he has the power to make the Regulation and that power cannot be canvassed directly or indirectly in a Court of law. His Majesty is given the power to make a Regulation if it appears to him to be necessary for any of the specified purposes. The decision has to be taken by him. It was stated in *Liversidge vs. Sir John Anderson et al* (1942) Appeal Cases 206 in considering a Regulation made by the Home Secretary that, on a question of interpreting the scope of a power, it was obvious that a wide discretionary power would more readily be inferred to have been confided to one who had high authority and grave responsibility. That observation would apply with much greater force where the power is conferred by the Imperial Parliament on His Majesty. I think the words make it clear that it is beyond the competence of a Court of law to decide whether a Regulation should have been made by His Majesty. If that is the correct position with regard to a Regulation in England, that would equally be the position regarding a Regulation made in Ceylon by His Excellency the Governor acting under the Orders in Council, 1939 and 1940.

I would refer to *Wijeyesekere vs. Festing* (1919) Appeal Cases 646 where the Privy Council considered the powers of the Governor under sections 3 and 5 of the Land Acquisition Ordinance. Section 3 says that " whenever it shall appear to the Governor that land in any locality is likely to be needed for any public purpose, it shall be lawful for the Governor to direct the Surveyor-General to examine.........such land and report............ whether the same is fitted for such purpose ". Section 5 says that " upon the receipt of such report it shall be lawful for the Governor to direct the Government Agent to take Order for the Acquisition of the land ". The Privy Council held that under these provisions the decision of the Governor was conclusive on the point that the land was wanted for a public purpose and that it was not open to the person whose land was affected to challenge the decision of the Governor upon this point (see also *The Government Agent vs. Perera* (1903) 7 New Law Reports 303).

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The Acting Attorney-General has invited my attention to the case of *Rex vs. Comptroller General of Patents, Ex Parte Beyer Products, Limited* (1941) 2 King's Bench 306, where the Court of Appeal considered the validity of a certain Regulation in England made under section 1 of the Defence Act, 1939. Dealing with an argument analogous to the argument submitted to me by the petitioner's Counsel, Scott, L.J., said :—

"The effect of the words 'as appear to him to be necessary or expedient' is to give to His Majesty in Council a complete discretion to decide what Regulations are necessary for the purposes named in the sub-section. That being so, it is not open to His Majesty's Courts to investigate the question whether or not the making of any particular Regulation was in fact necessary or expedient for the specified purposes. The principle on which delegated legislation must rest under our constitution is that legislative discretion which is left in plain language by Parliament is to be final and not subject to control by the Courts. In my view, the sub-section clearly conferred on His Majesty in Council that ultimate discretion."

In the course of his judgment Clauson, L.J., said :—

"The applicants have attacked Regulation 60E on the ground that His Majesty was not authorised by the Act of 1939 to make it. It was argued that the Regulation was not necessary or expedient for securing the public safety or any of the other purposes mentioned in the Act, but it appears to me, as a matter of construction of the Act to be quite clear that the criterion whether or not His Majesty has power to make a particular Regulation is not whether that Regulation is necessary or expedient for the purposes named, but whether it appears to His Majesty to be necessary or expedient for the purposes named to make the Regulation. As I construe the Act, Parliament has plainly placed it within the power of His Majesty to make any Regulation which appear to him to be necessary or expedient for the purposes named. Accordingly, the validity of Regulation 60E, or any other Regulation made under section 1, sub-section (1), of the Act, can be investigated only by inquiring whether or not His Majesty considered it necessary or expedient, for the purposes named, to make the Regulation and this application for prohibition can succeed only if it is within the power of this Court to investigate the action of His Majesty when he stated, as I conceive that His Majesty did in making the Order in Council, that this Regulation appeared to him to be necessary or expedient for the named purpose. In my view, this Court has no jurisdiction to investigate the reasons or the advice which moved His Majesty to reach the conclusion that it was necessary or expedient to make the Regulation. The legislature has left the matter to His Majesty and this Court has no control over it. I know of no authority which would justify the Court in questioning the decision which His Majesty must be taken to have stated that he has come to, namely, that this Regulation is necessary or expedient for the specified purposes. If His Majesty once reaches that conclusion with regard to a Regulation, that Regulation, when made, is the law of the land, subject to the provision in the Act that, if either House of Parliament takes a view differing from that on which His Majesty has acted, the order can be annulled. This being my view on the construction and effect of the Act, it is clearly wholly irrelevant to discuss whether Regulation 60E was in fact necessary or expedient for securing the public safety, or for any other purposes set out in the sub-section. It is a wholly irrelevant matter, and we have nothing to do with it. His Majesty formed the view that it was necessary or expedient, for the purposes mentioned, to make the Regulation, and, so far as this Court is concerned, there is an end of the matter."

I hold that the Compensation Regulations are *intra vires* of the powers conferred on the Governor by the Orders in Council, 1939 and 1940.

I shall proceed to consider the second point raised on behalf of the petitioner.

The Orders in Council, 1939 and 1940, were kept alive till February 24, 1946, by various Orders in Council made in pursuance of section 11 (1) of the Defence Act, 1939, as amended by the Defence Act, 1940, and also by an Act of 1945, extending the duration of the Defence Acts, 1939 and 1940, till February 24, 1946. By the Emergency Laws (Transitional Provisions) Act, 1946, the Parliament provided for the continuation in force of certain Defence Regulations until Dec, ember 31, 1947, subject, however, to the limitations, exceptions and modifications specified in Part 1 and Part 2 of the Schedule to the Act. In pursuance of the powers vested in him by section 18 (1) of that Act, His Majesty in Council passed the Order in Council, 1946, empowering the Governor to make an Order providing for the continuation in force until December 31, 1947, of any Defence Regulations having effect in the Island "which appear to the Governor to be required for purposes similar to those for which the Defence Regulations specified in the First Schedule to the Act of 1946 are required, or for purposes similar to the purposes of any Act of the Parliament of the United Kingdom passed on or after the first day of September, 1939, and in force at the date of the passing of the Act of 1946". The requisite Order (hereinafter referred to as the Governor's Order) was made by the Governor and published in the Government Gazette No. 9523 of February 22, 1946.

The argument of the petitioner's Counsel on the second point may be summarised as follows : The Compensation Regulations govern the Compensation payable "in respect of the taking possession of any land" in the exercise of emergency powers [(*vide* Regulation 2 (1)]. The "taking possession" contemplated by these Regulations is not merely the initial "taking possession" but also the retention of possession, and compensation in respect of the retention of possession is controlled by the Regulations only if the possession of the land is retained in the exercise of emergency powers [(*vide* Regulation 2 (1) (*a*)]. According to the definition given in Regulation 17 (omitting what is irrelevant to this inquiry) "Emergency

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Powers " means " any power conferred by Regulations made under the Emergency Powers (Defence) Acts, 1939 and 1940, as adapted, modified and extended to Ceylon by the Emergency Powers (Colonial Defence) Order in Council, 1939, and the Emergency Powers (Colonial Defence) (Amendment) Order in Council, 1940 ". The possession of Goluwapokuna Estate was retained from February 24, 1946, not under the Regulations made under the Defence Acts, 1939 and 1940, but under a Regulation brought into operation by the Governor's Order of February 22, 1946. The Tribunal in question, therefore, had no jurisdiction to assess the compensation due for the period commencing from February 24, 1946.

Now, among the Regulations which were " *continued in force* " by the Governor's Order were (*a*) the Miscellaneous Regulation 34 subject to the limitations and modifications as set out in the second column of Part 1 of the Schedule to the Order, and (*b*) the Compensation Regulations which were made for the Island in 1941 for purposes similar to the purposes of the Compensation Defence Act which was passed on September 1, 1939.

As it stood prior to February 24, 1946, the Miscellaneous Regulation 34 :—

(*a*) empowers by paragraph (1) a competent authority " to take possession of any land " .... " in the interests of public safety, etc." if it appears to him necessary or expedient to do so.

(*b*) authorises by paragraph (1A) a Police Officer to use such force as may be necessary in carrying out the directions of the competent authority with regard to the taking of possession ; and

(*c*) provides by paragraph (2) that " while any land is in possession of a competent authority by virtue of this Regulation, that land may be used by, or under the authority, of the competent authority for such purpose, and in such manner, as that authority thinks expedient in the interests of the public safety, etc."

The limitations and modifications set out in Part 1 of the Schedule to the Governor's Order of 1946 with regard to this Regulation are as follows :—

(*a*) In place of paragraph 1 the following paragraph is substituted :—" Where possession of any land had at any time prior to the twenty-fourth day of February, 1946, been taken by a competent authority by virtue of the powers conferred by any Defence Regulation in force at such time, and such land was immediately prior to that day in the possession of a competent authority by virtue of such powers, possession of such land may be continued after the aforesaid day if it appears to the authority that such continuance is necessary or expedient ".

(*b*) Paragraph 1A is omitted.

(*c*) Paragraph 2 is modified to read :—" while any land which is in the possession of a competent authority by virtue of this Regulation, the land may.........be used by, or under the authority of, the competent authority for the purposes of the public service or in any manner in which the land was being used immediately prior to the twenty-fourth day of February, 1946 ".

As they stood originally, paragraph (1) of the Regulation contemplated the initial taking of possession as well as the retention of possession by the competent authority and paragraph 2 indicated for what purposes the land could be used during the retention of possession. Under the Governor's Order of 1946 paragraph 1 of the Regulation discontinued the right to take possession of lands after February 24, 1946, but provided for the continuance of the retention of the possession of some lands whose possession had already been taken and paragraph 2 enabled the competent authority *inter alia* to use the lands, whose possession had been retained, for the purposes " specified in the enabling Act ".

It appears to me, therefore, that the Governor's Order " *continued in force* " that part of Regulation 34, as it stood before February 24, 1946, which enabled the competent authority to retain possession of Goluwapokuna Estate and to use it in the manner in which it was being used immediately prior to the twenty-fourth day of February 1946. The possession of the Goluwapokuna Estate from February 24, 1946, would thus be under the powers conferred by a Regulation made under the Defence Acts, 1939 and 1940, and would therefore, be a possession retained in the exercise of Emergency Powers as defined by Regulation 17 of the Compensation Regulations.

The rule *nisi* is discharged and the petitioner's application is refused with costs.

Rule discharged.

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Present: KEUNEMAN, J. & JAYETILEKE, J.

GUNASEKERA vs. ARTHUR DE ZOYSA

S. C. No. 46—*D. C.* (*Inty.*) *Balapitiya No.* 1339.
Argued and Decided on: 1st October, 1946.

Partition action—Party to interlocutory decree in representative capacity—Can he intervene thereafter to claim rights personally.

Held : That a party to proceedings and to the interlocutory decree in a partition action in a representative capacity is entitled to intervene up to the date of final decree as regards his personal rights.

Cyril E. S. Perera with *E. A. G. de Silva*, for the intervenient-appellant.
L. A. Rajapakse, K.C. with *D. D. Athulathmudali*, for the plaintiff-respondent.

KEUNEMAN, J.

I do not think the order of the District Judge disallowing the intervention of the intervenient can be supported. No doubt the intervenient was a party to the proceedings and to the interlocutory decree but he was a party in a representative capacity and not personally. He would accordingly be entitled to intervene up to the date of the final decree, subject to this, that the court would be entitled to put him on terms where the intervention was dubious or belated. However, in this case the appellant in his affidavit has given some explanation of his delay in putting forward the claim he now wishes to put forward.

In all the circumstances, I think the order of the District Judge must be set aside and the appellant will be entitled to intervene in this case and file statement if he will give security for costs in the sum of Rs. 200 to the satisfaction of the court within one month of the date of the record of this case reaching the District Court of Balapitiya. If he fails to give this security within the time required, his application for intervention will be refused.

There will be no costs of appeal or of the inquiry in the lower Court.

JAYETILEKE, J.
I agree.

Intervention allowed.

Present: NAGALINGAM, A.J.

MURUGESU OF PUTTUR vs. THAMBIPILLAI & ANOTHER

S. C. No. 223—*C. R. Jaffna No.* 16666.
Argued on: 19th November, 1946.
Decided on: 25th November, 1946.

Thesawalame—Action for pre-emption—Prior 247 *action in respect of same land against plaintiff and another—Failure of plaintiff to claim in reconvention right to pre-empt—Is the claim* resjudicata.

The plaintiff claimed the right to pre-empt certain lands which he alleged the 1st defendant transferred to the 2nd defendant in derogation of his (plaintiff's) rights.

The plaintiff and another, having obtained judgment against the 1st defendant in an earlier action, caused the Fiscal to seize the lands in question. The defendant preferred a claim which was dismissed, resulting in a 247 action against the plaintiff and his co-decree holder, who unsuccessfully contended, that the deed on which the claim was based was executed in fraud of creditors. The plaintiff did not pray by way of reconvention for a declaration of his right to pre-empt in that action.

Held : (i.) That the failure to counter-claim in the 247 action the right to pre-empt cannot be deemed to be a bar to the present action.

(ii.) That the cause of action that gives right to an action to pre-empt is entirely independent and totally unconnected with the cause of action giving rise to a 247 action.

N. Kumarasingham, for plaintiff-appellant.
No appearance for defendants-respondents.

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NAGALINGAM, A.J.

This is an action under the Thesawalame by the plaintiff, whom I shall refer to hereafter as the pre-emptor, to pre-empt certain lands described in the schedule to the plaint which he alleged had been transferred by the 1st defendant, the vendor, to the 2nd defendant, the vendee, in derogation of the plaintiff's right, and the only point for decision on appeal is whether the action is barred by certain proceedings had between the parties in an earlier case.

The history of and the facts relating to the earlier case are as follows. The pre-emptor and another by virtue of a decree entered in their favour against the vendor, the judgment debtor, had caused the Fiscal to seize the lands in question. Prior to the date of seizure the vendor had parted with his interests in favour of the vendee who preferred a claim which was dismissed. The vendee thereupon instituted a 247 action against the decree holders of whom, it will be remembered, the pre-emptor was one, and the judgment debtor, the vendor, for a declaration that the lands were not liable to be seized and sold under the decree in favour of the decree holders. The pre-emptor and his co-decree holder unsuccessfully contended that the deed by the vendor to the vendee was in fraud of creditors and by the decree in that action it was declared that the lands were not liable to be seized and sold under the decree.

It has been argued successfully before the learned Commissioner of Requests that the pre-emptor not having prayed by way of reconvention for a declaration of his right to pre-empt in the 247 action, when he filed his answer, and not having obtained an adjudication thereon at that stage, that decree operates as a *res adjudicata* and that the pre-emptor cannot in consequence maintain the present action. This view has been reached upon a consideration of the explanation to section 207 of the Civil Procedure Code. Under that explanation it is only "Every right of property.........or to relief of any kind which can be claimed, set up or put in issue between the parties to an action in the *cause of action for which the action is brought*" which becomes on the passing of the decree a *res adjudicata* whether it be actually so claimed, set up or put in issue or not in the action. Sufficient stress cannot be laid on the importance of the words I have underlined, for otherwise the effect of the explanation would be lost. What was the cause of action of the vendee in instituting the 247 action against the pre-emptor and others? It was that land admittedly belonging to him had been unlawfully seized by the Fiscal at the instance of the pre-emptor and his co-decree holders and the relief that the vendee claimed was a declaration that the lands were not liable to seizure and sale. The pre-emptor resisted the claim of the vendee on the ground that the deed had been executed in fraud of creditors and claimed a declaration that the deed be set aside and the lands be liable to seizure and sale.

The defence thus set up properly put in issue between the parties not only the right of the pre-emptor to have the dominium of the property revested in the judgment debtor but also the relief he claimed to have it declared that the properties were bound and executable under the decree, and both these matters had direct relation to the cause of action upon which the vendee came into Court. Can it be said that the right of pre-emption claimed by the pre-emptor was a right to property or relief of any kind in the remotest degree connected with the cause of action set out in the 247 action? Could the pre-emptor have claimed the right to pre-empt by way of reconvention? His right, if any, was not only against the vendee, the plaintiff in the 247 action, but in a larger measure against the judgment debtor, his co-defendant. Had the right to pre-empt been in fact claimed in the 247 action by the pre-emptor, could the matter have been adjudicated upon without the judgment debtor, the defendant, being afforded an opportunity of filing his defence to the claim thus set up? The issues that arise upon a claim to pre-empt are entirely foreign to those that arise in a 247 action. The cause of action that gives rise to an action to pre-empt is entirely independent and totally unconnected with the cause of action giving rise to a 247 action. In fact, a Court trying in the course of the same action issues in regard to a 247 action and an action for pre-emption would be trying two independent suits, and to say the least, it would be embarassing, not to say confusing.

I am therefore, of opinion that the right to pre-empt could not properly and legitimately have been interposed in the 247 action as it cannot be said to be either a right of property or relief which could have been claimed, set up or put in issue between the parties in the 247 action. It therefore follows that the failure to have counter-claimed in the 247 action the right to pre-empt cannot be deemed to be a bar. As this is the only basis upon which the plaintiff's action has been dismissed, I set aside the judgment of the lower Court and enter decree for the plaintiff in terms of his prayer to the plaint with costs both in this Court and the Court of Requests.

Appeal allowed.

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Present : WIJEYEWARDENE, J.

FERNANDO & ANOTHER *vs.* PERERA, INSPECTOR OF POLICE, NEGOMBO.

S. C. No. 65-66/1947—*M. C. Negombo No.* 48382.
Argued on : March 25th, 1947.
Decided on : April 1st, 1947.

Evidence of witness recorded before framing of charge—Not recorded de novo *after framing of charge—Can such evidence be acted upon in reaching a decision—Criminal Procedure Code, sections* 148, 150, 151, 151B, 187, 189 and 297—*Evidence Ordinance, section* 167.

Held: That evidence recorded in the presence of the accused before a charge is framed, and not recorded *de novo* after the framing of the charge, should not be used in reaching a decision against the accused.

Stanley de Zoysa, for the accused-appellant.
Boyd Jayasuriya, Crown Counsel, for the Crown.

WIJEYEWARDENE, J.

On May 23, 1946, the Police filed a report under sections 121 (2) and 131 of the Criminal Procedure Code and produced in custody the three accused—the two appellants and one Walter Fernando. The Magistrate remanded the accused till the following day when they were released on bail. On May 27 the Police instituted the present proceedings by filing a written report under section 148 (*b*) stating that the accused had committed offences under sections 314 and 315 of the Penal Code. The accused were present on that day. On June 17, Kaithan, the victim of the alleged assault, was examined in the presence of the accused who were represented by Counsel. Thereupon the Magistrate framed a charge under section 315 against the accused and they all pleaded not guilty.

The evidence given by Kaithan on June 17 was presumably recorded under section 187 (1) of the Code which enacts that " Where the accused is brought before the Court otherwise than on a summons or warrant the Magistrate shall after examination directed by section 151 (2)......frame a charge against the accused ". In recording this evidence the Magistrate followed the procedure laid down in section 150 (2) which is made applicable to an examination under section 151 (2) by section 151 B.

On September 6 Kaithan was recalled, and he was put a few questions in examination-in-chief and was then cross-examined by Counsel for the accused. Among other witnesses called for the prosecution on that date was Alice who gave definite evidence against the appellants. After hearing the evidence for the defence, the Magistrate convicted the appellants and acquitted Walter Fernando.

It is contended in appeal that the conviction is vitiated by the fact that on September 6 the Magistrate failed to record *de novo* the evidence of Kaithan given on June 17. It is urged that the trial in a case commences only after a charge is read and that the Magistrate has to follow then the procedure laid down in section 189 which reads :—

> " (1) When the Magistrate proceeds to try the accused he shall take in manner hereinafter provided all such evidence as may be produced for the prosecution or defence respectively."
>
> " (2) The accused shall be permitted to cross-examine all witnesses called for the prosecution and called or re-called by the Magistrate."

The section as cited above is section 189 of the Code of 1898 as amended by section 13 of Ordinance No. 13 of 1938. Before the amendment section 189 read :—

> " (1) When the Magistrate proceeds to try the accused he shall read over to him the evidence (if any) recorded under section 150 (corresponding to the new sections 151 (2) and 151B) and take in manner hereinafter provided all such further evidence as may be produced for the prosecution or defence respectively."
>
> " (2) The accused shall be permitted to cross-examine any person whose evidence has been recorded under section 150 and all witnesses called for the prosecution and called or recalled by the Magistrate."

The deliberate omission in the amended section 189 of any reference to evidence recorded under the new sections 151 (2) and 151 (B) supports the argument of the defence Counsel that the Magistrate should not have acted on the evidence of Kaithan given on June 17 in convicting the accused. It is, however, argued by Crown Counsel that the Magistrate could have so acted on that evidence in view of the provisions of section 297 which reads :—

> " Except as otherwise expressly provided all evidence taken at inquiries or trials under this Ordinance shall

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be taken in the presence of the accused or when his personal attendance is dispensed with in the presence of his pleader :

"Provided that if the evidence of any witness shall have been taken in the absence of the accused whose attendance has not been dispensed with, such evidence shall be read over to the accused in the presence of such witness and the accused shall have a full opportunity allowed him of cross-examining such witness thereon."

Clearly the proviso to section 297 does not apply to the present case as the evidence was taken in the presence of the accused. According to the context in which the words " except as expressly provided " occur, those words refer to circumstances where the Code provides for the taking of evidence in the absence of the accused. Thus we are left with that part of the section which says : " all evidence taken at the inquiries or trials under the Ordinance shall be taken in the presence of the accused.........pleader ". But the question still remains when should the Magistrate take such evidence in the presence of the accused so as to be able to act on that evidence for convicting the accused and not merely for the purpose of framing a charge. The answer to that question appears to me to be given in clear terms by the amended section 189 which contemplates evidence taken when the Magistrate proceeds to try the accused and omits all reference to any evidence taken earlier, thus departing from the provisions of the old section 189.

I would, therefore, hold that the Magistrate should not have used the evidence of Kaithan given on June 17, to reach a decision against the appellants. There is, however, the evidence of Alice which has been accepted by the Magistrate. That evidence justifies the conviction of the appellants. I see, therefore, no reason for reversing the finding of the Magistrate (*vide* section 167 of the Evidence Ordinance).

I dismiss the appeals.

Appeals dismissed.

Present : NAGALINGAM, A.J.

CADER MOHIDEEN vs. THE LANKA MATHA CO-OPERATIVE STORES.

S. C. No. 236—*C. R. Colombo No.* 1729.
Argued on : 20th March, 1947.
Decided on : 1st April, 1947.

Co-operative Societies Ordinance (*Cap.* 107)—*Section* 45—*Scope of section.*

Held : That a dispute between a society registered under the Co-operative Societies Ordinance and one of its members in regard to a transaction not resulting from membership is outside the scope of section 45 of the Ordinance.

S. J. Kadirgamar, for the plaintiff-appellant.
H. W. Jayawardena with *Shanmuganayagam*, for the defendant-respondent.

NAGALINGAM, A.J.

This appeal involves a short point of law and the question is whether a dispute between a society registered under the Co-operative Societies Ordinance Chap. 107 and one of its members in regard to a transaction not resulting from membership is one referable exclusively to the decision of the Registrar of Co-operative Societies and not triable by the ordinary Courts of law.

The facts shortly are : The plaintiff who was admittedly a member of the defendant society at the material dates was employed by it as checker and night watcher on a monthly salary of Rs 67·50 and the plaintiff alleging that his services had been wrongfully terminated instituted this action for recovery of arrears of salary and damages for wrongful dismissal.

Among other defences the defendant society put forward the plea that the Court of Requests had no jurisdiction to try the claim in view of the provisions of section 45 of the Ordinance. The learned Commissioner has upheld the plea and dismissed the plaintiff's action. It seems to have been conceded on behalf of the plaintiff at the trial that the action was in fact barred but on appeal the contrary has been maintained by the appellant's counsel. The respondent, however, endeavours to sustain the judgment of the Court of Requests by contending that one of the factors which would oust the jurisdiction of the Court is proof of the relationship of the plaintiff to the defendant society as a member. In other words his contention is that it is immaterial whether the dispute arises from the relationship of membership or not but that it is sufficient that the dispute

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is between a person who is clothed with the character of a member towards the society. If this were the intention of the Legislature, nothing would have been simpler than for the Enactment to have provided that a dispute between a person who is a member and the society should be referred to the Registrar for decision, but that is precisely what the Enactment does not say. Having regard to the scope and intention of the Legislature in enacting this provision it cannot be doubted that the object of this provision was to provide a speedy and expeditious disposal of a dispute between a member in his capacity as a member and the society by referring the dispute to a domestic tribunal. The construction contended for by the respondent's counsel would lead to the necessity of having to attribute to the Legislature an intention to regulate dealings not merely between members and the society but also between third parties and the society—an intention which it is difficult to conceive as ever having been in the mind of the Legislature. The true test whether a particular dispute falls within the ambit of this provision is to ascertain whether the dispute arises between the society and the member *qua* member. If the dispute is not between the member and the society in his capacity as member then that dispute is clearly outside the scope of the section.

It is manifest that the dispute between the plaintiff and the defendant does not arise from his relationship to the society as member. I would therefore hold that the dispute is one which is not compulsorily referable to the Registrar for decision but one that can properly be investigated by the Commissioner of Requests. The judgment of the learned Commissioner is set aside and the case is remitted to him for adjudication on the other questions that arise between the parties. The plaintiff will be entitled to the costs of appeal and of the trial had in the lower Court.

Appeal allowed.

Proctors : *R. Jeremiah* for plaintiff-appellant.
S. Sivasubramanium for defendant-respondent.

Present : NAGALINGAM, A.J.

CROOS *et al* vs. SELVADURAI, FOREST RANGER.

S. C. No. 101-110—*M. C. Chilaw* 30326, 30327 *and* 30878.
Argued on : 28th March, 1947.
Decided on : 1st April, 1947.

Forest Ordinance—Charge for offences under—Accused acquitted—Disposal of timber seized in connection with such offences.

Held : That on the acquittal of the accused of certain offences under the Forest Ordinance, timber seized in connection with the accusation should be delivered to them and that an order for the delivery of the timber to the Crown cannot be made.

Cases referred to : *Eyers vs. Muthukumaru et al* (1917, 4 C. W. R. 382).

A. H. C. de Silva, for the accused-appellants.
J. G. T. Weeraratne, Crown Counsel, for the Attorney-General.

NAGALINGAM, A.J.

The several appeals in these three cases deal with the same question of law and I shall consolidate them for the purpose of my judgment. The appeals are from the orders of the Magistrate of Chilaw directing that certain timber seized in the possession of the appellants should be delivered to the complainant. The appellants were charged with having committed offences under the Forest Ordinance and they were acquitted on points of law raised on their behalf. After the appealable period was over the appellants applied to the learned Magistrate for an order directing the delivery to them of timber which had been seized in connection with the accusation against them of having committed the offences of which they had been acquitted. The learned Magistrate made order refusing their application holding that the interests of justice demanded that the timber should be delivered to the complainant

On appeal it has been contended that the learned Magistrate had no jurisdiction to make the orders he did and the case of *Eyers vs. Muthukumaru et al* (1917, 4 C. W. R. 382) was cited in support. The judgment in this case was delivered by Wood Renton, C.J., who has exhaustively examined all the relevant sections and dealt with all the points that have been urged by learned

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Crown Counsel in his endeavour to uphold the order of the learned Magistrate. This case is a much stronger one than the present inasmuch as the accused there made admissions of having felled Crown timber and there was evidence to show that they were prepared to pay compensation to the Crown, but notwithstanding this very strong circumstance the learned Chief Justice held that on a true view of the relevant provisions of the Forest Ordinance and in view of the acquittal no order for delivery of property to the Crown could have been made. In regard to the cases before me, in one there is evidence of an express claim made by the accused to the timber seized and in the other two the utmost that can be said is that there is no evidence of an assertion of claim made by the accused in those cases although there is no admission by them that the timber seized belonged to the Crown.

Following the case cited I would allow the appeals and direct that the timber seized in each of these cases be delivered over to the respective accused persons.

Appeals allowed.

Proctors : *S. C. Shirley Corea* for the appellants.

Present : NAGALINGAM, A.J.

DINGIRI MAHATMAYA AND TWO OTHERS *vs.* KIRI BANDA.

S. C. No. 4—*C. R. Kegalle No.* 16771.
Argued on : 21st March, 1947.
Decided on : 1st April, 1947.

Kandyan Law—Inheritance—Rights of woman marrying in deega *after father's death.*

Held : That a woman who (prior to the Kandyan Law Amendment Ordinance 37 of 1938) married in *deega* after her father's death forfeited her rights to the paternal inheritance.

Cases referred to : *Meera Saibo vs. Punchi Rala* (13 N. L. R. 176).

C. V. Ranawake, for defendant-appellants.

NAGALINGAM, A.J.

The question that arises on this appeal is whether under Kandyan Law a daughter who marries in *deega* after her father's death forfeits her rights to share in the paternal inheritance.

The plaintiff instituted this action claiming the value of a one-fourth share of the paddy harvested from the field called Paragahamulakumbura on the basis that he is the owner of a ¼ share of the field. His title is derived from his deceased wife, Dingiri Menika. Admittedly the field belonged to Dingiri Menika's father who died leaving four children. According to the finding of the learned Commissioner Dingiri Menika married in *deega* after the death of the father. The learned Commissioner holds that as the marriage though in *deega* took place after the father's death, Dingiri Menika did not forfeit her rights to inheritance in the paternal estate.

The question in this case is not goverened by the Kandyan Law Amendment Ordinance, for Dingiri Menika married about twenty years ago and died about a year thereafter. The question of law involved was decided by a Bench of two Judges as early as 1910 after reviewing all the previous authorities and this decision has always been followed. It was explicitly laid down there that a woman who marries in *deega* after her father's death forfeits her rights to the paternal inheritance by reason of the marriage *Meera Saibo vs. Punchi Rala* (13 N. L. R. 176). The headnote is incorrect in that it sets out the contrary of the decision as what was decided by it. The Kandyan Law Amendment Ordinance, no doubt, softens the rigour of this principle so far as the claims of an unmarried daughter who survives her father to the paternal inheritance are concerned though the marriage be in *deega*, but the Ordinance, as stated earlier, has no application to the facts of the present case.

It, therefore, follows that Dingiri Menika did not inherit any share of the field. The plaintiff's claim, therefore, to a share in the field fails. In this view of the matter the plaintiff's action is dismissed with costs both of appeal and of the lower Court.

Appeal allowed.

Proctors : *J. H. Fernando* for the appellant.

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

GIRIHAGAMA vs. W. HATHURUSINGHE *et al.*

S. C. No. 13—*D. C.* (*Inty.*) *Kandy No.* 1965.
Argued and Decided on : 3rd October, 1946.

Civil Procedure Code, section 417—*Security for costs—Defendant residing out of jurisdiction.*

Held : That in exercising his discretion under section 417 of the Civil Procedure Code, the Judge must give reasons for his order.

Cyril E. S. Perera, with *T. B. Dissanayake,* for the plaintiff-appellant.
C. S. Barr Kumarakulasingham, for the 1st defendant-respondent.

KEUNEMAN, S.P.J.

In this case we may take it that the defendant did reside outside the jurisdiction of the District Court of Kandy, but the evidence tends to show that he was only just over the boundary. Under section 417 of the Civil Procedure Code the Judge has to exercise a discretion as to whether he should order the plaintiff to give security for costs. There is nothing whatever to show that the Judge has exercised a discretion. He has given no reason whatever for making the order except that he has mentioned the fact that the defendant lives outside the jurisdiction of the Court. In the circumstances the order of the District Judge cannot be supported. I allow the appeal and delete the order of the District Judge that the plaintiff should deposit Rs. 100 as security for costs. The appellant is entitled to the costs of this appeal.

Appeal allowed.

WIJEYEWARDENE, J.
I agree.

Present : NAGALINGAM, A.J.

JAINUDEEN MOHAMED SHERIFF & OTHERS vs. T. S. BONGSO, S. I. POLICE.

S. C. No. 122-125—*M. C. Trincomalie No.* 5547.
Argued on : 20th March, 1947.
Decided on : 1st April, 1947.

Penal Code, sections 203A and 183—*Offence under Purchase of Foodstuffs Regulations—Transporting rice without permit—Arrest without warrant of persons so transporting—Escape from custody—Can such escape be basis of a criminal charge.*

Held : That in the absence of a provision of law declaring that offences under Defence (Purchase of Foodstufis) Regulations are cognizable offences, the arrest of persons accused of offences under such regulations without a warrant is illegal, and the escape by such persons or their rescue from custody cannot be made the subject of criminal charge under section 220A or section 183 of the Penal Code.

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N. Rajaratnam, for accused-appellant.
J. G. T. Weeraratne, Crown Counsel, for Attorney-General.

NAGALINGAM, A.J.

There are four appeals in this case. The 1st accused-appellant was charged with having escaped or attempted to escape from the custody of Constable Silva and the other three appellants with having rescued or attempted to rescue the 1st appellant from the custody of the constable and with having obstructed the constable in the discharge of his public functions, namely, the conducting to the police station of the 1st accused-appellant who had been arrested for an offence of transporting rice without a permit. The point taken on behalf of all the appellants is that the arrest and consequential custody of the 1st appellant was illegal and that therefore the escape or attempted escape of the 1st appellant from the custody of the constable and the action of the other appellants in rescuing the 1st appellant or obstructing the constable cannot therefore be made the subject of criminal charges.

The case for the prosecution is that constable Silva apprehended the 1st appellant in the act of transporting a large quantity of rice and took him into custody. The provision of law which prohibits the transport of grain is said to be Regulation 4 of the Defence (Purchase of Foodstuffs) Regulations, 1942 (page 54 of the Consolidated Reprint of the Defence Regulations dated 1st October, 1946) which will hereinafter be referred to as the Purchase of Foodstuffs Regulations. Learned Crown Counsel concedes that this is the only provision of law relative to the subject. These Regulations do not declare an offence under them to be a cognizable one. It has, however, been stated that under Regulation 51 of the Defence (Miscellaneous) Regulations certain provisions had been enacted making such an offence a cognizable one, but Regulation 51 has ceased to be law since February, 1946, so that at the date of this offence in October, 1946, an offence under the Purchase of Foodstuffs Regulations cannot be said to have been declared a cognizable one by any of the Defence Regulations. It has, however, been contended that by the Food Control Amendment Ordinance (Cap. 132, page 70 of Vol. I of 1941 Supplement) such an offence is made a cognizable one. Sub-section 3 of section 6 of the principal Ordinance that is relied upon runs as follows :—

"Notwithstanding anything in the First Schedule to the Criminal Procedure Code every offence under this Ordinance shall be a cognizable offence within the meaning of that Code."

It will be observed that the offence that is made cognizable is not one under the Defence Regulations but one under the Food Control Ordinance itself. Learned Crown Counsel suggests that as there are references to the Food Control Ordinance in the Purchase of Foodstuffs Regulations it is permissible to treat section 6 (3) of the Food Control Ordinance as extending to offences created by the Purchase of Foodstuffs Regulations themselves. This is an unwarrantable construction to be placed on a statute, especially a penal one. It may be useful to contrast the provisions of the Food Control Ordinance and the Purchase of Foodstuffs Regulations with those of the Control of Prices Ordinance No. 39 of 1939 and the Defence (Control of Prices) (Supplementary Provisions) Regulations, where these latter regulations substitute certain provisions for those in the Control of Prices Ordinance and declare that every offence under the Ordinance shall be a cognizable one within the meaning of the Criminal Procedure Code. *Vide* section 5 (10) of the Price Control Ordinance as enacted in the Defence (Control of Prices) (Supplementary Provisions) Regulations. It would, therefore, be seen that the Defence (Control of Prices) (Supplementary Provisions) Regulations extends the provisions of the Control of Prices Ordinance and every offence in connection with the control of prices is an offence under the Ordinance itself and is declared a cognizable offence ; but in regard to offences relating to purchase of foodstuffs, certain offences are declared to be such under the Food Control Ordinance and the orders made thereunder, while others are declared to be offences under the Purchase of Foodstuffs Regulations. Although offences under the Food Control Ordinance are declared to be cognizable offences, there is no such provision in regard to the offences under the Purchase of Foodstuffs Regulations.

The resultant position, therefore, is that the arrest by constable Silva of the 1st appellant without a warrant was illegal and therefore the escape or the attempted escape of the 1st appellant cannot be regarded as an offence under section 220A of the Penal Code nor can the other appellants be said to have committed any offence either under section 220A or under section 183 of the Penal Code. I would, therefore, allow the appeals and acquit the accused.

Accused acquitted.

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Present : NAGALINGAM, A.J.

EHAMBARAM & ANOTHER VS. RAJASURIYA

Application for Revision in M. C. Colombo 17468, *Nos.* 5 *and* 6.
Argued on : 16th January, 1947.
Decided on : 6th February, 1947.

Revision—Application by accused whose appeals were previously dismissed—Same relief asked for —Allegation that judgment was pronounced per incuriam—*Can the Court entertain such application.*

Where applications in revision were made by two accused, whose appeals were previously dismissed, alleging that the opinions expressed by the appeal Court in the judgment were made *per incuriam.*

Held : That, where the object of an application in revision was in fact to re-argue a case already decided, the Court cannot and should not entertain such application.

Cases referred to : *Police Officer of Mawella vs. Galapatha* (1915, 1 C. L. R. 197).
In Revision : 23 N. L. R. 475.

E. F. N. Gratiaen, K.C., with *N. Nadarasa*, in support.

NAGALINGAM, A.J.

These are two applications by way of revision made by the two accused persons whose appeals had previously been dismissed for substantially the same relief that they sought on appeal and which was not granted to them. The judgment of this Court passed on appeal was pronounced after counsel had been heard fully on behalf of the accused. In their petitions the petitioners seek to controvert some of the opinions expressed by this Court in its judgment on appeal as having been made *per incuriam* and further aver that as the Magistrate had in other cases upon similar facts presented by the prosecution that the cases had not been proved against the accused persons in those cases they did not deem it necessary to call their evidence on the merits despite the fact that they had a substantial defence on the facts.

I may say at once that the views expressed by this Court in delivering its judgment on appeal and which are now sought to be canvassed were not made *per incuriam.* To say the least, those views represent one line of thought upon certain disputed questions of fact which were fully debated at the Bar. It is true that this Court has, acting in revision, modified or even vacated judgments pronounced by it on appeal when appraised of the circumstances that the Court had erred in regard to an obvious question of fact or of law ; and one may go so far as to say that those are cases where, on error being pointed out the Court, without wanting tc hear arguments, would *ex mero motu* proceed to set the error right.

Two cases may be referred to as illustrating this principle. In the case of *Police Officer of Mawella vs. Galapatha* (1915, 1 C. L. R. 197) Wood Renton C.J., when the case came up in appeal before him indicated to the appellant's counsel who took the point that the complaint to Court against the accused in regard to an excise offence had not been made by an Excise Commissioner, a Government Agent or an officer authorised by either of them in that behalf, that a signature which purported to authorise the prosecution was, according to his knowledge, the signature of one Mr. Forest, and acting upon that statement of the learned Chief Justice, counsel did not contest the point further. Thereafter, it was discovered that in point of fact the signature was not that of Mr. Forest, and Wood Renton, C.J., on the matter being brought to his notice set aside his order of dismissal of the appeal and expressed himself as follows :—

> " I set aside as having been made *per incuriam* and by what may prove to be a mistake on the part of the Court itself the order of the 23rd of July dismissing the appeal and send the case back to the Police Court of Tangalla for further inquiry and adjudication whether the requisite authority for the institution of the proceedings was given."

The second case is one decided by Shaw, J. (P. C. Batticaloa No. 8306 (1921) 23 N. L. R. 475). In that case on appeal the learned Judge set aside the conviction and sent the case back for non-summary proceedings to be taken but thereafter it was brought to his notice that his attention was not drawn at that time to a change effected in the Penal Code by Ordinance No. 31 of 1919. He thereupon acting in revision, observing that the decision of his was undoubtedly wrong and made *per curiam*, set aside the order earlier made by him and dismissed the appeal.

The present case is far removed from either of the two cases cited above and petitioner seeks in fact to have the case re-argued. I do not think that the Court has power to entertain such an

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application ; nor do I think that the Court should give its sanction to such a practice being created, for it would not be conducive to the efficient or proper administration of justice.

The second ground upon which the applications for revision are based is that the appellants or their legal advisers had taken a particular view of the case for the prosecution and therefore refrained from placing evidence of facts in support of the defence which was then available, and therefore stands on a weaker foundation and requires only to be stated to be rejected as totally unsustainable.

I, therefore, refuse the applications.

Application refused.

Proctors : *Kanagasunderam* and *Namasivayam* for petitioners.

Present : DIAS, J.

MASILAMANY vs. RODRIGO, S. I. POLICE

S. C. No. 1028—*M. C. Jaffna No.* 789.
Argued on : 16th October, 1946.
Decided on : 22nd October, 1946.

Criminal Procedure—Accused charged with housebreaking by night under section 443 *of the Penal Code—Order reserved by Magistrate after trial—Charged afresh by Magistrate under section* 450 *of the Penal Code—Regularity of procedure—Ingredients necessary to constitute an offence under section* 450*—Criminal Procedure Code, section* 193 (1).

The accused was charged with housebreaking by night under section 443 of the Penal Code. After the evidence and addresses the Magistrate reserved his order. On the day on which order was to be delivered the Magistrate charged him afresh under section 450 of the Penal Code and after tendering the witnesses for cross-examination convicted the accused under section 450.

Held : (i.) That as there were no facts admitted or proved at the first trial to show that the accused had committed an offence under section 450 of the Penal Code, the learned Magistrate was not justified in framing a new charge under section 193 (1) of the Criminal Procedure Code.

(ii.) That in order to maintain a charge under section 450 of the Penal Code the prosecution must prove not only that the accused was found in a house but that he failed to give a satisfactory account of himself.

Per DIAS, J.—" It was urged that when the Magistrate reserved his order for June 4, he considered the facts and decided that the charges under sections 443 and 369 could not be sustained, and then, without any proof, made up his mind that the accused was guilty under section 450. No doubt the language used by the legislature in section 193 (1) may lead to this result, but in such cases I think that the fairer course would be for the Magistrate after framing the new charge to send the case for disposal by another Magistrate, unless the facts already proved in the earlier proceeding cover all the requisite ingredients of the new offence for which the accused is to be charged, and his guilt is clear beyond all reasonable doubt in regard to the fresh charge.

Cases referred to : *Dias vs. Suppiah* (1940, 41 N. L. R. 575.
Karup vs. Banda (1923) 25 N. L. R. 402.

M. M. Kumarakulasingham, for accused-appellant.
J. G. T. Weeraratne, Crown Counsel, for Attorney-General.

DIAS, J.

The accused-appellant has been convicted under section 450 of the Penal Code with having been found on February 24, 1946, in a building, to wit, the house of Annamah, No. 43, Sivapragasam Road, Jaffna, and failing to give a satisfactory account of himself. He was sentenced to pay a fine of Rs. 50 or in default to undergo three weeks rigorous imprisonment.

The manner in which the appellant came to be charged with and convicted of this offence is somewhat unusual. On February 25, 1946, the Jaffna police filed a plaint charging the appellant with committing housebreaking by night on February 24, 1946, by breaking into the house of Annamah with the intention of committing theft —section 443 of the Penal Code. On that day the Magistrate recorded " I assume jurisdiction as A. D. J." by which I understand he proceeded to try the case in terms of section 152 (3) of the Criminal Procedure Code.

The trial began on March 5, and the prosecution was closed on May 1. The defence began on May 22 and the Magistrate fixed the case for addresses on May 29. After the addresses the Magistrate reserved his order for June 4, and directed that the authorities cited should be sub-

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mitted to him in Chambers. He had, therefore, six days in which to consider what his order should be. On June 4 the Magistrate recorded "In view of my opinion of the evidence I charge the accused afresh under section 450 of the Penal Code. He pleads "I am not guilty". I inform him that he is entitled to re-cross-examine any of the prosecution witnesses he desires and to give or call evidence if he desires".

"He does not wish to call or give evidence or to recall prosecution witnesses. Mr. C. Cathiravelu will only address. Addresses on 8-6-46." It will be observed that no trial on this new charge took place. Mr. Cathiravelu addressed the Court, and on June 11 the Magistrate delivered his judgment convicting the accused under section 450. There has been neither an acquittal nor a conviction on the charges of housebreaking and theft.

It is obvious on a perusal of the record that the Magistrate on the evidence led at the first proceeding was not prepared to hold that the charges of housebreaking or theft had been established. It is clear that, while the Magistrate believed that the appellant had gained entrance to the house of this lady by climbing over a wall through some wire netting, his object in so doing was not to commit theft, but probably to visit a young female on the premises. He therefore under section 193 of the Criminal Procedure Code, decided to drop the charges on which the appellant had been brought before the Court, and proceeded to charge him for the offence which he thought the evidence disclosed.

Section 193 (1) provides that "if from the facts admitted or proved it appears that the accused has committed an offence within the jurisdiction of the Magistrate to try other than that specified in the charge.........the Magistrate may convict the accused of such offence, but before he so convicts, he shall frame a charge and shall read and explain it to the accused, and such of the provisions of Chapter XVII. as relate to altered charge shall apply to the charge framed under this section".

Were there any facts "admitted or proved" at the earlier trial which made it appear that this appellant had committed an offence under section 450? I am unaware of any provisions in the Criminal Procedure Code for admissions in criminal trials other than a plea of guilty or an "unqualified admission of guilt" under section 188. There was no such admission in this case that the accused committed an offence under section 450. The plea was "not guilty". What did the facts at the earlier proceeding prove?

Section 450 creates two distinct offences. The Magistrate was apparently of the view that the facts proved in the earlier proceeding establish that the accused is guilty of the second offence created by section 450, namely that he was found in or upon the house of Annamah and failed to give a satisfactory account of himself. Assuming that the accused was found in the house of Annamah what evidence is there that he failed to give a satisfactory account of his presence? The burden of proving both the ingredients under section 450 rests with the prosecution, *Dias vs. Suppiah* (1940) 41 N. L. R. 575, *Karup vs. Banda* (1923) 25 N. L. R. 402. The latter is a decision of a divisional bench. It may be that in the earlier proceeding the appellant denied his presence and set up a false *alibi*. That however does not prove that he is guilty of this offence. To say "I was not in the house" is not giving an account which must be weighed with the other evidence in the case. It was for the prosecution to prove both the presence of the accused in the house (which they have done) and also that he failed to give a satisfactory account of himself (which they have failed to do). The fact that the accused on trial for housebreaking and theft set up a false *alibi* does not in the present proceeding absolve the prosecution from this burden of proof. In fact the Magistrate did not afford the prosecution any opportunity of discharging that burden of proof.

The conviction of the appellant therefore cannot stand and must be set aside.

It is not strictly necessary to consider the other question argued whether the course this proceeding took was unfair to the appellant. It was urged that when the Magistrate reserved his order for June 4, he considered the facts and decided that the charges under sections 443 and 369 could not be sustained, and then, without any proof, made up his mind that the accused was guilty under section 450. No doubt the language used by the legislature in section 193 (1) may lead to this result, but in such cases I think that the fairer course would be for the Magistrate after framing the new charge to send the case for disposal by another Magistrate, unless the facts already proved in the earlier proceeding cover all the requisite ingredients of the new offences for which the accused is to be charged, and his guilt is clear beyond all reasonable doubt in regard to the fresh charge.

I enter a verdict of acquittal under section 450 and also on the charges under sections 443 and 369.

Set aside.

Proctor: *S. C. Kadiravalu* for the appellant.

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Present : JAYETILEKE, J. & NAGALINGAM, A.J.

MARCELINE FERNANDO & OTHERS vs. PEDRU FERNANDO & OTHERS.

S. C. No. 53 (*L*)—*D. C.* (*F*) *Negombo No.* 12202.
Argued on : 25th and 26th March, 1946
Decided on : 7th May, 1947.

Compensation—Improvements by purchaser on property gifted subject to fidei commissum—*Purchaser unaware of* fidei commissum—*Is he a* mala fide *possessor—Can transferee from such improver claim compensation.*

Held : (i.) That a person, who makes improvements on property purchased from the heirs of a donee, without being aware that the gift to such donee was subject to a *fidei commissum*, is in the position of a *bona fide* improver.

(ii.) That a transferee from such improver is entitled to compensation for such improvements from the *fidei commissaries.*

Cases referred to : *De Livera vs. Abeysinghe* (1917) 19 N. L. R. page 492 at page 493.
Dassanayake vs. Tillekeratne (1917) 20 N. L. R. page 89.
Du Plessis vs. Estate Meyer and others (1913) Cape Supreme Court Reports 1006.
Brunsden's Estate vs. Brunsden's Estate and others (1920) Cape Supreme Court Reports 159.
Steyn "Law of Wills in South Africa" page 274.

Cases followed : *Mudaliyar Wijetunge vs. Duwalage Rossie et al* (1946) 47 N. L. R. page 361 at 372.

L. A. Rajapakse, K.C., with *H. W. Jayewardene*, for 4th-9th defendants-appellants.
N. E. Weerasooriya, K.C., with *E. B. Wickremenayake* and *S. R. Wijeyetileke*, for plaintiffs-respondents.

JAYETILEKE, J.

This is an appeal from a decision of the District Judge which arose under these circumstances. The plaintiffs brought this action for a partition of the land depicted in plan Z. They alleged that the original owners of the land were Rapiel and his wife Maria and that they gifted it to their son-in-law Peduru by deed No. 8737 dated November 21, 1862, (P1) subject to a *fidei commissum* which extended to four generations. The 4th-9th defendants denied that P1 created a *fidei commissum* and claimed the land on two deeds No. 11484 dated April 29th, 1897 (4D2) and No. 16943 dated July 2, 1906, (4D3) executed by the heirs of Peduru in favour of their predecessor in title Franciscu Fernando. They claimed, in the alternative, compensation for certain improvements effected by them and their predecessor in title. The District Judge held that P1 did not create a valid *fidei commissum*, and there was an appeal to this Court against that order. This Court reversed the judgment of the District Judge and sent the case back for inquiry into the alternative claim. At the inquiry, after evidence was led on both sides, the question was raised whether the 4th-9th defendants were legally entitled to claim compensation. The District Judge held that Franciscu Fernando was a *mala fide* possessor, and that, therefore, the 4th-9th defendants were not entitled to claim compensation. The present appeal is against that order. At the argument before us the counsel for the 4th-9th defendants urged that the finding of the District Judge is in the teeth of the evidence, and he invited our attention to two passages in the evidence at pages 40 and 54 of the typewritten copy which show that P1 was never registered and that no one was aware of its contents till a copy was obtained for the purpose of this case. It must be noted that at the time P1 was executed there was no provision in our law for the compulsory or optional registration of deeds. In view of the evidence it seems to me that it was not possible for the District Judge to hold that Franciscu Fernando was a *mala fide* possessor. The deeds 4D2 and 4D3 purported to convey the lands to him absolutely and there is no reason to think that he did not enter into possession in the *bona fide* belief that he was the owner. What then are his legal rights in regard to any improvements effected by him to the property? On this question the judgment of the Privy Council in *de Livera vs. Abeysinghe* (1917) 19 N. L. R., page 492 at page 493 appears to be of some assistance though the facts are different from those in the present case. The facts of that case show that the claim for compensation was made by a purchaser from a fiduciary who was in the position of a trespasser. In the course of his judgment Earl Loreburn said :

"In the facts of the present case the appellant was not acting *bona fide.* He knew the risks, he knew the facts, showing that he was a mere trespasser in what he did, and he knew that he was invading the rights of the

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heirs, and knew that Mary de Livera had no right to alienate, and knew that he was altering the character of this property without the consent of the persons whose interest it was to preserve it, and without any authority from anyone except the trustee whose duty it also was to preserve it. Their Lordships think in such a case as this, it is quite impossible to suppose compensation would be payable ".

Their Lordships did not set aside the question whether a purchaser from a fiduciary is entitled to claim compensation from the *fidei commissary* for improvements effected by him to the property, but it seems to me that there is necessarily implicit in the passage quoted above that he is entitled to do so if he effected the improvements in good faith. There is ample authority that a fiduciary or his estate is entitled to claim compensation as against the *fidei commissary* for beneficial expenditure upon the property which forms the subject of the *fidei commissum.* (Vide *Dassanayake vs. Tillekeratne* (1917) 20 N.L.R., page 89; *Du Plessis vs. Eatate Meyer and others* (1913) Cape Supreme Court Reports 1006; *Brunsden's Estate vs. Brunsden's Estate and others* (1920) Cape Supreme Court Reports 159. There is also authority that a purchaser from a fiduciary would likewise be entitled to compensation Steyn "Law of Wills in South Africa ", page 274.

The question of principle raised here is indistinguishable from that which was argued in *Mudaliyar Wijetunge vs. Duwalage Rossie et al* (1946) * 47 N.L.R., page 361 at 372. before my brother Wijeyewardene and myself. The facts of that case are as follows:—Two persons, Nandiris and Siyaneris were entitled to a land in equal shares. By deed P3 of 1906, Nandiris gifted his half share to Carlina subject to the condition that she should not sell mortgage or otherwise alienate the said share and that upon her death it should devolve on " all her children being heirs descending from her and those who have obtained authority as her executor or administrator ". By deed D1 dated March 22, 1918, Nandiris purported to cancel the conditions in P3 and to gift the half share absolutely to Carlina. By deed D6 dated March 24, 1918, Carlina transferred the half share to Nandiris. In the year 1919 one E. C. de Fonseka wanted to purchase that share from Nandiris and he consulted his legal advisers whether the title was good. He was advised that the title was good and he purchased the share on deed D3 of 1919. After his purchase he entered into possession and planted the land with budded rubber. The question arose whether E. C. de Fonseka was a *bona fide* possessor. It was held that he was and that the purchaser at the sale in execution against him was entitled to claim compensation for the improvements effected by him.

I would accordingly set aside the order appealed against and send the case back so that the District Judge may decide what sum the 4th-9th defendants are entitled to on the findings already made by him. If he has failed to find on any of the items claimed by the 4th-9th defendants he will hold a further inquiry, if necessary, and make his decision. As the 4th-9th defendants have claimed unsuccessfully to exclude a portion of the land from the action I would award them half costs of appeal. The parties will bear their own costs of the inquiry.

NAGALINGAM, A.J.
I agree.

Proctors: *Francis Gunaratne* for the appellant.
C. V. Dias for the respondent

* 32 C. L. W. p 108.

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

DIAS ABEYSINGHE vs. DIAS ABEYSINGHE & TWO OTHERS

S. C. No. 2—*D. C.* (*Inty.*) *Negombo No.* 13066.
Argued on: 29th & 31st October, 1946.
Decided on: 8th November, 1946.

Partition—Co-owner erecting new house on common land—Possession for over ten years—Does mere possession mature into prescriptive title to building and soil covered thereby—Co-owners, members of one family—Necessity to lead strong evidence of exclusive possession to establish prescription—Can undivided portion of larger corpus *be partitioned.*

Held: (i.) That, where a co-owner erects a new building on the common land and remains in possession thereof for over ten years, he does not acquire a prescriptive right to the building and the soil on which it stands as against the other co-owners merely by such possession.

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(ii.) That where the co-owners are members of one family very strong evidence of exclusive possession is necessary to establish prescription.

(iii.) That the partition of an undivided portion of a larger *corpus* cannot be allowed.

L. A. Rajapakse, K.C., with *Kingsley Herat* and *Dharmakirti Peiris*, for defendants-appellants.
N. Nadarajah, K.C., with *J. A. Obeyesekere*, for plaintiff-respondent.

KEUNEMAN, S.P.J.

This is a partition action brought by the plaintiff in respect of premises depicted in Plan No. 127 of 1944 (marked X) made by L. H. Croos-Dabrera, Licensed Surveyor, of the extent of 23·25 perches. The main contest of the defendants was that this was only an undivided portion of a larger extent of 3 roods 38 perches depicted in Plan No. 156 of 1944 (marked Y) made by the same Surveyor, and that plaintiff's action was misconceived and unmaintainable. In the latter plan (marked Y) the land of which the plaintiff sought partition is the central block marked A thereon, but the plan shows other portions of land both on the west and on the east of Lot A.

It is not in contest now that the original land was that depicted in Plan Y, and that the original owner was J. P. S. Wijesinghe. This land was known as the Kotugoda Walauwa, the building standing in the centre of the land. J. H. S. Wijesinghe on his death left three children, Abraham, Francis and Johanna, who became entitled each to an undivided one-third of the land. William Charles Amarasekera, a son of Johanna, became the owner of her one-third share by deed P2 of 1895 from his mother, and added an eastern wing to the original Walauwa and remained in possession of the eastern wing. By P3 of 1895 William Charles Amarasekera conveyed the undivided one-third share of the whole land to Albert, one of the children of Abraham, who by P4 of 1902 conveyed the same share to Jane (who was a child of Abraham) and the widow of William Charles Amarasekera. Jane by P5 of 1934 conveyed to Angelina who was her adopted daughter. That deed described the premises conveyed as the eastern portion of the land and as containing in extent 266 feet in length from north to south and 61 feet in width from east to west. Angelina by P6 of 1935 conveyed to the plaintiff, with the same description.

Plaintiff further contended that the share of Francis the one-third owner passed to Albert the son of Abraham, but no deed was produced in support. Albert added a west wing to the original Walauwa and possessed the west wing and died about 1910. After his death his widow and some of the children purported to convey by the deeds P7, P8 and P9 of the years 1923, 1923 and 1928, but these deeds are not very clear as to the *corpus* or the extent of the land sold. Some of the deeds refer to lots depicted on Plan 1094 of the 17th February, 1924, made by H. S. Perera, but that plan has not been produced and I am not able to find that the deeds relate to a defined western block of the original land. The deeds were in favour of Aldon Abeysinghe who is said to be a brother of the plaintiff. By P10 of 1928 Shelton (who appears to be the same as Aldon) is said to have acquired another share. Shelton conveyed by P11 of 1929 to the plaintiff the whole of a divided portion of the land, the extent given being " about one and a half acres ". The eastern boundary is given as " the other portion of the Walauwa ". The claim of the plaintiff is that by prescription the eastern and the western blocks have passed absolutely to him, and that the only portion of the land now remaining is the central block depicted in Plan X already referred to.

I may also state that Jane (already mentioned) who was entitled to a third share of Abraham's rights, by P16 of 1935 purported to convey to plaintiff and his brother the 1st defendant one-third of a defined portion of land which may be regarded as the land depicted in plan X, mentioning as the extent 266 feet in length from north to south and 25 feet in breadth from east to west. In this deed Jane reserved a life interest which she subsequently conveyed by P17 of 1938.

Also Ellen the 3rd defendant-appellant herself by deed P19 of 1939 purported to convey to the 1st defendant a seven-twelfth share of a defined block which can be identified as that depicted in Plan X. The length is given as 266 feet and the breadth as 25 feet.

I may now deal with the issue of prescription. Plaintiff claims that he and his predecessors have prescribed to the eastern and western blocks of the original land, and that all that remains to be partitioned is the central block, *i.e.* the land in Plan X. It has been established that William Charles Amarasekera built the eastern wing and that Albert built the western wing, and that they and their successors including the plaintiff have been in possession of those wings. On the other hand it is not unusual for one co-owner who has erected a new building on the common land to remain in possession of that building, and he may well have a right to do so. The exercise of that right would not necessarily mature into a pres-

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scriptive title to the building and the soil on which it stands as against the remaining co-owners. It is further to be noted that William Charles Amarasekera and Albert who acquired his interest did not purport to deal with a divided eastern block (*vide* P3 and P4) but only with an undivided share, and it was not till 1934 that Jane, their successor in her deed P5 asserted such a claim. As regards the western wing said to have been erected by Albert. I cannot draw any certain inference from the deeds that a claim to this block as a divided block was asserted until plaintiff received his deed in 1929.

It is also true that Jane by P16 of 1935 purported to deal with a divided central block—which may be identified as the lot in Plan X, and the 3rd defendant by P19 of 1939 purported to do the same. The 1st defendant was the grantee under those deeds, and we may assume that when it suited their purpose all the parties in this action adopted the attitude that the original land had been divided into three defined blocks. In fact the 3rd defendant at one stage adopted this view in her answer also.

But I do not think we can decide this case on the deeds in view of the fact that all the co-owners possessed portions of the original land. It has not been established in this case that there was an arrangement arrived at by the co-owners to divide the land in such a manner that title was to be affected, and the difficulty is to discover anything which is the equivalent of ouster.

I may point out that the larger premises in question contained a front and a back compound. As regards the front compound on the north, there is positive evidence that this was never divided up and that it was used in common by all the co-owners. In fact, access to all the houses was obtained by means of a circular drive which extended well to the east and to the west of the land depicted in Plan X. This was admitted by the plaintiff, and the District Judge has held that " it is clear that the drive was possessed in common ". He however added that this was for convenience and not because it was the common property of the three sets of owners. In my opinion the District Judge has misunderstood the position. There was no evidence whatever that the front compound was dividedly possessed at any time, and the only evidence was that all along it was possessed in common, and I think this fact goes very far to nullify the contention of the plaintiff that there ever was divided possession of the larger *corpus* that resulted in the obtaining of a prescriptive title.

As regards the back compound to the south, there was evidence that it was divided into three blocks by fences which were ten years old at least, but it is not clear whether the division was intended to be exclusive or was merely adopted for the purpose of convenience.

A further point of importance is that the co-owners are all members of one family, and very strong evidence of exclusive possession was necessary to establish prescription. Also, action in this case was instituted on the 15th June, 1944. The facts from which we can presume any acknowledgement of the alleged division by the 1st and 3rd defendants were in 1935 and 1939—see deeds P16 and P19—that is, within the prescriptive period.

On the evidence I do not think it is possible to hold that the plaintiff has prescribed to the eastern and the western blocks of the larger premises. It, therefore, results that the plaintiff has sought partition of an undivided portion of the proper *corpus*. This cannot be allowed. I do not think any useful purpose will be served by sending this case back so that the proper *corpus* may be included. In the circumstances, I allow the appeal, set aside the judgment appealed against, and dismiss the plaintiff's action with costs in both Courts ; but I reserve the right to the plaintiff to bring a proper partition or other action relating to the correct *corpus*.

Appeal allowed.

CANEKERATNE, J.
I agree.

Present : NAGALINGAM, A.J.

IN RE LESLIE MARK ANTHONY

In the matter of an application for a writ of Habeas Corpus for the production of the body of Leslie Mark Anthony.

Argued and Decided on : 17th February, 1947

Habeas Corpus—Minor brought up by petitioner since infancy after mother's death—Appointment of respondent as guardian and curator by father by notarial deed—Should the Court interfere with such appointment after father's death.

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Held : That when by a notarial deed the father of a minor had appointed a guardian and curator in regard to the person and property of the minor, the Court should not interfere with such appointment except for good reasons.

A. H. C. de Silva for petitioner.
E. D. Cosme for respondent.

NAGALINGAM, A.J.

This is an application by the petitioner who is the grandfather of the minor, Leslie Mark Anthony, for a writ of *Habeas Corpus* for the production of the body of the minor who, he alleges, is wrongfully detained by the two respondents who are the paternal uncles of the minor. The Magistrate who held the preliminary inquiry has recorded a strong finding which has not been challenged before me that from the time of the minor's mother's death, which took place when the minor was two months old, the petitioner and his wife had brought up the minor and that the minor was taken by the petitioner to see the father at his last illness and that after the father succumbed to his ailment he left the minor with the paternal uncles till the almsgiving, which was to have taken place on the eighth day, when he was to go and take back the child. The learned Magistrate also finds that the almsgiving was had by the paternal uncles on the 4th day after the death and that the respondents had removed the child thereafter and had refused to give over the child to the petitioner. There is also a very strong finding recorded that the paternal uncles are guilty of fabricating false documents and giving perjured testimony in regard to the date at which the minor was removed from the custody of the petitioner and especially when they allege that it was the minor's father who removed the child in the year 1944.

The position would, therefore, appear to be that the minor had been brought up from the time when he was two months old by the petitioner and his mother and that when the minor was taken to see the father about the date of the latter's death, the petitioner was lulled into a false sense of security by being asked to hand over the child to the paternal uncles till the almsgiving, and that the respondents have thereafter refused to surrender the child to the petitioner.

On behalf of the respondents, however, it has been contended that in law the respondents are entitled to the custody of the minor notwithstanding the fact that the minor may have been brought up by the petitioner for the past several years. It is alleged that by deed D3 of 1945 the father of the minor appointed the 1st respondent the guardian over the person and curator over the property of the minor child. An attempt was made to show that the deed was not a genuine document, but it was a notarially attested deed and no issue was raised and no finding reached that it was a document that was either not executed by the deceased father or that the deceased father, if it was executed by him, was not aware of its contents, or even that it was procured by undue influence or fraud. The case, therefore, has to be viewed as if the deed D3 is a valid document and as if the father had duly appointed a guardian and curator in regard to the person and property of the minor.

The question, therefore, is whether the appointment by the father can be nullified by an order of this Court at this stage merely on the footing that the minor had been brought up by the petitioner from his infancy. I do not think so. It was urged that in any event the 1st respondent is a bachelor and as he is now stationed at Trincomalee he would not be able to look after the interests of the minor; but both those circumstances were within the knowledge of the father when he chose to make the appointment of the 1st respondent. Besides the 1st respondent has made arrangements to board the child with his married brother and there is no allegation before me that the child is now being ill-treated or that his education is being neglected or that any events have supervened from which it could be said that the interests of the minor are in any way prejudiced.

In these circumstances, the right of the father to appoint a guardian or curator over the person and property of the minor should not be interfered with by Court. But of course, if hereafter it can be shown that the curator and guardian of the minor is either not taking sufficient interest in the minor or that the minor's interests are being sacrificed or that the minor is being neglected either in regard to his maintenance or education, this order would not preclude the petitioner or any other person interested in the minor from making a further application to this Court. At the present stage, however, the only proper order that can be made is that the petitioner's application should be refused, and I refuse it accordingly.

Application refused.

Proctors : *Ashly Peiris* for the petitioner.
W. P. Ranasinghe for the respondent.

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Coram : HOWARD, C.J. & WIJEYEWARDENE, J.

PUNCHI APPUHAMY vs. SEDERA AND ANOTHER.

S. C. No. 65/1946—*D. C.* (*Final*) *Kegalle* 3350.
Argued on : March 11th, 1947.
Decided on : March 20th, 1947.

Paulian action—Deed of transfer pending a claim for unliquidated damages against transferor—Action to set aside such deed after obtaining decree for damages—Fraud and collusion—Can such action be maintained.

Held: That a Paulian action is available to a person, who having obtained a decree on a claim for unliquidated damages against another, impugns a deed of transfer by the latter on the ground that it was executed fraudulently and collusively, although at the time of its execution such claim for unliquidated damages was pending.

Cases referred to : *Fernando vs. Fernando* (1924) 26 New Law Reports 292.
Baronchi Appu vs. Siyadoris Appu (1914) 4 Court of Appeal cases 65.

L. A. Rajapakse, K.C., with *C. R. Guneratne*, for the plaintiff-appellant.

N. Nadarajah, K.C., with *H. W. Jayewardene* and *G. T. Samarawickreme*, for the 1st defendant-respondent.

No appearance for the 2nd defendant-respondent.

WIJEYEWARDENE, J.

This is an action under section 247 of the Civil Procedure Code combined with a Paulian action.

The plaintiff filed D. C. Kegalle 2091 on July 20, 1942, against the 2nd defendant, claiming damages for defamation. Summons was issued ten days after and was served on the second defendant in September, 1942. Decree was entered on June 24, 1943, awarding the plaintiff Rs. 542·30 on account of damages and costs. In execution of the decree the plaintiff caused the Fiscal to seize certain properties including paddy fields and rubber lands, and the first defendant claimed them on deed P1 of August 18, 1942, executed by the second defendant in his favour. That claim was upheld, and the plaintiff, thereupon, filed the present action against the two defendants. The District Judge dismissed the action with costs.

The second defendant is married to a sister of the first defendant. The properties transferred by P1 are all situated in the village of Dimbulagama where the second defendant and his wife live. The first defendant, on the other hand, lives in the village of Atugoda, ten miles away from Dimbulagama.

The deed P1 purports to be a transfer of twenty-two lands, including the residing house and garden of the second defendant, for Rs. 1,500 paid in the presence of the Notary. When the second defendant was examined in December, 1943, under section 219 of the Civil Procedure Code (*vide* P2), he said that he sold the land to the first defendant "for a debt" and that he was "insolvent today" and unable to pay the judgment debt. Giving evidence in the present case the first defendant gave a different version of the transaction. He said that the second defendant sold the lands to him for Rs. 1,500, as the second defendant desired to leave his village because he was afraid to live there as his brother had been murdered in that village. That murder was about ten months before the execution of P1. He admitted, however, that the second defendant did not leave the village after the transfer. The second defendant himself did not give any evidence. The properties in question have been valued by the plaintiff's witness, Mr. Sumanasekera, a Court auctioneer, at Rs. 6,742·50, and he submitted a detailed valuation report P5. That valuation is supported by the evidence given by the plaintiff and the Vel Duraya of the village and stands uncontradicted by the evidence of the first defendant who alone gave evidence for the defence. Even if the first defendant's statement is accepted that he paid Rs. 1,500 for the transfer, it is clear from the evidence that the properties were worth more than four times the consideration paid by him.

The oral evidence of the plaintiff and his witnesses is to the effect that the second defendant has continued to be in possession of the properties in spite of the deed P1. This evidence is supported strongly by the documents produced in the case. The extracts from the Acreage Tax Register of the village for the four years 1942 to 1945 (P6, P7, P8 and P9) mention the name of the second defendant as the owner of Yakadagalundurapuhena *alias* Kotilawatte which alone, among the rubber lands transferred by P1, was liable to pay an Acreage Tax, being the only planted land over five acres in extent. The documents P11, P12, P13 and P14—copies of Form C,

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referred to in section 8 of the Rubber Thefts Ordinance, and signed by the second defendant—show that the second defendant claimed to be the owner of that rubber land in 1944. The Superintendent of Gracelyn Estate produced documents P15, P16 and P17 in support of his evidence that the second defendant sold the rubber from his lands in 1942, 1943 and 1944 and brought rubber sheets to the factory on Gracelyn Estate for smoking in April, October, November and December, 1944. The first defendant attempted to take away the effect of all this evidence by stating that he asked the first defendant's wife to " take " the rubber and that " she gave (him) Rs. 25 or Rs. 20 for rubber ". He was very vague about this arrangement and did not state when and how often these payments were made. As regards the paddy fields he said : " I told my sister (second defendant's wife) that I would possess the fields in my village ". This could only mean that he possessed none of the paddy fields transferred by P1, as all the fields were in another village, ten miles away from his village. He admitted that the second defendant continued to live in the village Dimbulagama even after the execution of P1 and that the second defendant's wife was still residing in the house conveyed by P1. He admitted, further, that before he obtained the transfer P1 he was aware that the plaintiff had filed an action against the second defendant for damages.

In view of all evidence referred to by me I hold that the defendants acted fraudulently and collusively in respect of the transfer with the intention of defrauding the creditors of the second defendant, and that the transfer did, in fact, prevent the plaintiff from obtaining satisfaction of his decree in D. C. Kegalle 2091.

The counsel for the first defendant sought to support the judgment of the District Judge by contending that it was not open to the plaintiff to bring a Paulian action, as at the time of the execution of the transfer P1 the plaintiff had only filed an action in respect of his claim for unliquidated damages and had not obtained a decree. In support of his argument he relied on the following passage in the judgment of Jayewardene A.J., in *Fernando vs. Fernando* (1924) 26 New Law Reports 292) :—

" The action to set aside a transaction as being fraudulent, that is the Paulian action, is given to creditors, to whose prejudice things have been fraudulently alienated. Voet XIII., 8, 3. The defendant is not, in my opinion, in the position of a creditor of Manuel Joseph at the present time. There is no debt due to him, and his claim is one for unliquidated damages only. A person who has such a claim against another cannot be regarded as a creditor. A creditor connotes the existence of a debt and a debtor. It cannot be said that the claim for damages is a debt, or that the person against whom the claim is made is a debtor. It is only when the claim is found by the Court to be due and is embodied in a decree that the relation of creditor and debtor would arise in such a case."

The above passage appears to be in conflict with the decision in *Baronchi Appu vs. Siyadoris Appu* (1914) 4 Court of Appeal cases 65. It is however, sufficient for the purpose of the present action to state that the judgment of Jayewardene, A.J., is, in fact, an authority against the contention of the defendant's counsel that a person who had not obtained a decree at the time of the execution of the impugned deed cannot bring a Paulian action, even after he has obtained a decree in his claim for unliquidated damages. The facts in *Fernando vs. Fernando* (supra) are briefly as follows :—A entered into an agreement with Manuel Joseph about January, 1924, for the use of a boat in connection with some fishing operations. Differences arose between A and Manuel Joseph after some time, and A filed an action against Manuel Joseph in March, 1924, to recover damages for an alleged breach of the agreement. Acting arbitrarily A detained the boat during the pendency of the action without taking steps under Chapter 47 of the Civil Procedure Code to sequester the boat before judgment. Manuel Joseph transferred the boat to X in May, 1924, and X, therefore, filed an action against A for the recovery of the boat. A who had not obtained a decree in his case filed answer pleading that the transfer of the boat to X was fraudulent and moved to add Manuel Joseph as a party to the action in order to prove his allegation of fraud. The Supreme Court held that A was not entitled to ask Manuel Joseph to be added as a party, as *at that time* A had not obtained a decree in the action brought by him against Manuel Joseph. After setting out the facts and considering various authorities Jayewardene, A.J., concluded his judgment as follows :

" In my opinion, therefore, the defendant (A) is not a creditor at present, and cannot ask for the cancellation of the transfer in favour of the plaintiff (X) on the ground of its being a fraudulent alienation. It may be that if he obtains a decree in his favour in his action against Manuel Joseph before the trial of the present action, he would be entitled to maintain his claim in reconven-

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tion. When that happens he can ask the Court to add Manuel Joseph as a party to the action. But, for the present, it would be useless to add him. This is the only question arising in the appeal."

The judgment of Jayewardene, A.J., does not therefore, help the defendants, as the plaintiff had obtained a decree against the first defendant on his claim for unliquidated damages at the time he instituted the present action.

I allow the appeal and direct judgment to be entered in favour of the plaintiff in terms of the clauses (*a*) and (*b*) of the plaint. I award the plaintiff costs here and in the District Court.

Howard, C.J.
I agree.

Proctors: *L. A. Gunawardena* for plaintiff-appellant.
C. H. Udalagama for defendant-respondent.

IN THE COURT OF CRIMINAL APPEAL

Present: Soertsz, A.J.C., (President), Jayetileke, J., & Canekeratne, J.

REX vs. J. A. SIMON WIJERATNE

Application No. 64 of 1946 (with leave obtained)—S.C. 15/M.C. Kalutara No. 37375.
Argued on: 15th January, 1947.
Decided on: 3rd February, 1947.

Court of Criminat Appeal—Private defence—Exceeding the right—Puzzling verdict by jury.

The accused was indicted with attempt to murder and his defence was that he inflicted the injuries on the deceased in self-defence.

The jury returned after considering their verdict (which was a 5 to 2 one) and on being questioned by the clerk of the Assize as to whether the accused was guilty or not of attempted culpable homicide not amounting to murder the Foreman answered 'No.' They were then asked whether the accused was guilty of a lesser offence, and the answer was "he has exceeded the right of private defence." The Court then said 'Then do you find him guilty,' and the Foreman replied 'definitely not.'

Thereupon the Court having explained that if the accused exercised the right of private defence and did not exceed the right, then he is not guilty, but if he exceeded the right of private defence he is guilty, asked the jury to retire again. On their return after reconsideration they replied that they were unanimous that the accused was guilty on the ground that he 'exceeded the right of private defence to a certain extent.' The Court accepted this verdict and the accused was sentenced.

Held: That the verdict was a puzzling one and that since the jury found that occasion for self-defence arose, it could not be said having regard to the injuries inflicted, that the accused exceeded his right of private defence.

M. M. Kumarakulasingham for appellant.
T. S. Fernando, C.C., for the Crown.

Soertsz, A.C.J.

In this case the appellant was charged with attempt to murder a man called Seemon Appuhamy. The appellant's defence was that he inflicted the injuries found on the injured man in the course of defending himself against an attack on him by the injured man which gave rise to a reasonable apprehension in his mind that if he did not defend himself in the way he did he would be killed or, at least, grievously injured. Upon that plea the questions that arose for consideration were whether an occasion arose for the appellant to exercise the right of self-defence, whether he exercised it reasonably without inflicting more harm than was necessary for the purposes of defence, or whether he exceeded the right given to him by law.

The learned trial Judge directed the Jury on this part of the case as follows:—

"If you find that as the accused says he went there on a very peaceful mission to buy some nails, that he was taken unaware and the complainant attacked him with a knife on his head, that he rushed and picked up a manna knife or any other knife that was lying somewhere there and used that knife on the complainant, well then the question is—two questions arise: firstly, as to whether he was justified in inflicting those wounds and secondly whether he had exceeded his right of private defence. Well, in view of the nature of the injuries on the accused himself it would be a

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correct proposition of law to say that where he apprehended or reasomably apprehended that his life was in danger or that he would sustain grievous injury at the hand of his assailant he was entitled, in order to defend himself against that attack, to use the knife or any other weapon, and use it in such a way as to cause the death of the assailant. If you accept those facts the accused will be entitled to ask for a verdiet of ac quittal at your hands, because the law does not say that a man whose life is being threatened must sit with his arms folded and suffer death. It gives the right of self help to every individual. In this case, although the complainant denies it, yet in view of the nature of the injuries on the accused if you think the complainant was armed, and if you accept the accused's evidence that he was unarmed that this man attacked him, that in order to protect himself he picked up the knife that was lying nearest to him and started slashing at the other man in order to save himself, it would be very difficult to say in these circumstances that the man had exceeded the right of private defence, and in that case you will bring in a verdict of not guilty."

The learned Judge also invited the Jury to consider another defence which the appellant might have advanced, namely, that these injuries inflicted in a sudden fight upon a sudden quarrel and without premeditation, and that, therefore, they might find the appellant guilty of attempt to commit culpable homicide not amounting to murder. Thirdly, he asked them to consider the question whether the appellant had a murderous intention or only the knowledge that death was likely to result from his act, and he directed them that in the latter case the offence would be again attempt to commit homicide not amounting to murder.

The Jury retired to consider their verdict and when they returned to Court they said to the Clerk of Assize that they were divided by 5 to 2 in regard to the verdict. Thereupon the Clerk of Assize said to them " Do you find the prisoner guilty or not guilty of attempted *culpable homicide not amounting to murder* ? " (*sic.*). The Foreman answered " No ". The next question the Clerk of Assize put to them was " Do you find him guilty of a lesser offence ? ". The answer was " He has exceeded the right of private defence ". The Court then said " Then do you find him guilty ? " and the Foreman replied " Definitely not ". Thereupon the Court said " It is difficult to understand your verdict. If he exercised the right of private defence and did not exceed the right, then he is not guilty. But if he exceeded the right of private defence, then he is guilty of attempted culpable homicide not amounting to murder. Will you go and reconsider your verdict ". They then retired again, and when they came back the Clerk of Assize said to the Foreman " Mr. Foreman are you unanimously agreed upon your verdict ? " Foreman " Yes ". Clerk of Assize " Do you find the prisoner guilty or not guilty of attempted culpable homicide not amounting to murder ? " Foreman " Guilty ". Court, " On what grounds ? " Foreman " Exceeding the right of private defence to a certain extent ". Court: " I am bound to accept this verdict. I sentence you to a term of two years' rigorous imprisonment ".

To say the least, this is extremely puzzling. Firstly, the Jury by a majority of 5 to 2 declared that the prisoner was not guilty of attempting to commit culpable homicide not amounting to murder, on the footing it must be supposed that he has not exceeded the right of private defence. If the appellant had not acted in excess of that right, he was entitled to be acquitted and yet, in the next breath, the Jury say that " he has exceeded the right of private defence " and again definitely that he was not guilty.

On reconsidering their verdict, they found unanimously that the prisoner is guilty of attempt to commit culpable homicide not amounting to murder because he exceeded the right of self-defence to some extent. This is extremely unsatisfactory, and we are of opinion that their verdict ought not to be allowed to stand. We have examined the evidence in the case and we are of opinion which appears to have been the opinion of the trial Judge too that once the Jury found, as they did, that occasion for self defence arose, it cannot be said having regard to the injuries the appellant inflicted, that he did more harm than was necessary for his defence.

Conviction set aside.

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IN THE COURT OF CRIMINAL APPEAL

Present : Howard, C.J. (President), Wijeyewardene, J. & Canekeratne, J.

REX vs. A. H. M. CASSIM

Appeal No. 3 of 1947 with Application 15 of 1947—S.C. 57/M.C. Galle 50.
Argued on : 10th March, 1947.
Decided on : 21st March, 1947.

Court of Criminal Appeal—Evidence—Statement alleged to have been made by person not called by Crown elicited in cross-examination from prosecution witness—Denial of statement by such person when called by defence—Effect of such denial.

Held : That, where a statement alleged to have been made by a person, who was not called as a witness by the Crown, is elecited in cross-examination from a prosecution witness, and later such person, when called by the defence, denied having made such statement, the jury ought to be told that there is no substantive evidence of such statement before them and that such testimony should not be considered by them.

H. V. Perera, K.C., with *J. N. Fernandopulle* for appellant.
T. S. Fernando, C.C., with *E. L. W. de Zoysa, C.C.*, for the Crown.

Howard, C.J.

The appellant was convicted by a Judge and Jury of the offence of abetment of attempted murder and sentenced to a term of six years' rigorous imprisonment. The evidence established that on the 25th December, 1944, Mohammadu, the son-in-law of the appellant, received injuries in the house of the appellant which were inflicted with a knife by one Fathar. The Crown alleged that, in addition to a man called Sameem, the appellant participated in holding Mohammadu in a chair whilst the injuries were being inflicted. It was also alleged by the Crown that Mohammadu had been lured into the house of the appellant by a message received from the appellant through one Samath. The evidence in regard to this message appears at p. 22 of the record and emerged as a result of a question put by counsel for the appellant. The Crown as appears from p. 12 of the record had merely elicited the fact that in consequence of what Samath told him on the 24th December he came to Galle on the 25th December to meet the appellant. In answer to the question put by counsel for the appellant as to what Samath came and told him, Mohammadu replied as follows :—

"As far as I can remember he told me that my father-in-law came from Trincomalie and that he means to settle me everything and wanted me to come and see him, if possible the next day between 2 and 3 p.m."

Samath was not called by the Crown, but on being put into the witness-box to give evidence on behalf of the appellant stated that he never took a message on the 24th December to Mohammadu from the appellant asking him to come there on the next day between 2 and 3 p.m. The learned Judge in his charge to the Jury dealt with the evidence as to the message in the following passage :—

"The next material date is the 24th of December. On the 24th of December, Mohammadu says he received a visit from Samath, one of the three who called at Mohammadu's house with Cassim and attempted to get the pro-note from Mohammadu's wife. Samath had gone again and, in consequence of what he said, Mohammadu went to see his father-in-law Cassim.

Now, Samath is not being called for the Crown. In the absence of a witness, what he said to another is hearsay. But Mr. Nissanka for the defence, cross-examined Mohammadu and said "tell us what Samath said"—the defence wanted to know what definitely Samath said and he was entitled to have it as he undertook to call Samath as a defence witness.

Mohammadu told you what Samath said, Mr. Nissanka asked Mohammadu "what is that Samath came and told you on the 24th December"? Mohammadu said "as far as I can remember he said father-in-law came from Trincomalie, he means to settle everything and wanted me to come and see him next day between 2 and 3 p.m." That was the message from Cassim and, in consequence of it it was that Mohammadu went to see his father-in-law beeween 2 and 3 p.m. the next day and got stabbed."

The charge was continued on the following day when the learned Judge in regard to this matter stated :

"Yesterday, we got to that part of Mohammadu's evidence in which he received this invitation from Samath to go and see his father-in-law between the hours 2 and 3 p.m. next day."

Mr. H. V. Perera, on behalf of the appellant, contends that this passage conveys to the Jury that there was evidence that Samath gave a

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message to Mohammadu from the appellant whereas there was legally no such evidence. Samath denied the fact that he ever gave such a message and Mohammadu's evidence as to the receipts of such a message being hearsay could only be put in evidence to corroborate the testimony of Samath. There was, therefore, no substantive evidence of such a message. The majority of us, therefore, think that Mr. Perera's contention is correct and the Jury instead of being invited to consider the testimony in regard to such a message should have been told that there was no such message.

Crown Counsel has asked us to say that, with a proper direction on this point the Jury would have come to the same conclusion. The majority of us are unable to say that the Jury must have of necessity convicted the appellant. If there was legal evidence with regard to the message it was a clear indication that Mohammadu had been lured to the house by the appellant and therefore a most important testimony implicating the appellant. Without such testimony the Jury were confronted with what in our opinion was in many respects a most improbable story particularly having regard to the fact that Azeez, the chief witness for the Crown, apart from Mohammadu, in his statement to P. C. Hashim on the day of the incident made no mention of the appellant as having been in any way implicated in the affair.

For the reasons I have given, the conviction is set aside and having regard to the fact that this is the second trial of the appeal we do not order a fresh trial.

Conviction set aside.

Proctors : *A. I. Cader* for the appellant.

Present : JAYETILEKE, J.

B. WRIGHT, S. I. POLICE, ANURADHAPURA vs. S. M. SIRIWARDENA

S. C. 86—M. C. Anuradhapura No. 19761.
Argued on : 8th May, 1947.
Decided on : 21st, May, 1947.

Criminal Procedure—Accused charged with certain offences—Prosecution evidence disclosing only abetment of such offences—Acquittal of accused without amending charges—Criminal Procedure Code, Section 172 (1).

Where an accused person was charged with certain offences under the Penal Code, and the evidence for the prosecution disclosed that the accused only incited others to commit the said offences and the Magistrate acquitted the accused on the ground that the charge was not established.

Held : (i) That as the evidence disclosed offences under sections 100 and 107 of the Penal Code, the Magistrate should have, without acquitting the accused, amended the charges under section 172 (1) of the Criminal Procedure Code.

(ii) That the offence of criminal intimidation is not triable by a Magistrate summarily if the threat is to cause death or grievous hurt.

A.C.M. Ameer, C.C., for complainant-appellant.

H.V. Perera, K.C., with *Colvin R. de Silva* for accused-respondent.

JAYETILLEKE, J.

The accused in this case was charged under Sections 343, 333 and 486 of the Penal Code with having assaulted or used criminal force to one Arasaratnam, an Accountant of the Polonnaruwa Kachcheri, with having wrongfully confined him and with having threatened to kill him. The Magistrate tried the case summarily and acquitted the accused. There is a Schedule to the Criminal Procedure Code which shows the offences which are and which are not triable by a Magistrate summarily. According to that Schedule the offence of criminal intimidation is not triable by a Magistrate summarily if the threat is to cause death or grievous hurt. The Magistrate does not seem to have been aware of the existence of this Schedule.

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In view of Arasaratnam's evidence, the Magistrate should, in the first instance, have taken non-summary proceedings. If, in the course of the inquiry, he found that there was no substance in the charge under section 486 it would have been open to him to discharge the accused on that charge and to proceed to try the other charges.

At the trial three witnesses gave evidence for the prosecution, namely, Arasaratnam, Manamperi the Divisional Revenue Officer, and Perera the Assistant Farm Manager. Their evidence, if true, discloses rather serious offences committed by the accused.

Arasaratnam said that on November 2, 1946, he proceeded with Manamperi and Perera to one of the farms at Hingurakgoda, of which the accused was the manager, to check the stores. When he was checking the stores the accused came there and called up the labourers. The accused shouted to the labourers not to allow him to leave the stores unless chillies and other provisions were given to them, threatened to kill him and asked someone to bring a gun. When he went inside the stores the accused shouted to the labourers to lock him in and the labourers closed the door and pressed against it.

Manamperi said that when Arasaratnam was checking the stores the accused went there and called up the labourers and about 300 or 400 labourers turned up. Addressing the labourers the accused said :

> " You are without chillies and flour for three weeks. He is the man, keep him inside, hit him. Don't allow him to go inside. Bring a gun."

Then the labourers went inside the store and the accused instigated them to assault Arasaratnam. He heard some of the labourers shouting " Eat his flesh ". At this stage he intervened and pleaded with the accused to allow Arasaratnam to go. The accused listened to him and allowed the labourers to go. Immediately afterwards the accused changed his mind and called the labourers back saying that Arasaratnam had deducted Rs. 50 from his salary and was harassing him.

Perera said that when the labourers came the accused proceeded to " incite " them. The accused told the labourers :

> " Go and surround him. Pull him out. Bring a gun. Pull him. Kill him."

The labourers became excited and moved about on all sides. They assembled near the store demanded chillies from Arasaratnam and threatened to take him out and kill him. Then Manamperi intervened and spoke to them. Some of the labourers listened to him and went away, but the accused continued to incite those who were there.

The accused did not give evidence nor did he call any witnesses.

At the close of defence Counsel's address the Magistrate acquitted the accused. In his order he says :

> " The accused incited the labourers to do certain things. That is not the charge he is called upon to answer."

It seems to me that if he read Sections 100 and 107 of the Penal Code he could not have made that observation. Section 100 says that a person abets the doing of a thing who instigates any person to do that thing. Section 107 says that if the abetter is present when the offence is committed he shall be deemed to have committed such offence. It is true that these sections are not referred to in the charge. But Section 172 (1) of the Criminal Procedure Code gives the Court the power to amend a charge at any stage of the trial. In *Hamy vs. Appuhamy* (1898) 3 N. L. R. page 101 at page 102 Lawrie, J. said :—

> " If the Crown had not made out a sufficient case against the accused, they were entitled to an acquittal : if, on the other hand, the Crown had made out a sufficient case for a conviction for an offence, but a case not entirely in conformity with the indictment, the District Judge should have altered the indictment and have called on the accused for the defence."

The order of the Magistrate cannot be supported and must be set aside. I would send the case back for a fresh trial before another Magistrate.

Set aside and sent back.

Present : HOWARD, C.J.

S. APPUHAMY & ANOTHER vs. S. RAMASAMY PILLAI'S daughter, THAILAMMAH

S.C. 244 with Application for leave to Appeal (S.C. 46)—C.R. Kandy No. 23749.
Argued on : 27th February, 1947.
Decided on : 4th March, 1947.

Execution Sale—Decree against defendant adjudged lunatic at time of decree—Purchase by decree-holder at sale in execution—Later transfer to bona fide *purchaser—Can such transfer be set aside.*

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Held : That a deed in favour of a *bona fide* purchaser of property sold in execution of a decree against a defendant, who had been adjudged a lunatic at the time the decree was entered, cannot be set aside merely on the ground that such decree and subsequent orders thereon were null and void.

Cases referred to : *Wijeratne vs. Sapugodage Mendis Appu* (32 C.L.W. 105.)
Sheik Ismail Rowther et al vs. Rajah Rowther (1906) 30 Indian Law Reports (Madras) 295.
Zain-ul-Abdin Khan vs, Asghar Ali Khan (1888) 10 Allahabad 166.

Cyril E. S. Perera with *L. C. Weeramantry* for the appellants.
N. E. Weerasooriya, K.C., with *S. R. Wijeyetilleke* for the petitioner-respondent.

HOWARD, C.J.

This is an appeal by the 3rd and 4th respondents from the judgment of the Court of Requests, Kandy, setting aside a decree of the same Court dated the 11th May, 1938, on the ground that the defendant in that case was of unsound mind and also setting aside subsequent orders made in the case and declaring the sales made thereunder were null and void. The plaintiff in the original case has since died leaving as heirs his mother the 1st respondent and his brother the 2nd respondent. The defendant in the original case has also died leaving as heirs the petitioner who is the respondent to this appeal and another daughter. The plaintiff obtained decree on the 11th May, 1938. In pursuance of this decree the defendants' properties were sold on the 2nd August, 1938, and the 22nd October, 1938, and purchased by the plaintiff. The latter subsequently sold the properties to Muttu Kannu Ammal and Sunderam Pillai by deed No. 688 dated the 13th February, 1942. These two purchasers by deed No. 762 of the 5th May, 1945, sold the same properties to the appellants for the sum of Rs. 6,000. The respondent to this appeal applied for the decree and subsequent sales and orders to be set aside on the ground that the defendant, her father, was adjudged a lunatic on the 1st September, 1938. In setting aside the decree, sales and orders the Commissioner has held that the defendant was adjudicated a lunatic on the 1st September, 1938, and was of unsound mind even when the decree was entered on the 11th May, 1938. It would appear also that the appellants when they purchased the properties in 1945 were aware of the fact that the defendant had been of unsound mind for about two months prior to the order adjudging him a lunatic.

There is no suggestion that the appellants had in purchasing the properties been a party to any fraud either in connection with the decree, order for sale or their subsequent purchase. In these circumstances they were *bona fide* purchasers for value. The case is in my opinion governed by the judgment of Wijeyewardene, J. in *Wijeratne vs. Sapugodage Mendis Appu* (32 C.L.W. 105) where it was held that the title of a *bona fide* purchaser from a decree holder who purchased at a sale held in execution of his decree is not affected by the subsequent reversal of such decree. In his judgment Wijeyewardene, J. referred to the judgment of the High Court of Madras in *Sheik Ismail Rowther et al vs. Rajab Rowther* (1906) 30 Indian Law Reports (Madras) 295, and cited with approval the following passage from that judgment :—

> "Assuming that the first defendant in obtaining the decree had been guilty of misrepresentation or fraud, the proceedings were only voidable, and a *bona fide* purchaser from him is entitled to rely on his title as such. The plaintiff had only an equity to set aside the proceedings which were the result of fraud or misrepresentation, and that equity cannot be allowed to prevail against persons in the position of the appellants.
>
> It is by no means clear that it was the duty of the appellants when aware that their vendor's title was under a Court sale, to refer to the decree on which the sale was held ; but, assuming that it was, we are unable to agree to the argument urged for the plaintiff that a reference to the decree as it stood before it was set aside would have shown any flaw in the title of the first defendant so as to fix the appellants with notice of the first defendant's fraud."

The decision of the Madras Court was, as pointed out by Wijeyewardene, J., consistent with the judgment of the Privy Council in *Zain-ul-Abdin Khan vs. Asghar Ali Khan* (1888) 10 Allahabad 166. The respondents are in a stronger position in this case as they are not merely purchasers at an execution decree but from a person who bought from the purchaser at an execution decree. The judgment of the Commissioner for the reasons I have given must be set aside so far as the appellants are concerned and they are declared entitled to the lands described in the Schedule to the respondents' petition together with their costs in this Court and the Court below.

Set aside.

Proctors : *N. A. M. Naheem* for the appellant.
V. R. Wickramatilake for the petitioner-respondent.

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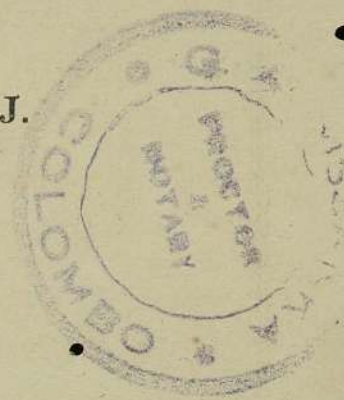

IN THE COURT OF CRIMINAL APPEAL

Present : HOWARD, C.J., (President), KEUNEMAN, J., & CANNON, J.

REX vs. W. PREMERATNE *alias* BANDA

Application No. 12 of 1947—S. C. 95/M. C. Panadura 40687.
Argued on : 24th February, 1947.
Decided on : 3rd March, 1947.

Court of Criminal Appeal—Verdict guilty of murder—Evidence disclosing elements of defence of grave and sudden provocation—Failure on the part of trial Judge to give adequate direction thereon.

Held : That where in the absence of an adequate direction by the learned trial Judge to the jury on the defence that the act was committed when the accused had lost his power of self-control by reason of grave and sudden provocation, when the elements of such defence was disclosed in the evidence, the conviction for murder cannot stand and a verdict of culpable homicide not amounting to murder should be substituted.

H. V. Perera, K.C., with *K. A. P. Rajakaruna* and *Siri Perera* for the appellant.
T. S. Fernando, C.C., with *E. L. W, de Zoysa, C.C.*, for the Crown.

HOWARD, C.J.

The applicant was found guilty of the offence of murder by a majority verdict of five to two. Mr. H. V. Perera on his behalf, whilst not complaining that the Jury have rejected the plea put up by the applicant at his trial that he was exercising the right of private defence, maintains that the learned Judge has not properly put before the Jury the defence that the applicant committed the act when he had lost the power of self-control by reason of grave and sudden provocation. The learned Judge before dealing with the facts in this particular case dealt with the possible defence available to the applicant. On page 9 of the record he says that " it may be urged that it is possible to say in this case that there was grave and sudden provocation ". On page 10 he again refers to this defence and again on page 13. The learned Judge then goes on to deal with the facts so far as the defence is concerned. The Jury, however, is not asked to consider the facts and decide whether a defence based on the fact that the applicant had lost his power of self-control by reason of grave and sudden provocation. In *Mancini vs. Director of Public Prosecutions* (28 Criminal Appeal Reports, p. 73) Viscount Simon, L.C., states as follows :—

> " To avoid all possible misunderstanding, I would add that this so far from saying that in every trial for murder, where the accused pleads not guilty, the Judge must include in his summing-up to the Jury observations on the subject of manslaughter. The possibility of a verdict of manslaughter instead of murder only arises when the evidence given before the Jury is such as might satisfy them as the Judges of fact that the elements were present which would reduce the crime to manslaughter, or at any rate might induce a reasonable doubt whether this was, or was not, the case."

The Crown in this case put before the Jury the evidence of two eye-witnesses, Eradias and Rodrigo. Eradias, a boutique-keeper, stated that it was a moonlight night and the applicant was seated in his boutique when the deceased came in and addressed the applicant saying " Are you Banda ". Eradias told the deceased not to have any discussion in the boutique. The deceased left the boutique and the applicant followed and said something which could not be heard. The deceased then came close to the applicant saying " *Tho*—what did you say ". The deceased raised his hand but before he could hit the applicant, the latter stabbed him with a knife several times. The evidence of Eradias was corroborated by that of Rodrigo, who also stated that the deceased when he came into the boutique approached the applicant who was seated, in a threatening manner. The majority of us consider that the evidence of those two witnesses is such as might satisfy the Jury as the Judges of fact that the elements were present which would reduce the crime to culpable homicide not amounting to murder. In these circumstances we set aside the conviction from murder and substitute a conviction for culpable homicide not amounting to murder. In respect of this offence we pass a sentence of 15 years' rigorous imprisonment.

Conviction altered.

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Present : DIAS, J.

ABDUL RAHMAN LEBBE MOHAMED THASSIM vs. EDMUND RODRIGO, CONTROLLER OF TEXTILES

Application for a Writ of Certiorari on the Controller of Textiles.—S. C. No. 167.

Argued on : 28th May, 1947.
Decided on : 3rd June, 1947.

Certiorari—Order made by Textile Controller under Regulation 62† *of the Defence* (*Control of Textiles*) *Regulations*, 1945—*Bias on the part of the Controller—Is it a ground for quashing such order.*

Held : That inasmuch as a proceeding under Regulation 62† of the Defence (Control of Textiles) Regulations 1945 is a judicial inquiry, the Controller should possess an open mind and should be free from bias.

(ii.) That where it is shown that the Controller's mind was tainted with bias, he has acted without jurisdiction and an application for a *certiorari* to quash an order made in such proceedings should be allowed.

Cases referred to :—Abdul Thassim vs. Edmund Rodrigo (1947) 48 N. L. R. 121.*
See *In re a Sworn Translator* (1932) 12 C. L. Rec. *xciv.*
Board of Education vs. Rice (1911) App. Cases 279 at p. 282.
A Pleader vs. Judges of the High Court of Allahabad A. I. R. (1931) P. C. 112.

H. V. Perera, K.C., with *C. Suntheralingam*, for petitioner.
Walter Jayewardene, Crown Counsel, for the respondent.

DIAS, J.

This is an application under section 42 of the Courts' Ordinance for a writ of *certiorari* to quash the order dated April 10, 1946, made by the respondent, Mr. Edmund Rodrigo, the Controller of Textiles, declaring the petitioner to be unfit to continue to hold a textile license, and cancelling his license as from April 10, 1946, under section 62 of the *Defence* (*Control of Textiles*) *Regulations* 1945 published in the Defence Regulations in force on October 1, 1946, page 108.

Mr. Edmund Rodrigo was the Controller of Textiles at the date this application was filed. Since then, however, he has ceased to function and has been succeeded by another officer. It was agreed between counsel on both sides that the decision of the questions raised need not be delayed while steps were being taken to add or substitute the present holder of the office as a respondent, and that the Court should proceed to adjudicate as between the petitioner and the respondent before the Court.

Under the Textile Regulations the holder of a textile license can be punished for a breach of its provisions in three ways :

(*a*) He can with the written sanction of the Controller be charged in a Magistrate's Court—section 59 read with section 57. On his conviction the licensee can appeal in the ordinary way to the Supreme Court. When the conviction stands the Controller can cancel the license—section 60.

(*b*) Where the Controller is satisfied that a dealer has contravened the regulations, other than certain specified regulations, the Controller may, without prosecuting him or sanctioning his prosecution, make what is called a " punitive order " under section 58 (1). A person against whom such an order is made, has the right to appeal to " the Tribunal of Appeal " constituted under section 58A. The order of the Tribunal of Appeal " is final and conclusive—section 58A (6). Under a punitive order the Controller has the power to suspend or cancel the license granted to the offender.

(*c*) Section 62 of the Regulations provides :
" Where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer, the Controller may cancel the textile license or textile licenses issued to that dealer ".

There is no appeal from an order made under this regulation.

Regulation 62 came up for elucidation and construction in this very case before a Bench of five Judges (1947) 48 N. L. R. 121 when it was laid down that the Controller of Textiles when he

* 34 C.L.W. 42 (Edd.) † Cited in the judgment (Edd.)

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exercises functions under Regulation 62 of these Regulations is a " person or tribunal " within the meaning of section 42 of the Courts Ordinance. It was also laid down that the fact that he can only act when he has " reasonable grounds " indicates that he is acting judicially and not exercising merely administrative functions. It was, therefore, held that the Controller when acting under section 62 was amenable to a mandate in the nature of a writ of *certiorari*. Until this decision was given the Controller and those advising him had been acting under the belief that a proceeding under section 62 was in the nature of purely *departmental* or *administrative* action and could not, therefore, be reviewed by the Courts of law, see *In re a Sworn Translator* (1932) 12 C.L. Rec. *xciv*. That fallacy has now been exploded.

In order to appreciate the questions which arise for decision, and in view of the order I propose to make, it is necessary to consider the matter from its inception.

On January 5, 1945, in the course of an inquiry at the shop of Messrs. Hamid & Company (a stranger to these proceedings), the respondent inspected certain bill books of that firm and came to the conclusion that this petitioner " appeared to have purchased textiles from the said firm approximately of the value of Rs. 20,000 for his business at Ambalangoda ". The respondent, thereupon, instructed two officers of his department to investigate whether these textiles were taken to the petitioner's business at Ambalangoda and whether they were disposed of in accordance with the Regulations.

These two officers made their investigations, and their reports are appended as exhibits D and E to the respondent's affidavit. A third officer furnished the report marked F.

The respondent says in paragraph 6 of his affidavit : " From the investigations made by me and by the three officers.......it appeared to me that the petitioner had contravened the said Regulations and was carrying on business in a manner prejudicial to the effective control of textiles and was, therefore, liable to be dealt with on the ground that he was unfit to hold any textile license ".

On January 10, 1945, therefore, the respondent wrote the letter marked H to the petitioner stating that he had been informed that the petitioner had committed various (specified) breaches of the Regulations, and he was called upon to show cause in writing before January 20, 1945, why his license should not be cancelled for these breaches of the Regulations. This action was taken by the respondent under section 58 (1) (2) of the Regulations. It is to be noted that the time given for showing cause was ten days, and no objection was taken then that the time given was insufficient.

The petitioner showed cause, but on his application the inquiry which had been fixed for February 2 was put off until February 5. On this date petitioner's counsel applied for another postponement which the respondent, in my view, rightly refused. Counsel then retired from the proceeding and the respondent proceeded to hear the evidence and made order cancelling the petitioner's license. This order was communicated to the petitioner on February 7, 1945. This was clearly a " punitive order " made under section 58 (1) of the Regulations.

The petitioner appealed to the Tribunal of Appeal under section 58 (3). On March 19, 1945, when the appeal was taken up for hearing, the Tribunal sent the case back to the respondent after making the following order :

> " After examining some copies of letters produced on behalf of this appellant, the Controller states that his order has not been conveyed in full to the appellant and wishes to rectify the position. We have also considered the suggestion made in the petition of appeal that the appellant be given an opportunity of producing evidence in support of his written explanation. This suggestion seems to us to deserve consideration by the Controller. We, therefore, adjourn further consideration of the appeal."

The matter then came up before the respondent on April 26, 1945. On that day counsel for the petitioner took up the position that the respondent was too closely connected with the facts of the case to take an impartial view of the matter, and suggested that the inquiry be passed on to someone else—Exhibit I. The respondent was not prepared to do this. It seems to me that both counsel for the petitioner and the respondent were wrong in the attitudes they adopted. Counsel for the petitioner had no right to ask that the matter should be passed on to someone else in the light of the definite order made by the Tribunal of Appeal. The matter was to go back *to the respondent* so that some mistakes should be rectified and that the petitioner's evidence should be led. If the petitioner did not want this respondent to continue to deal with the matter, he ought to have obtained a direction from the Tribunal of Appeal to that affect. Not having done so, his attitude was unreasonable and obstructive. How could the matter be dealt with by a new officer

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unless the whole proceedings were started *de novo* ? The Tribunal of Appeal did not order that the proceedings should be held afresh.

Instead of so ruling, the respondent recorded : " I am not prepared to do this. These are not judicial proceedings, and in departmental administrative matters, the head of the department is necessarily aware of the facts ; and what is more, is officially interested in the matter ". Counsel for the petitioner then asked for another date which the respondent gave him and refixed the matter for May 10, 1945.

On May 10, 1945, after certain submissions were made by counsel for the petitioner, the respondent made the long minute which is appended to Exhibit J. Counsel having heard the respondent dictate this minute then stated that his clients were not prepared to participate in the inquiry. He again submitted that the respondent was too intimately connected with the facts of the case to hold an impartial inquiry, and wanted it held by some other person. The respondent then went on to record :

> " I cannot understand Mr. Suntheralingam's position. After my last explanation that this is *not an impartial judicial inquiry*, but the exercise of definite *administrative powers* vested in me, and which I can exercise on facts that come under my direct notice, facts which I hear from others, and facts that emerge from perusal of documents and from facts which may be elicited in the course of an inquiry. It is left to me to hold an inquiry or not as the case may be at my entire discretion, and there is certainly no provision for an inquiry by anybody else. The only other authority having any part or share in the eventual disposal of the matter is the Appeal Tribunal which, I presume, will not concern itself in the correct observance of any procedure on the lines of a lawsuit, but will only look into the question whether in all the circumstances of the case, I have exercised my discretion in a reasonable and appropriate manner. I think all these attempts to pretend that the shop is the unit and not the licensee is an attempt at gaining time......and he only wants to take time because he knows that when there is an appeal pending, he can continue his trade, and he wants to make that continue as long as possible I shall return the papers to the Appeal Tribunal as soon as it is reconstituted."

On September 30, 1945, the matter went back to the Tribunal of Appeal—Exhibit K. Counsel for the petitioner then addressed a long argument to the tribunal and asked that the matter be not proceeded with until effect was given to the order of March 19, 1945. The application was refused. Nothing deterred, counsel then asked the Tribunal to suspend proceedings to enable the petitioner to move the Supreme Court for a writ of *Certiorari*. This application was also refused by the Tribunal. On September 24, 1945, the Tribunal recorded that it had been served with a notice from the Supreme Court, and therefore the appeal proceedings were suspended *sine die* until the decision and disposal of the application to the Supreme Court.

On September 24, 1945, the petitioner making the Tribunal of Appeal the respondent had moved the Supreme Court for writs of *certiorari*, *prohibition* and *mandamus*. The matter came up before Cannon, J. on March 15, 1946, when a compromise was effected. Canon, J. said : " The object of the petitioner is to prevent the Tribunal of Appeal considering what they submit is a matter alien to the decisions appealed from. Having regard to the Controller's letter and the present position which has resulted from unforeseen circumstances, it seems that an order of the Court in the matter as it now presents itself is unnecessary, and a *consent order* has, therefore, been drafted with the assistance of Mr. H. V. Perera and the Solicitor-General who appears as *amicus curiae*. The order is as follows : The Controller of Textiles revokes the two orders appealed from, and the petitioner withdraws his application. The position of the petitioner and the Controller of Textiles will be as it was on the 7th of February, 1945."

Two facts emerge : In the first place the Controller of Textiles was no party to those proceedings. No relief had been asked for as against the Textile Controller, and I find it difficult to see how this order binds the present respondent. This question has not been raised or argued, and I shall say no more about it, except that the respondent apparently acquiesces in the order drafted by the Solicitor-General who represents the administration. In the second place what was reversed by the Supreme Court in the consent order were not only the proceedings before the Tribunal of Appeal, *but also the two orders of the Textile Controller which were appealed against.* In fact the resulting position was as it existed before the Textile Controller wrote the letter H dated January 10, 1945, calling upon the petitioner to show cause why a punitive order should not be made against him.

It is at this point that the present matter of complaint emerges. The order of the Supreme Court is dated March 15, 1946. On March 25, 1946, the respondent wrote the letter marked C to the petitioner stating : " I believe you to be unfit to continue to hold a license to deal in textiles....... You are, therefore, requested to show cause in writing before 5th April, 1946, why I should not revoke all outstanding licenses issued to you to deal in textiles ". In the reason given

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by the respondent in the letter marked C for his belief that the petitioner was unfit to hold a license appears this : " When you were questioned why you did not take them (the textiles) to your shop, you produced a bill book containing bills on which *the name of D. V. Mendis as purchaser had been forged and in which you had altered their date* ". It is to be noted that the time given for showing cause was eleven days.

To this letter the petitioner's proctor on April 3, 1946, that is to say, two days before cause had to be shown, replied by letter marked D1 stating that they were consulting counsel and in view of the Easter holidays a date in May was asked for in order to show cause.

No reply was sent to this communication, but on April 10, 1946, the respondent by his letter E acting under section 62 of the Regulations revoked all the petitioner's licenses with effect from that date. The question for decision is whether the respondent acted without jurisdiction or in excess of his jurisdiction in making the order.

It having been clearly declared to be the law that the respondent in acting under section 62 of the Regulations was acting in a judicial and not in an administrative capacity, it is urged that in cancelling the petitioner's licence he acted without jurisdiction because the time given for showing cause was inadequate in that a fair opportunity for meeting the accusation was not afforded to the petitioner. It is further contended that the act of the respondent in proceeding to make his order without replying to the petitioner's letter D1 dated April 3, 1945, has prejudiced the petitioner. It is further argued that even if the petitioner was in default, it was the duty of the respondent to have held an inquiry on April 5, 1945, before making up his mind to cancel the licences. Considering the fact that one of the accusations made against the petitioner is that he had either forged a document or caused somebody to forge it, it is contended that the petitioner should have been first prosecuted in a Court of Law for that offence, before the drastic provisions of section 62 were invoked against him. Finally, it is urged that the respondent was biassed, that he had already made up his mind against the petitioner, that he did not have that open mind which is a cardinal chracteristic of a Judge, and that therefore he was incompetent to deal with this matter under section 62.

I cannot agree that the time given by the respondent for showing cause was insufficient or inadequate. It will be recalled that when the petitioner was first asked to show cause on January 10, 1945, at a time when he was probably quite ignorant of the action contemplated against him, he was satisfied with ten days. By April, 1946, both the petitioner and those advising him must have been fully aware of what the facts were and the legal principles involved. They were given eleven days in which to show cause. The petitioner waited until two days before the date fixed for showing cause, and wrote a vague letter stating that they were consulting counsel and, in view of the approaching Easter vacation, asked for a date in May. I consider this to be an unsatisfactory letter, and the application should have been disallowed out of hand. It would have been more satisfactory had the respondent replied to the letter D1, but even if it did reach his office on April 4, it may not have reached a busy man like the respondent until April 5 when it was too late to reply to it. I find that the first point taken fails. Before a person is penalised under section 62 he is entitled to be told of the accusations against him, and he should be afforded a reasonable opportunity for showing cause. That has been done in this case, but the petitioner did not avail himself of the opportunity afforded him. He was in default and the respondent could not be expected to go on postponing the inquiry until it suited the convenience of the petitioner to attend. The decision of the House of Lords in *Board of Education vs. Rice* (1911) App. Cases 279 at p. 282 was cited. It was there held that the officer must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But he was not bound to treat such a question as though it were a tria . He had no power to administer an oath and need not examine witnesses. He can obtain information in any way he thinks best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

I do not think any prejudice has been caused to the petitioner by reason of the fact that no reply was sent to his letter D1. It was the lateness of the despatch of the petitioner's letter which prevented the respondent from sending him a reply.

Under section 62 when a party is in default, there is no inquiry which the Controller can hold, for the section presupposes that before the petitioner is called upon to show cause, the Controller is already in possession of certain facts which make him form the view that a person should be

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called upon to show cause. If that person appeared and disputed the truth of the accusations, or demanded an inquiry, the Controller was bound to hold that investigation before he can have " reasonable grounds to believe " that the dealer is unfit to continue as a dealer. But when the petitioner is in default, it is open to the Controller to form that belief on the uncontested facts which are before him. Undoubtedly, there is a presumption of innocence in favour of the petitioner. That presumption could be displaced either after an inquiry at which the petitioner was present, or when the petitioner is in default, as was the case here, on the information already before the Controller.

Counsel for the petitioner admits that it is not a condition precedent for the taking of action under section 62 that there should have been a prosecution of the petitioner in a criminal Court. He has cited authorities, mostly in cases where members of the legal profession have been disbarred for professional misconduct in matters showing that they had committed some criminal offence. The Privy Council has expressed the view in *A Pleader vs. Judges of the High Court of Allahabad* A. I. R. (1931) P. C. 112, that in such cases, it is desirable that the offender should be first tried for the alleged offence, before disciplinary action is taken against him. That does not, however, prevent such action being taken against a person without first setting the criminal law in motion. To lay down such a principle would be inexpedient, for there are many cases where there is a moral certainty that a person may have committed a crime, which cannot be supported by evidence in a Court of Law, and yet that person may be guilty of conduct which makes him amenable to disciplinary action. The fact is that every case must be decided on the peculiar facts applicable to it.

The substantial point urged to show that the respondent acted without jurisdiction is that he was biassed and did not possess that " open mind ' which is an attribute of the judicial mind, and that, therefore, he had no jurisdiction to deal with the petitioner under section 62. Curiously enough, this point has not been taken in the petition. The explanation is that until the respondent filed his counter-affidavit and the exhibits annexed thereto, the petitioner was unable to formulate this as a ground of objection. This is strange, because counsel who appeared for the petitioner in the earlier proceedings, time after time protested that Mr. Edmund Rodrigo was so intimately connected with the matter, that it was not expedient that he should continue to function both as prosecutor and Judge. In fact, the whole of the previous proceedings show that one of the main objections, if not the main objection, urged by Mr. Suntheralingam was this question of bias The evidence also proves that Mr. Rodrigo appears to have conceded this ; but his point of view—subsequently declared by a Bench of five Judges to be erroneous—was that as this was a departmental and not a judicial inquiry—he was entitled to be biassed. In passing I may be permitted to observe that it is by no means clear whether in an administrative or departmental inquiry against a person which may entail penal consequences, the head of a department who knows the facts can be both prosecutor and Judge. I believe in such cases His Excellency the Governor has been known to quash the proceedings. Now that the law has been judicially declared that a proceeding under section 62 is a judicial inquiry and not merely an administrative proceeding, the evidence clearly shows that when the respondent called upon the petitioner to show cause under section 62, he had already made up his mind that the petitioner was unfit to continue as a dealer in textiles.

A Judge who is biassed has no jurisdiction to hear that case. Our Courts have even gone to the length of holding that even if there is the semblance of bias in the Judge, he must not try that case. I was informed that there is a Deputy Controller of Textiles. Section 53 of the Regulations provides that, subject to the general direction of the Controller, (*a*) any power or function conferred upon or assigned to the Controller by any of the provisions of these Regulations may be exercised or discharged by any Deputy Controller of Textiles ; and (*b*) any such power or function, *other than power* or *function under Regulation 57 or Regulation* 58, may be exercised or discharged by an Assistant Controller of Textiles or by any other officer authorised in writing in that behalf by the Controller. Section 57 refers to the granting of sanction to prosecute. Section 58 deals with the power to make a " punitive order ". It is to be noted that section 62 is not excepted under section 53 (*b*). Therefore, the power to hold an inquiry and to make an order under section 62 can be lawfully delegated to a subordinate by the Controller.

In the circumstances of this case, what the respondent should have done was to have called upon the petitioner to show cause under section 62 and then hand over all the evidence to his subordinate with the direction that he should hold

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the inquiry *without any interference from the Controller*, and report his findings to him. If the findings were adverse to the petitioner and were to the effect that he was unfit to continue as a dealer, action could be taken under section 62, and no objection whatever could be taken to the legality of the procedure adopted, for in such a case the Controller would clearly have " reasonable grounds to believe " that the dealer was unfit to continue as such. I have no doubt that had the respondent been aware that proceedings under section 62 were judicial and not administrative, he would have taken the proper course. However as things are, an erroneous course of procedure was followed owing to a misapprehension of the nature of the proceedings under section 62. In doing so the respondent was clearly biassed against the petitioner, and he had, therefore, no jurisdiction to deal with the matter under section 62. The proceedings culminating in the cancellation of the petitioner's licences cannot, therefore, stand.

The rule *nisi* will, therefore, be made absolute. In all the circumstances of the case I think each party should be ordered to bear his own costs.

Rule nisi made absolute.

Present : Howard, C.J. & Wijeyewardene, J.

SAUNDRANAYAGAM vs. SUPPRAMANIAM CHETTIAR

S. C. No. 10*M—D. C.* (*F*) *Kandy No.* 1301.

Argued on : 18th & 19th March, 1947.
Decided on : 27th March, 1947.

Principal and agent—Promise by purchaser of property to pay commission to agent—Receipt of secret commission from seller—Is agent entitled to payment from purchaser.

Held : (i.) That an agent employed to purchase property, who received a secret profit from the seller, is not entitled to insist on fulfilling any promise by the purchaser to pay commission to him.

Per Howard, C.J.—" That if all he (appellant) can show is nicely balanced calculations which lead to the equal possibility of judgment on either the one side or the other being right, he cannot be said to have succeeded."

Cases referred to :—*Andrees vs. Ramsay & Co.* (1903) 2 K. B. 635.
Naba Kishore Nandal vs. Upendra Kishiore Nandal A. L. R. (1922) Privy Council 39.

H. V. Perera, K.C., with *N. E. Weerasooriya, K.C.*, and *M. P. Spencer*, for the defendant-appellant.

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

Howard, C.J.

The defendant appeals from a judgment of the District Court awarding the plaintiff a sum of Rs. 10,375, which the latter alleged to be due to him as commission for negotiating the purchase of the Mahakande Estate. In his plaint the plaintiff alleged that the defendant at Matale engaged the services of the plaintiff to arrange for the purchase of this estate and promised to pay the plaintiff remuneration at the rate of 2½ per centum on the purchase price on the completion of the purchase by the defendant of the said estate. The plaintiff further alleges that he brought the defendant and the owner of the estate together and on the 2nd April, 1943, the defendant purchased the estate for the sum of Rs. 415,000. The defendant in his answer denied that he agreed to pay the plaintiff any remuneration on the purchase by the defendant of the Mahakande Estate. The defendant further alleged that the owner of the estate had requested Messrs. Keell & Waldock, Brokers of Colombo, to find a purchaser for the said estate and had undertaken to pay Messrs. Keell & Waldock 2½ per cent. commission on the purchase price, and that Messrs. Keell & Waldock had agreed to pay the plaintiff half the said commission if the plaintiff introduced a prospective purchaser to Messrs. Keell & Waldock. In order to earn this commission the plaintiff had requested the defendant to purchase the estate and that any commission on the sale was payable by the vendor and that the plaintiff having

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received commission from Messrs. Keell & Waldock was not entitled to recover any commission from the defendant. In finding for the plaintiff the learned District Judge after a careful examination of the evidence has held that the defendant agreed to pay the plaintiff 2½ per cent. on the purchase value. Mr. H. V. Perera on behalf of the defendant, whilst conceding that the question at issue was one of fact, contends that the burden of proving the agreement to pay commission rested on the plaintiff and that there was no evidence to justify the finding in the plaintiff's favour.

The plaintiff, who styled himself broker and commission agent, stated in evidence that he did business at Matale and one Marimuttu assisted him. Previous to the negotiations in regard to the Mahakande Estate he did not know the defendant who was introduced by Marimuttu as a possible purchaser. According to Marimuttu the defendant who lives at Nawalapitiya came and saw him in the early part of December, 1942, and asked him if there was any estate to be sold. Marimuttu told him that there was an estate at Peradeniya and he should come after a week's time. Marimuttu then communicated with Colonel T. Y. Wright, the owner of the estate, on behalf of the plaintiff.. Colonel Wright replied on the 5th December, 1942, (P6), stating that the estate was for sale and referring the plaintiff to Messrs. Keell & Waldock. The plaintiff thereupon wrote D8 of the 7th December, 1942, to Messrs. Keell & Waldock and obtained particulars of the estate. Subsequent to that letter Messrs. Keell & Waldock undertook to pay the plaintiff half of their 2½ per cent. commission if he found a purchaser for the estate. It would appear that Marimuttu wrote to the defendant on the 16th December, 1942, and arranged that the plaintiff, defendant and himself should visit the estate on the 22nd December, 1942. The defendant acknowledged this letter by P5 dated the 17th December, 1942. On the 22nd December, 1942, the plaintiff, defendant and Marimuttu visited the estate as arranged. On the 23rd December, 1942, the plaintiff says that he wrote the letter P1 to the defendant. P1 is worded as follows :—

" C. Saundranayagam.

No. 5, Taralanda Road,
Matale, 23rd December, 1942.

Mr. Y. L. Suppramaniam Chettiar,
No. 75, Gampola Road,
Nawalapitiya.

Mahakande Estate

Dear Sir,

Yesterday after you visited the above estate with me Mr. A. K. Marimuttu Pillai and our interview with Col. T. Y. Wright you informed us that you are prepared to purchase same and to do the needful in connection with this matter. I wish to bring to your information that if you desire me to negotiate this transaction for you, please note that you must pay me my usual 2½" % commission. If my terms are agreeable kindly send me a letter authorising me to negotiate this transaction for you and I shall do my best for you. Thanking you for an early reply.

Yours faithfully,
Sgd. C. SAUNDRANAYAGAM."

The plaintiff further states that he received letter P2 from the defendant on the 25th December, 1942. This letter which is addressed not to the plaintiff but to Marimuttu is worded as follows :—

" A. K. Marimuttu Pillai, Esq.,

Manoranjithavasa, No. 5, Taralanda Road,
Matale.

Mahakande Estate

Dear Mr. Marimuttu Pillai, Esq.,

I am ready and willing to purchase above estate on the 4th January, 1943, without fail. Please inform Mr. Saundranayagam to arrange with Messrs. Keell & Waldock of Colombo accordingly. I trust you and Mr. Saundranayagam will do everything for me in the above matter and oblige.

Sgd. (in Tamil).
25-12-42."

The plaintiff states that after receiving P2 he took steps to complete the sale. The sale was actually completed in Messrs. Keell & Waldock's office on the 8th January, 1943, when the defendant received D4 from Messrs. Keell & Waldock. According to the plaintiff the latter when he handed the particulars of the estate to the defendant did not tell him that Messrs. Keell & Waldock had asked him to negotiate the sale and had further promised him half their commission. According to the plaintiff the defendant acquired this information between the 22nd December, 1942, when the estate was inspected and the 8th January, 1943, when the deal was completed. After the sale was closed the defendant according to the plaintiff said he would pay the commission and a *santosam* in addition.

It is now necessary to examine the evidence put forward by the plaintiff to support his case that the defendant agreed to pay him commission. The plaintiff's story is chiefly remarkable for its inconsistencies. In examination-in-chief he says that the agreement to pay is contained in the letters P1 and P2. There was no previous agreement to pay commission. There is also the following passage where he says " On this occasion (that is to say the occasion when they visited the estate) I did not talk to the defendant about the

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commission nor did he talk to me about the commission ". Again in cross-examination he says :

" At the initial stages there was no mention by the defendant of any commission being paid to me. On the day we went to inspect the estate the question of commission was not discussed at all. On the day we went to inspect the land I had already received a promise from Messrs. Keell & Waldock that they will pay me half their commission."

* * * *

" For the first time I indicated to the defendant that he must pay me a commission in this letter P1."

But later on in the cross-examination the following passages occur :—

" When I got the particulars about this estate and told the defendant about it in Marimuthu's house somewhere about the second week of December, I did not give the defendant the name of the estate. I gave him all other particulars. Then the defendant asked me to give him the name of the estate and asked me not to fear that he would drop us and close the transaction himself. He said he would pay my usual 2½% commission. On that occasion I told the defendant that my commission was 2½%. He said he was prepared to pay my commission at 2½%. Thereafter we visited the estate on the 22nd December, 1942. There is no writing by which the defendant has agreed to pay me or Marimuttu 2½% commission.. Either on the 6th of January, 1943, or on the 8th of January, 1943, defendant promised me verbally to pay me the commission at 2½%. Defendant promised to pay this in the building in which Messrs. Keell & Waldock have their offices. (XXd. ? contd.) My assistant Marimuttu heard the promise given verbally by the defendant on the 6th or 8th January, 1943, that he would pay me 2½% commission. Marimuttu heard defendant promising me 2½% about the middle of December, 1942. The first time I asked the defendant in writing to give me commission was when I wrote to him P1. The defendant's promise to pay my usual commission of 2½% plus a santosam was made either on the 6th January, 1943, or on the 8th January, 1943."

It is interesting to discover to what extent the evidence of Marimuttu corroborates that of the plaintiff in regard to the promise to pay commission and the occasion or occasions on which such promise was given. In examination-in-chief Marimuttu stated as follows :—

" After defendant received the purchase note he told us at the office of Messrs. Keel & Waldock that he had learned that we were getting a commission from Messrs. Keell & Waldock. Plaintiff said 'yes'. Defendant then told plaintiff that he (defendant) was going to give plaintiff a commission and also in addition to that a *santosam* for getting the estate cheap for him. Defendant promised to give 2½% commission on the purchase value. Defendant did not say how much *santosam* he was going to give."

In cross-examination Marimuttu stated :—

" I will get a share of the claim that is made by the plaintiff if he succeeds. On the day of the inspection of the estate namely the 22nd of December, 1942, defendant said that he was willing to buy the estate. Defendant verbally told us so and confirmed it by letter also. Defendant by letter P2 confirmed that verbal statement. The confirmation was sent to me. When defendant took the particulars of the estate from me in December, 1942, he said that he would pay us commission. That was prior to the inspection on the 22nd December, 1942. By a writing Messrs. Keell & Waldock agreed to pay the plaintiff a half share of their commission. No writing was taken from the defendant regarding his promise to pay commission to the plaintiff. Defendant said, when taking the particulars from the plaintiff, that he would pay the commission and that after inspection of the land, if he was satisfied he would give a writing confirming that agreement to give the commission. After the inspection defendant said that he would send a writing embodying the agreement to pay commission. He said he would send the writing to both of us. We were both going to share the commission. Defendant did not in fact send a writing agreeing to pay a commission. Then the plaintiff wrote a letter to the defendant asking for authority to negotiate the sale, and in that letter plaintiff mentioned about the commission. Plaintiff wanted a reply sent to him. Defendant sent a reply to me. In the letter sent by defendant to me, which was a reply to the letter sent by the plaintiff to defendant, he (defendant) did not say that he was willing to pay commission. After I received letter P2 from the defendant we did not take any steps to get a writing from the defendant to pay us commission."

To sum up the evidence in regard to the promise to pay commission it would appear that both the plaintiff and Marimuttu agreed that the only evidence in writing of such a promise is contained in the documents P1 and P2. They are agreed that a promise was given in Messrs. Keell & Waldock's office on the 6th January, 1943, after the purchase price had been agreed. In fact according to the plaintiff and Marimuttu the defendant not only promised to pay the commission but also a *santosam*. In regard to any promise made prior to P1 and P2 the plaintiff first of all says that there was no prior promise and later in his evidence says that such a promise was made when the defendant was given particulars of the estate by the plaintiff. This information was alleged to have been given in Marimuttu's house about the second week in December. Marimuttu agrees with the second version given by the plaintiff as to when the first promise was made.

It is necessary to consider how the learned Judge when confronted with this variety of testimony has reached the conclusion that the plaintiff has discharged the burden of proving that the defendant agreed to pay his commission. He has apparently arrived at this conclusion after a consideration of P1 and P2. The defendant denies that he ever received P1. Marimuttu in his evidence in cross-examination states that after the inspection the defendant said he would send a writing to both the plaintiff and himself embodying the agreement to pay commission. The

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inspection took place on the 22nd December. It is very curious that in spite of the promise of the defendant that he would send a writing embodying the agreement the plaintiff should have thought fit to have written on the 23rd December —the very next day—a letter to the defendant informing him that he must pay commission. Moreover no mention is made in P1 of the promise made after the inspection on the previous day. There are other curious features in plaintiff's and Marimuttu's evidence in regard to P1. At an abortive trial before Mr. Nagalingam the plaintiff stated that P1 was in a book in which he keeps copies of all his letters. The book was not produced but the plaintiff said he detached P1 in order to produce it in Court. At the second trial, however, he said that he detached P1 from the book in December, 1942, when he had no idea he would have to file it in Court of law. Marimuttu in regard to P1, in his evidence before Mr. Nagalingam says that the plaintiff showed him the letter before it was posted. At the second trial Marimuttu said that P1 was shown to him by the plaintiff on the 24th December after it had been posted and the plaintiff asked him to keep it. It has been argued on behalf of the plaintiff that P2 is an answer to P1 and must be taken to be a promise to pay commission. It is difficult to understand this argument. P2 is not addressed to the writer of P1. No reference is made in P2 to P1 nor is there any mention of the payment of commission. Inspite of this the learned Judge in his judgment says that the letter P2 clearly implies that the defendant has accepted the terms contained in letter P1. The learned Judge in coming to this conclusion has ignored the inconsistencies with which this piece of evidence is surrounded. It is on these two documents alone that he has decided in the plaintiff's favour. He does not find that the defendant on any other occasion gave any promise to pay commission. Moreover he has come to the conclusion that the defendant after he had heard that the plaintiff was being paid commission by Messrs. Keell & Waldock changed his mind in regard to this promise to pay. At page 93 of the record the following passage occurs in the judgment :—

> " Plaintiff says that somehow or other defendant had learnt on the 6th of January, 1943, when they went to the office of Messrs. Keell & Waldock that the plaintiff was hoping to get a share of the commission from Messrs. Keell & Waldock. To my mind that is what made the defendant change his mind and refuse to make any payment to the plaintiff by way of commission later."

This amounts to a finding by the learned Judge that at the time when P2 was written the plaintiff without the knowledge of the defendant has acquired a profit not contemplated by the defendant. The question of an agent receiving secret profits is dealt with in Vol. I. Halsbury's Laws of England (Hailsham edition), pp. 251-254 in the following passage :—

> " An agent must not, without the knowledge of his principal, acquire any profit from his agency other than that contemplated by the principal at the time of making the contract of agency."
>
> " A bribe or secret commission is a profit or benefit received by the agent from the third person with whom the agent is dealing on his principal's behalf without the knowledge or consent of the principal, or which was not contemplated by the principal at the creation of the agency."
>
> " On discovering the receipt of a bribe the principal may instantly dismiss the agent, and, if he has already been dismissed may justify the dismissal on that ground, even though the bribery was not discovered till after the dismissal.
>
> The agent forfeits any commission in respect of the transaction and becomes liable to his principal for the amount of the bribe, if in money, or for the value of the property so received by him, such value being measured by the highest value which the property might have fetched in his possession."

In *Andrees vs. Ramsay & Co.* (1903) 2 K. B. 635 it was held that an agent to sell property who has sold the property but received a secret profit from the purchaser must not only account for that profit to his principal but is not entitled to any commission from his principal. At p. 638 Lord Alverstone, L.C.J. stated as follows :—

> " I think, therefore, that the interests of the agents here was adverse to that of the principal. A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission. In my opinion, if an agent directly or indirectly colludes with the other side, and so acts in opposition to the interest of his principal, he is not entitled to any commission. That is, I think, supported both by authority and on principal."

Having regard to the principles of law governing the relationship of principal and agent I am of opinion that the plaintiff having acquired an interest in Messrs. Keell & Waldock's commission could not insist on the defendant fulfilling any promise to pay commission based on the documents P1 and P2.

Apart from any question arising from the law governing the relationship of principal and agent I have come to the conclusion that the evidence did not justify the learned Judge in coming to the conclusion that the defendant even agreed to pay commission to the plaintiff. In coming to this conclusion I have not been unmindful of the fact that the burden lies on the appellant to show

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that the judgment appealed from is wrong. That if all he can show is nicely balanced calculations which lead to the equal possibility of judgment on either the one side or the other being right he cannot be said to have succeeded, *vide Naba Kishore Nandal vs. Upendra Kishore Nandal* A. L. R. (1922) Privy Council 39. In the present case I am of opinion that the calculations were not nicely balanced making possible a verdict one way or the other. The learned Judge has formed an erroneous view of the documents P1 and P2. The verdict in favour of the plaintiff cannot be allowed to stand. It must be set aside and judgment entered for the defendant on the 'plaintiff's claim together with costs in this Court and the Court below.

Appeal allowed.

WIJEYEWARDENE, J.

I agree.

Proctors : *Leiching and Lee* for the appellant.
Kumarasamy and Wijeratnam for the respondent.

Present : DIAS, J.

NAZAAR & 2 OTHERS vs. HASSIM

S. C. No. 271 *of* 1946—*C. R. Colombo No.* 96001.

Argued on : 16th May, 1947.
Decided on : 20th May, 1947.

Landlord and tenant—Tenant occupying co-owned property—Transfer pending partition action to one co-owner of interests which might accrue by final decree to others—Covenant that full rent should be paid to such co-owner—Request to tenant to pay by co-owners transferring in pursuance of such covenant —Does this create a new tenancy—Duty of tenant when there are several landlords.

Held : (i.) That where a tenant in possession of co-owned property is requested in pursuance of a covenant among co-owners to pay the whole of the rent to one of them to whom the others had transferred, pending partition proceedings in respect of such property, their right, title and interest, which shall accrue to them under the final decree, no new tenancy is created.

(ii.) That in the case of a plurality of landlords it is the duty of the tenant to pay each of them his or her share of the rent.

Cases referred to :—*Buddharikita Terunnanse vs. Gunasekera* (1895) 1 N. L. R. 206.
Panis Appuhamy vs. Selenchi Appu (1903) 7 N. L. R. 16.
Weeraratne vs. Abeywardene (1934) 36 N. L. R. at pp. 140-141.
Manchanayaka vs. Perera (1945) 46 N. L. R. 457.
Mather vs. Theivapillai (1936) 16 C. L. Rec. 218.

E. B. Wickramanayake, with *C. Renganathan*, for plaintiffs-appellants.
M. I. M. Haniffa, with *M. S. Abdulla*, for defendant-respondent.

DIAS, J.

The three appellants, their brother and sister Sitti Rowha (now deceased) are the owners of an undivided half of the premises known as No. 248, Main Street, Colombo. The other undivided half is said to belong to a Mrs. Nakeem.

The defendant is the monthly tenant of the *whole* premises. The practice was for him to pay one-half of the rent to Mrs. Nakeem and the other half to A. J. M. Nazaar, the first plaintiff, for and on behalf of the co-owners of the other half.

In the case of a plurality of landlords, each of them is entitled to claim his share of the rent from the tenant, unless it has been expressly agreed to the contrary—*Buddharikita Terrunnanse vs. Gunasekera* (1895) 1 N. L. R. 206, Wille on Landlord and Tenant (3rd ed.), p. 168, Tambyah on Landlord and Tenant, p. 104 ; *Panis Appuhamy vs. Selenchi Appu* (1903) 7 N. L. R. 16 ; and *Weeraratne vs. Abeywardene* (1934) 36 N. L. R. at pp. 140-141.

The premises are the subject of a partition action—D. C. Colombo case No. 74.

On the occasion of the marriage of Sitti Rowha, the brothers and the prospective husband Keyath entered into the deed P1 dated September 9, 1939. The brothers covenanted to transfer, grant and convey to Sitti Rowha absolutely as a marri-

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age settlement all the shares, right, title and interest in these premises which shall accrue to them under and by virtue of the final decree in the partition action, and of the proceeds of sale, in the event of the Court decreeing a sale of the premises ; and that in the meantime, and until such time as their shares of the proceeds of sale, as case may be, is granted as aforesaid, the brothers agreed *to give Sitti Rowha* the share of the rent accruing to them from the said premises No. 248.

It is to be observed that the covenant to pay the rent to Sitti Rowha is to her alone and not to her heirs etc. Except for the fact that the deed is entered into with Keyath, he does not otherwise figure in the deed at all. The nature of a deed like P1 was considered in the case of *Manchanayaka vs. Perera* (1945) 46 N. L. R. 457. It was laid down that while a deed like P1 passes an immediate interest in the property and is not merely an agreement to convey in the future, the right or title comes into existence only upon the entering of the final decree in virtue of the *jam tunc* principle of the Roman Dutch Law or the equitable principle of the English Law that "when the property comes into existence, the assignment fastens on it ".

The partition action, we are informed, has abated, so that it is problematical when the final decree will be entered, if at all. Furthermore, Sitti Rowha died in March, 1944. The stipulation to pay the rent to Sitti Rowha ceased with her death, for there is no stipulation in favour of her heirs. The deed P1, therefore, for all practical purposes, is valueless. What rights Keyath may be able to claim under it we are not concerned with.

On the death of Sitti Rowha issueless and intestate, her husband as a sharer under Muhammadan Law would become entitled to an undivided half of her undivided share in these premises, while the other half of her share would devolve on her residuary heirs, her brothers. Therefore, on her death Keyath became a co-owner of the premises. He would, therefore, be entitled to claim from the defendant his share of the rent. The defendant who is a mere monthly tenant could not be expected to know and would not know what that share is. It was the duty of the landlords to inform him to whom he had to pay and what he had to pay them.

For four or five months after Sitti Rowha's marriage Nazaar paid the brothers' share of the rent to the lady. Then disputes arose and Sitti Rowha left the brothers and took up her residence with Keyath. Thereupon Nazaar on behalf of the other brothers and himself requested the defendant to pay the full half share of the rent to the sister. I cannot hold that this created a new tenancy between the defendant and Sitti Rowha. There was only one tenancy over the whole premises. Some of the landlords instead of demanding their shares of the rent from her tenant, requested him to pay it to a person designated by them. There is nothing improper in that.

After the lady's death however the position changed. The defendant could not pay the rent to the lady who was dead. A new co-owner had become a landlord. The obligation of the defendant was to pay the landlords their respective shares of the rent. The brothers and Keyath fell out. The plaintiffs demanded the rent and after the letters P2-P5 had passed between them, the defendant paid the plaintiffs a sum of Rs. 80 representing the rent for the months of April and May, 1944. Keyath who appears to have fallen out with his co-owners then demanded the rent from the defendant, and, eventually, sued him in C. R. Colombo Case No. 95852. The defendant might then have interpleaded. Section 632 of the Civil Procedure Code does not prohibit a tenant in the situation of the defendant from calling upon several landlords who are each claiming the rent to interplead—*Mather vs. Theivapillai* (1936) 16 C. L. Rec. 218. He did not do so, but merely called Nazaar as his witness. The Court held against the defendant. That decree does not affect this case because the plaintiffs to this case were not parties to it. The Court having held that the defendant was the tenant of Keyath ordered him to pay rent to Keyath.

The plaintiffs now sue the defendant claiming a sum of Rs. 40 as the rent due for the month of June, 1944, and ask for a decree that the defendant should thereafter pay the rent to them. The defendant counterclaims the sum of Rs. 80 already paid to the plaintiffs.

The Commissioner of Requests dismissed the plaintiffs' action and upheld the claim in reconvention, holding that on the execution of P1 Sitti Rowha obtained an immediate interest in the half share, and that the defendant by operation of law had to attorn to her. I am of opinion that this view is erroneous. No doubt the lady obtained an immediate interest in the property, but her title could only accrue on the entering of the final decree. I am unable to hold that no

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the execution of P1 a new tenancy came into existence. The obligation of the defendant was always the same. It is his duty in the case of a plurality of landlords to pay each of them his or her share of the rent, unless there is some express agreement to the contrary.

If the parties cannot settle this trivial dispute, I set aside the decree appealed from and send the case for a trial *de novo* on fresh pleadings before another Commissioner of Requests. Until the case is ripe for trial, the incidental steps may be taken before the Commissioner who tried this action. Keyath will be added as a plaintiff, and if he objects he will be added as a defendant. The plaintiff and Keyath will in their pleadings set out their respective claims to the rent and the fractional shares they claim. The money lying to the credit of C. R. Colombo Case 95852 will be transferred to the credit of this case and will be paid to the party or parties ultimately declared entitled to receive the same. The heirs of any deceased co-owners will have to be added. In adjudicating on the rights of the parties the Commissioner will not lose sight of the decree in C. R. Colombo Case No. 95852 as between Keyath and this defendant.

The cost of these proceedings both here and below will be borne by the parties. All other costs will be in the discretion of the trial Judge.

Set aside and sent back.

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

A. P. ROWLANDS vs. R. S. ROWLANDS

S. C. No. 93 (*Inty.*)—*D. C. Colombo No.* 438/*D.*
Argued and Decided on : 14th March, 1947.

Divorce—Permanent alimony to wife—Order made by consent of parties—Subsequent application to modify order under section 615 *of the Civil Procedure Code—Has the Court jurisdiction to grant such application.*

Held : That where an order for payment of permanent alimony was entered of consent, such order cannot be varied later under Section 615 of the Civil Procedure unless such variation had been agreed upon in the consent decree.

Cases referred to :—*Swaris vs. Perera* 41 N. L. R. 562.

H. V. Perera, K.C., with *S. J. Kadirgamer*, for plaintiff-appellant.
N. E. Weerasooriya, K.C., with *D. W. Fernando*, for defendant-respondent.

SOERTSZ, S.P.J.

This is an appeal from an order by the District Judge of Colombo refusing the application made by the husband in this case to have the order made in the case in respect of permanent alimony modified on the ground that since the order was entered his income has suffered substantial reduction. The application is made under section 615 of the Civil Procedure Code.

It is necessary to recapitulate briefly the facts that led to this application in order to understand and deal with the objection taken by the defendant to this application on the ground that it is bad in law. The plaintiff, that is, the present petitioner-appellant, sued the defendant for a divorce on the ground of malicious desertion. The defendant denied desertion on her part and counter-claimed a judicial separation on the ground of malicious desertion on the part of the plaintiff. When the case was called for trial, the plaintiff led no evidence. The defendant's testimony was taken in support of her allegation of malicious desertion and, in the course of her testimony, she declared that she was willing to accept Rs. 400 on account of alimony for herself and Rs. 135 for the maintenance of their minor daughter, and she also said : " I am content that the payment of alimony be secured by the hypothecation (of certain named properties) to Mr. C. E. Jayawardene as my Trustee ".

Decree was to be entered for judicial separation and the terms in regard to alimony, maintenance and hypothecation of property by way of securing payment were agreed upon. But the matter and manner of the hypothecation caused much dis-

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cussion and delay. In the end the Public Trustee was brought in and it was agreed to amend the decree in respect of alimony, maintenance and hypothecation. The Court approved the amendment. In view of the extent of the amendments they were not made in the existing decree itself but a new paper containing the amendments was filed to take effect as the amended decree. This amended decree had previously been submitted to the plaintiff's proctors for approval and they made certain alterations in it and sent it back with the endorsement " approved as amended in red ink ". One of the amendments they made was to delete the words :

> " and this allowance is to continue until further orders and be subject to variation as future circumstances may require."

which appeared in the decree as it was first entered. On these facts, the question for consideration is whether it is open to the plaintiff to seek to amend the terms in regard to alimony under section 615 of the Civil Procedure Code. That section provides for two kinds of orders for permanent alimony, namely (*a*) " orders that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or such annual sum of money for any term not exceeding his own life.........and for that purpose may cause a proper instrument to be executed by all necessary parties ; (*b*) orders on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable. In regard to the latter kind of orders, a proviso says : " that if the husband afterwards from any cause becomes unable to make such payments it shall be lawful for the Court to discharge or modify the orders "...... It is clear that, whatever the position be in regard to the first kind of orders, the second kind of orders are, ordinarily. liable to modification. But the point now taken is that no modification is possible if the order is one that has been entered by the consent and agreement of both the parties concerned. It is submitted that this decree in so far as it was concerned with alimony, provided for security being given, and thereby revealed the fact that it was an order made by agreement. The payments ordered were monthly payments and the Court *mero motu* had no power to order these payments to be secured by mortgage. That was something arranged by the parties themselves. A similar question arose in the case of *Swaris vs. Perera* 41 N. L. R. 562. Hearne, J., who delivered the judgment of the Court observed as follows :—

> " But the Court has no jurisdiction to make an order against the husband for monthly or weekly payments coupled with an order requiring him to give security for such payments...
>
> I am clearly of the opinion that the form of the order to which the defendant agreed left him no statutory right to re-open the matter......... Such an order could not be made apart from consent and, in the circumstances of this case, the Court could not vary the order unless the plaintiff (in the present case it would be the defendant) also agreed to this being done. In the case of *Maidlow vs. Maidlow* (1914) Prob. 246, it was hled that having regard to section 1 (2) of the Matrimonial Court Act 1907 b......... this provides for the payment by the husband of monthly or weekly sums during their joint lives—" an order for the payment to the wife during her life could only be made by consent, and the order being so made could not be varied. There are not, in the present case, any allegations of fraud, mistake or misrepresentation leading to the entering of the consent order upon which a consent decree may be impeached.

In certain cases, this result may work hardships but that is a matter for the Legislature. So far as we are concerned, the law as judicially interpreted, prevents us from acceding to the petitioner's application. I would dismiss it with costs

Appeal dismissed.

JAYETILLEKE, J.

I agree.

IN THE COURT OF CRIMINAL APPEAL.

Present : WIJEYEWARDENE, J. (President), JAYETILEKE, J. & CANEKERATNE, J.

REX vs. JEEMONIS FERNANDO *alias* JEEMAIYA & FOUR OTHERS.

C. C. A. Appeals Nos. 5-9/1947 *: with application Nos.* 44-47 *S. C. No.* 124 *: M. C. Panadure* 43725/*First Western Circuit* 1947, *Colombo Assizes.*

Argued on : March 31, 1947.

Decided on : April 2, 1947.

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Court of Criminal Appeal—Conviction for murder—Direction to jury by trial Judge not to consider verdict of culpable homicide—Misdirection.

The four appellants were convicted of murder. The defence was that the second accused inflicted some injuries on the deceased in the exercise of the right of private defence, and that later some other persons—not the other accused—came and joined in the attack on the deceased. The learned trial Judge asked the jury to consider whether any of the accused were guilty of murder or of voluntarily causing grievous hurt. Further he said that the verdict of culpable homicide not amounting to murder did not arise for consideration in this case.

Held: That, in the circumstances, the learned trial Judge's direction to the jury that they should not consider the verdict of culpable homicide amounted to a misdirection.

A. H. C. de Silva, with *Mahesa Ratnam*, for the first accused-appellant and applicant.
H. Wanigatunga, with *Mahesa Ratnam*, for the second accused-appellant and applicant.
G. P. J. Kurukulasuriya, with *Dodwell Gunawardene*, for the third accused-appellant and applicant.
M. M. Kumarakulasingham, for the fourth accused-appellant and applicant.
Boyd Jayasuriya, Crown Counsel, for the Crown.

WIJEYEWARDENE, J. (*President*)

The four appellants and one Daniel Fernando were indicted on two counts. The first count was that they were members of an unlawful assembly, and the second count was that they as members of an unlawful assembly committed murder by causing the death of one Carolis Perera. The jury found the four appellants guilty of murder and returned a verdict of not guilty in favour of Daniel Fernando.

It was contended in appeal that, in view of the acquittal of Daniel Fernando, it was not open to the jury to return a verdict against the appellants under section 296 read with section 146 of the Penal Code. We do not think there is any merit in that contention. In the first place, it was not the case for the Crown that the five accused who were indicted were the only members of the unlawful assembly. Moreover, it is quite clear from the proceedings that, while there was overwhelming evidence that the four appellants and another took part in the transaction which resulted in the death of Carolis Perera, there were circumstances which involved in some doubt the identity of the fifth person—whether it was Daniel Fernando or a brother of his.

There remains, however, the second point argued in appeal—that there was a misdirection when the learned trial Judge stated in the course of his charge that a verdict of culpable homicide not amounting to murder did not arise for consideration in this case.

The evidence led by the Crown showed clearly that the appellants and another had inflicted a number of injuries on Carolis Perera. The defence was that the second accused inflicted some injuries on Carolis Perera in the exercise of the right of private defence and that later some other persons—not the other accused in the case—came and joined in the attack on Carolis Perera. The trial Judge asked the jury to consider whether any of the accused were guilty of murder or of voluntarily causing grievous hurt and invited them to acquit the accused if they rejected the evidence for the Crown or thought it probable that the injuries on Carolis Perera were casued in the circumstances deposed to by the second accused. He proceeded to say, " Counsel for the defence has referred to culpable homicide not amounting to murder, but I will ask you not to consider that ". After careful consideration, we have reached the decision that this was a misdirection. It is not possible for us to speculate as to whether the jury would or would not have returned a verdict of culpable homicide not amounting to murder if they did not receive the direction not to consider such a verdict. It was open to the jury to consider such a verdict in this case, though it is somewhat difficult to say how a reasonable jury could have brought such a verdict.

The decision of the Court is that a verdict of culpable homicide not amounting to murder should be substituted for the verdict of murder. We sentence each of the appellants to undergo rigorous imprisonment for ten years and pay a fine of Rs. 1,000 and in default undergo rigorous imprisonment for a further period of three years. We direct that half the fine paid or recovered should be given as compensation to the heirs of Carolis Perera.

Verdict of culpable homicide not amounting to murder substituted.

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Present : Dias, J.

B. A. CAROLIS APPUHAMY vs. J. L. M. PODI NONA & 4 OTHERS

S. C. No. 22—*C. R. Gampaha No.* 2355.
Argued and decided on : 21st May, 1947.

Damages—Land sold in execution of decree—Obstruction to Fiscal's surveyor proceeding to prepare plan—Irregular decree—Is obstruction justified—Liability of person so obstructing.

Held : (i.) That the fact that a decree entered in a case was irregular is no justification for a person to obstruct a surveyor who proceeds to a land sold in execution of such decree for the purpose of preparing a plan as required by section 286 of the Civil Procedure Code.

(ii.) [illegible] so obstructing is liable in damages to the purchaser for direct loss caused to him.

Cases referred to :—*Appuhamy vs. Thailaman* 1947, 48 N. L. R. 110.
Wijeratne vs. Mendis Appu 1946, 47 N. L. R. 393.
In re Molamure 1935, 37 N. L. R. at page 44.
Gnanamuttu vs. Chairman, U. *D. C., Bandarawela* 1942, 43 N. L. R. at page 370.

E. B. Wickramanayake, with *T. B. Dissanayake,* for plaintiff-appellant.
S. C. E. Rodrigo, for defendant-respondent.

Dias, J.

The plaintiff, who was not a party to the present proceedings in C. R. Gampaha No. 8951, purchased at the Fiscal sale, held in execution of the decree in that case, a certain land. In order to obtain a Fiscal's transfer he had to deposit the requisite fees for the survey. When the surveyor went to the land, William, the defendant, who is now dead and is represented by the first defendant assisted by the other defendants obstructed the surveyor and turned him out. Thereupon the plaintiff had to incur further expenditure to get the land surveyed. He is now claiming that sum from the defendants as being direct damages flowing from the wrongful act committed by the defendants in obstructing the Fiscal's surveyor. The facts are not in dispute, but it is strongly argued that the conduct of the defendants in resisting the surveyor is not wrongful because the decree in the case in which execution was issued was irregular. It has been held in the case of *Appuhamy vs. Thailaman* 1947, 48 N. L. R. 110 and *Wijeratne vs. Mendis Appu* 1946, 47 N. L. R. 393, that even if a decree is later set aside for an irregularity, a *bona fide* purchaser at a Fiscal sale under that decree would not be affected. Granting that the proceedings which culminated in the decree are irregular, there is clear authority for the proposition that William, instead of taking the law into his own hands by resisting the officer of the Court should have sought his remedy by applying to the Court for redress. In the case of *In re Molamure* 1935, 37 N. L. R. at page 44 it was held that it is an established rule that it is not open to any party to question the orders of the Court or any process issued under the authority of the Court by disobedience. There is no act which the Court may do which may not be questioned in a proper form and on a proper application. That principle was upheld in the later case of *Gnanamuttu vs. Chairman,* U. *D. C., Bandarawela* 1942, 43 N. L. R. at page 370.

The Commissioner of Requests seems to think that the conviction of William in the Magistrate's Court for obstructing a public officer is bad. That may or may not be so and we are not concerned with it. I hold that these defendants by their wrongful act have caused direct loss to this plaintiff and that, therefore, he is entitled to recover damages. I set aside the judgment appealed from and enter judgment for him as prayed for with costs both here and below.

Judgment set aside.

Proctors : D. A. Weeratunga for the appellant.
K. B. G. Perera for the respondent.

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Present : Dias, J.

VELUPILLAI SELLIAH vs. SINNAMMAH, WIFE OF SELLIAH

S. C. No. 375 (*Addl.*) *of* 1947—*M. C. Jaffna No.* 1997.
Argued on : 11th June, 1947.
Decided on : 16th June, 1947.

Evidence Ordinance (Cap. 11,) Section 112—Meaning of the word "access"—Observations by Privy Council in an Indian case—Effect—Maintenance Ordinance, (Cap. 76,) Section 4—Wife living in adultery—Burden of proof.

Held : (i.) That the observations by the Privy Council in *Karapaya Servai vs. Mayandi* A.I.R. (1934) P.C. 49* regarding the interpretation of the word " access " in section 112 of the Evidence Ordinance are not mere *obiter dicta*, but embody a decision overruling *Jane Nona vs. Leo* reported in 25 N.L.R. 241.

(ii.) That the burden of proving that the wife is living in adultery, disentitling her to receive an allowance from her husband under section 4 of the Maintenance Ordinance (Chap. 76), is on the husband, if he asserts it.

Cases referred to : *Jane Nona vs. Leo* (1923) 25 N.L.R. 241.
Karapaya Servai vs. Mayandi A.I.R. (1934, P.C. 49.*
Ukkumenika vs. Vidane (1946) 34 C.L.W. 21.
Ranasinghe vs. Sirimana (1946) 47 N.L.R. 112.†
Subaliya vs. Kannangara (1899) 4 N.L.R. 121.
Letchiman Pillai vs. Kandiah (1928) 30 N.L.R. at p. 281.
Jane Nona vs. Van Twest (1929) 30 N.L.R. at p. 451.
Bebi vs. Tidiyas Appu (1914) 18 N.L.R. 81.
Eliza vs. Jokinu (1917) 20 N.L.R. 157.
Aja Umma vs. Hameedu (1929) 10 C.L. Rec. 73.
Narayanan Chettiar vs. Official High Court, Rangoon A.I.R. (1941) P.C. 93 and see *Coomaraswamy vs. Vinnaya Gamoorthy* (1945) 46 N.L.R. at p. 249.
Ebert vs. Ebert (1921) 22 N.L.R. at p. 322.

H. W. Thambiah, for respondent-appellant.
No appearance for applicant-respondent.

Dias, J.

This appeal was pressed on two points. It was urged in the first place that the Full Bench decision in *Jane Nona vs. Leo* (1923) 25 N.L.R. 241 has not been over-ruled by the decision of the Privy Council in *Karapaya Servai vs. Mayandi* A.I.R. (1934) P.C. 49* and that, therefore, the Magistrate's order condemning the appellant to pay maintenance in regard to the child Saraswathie is bad inasmuch as at the time that child could have been begotten the appellant and his wife, the applicant, were living apart and he had established under section 112 of the Evidence Ordinance that during that period he had no " access " to his wife in the sense that no actual marital relations had taken place between them. It was contended in the second place that the order of the Magistrate condemning the appellant to pay maintenance to the applicant cannot be justified because the burden of proving that she was not living in adultery under section 4 of the Maintenance Ordinance (Chap. 76) was on the woman, and that the onus of affirmatively proving that she was living in adultery was wrongly placed on him. In support of the latter proposition, the case of *Ukkumenika vs. Vidane* (1946) 34 C.L.W. 21 was cited. For both these reasons it was argued that the Magistrate's order must be set aside.

In *Jane Nona vs. Leo* (1923) 25 N.L.R. 241, the word " access " in section 112 of the Evidence Ordinance was held to mean " actual intercourse " and not " possibility of access." In *Ranasinghe vs. Sirimana* (1946) 47 N.L.R. 112.† Howard, C.J. said : " In the case of *Karapaya Servai vs. Mayandi* A.I.R. (1934) P.C. 49,* it was held by their Lordships of the Privy Council that the word "access" means no more than "opportunity of intercourse." It had been suggested in that case by counsel for the appellant that the word implied " actual cohabitation." In view of this decision the judgment of the Full Bench in *Jane Nona vs. Leo* (1923) 25 N.L.R. 241, that the word " access " in section 112 of the Evidence Ordinance is used in the sense of " actual intercourse " and " not possibility of access " or " opportunity for intercourse " can no longer be regarded as a binding authority. In a recent case I followed the decision in *Ranasinghe vs. Sirimana* (1946) 47 N.L.R. 112.† I am unable to

* See 34 C.L.W. p. 99 — † See 31 C.L.W. 3.

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agree with the contention that the observations of the Privy Council in *Karapaya Servai vs. Mayandi* A.I.R. (1934) P.C. 49, are mere *obiter dicta*, and, therefore, not binding. The Magistrate has found as a fact that, although the applicant and the appellant were living apart at the time the child could have been begotten, there were both the possibility of and opportunities for intercourse. I am unable to disturb the findings on this point. The first contention of the appellant, therefore, fails.

Proceedings under the Maintenance Ordinance are not criminal but civil in their nature. This has been laid down in a long chain of decided cases. In *Subaliya vs. Kannangara* (1899) 4 N.L.R. 121. Bonser, C.J. held that the foundation of the Magistrate's Court in matters of maintenance is the civil liability of the father already existing under the Roman-Dutch Law wherein the mother can compel the performance of this duty by civil action, and that Chapter 76 merely provides a simpler, speedier and less costly remedy. In *Letchiman Pillai vs. Kandiah* (1928) 30 N.L.R. at p. 281. Drieberg, J. following *Subaliya vs. Kannangara* (1899) 4 N.L.R. 121, said that a wife's claim to maintenance is on the same footing, and that it has been held that the common law right of action does not now exist and she can claim relief only under the Maintenance Ordinance. In *Jane Nona vs. Van Twest* (1929) 30 N.L.R. at p. 451. Dalton, J. after reviewing all the decided cases, said that they lead one to conclude that maintenance proceedings are of a civil nature. Therefore, inculpatory statements made by the man to a police officer can be proved against him in a maintenance proceeding for he is not an accused—*Bebi vs. Tidiyas Appu* (1914) 18 N.L.R. 81. Maintenance proceedings not being criminal in their nature can be decided by a decisory oath—*Eliza vs. Jokinu* (1917) 20 N.L.R. 157. In criminal trials before a Magistrate the prosecution cannot lead evidence in rebuttal, but in maintenance cases the applicant can do so, because the proceedings are civil by nature and not criminal—*Aja Umma vs. Hameedu* (1929) 10 C.L. Rec. 73.

In a criminal trial the right to begin is fixed by law. The accused being presumed to be innocent and because if no evidence was led on either side the prisoner would be entitled to be acquitted by reason of the presumption of innocence, therefore the prosecution must begin—see section 101 Evidence Ordinance Illustration (*a*). In all other proceedings, unless the burden of proof is by law *expressly* placed on a particular person, the right to begin is laid down by section 102 of the Evidence Ordinance. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person—section 103 Evidence Ordinance Under the Maintenance Ordinance section 14 provides that *before summons is issued on the respondent* the Magistrate shall commence the inquiry by examining the applicant on oath or affirmation. If after such examination there is in the judgment of the Magistrate no sufficient ground for proceeding, he may make order refusing to issue a summons. What has the applicant to prove at this preliminary *ex parte* proceeding? Under section 2 of the Ordinance she must satisfy the Magistrate *prima facie* that she is the wife of the respondent or the mother of his illegitimate child, that the respondent having sufficient means either neglects or refuses to maintain her, or that the illegitimate child is unable to maintain itself. I do not think she has to prove anything more. If the Magistrate is satisfied on these points he will issue process.

After the respondent appears the *inter partes* inquiry begins. The applicant has already begun when she gave her *ex parte* evidence. She will now be recalled and repeats and amplifies her evidence, if necessary, and submits herself for cross-examination. After that she calls her witnesses. When the respondent appears he may under section 3 offer to maintain his wife on condition that she lives with him. If the lady refuses to do so and establishes to the satisfaction of the Magistrate that he is living in adultery, or that he has habitually treated her with cruelty, the Magistrate can make an order for maintenance under section 2 notwithstanding the respondent's offer to live with her. Clearly the burden of proving that the respondent is living in adultery or that he had habitually ill-treated her lies on the applicant, because the law will neither presume that he is an immoral man nor that he is a cruel husband. He has not to prove that he is not living in adultery or that he has not ill-treated her. The legal presumption of innocence makes it unnecessary for him to establish these facts which must be proved by the person making these allegations and who wishes the Court to believe in their existence—*ei incumbit probatio qui dicit, non qui negat.*

Assume however, that the husband makes no offer to resume married life, but contests the applicant's claim and, while admitting that she is his wife, alleged under section 4 that she is living in adultery, surely it is for him to prove that fact?

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There is a presumption of innocence not only in regard to the commission of a crime, but also in regard to any allegation of wrong doing or immoral conduct. Take the allegation of fraud in a civil action. The Privy Council has held that fraud must be established by the party alleging it beyond all reasonable doubt—*Narayanan Chettiar vs. Official High Court, Rangoon* A.I.R. (1941) P.C. 93 and see *Coomaraswamy vs. Vinnaya Gamoorthy* (1945) 46 N.L.R. at p. 249. The reason is because there is a presumption against any form of wrong doing or immorality. Therefore, the burden is on the person who alleges fraud or immorality to prove it. It is not for the applicant in a maintenance case to prove that she is not living in adultery. How is she to prove this *negative* fact? Section 4 of the Maintenance Ordinance does not say that the woman must prove that she is not living in adultery. All that section 4 enacts is that she should not be entitled to maintenance if it is proved that she is living in adultery. Section 4 does not place the onus on her.

With respect, therefore, I find it difficult to concur in the principle laid down in *Ukkumenika vs. Vidane* (1946) 34 C.L.W. 21, where it was held that " no order can be made against the defendant as section 4 of the Ordinance states expressly that a wife who makes an application for an order against the husband must be one who is not living in adultery and must not be living separately from her husband by mutual consent. *All these facts have to be first established by the wife*, and the learned Magistrate was, therefore, in error in calling upon the defendant to establish his case before the applicant's case was placed before the Court in accordance with law." I respectfully agree that it would be improper for the Magistrate to call upon the husband to establish his case before the applicant's case was placed before the Court. If the procedure provided by the Ordinance is followed, that could not happen. It is a condition precedent to the issuing of process that the Magistrate should be *prima facie* satisfied that a case for inquiry exists. Even after the husband has appeared, the initial onus is still on the applicant to establish her case before the husband is called upon for his defence. But I cannot assent to the proposition that *before the respondent is heard, it is the duty of the applicant as part of her case to establish by proof that she is not living in adultery.* There is no necessity for a person to prove that she is not living in adultery when the law presumes that she is living a chaste life. The burden of proving adultery under section 4 is on the person who asserts it, in the same way as the burden of proving that the husband is living in adultery under section 3 is cast on the wife.

It was laid down in *Ebert vs. Ebert* (1921) 22 N.L.R. at p. 322, which was a maintenance case, that " it is not possible to lay down any general rule, or to define what circumstances would be sufficient and what would be insufficient upon which to infer the fact of adultery. Each case must depend on its particular circumstances. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts which of necessity are as various as the modifications and combinations of events in actual life." The Magistrate has found that the appellant has not led any specific evidence of the fact that the applicant is living in adultery. I have read through the evidence, which merely shows that the husband and wife parted because the lady displayed a tendency to talk to members of the opposite sex. That *per se*, is totally insufficient to establish adultery, and there is no other evidence.

I see no reason to interfere with the Magistrate's assessment of the quantum of maintenance payable by the appellant.

The appeal is dismissed.

Appeal dismissed.

Proctors : *Kulaveerasingham* for the appellant.

IN THE PRIVY COUNCIL

(From Rangoon—15th December, 1933)

Present : LORD MACMILLAN, SIR JOHN WALLIS & SIR GEORGE LOWNDES.

KARAPAYA SERVAI & OTHERS vs. MAYANDI

PRIVY COUNCIL APPEAL No. 135 *of* 1931.

A. Pennell for appellants.
V. Avertoon for respondent.

SIR GEORGE LOWNDES

The question for determination in this appeal is as to the respondent's right to share in the estate of one Karapaya Servai a Madrassi Hindu, who seems to have acquired a considerable fortune in Burma. He died a lunatic in 1923. The respondent is the son of Karapayi (or Karupi). who is now admitted to have been the first wife of Karapaya, and the defence to his claim is a denial of his paternity. The appellants are two minor sons of Karapaya by his second wife, Nachiamma, and one Chellaya, a brother of Nachiamma, who had been appointed guardian in the lunacy, and was at the date of the suit in effective possession of the estate.

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The suit was instituted by the respondent in the District Court of Pyapon, and the main issue formulated for decision was : " Is the plaintiff the son of the deceased lunatic Karapaya, begotten in lawful wedlock with Karapayi ? " The District Judge answered this question in the negative and dismissed the suit. The High Court on appeal took the opposite view, declaring the respondent's legitimacy and giving him a decree for a third share of the estate. It is common ground that the case is governed by section 112, Evidence Act (1 of 1872), which is in the following terms :—

" The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

The validity of the marrigge between Karapaya and Karapyai was at first disputed—most unnecessarily, as their Lordships think—but was subsequently admitted, and there being no suggestion that it was afterwards dissolved the only question is whether it has been shown that Karapaya and Karapayi had no access to each other at any time when the respondent could have been begotten. The burden of showing this was, in their Lordships' opinion, rightly laid on the appellants. It was suggested by Counsel for the appellants that " access " in the section implied actual co-habitation, and a case from the Madras reports was cited in support of this contention. Nothing seems to turn upon the nature of the access in the present case, but their Lordships are satisfied that the word means no more than opportunity of intercourse.

There can be no doubt that in December, 1911, the parties came together after having lived separate for a considerable time. Karapaya was settled at Tamangyo in the Pyapon District with his second wife : Karapayi had been living in the Moulmein District, where her mother and brother resided. What exactly took place is uncertain but it is admitted that she came to Tamangyo where she was refused admission to the house in which her husband and Nachchiamma were living and put up with one Viyani Maistry, a relative of Karapaya, in a neighbouring village. On 24th December, 1911, an agreement in writing (a copy of which was put in at the trial by the appellants as Ex. 14) was come to between them in the following terms :—

" This agreement is written and given on 9th Margali of Veerothukeruthu by Mawana Kunna Runa Karappiah Servai residing at Tamangyo in Pyapon Township in favour of his wife Karupayi that the profit produced by cultivating his share of paddy field namedMaruthaKammu China Aroken, Savari Muthu may be given to her. Suna Pana Vellai Thever must look after my share by providing her the profit produced thereon in my share. If she had no money for expense let her write to me."

The document is signed by the husband and verified by the village headman of Tamangyo. He was examined on commission at the instance of the appellants and deposed to its execution, but his memory was obviously failing and his evidence carries the story no further.

The materiality of these facts, however, is that in December, 1911, the parties were admittedly in touch with each other, were residing at all events for a short period in reasonable proximity, the wife being in the house of a relative of the husband, and that there is nothing in the agreement to suggest that she was unfaithful or that the parties were on terms of personal hostility, though no doubt the presence of the second wife would make an open reconciliation difficult. If, therefore, the respondent could have been begotten during this period his legitimacy was undeniable. It seems to follow that the date of his birth was the most important question in the case. It might have been expected under these circumstances that the appellants would have put this at some time outside the possibility with which they were faced having regard to the episode of December, 1911. But this was not so—rather the contrary. For they seem to have pinned their faith throughout to a birth in August of the following year, which might well be almost fatal to their defence.

It appears that in 1915 Karapayi again descended upon her husband and the second wife at Tamangyo—this time accommpanied by her son—and took proceedings under the Criminal Procedure Code for maintanance. She filed a petition in this in the District Magistrate's Court at Pyapon, in which she stated that the respondent was conceived at the time of separation and supported the particular date by an official birth return. This petition or, rather, a copy of it, as the original file had been destroyed, was put in evidence at the trial by the appellants, being their Ex. 13. Karapayi was called as a witness for the respondent, and was cross-examined at great length by very experienced counsel who appeared for the appellants ; but no question was put to her suggesting that 20th August, 1912, was not the true date of the respondent's birth. It may be assumed therefore that birth on this date was part of the appellant's case. In the Court of Appeal they seem to have gone even further, as the learned Chief Justice, by whom the judgment of the Court was delivered, says :

" The admissibility and truth of the statement of Karapayi that on 24th December, 1911, she was with child was not challenged before us " and he was evidently under the impression that this had also been the appellants' attitude in the trial Court.

However this may be the appellant had manifestly set up against themselves a case which it was very difficult for them to refuse. They no douot were able to throw a cloud of suspicion upon the moral conduct of Karapayi after 1911, but they made no attempt to prove the one fact that was vital to their defence, viz., non-access in or about December of that year. Apart from the headman, whose evidence has already been referred to, and who merely proved the 1911 agreement, the only witness examined by the appellants who could give evidence as to what happened in December, 1911, were Chellaya, Nachiamma and one Kawana Kali Mutu, who professed to have been a life-long friend of Karapaya. The material parts of their deposition were as follows :—

Chellaya (in chief)

" Karapaya, Nachi Ama and I came back to Burma after having stayed for one year in India. Then I took an employment in the Chetty's house. S. K. R. S. K. R. Firm at Kyethpamwezaung. Karapaya Nachi Ama lived at Tamangyo and lived there for two years, Tamangyo is about a mile distant from Kyethpamawezaung. At the time I did not see Karapayi there. I worked in the Chetty's house for about five years. I saw Karapayi only when she reported to U. Maung, the headman. Karapayi reported that she had been driven out of the house and she did not get proper maintenance. She asked the headman to request Karapaya to take her back and she promised that she would live with him properly. A panchayat was held over that matter. Karapaya then signed an agreement. (Note —The translation of the agreement is filed as Ex. 14). Rs. 100 or Rs. 110 was given to Karapayi for the expense to go back to India and to live with Karapaya's mother at Uttantun."

(In cross-examin ation)

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" Karapayi made a report to the headman. After receipt of her report, the headman summoned Karapaya. Karapayi said at that time that she would live in Karapaya's house without running away to another house if she was to have her maintenance in his house. He did not like to have Karapayi in his house. When he was requested by the elders to keep her in the house, he said that he agreed to send her back to India."

Nachiamma (in chief)

" I did not see Karapayi up to that time, in Burma. I remember about the agreement which my husband made with Karapayi about the maintenance. This agreement was given at the panchayat at Kyethpamwezaung. I did not see Karapayi at that time but I heard that she was putting up in Viyanna Maistry's house. My husband told me that he had given about Rs. 100 to Karapayi to go back to India, and live in her mother-in-law's house, *i.e.* Karapaya's mother's house. Karapayi had never lived in a house with me and Karapaya. It is not true that I, Karapaya and Karapayi lived in one house and that I and Karapaya drove her out before the panchayat."

Kawana Kalia Mutu (in chief)

" Karapaya sent for me to be present at the panchayat but I did not go there and I do not know in whose house the panchayat was held. He requested me to be present at the panchayat to be held in the headman's house at Kyethpamwezaung. I was too busy then and could not go as requested. I did not see Karapayi at that time, I asked Karapaya later if the panchayat was over. Karapaya said that she promised to him to live properly and he therefore agreed to take her back but she must not remain in Burma and must go back to India. He further said that he had executed an agreement and so she might go and live in his mother's house."

It would, their Lordships think, be quite impossible for any Court to hold on this evidence that the appellants had proved non-access in December, 1911. The one person who might have been able to give useful evidence in this question was Viyani Maistry, in whose house Karapayi was staying at the time, but he was not examined.

It seems probable however that what the appellants really relied upon in proof of their case was the effect of certain other documents which are upon the record, and to which reference is made in the judgment of the trial Judge.

The first of these is a written statement filed by Karapaya in the maintenance case of 1915. In it he denies the paternity of the respondent, and charges that Karapayi had been living in adultery for many years at Moulmen with one Nachiappa. He however says that he did not know of this " until about three years ago ". This document was put in evidence, apparently without objection, by the appellants, and seems to have been relied by the trial Judge. The High Court held that it was inadmissible. In their Lordships' opinion it cannot be used as a statement by Karapayi under section 32 (5), Evidence Act, as it was not made before the dispute as to the respondent's paternity arose. It is also obviously not admissible under section 33 (*m*), as it was not a statement given in evidence at the maintenance enquiry. Even on the basis of it having been admitted by counsel, it can only, their Lordships think, be evidence that such a statement was made by Karapaya in 1915, and can have no possible relevance to the question of access in 1911.

The next document is a copy of the judgment of the District Magistrate in the same proceeding. He held on the evidence before him that the respondent was not the son of Karapaya. This document has also found its way on to the record, but it is clearly not binding upon the respondent, as was admitted to the District Court, and its relevance to what took place in 1911 is, to say the best of it, extremely remote. One other incident must be referred to, which assumed considerable importance at the trial, and has been pressed by the appellants' counsel before the Board, Karapaya was certified a lunatic in 1920, and Chellaya applied to be appointed guardian of his person and property. To buy off the opposition of Karapayi it was arranged upon the advice of one Narayanar Chettiar that Rs, 5,000 out of Karapaya's estate should be given to her upon condition that she would admit that the respondent was the son of Nachiappa, with whom Karapayi had alleged in 1915 that she was living. She accepted the terms offered, and in pursuance of the arrangement was caused to purchase two houses in the joint names of herself and the respondent, who was described in the purchase deed as the son of Nachiappa. On the same day an application was made by her to be appointed guardian of the respondent, who was again described as the son of Nachiappa, and she was so appointed. Copies of all these documents were brought on the record at the trial, some pages of the cross-examination of Karapayi were devoted to them, and the trial Judge evidently regarded them as of importance. It is sufficient to quote three sentences from his judgment.

" I have no doubt that Karapayi declared that the plaintiff was Nachappa's son when she received Rs. 5,000. If the plaintiff is not the child got by her with Nachiappa, I do not think she will declare as she had done. Under these circumstances I am of opinion that the defendants have fairly proved that the plaintiff is not the deceased Karapaya's son.

How any of these statements by Karapayi could be used as evidence against the respondent, or, if allowed to be proved, how any possible weight could be attached to them, having regard to the circumstances under which they were made, their Lordships fail to understand. Only the guardianship application seems to have been referred to in the High Court, and as to it the learned Chief Justice records that counsel for the present appellants :

" Properly admitted that the contents of the petition were not admissible against the plaintiff as evidence of the truth of the statements therein contained."

Their Lordships think that a similar concession might well have been made in the agreement before them. It is not necessary to refer in any detail to the deposition of Karapayi, or of the other witnesses who were called in support of the respondent's case. Their evidence may have been quite untrustworthy, and their Lordships are certainly not impressed with the veracity of the lady, but there is nothing to be extracted from their depositions which held the appellants towards proof of non-access upon which the success or failure of their defence so intimately depends. For these reasons their Lordships think that the conclusion come to by the High Court was right, that the appeal fails, and should be dismissed with costs. And they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for appellant : *J. E. Lambert.*

Solicitors for respondent : *Bramall & Bramall.*

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Present : Dias, J.

LOKUMENIKE vs. SILINDUHAMY & 4 OTHERS

S. C. No. 192 *of* 1946—*C. R. Ratnapura No.* 1528.
Argued on : 5th June, 1947.
Decided on : 10th June, 1947.

Civil Procedure—Ex parte *decree—Application to set aside—Jurisdiction of court that passed such decree to entertain such application—When may a party apply to Supreme Court.*

Held : (i.) That where an *ex parte* order had been made behind the back of a party by any court, such court has jurisdiction to entertain and determine an application by the party affected to vacate such order.

(ii.) That an application for relief to the court that passed such *ex parte* decree should be made before the Supreme Court is moved to interfere.

Cases referred to : *Habibu Lebbe vs. Punchi Ettena* (1894) 3 C.L.R. at p. 85 *Craig vs. Kansen* (1943) 1 K.B. 256.
Gargial vs. Somasundram Chetty (1905) 9 N.L.R. 26.
Weeraratne vs. Secretary, D. C. Badulla (1920) 2 C.L. Rec. 180, 8 C.W.R. 95.
Caldera vs. Santiagopulle (1920) 22 N.L.R. at p. 158.
Sayaboo Mohamadu vs. Maula Abubaker (1926) 28 N.L.R. at p. 63.
Tambirajah vs. Sinnama (1935) 36 N.L.R. 442.
Allis vs. Ran Menika (1927) 5 T.L.R. 11.
Bank of Chettinad vs. Pulmadan Chetty (1932) 12 C.L. Rec. at p. 28.

H. V. Perera, K.C., with *S. R. Wijeyetileke*, for second respondent.
N.E. Weerasooriya, K.C., with *P. Navaratnarajah*, for petitioners-respondents.

Dias, J.

The plaintiff B. A. Abraham Singho instituted this mortgage action, and as the mortgagors were dead, he moved to have a " legal representative " appointed in place of the deceased mortgagors under section 7 of the Mortgage Ordinance. The respondents named to that application were the present five respondents and E. P. Punchimenike who is also a respondent to this appeal.

The Court ordered notices to issue on the respondents. On May 25, 1943 the Court Clerk journalled that all the respondents had been reported to have been served with notice, and as they were absent, M. K. Silinduhamy (the first respondent to this appeal) was appointed legal representative of the deceased mortgagors. Thereafter summons in the main action were issued on her. On the returnable date summons having been reported to have been served on her, and she being absent, a decree absolute was entered in the action on July 13, 1945.

Thereafter order to sell was issued, and at the sale the appellant, who is the wife of the plaintiff mortgagee, purchased the land.

On February 22, 1945 the present respondents came before the Court alleging that the original notices for the appointment of a legal representative had not been served on them, that they were unaware of the institution of the action until January, 1945, and that the summons in the main action had not been served on Silinduhamy, the first respondent. They therefore moved the Court to vacate all the proceedings.

An inquiry was held by the Commissioner and he has found as a fact that the original notices for the appointment of the legal representative were not served by the Fiscal's officer on persons known to him, but on being pointed out to him This important fact had not been entered in the journal of the case. Had it been, the Judge before taking any further action would have directed what is called an affidavit of identity to be produced by the person who pointed out the persons to the process server identifying them as the persons wanted. There was thus no proof whatever that the correct persons had been pointed out. The appointment of Silinduhamy as the legal representative was therefore bad *ab initio*. The Judge has also accepted the evidence of Silinduhamy that she was never served with the summons in the main action. He, therefore, held that the proceedings culminating in the decree and thereafter were void, and he set aside all the proceedings in the case. From that order the purchaser at the mortgage sale, who is the wife of the plaintiff, appeals.

In her petition of appeal she has stated " that it was not stated at the hearing under what provisions of the law this application was made : but presumably it was under section 344 of the Civil Procedure Code. If so, it is submitted that that section cannot in law be invoked in view of

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the wording of the section itself." The proceedings show that counsel from Colombo appeared for the parties at the inquiry. No reference whatever was made to section 344 by either counsel at the inquiry.

It is clear that the learned Commissioner of Requests held this inquiry under a rule of practice which has become deeply ingrained in our legal system—namely that if an *ex parte* order has been made behind the back of any party, that party should first move the Court which made that *ex parte* order in order to have it vacated, before moving the Supreme Court or taking any other action in the matter. If authority is needed for this proposition it is to be found in the following cases : In *Habibu Lebbe vs. Punchi Ettena* (1894) 3 C.L.R. at p. 85 and see *Craig vs. Kansen* (1943) 1 K.B. 256. Bonser, C.J. said " I am informed by my learned brother that it has long been the practice, and a practice which has been expressly approved by this Court, that in cases like the present one, application should be made in the first instance to the Court which pronounced the judgment ; and if the Court which pronounced the judgment refuses to set it aside, then, and then only, should there be an appeal from that refusal. This course appears to me to be the most convenient one ; and, furthermore, it is in accordance with the practice of the Appeal Court in England. It has been laid down that although the Court of Appeal may have jurisdiction to hear appeals from judgments given by default, yet, that it is not desirable to exercise that power, and to encourage appeals to be brought before the case has been tried......Therefore, if the judgment was given in the absence of one of the parties, I think that under the practice laid down by this Court, it was competent for the District Judge to deal with the case, and that the plaintiff adopted the proper course in applying first to the District Judge before coming to this Court." In *Gargial vs. Somasundram Chetty* (1905) 9 N.L.R. 26, the case of *Habibu Lebbe vs. Punchi Ettena* (supra) was followed. Layard, C.J. said that the practice referred to had been in existence for the last thirty years at least and " I believe that it existed prior to that date." In the Badulla case which was cited, and which is reported under the name of *Weeraratne vs. Secretary D. C. Badulla* (1920) 2 C.L. Rec. 180, 8 C.W.R. 95. Bertram, C.J. followed the two earlier cases. In *Caldera vs. Santiagopulle* (1920) 22 N.L.R. at p. 158. Bertram, C.J. following *Weeraratne vs. Secretary D. C. Badulla* (supra) said " The order was made *ex-parte* behind the back of the defendant, and in accordance with the authorities cited in a very recent case......a person seeking to set aside such an order must first apply to the Court which made it, which is always competent to set aside an *ex parte* order of this description." In *Sayadoo Mohamadu vs. Maula Abubaker* (1926) 28 N.L.R. at p. 63. Jayewardene, J. said : " An *ex parte* order under ' these Sections should, I think, be treated as any other *ex parte* order made by the Court, and any party affected by it should be entitled to apply to vacate it on notice to the party in whose favour it was made.' " In *Tambirajah vs. Sinnamma* (1935) 36 N.L.R. 442, it was laid down that the final decree in a partition action can be set aside upon proof that summons had not been served upon a party to the action.

The appellant has cited the case of *Allis vs. Ran Menika* (1927) 5 T.L.R. 2., the facts of which bear a similarity to the facts of the present case. What that case decided was that section 344 of the Civil Procedure Code relates to the execution of decrees, and enables a Court to dispose of questions relating to the execution which arise between the parties, instead of referring them to a separate action. It does not confer a special power to the Court to set aside its own decrees—see also *Bank of Chettinad vs. Pulmadan Chetty* (1932) 12 C.L. Rec. at p. 28. I do not think these cases apply to the facts of the present case. This inquiry was not held under section 344 of the Civil Procedure Code. The findings of fact of the Commissioner of Requests cannot be disturbed. Those findings show that there was no proper service of summons on the defendant, with the result that the proceedings were *ex parte* and bad. Under such circumstances it is rather late in the day to argue that the Court had no power to hold the inquiry it did, or to make the order which it did.

The appeal is dismissed with costs.

Appeal dismissed.

Proctors : *P. A. Dharmadasa* for petitioners-respondents.

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Present : Dias, J.

KARUNARATNE vs. INSPECTOR OF POLICE, BAMBALAPITIYA

S. C. No. 378 *of* 1947—*M. C. Colombo South No.* 8959
Argued on : 17th June, 1947.
Decided on : 20th June, 1947.

Criminal Procedure—Charge of theft joined with alternative charge of disposing the stolen property—Is such joinder bad.

Held : That that it is not a misjoinder to charge a person with theft and alternatively with a charge of assisting in the concealment or disposal of the stolen property.
Disapproved : *Rahim vs. Silva* (1934) 2 C.L.W. 476.
Followed : *Rex. vs. Thambypillai* (1920) 21 N.L.R. 455.
Cases cited : *Rex vs. William Perera* (1944) 45 N.L.R. 433.
Rex vs. Piyasena (1942) 44 N.L.R. 58.
Mariyanayagam vs. Basnayake (1944) 45 N.L.R. 479.

No appearance for accused-appellant.
J. G. T. Weeraratna, C.C., for the Crown.

Dias, J.

The appellant and one Edwin were jointly charged as follows : (1) that on October 22, 1946 they committed theft of an " electro Magnetine fertilizing machine " the property of the Colombo Municipal Council, an offence punishable under section 367 of the Penal Code, and (2) in the alternative that they dishonestly disposed of that machine to one Jainul Abdeen of Skinner's Road South knowing or having reasont to believe that it was stolen property, an offence punishable under section 396 of the Penal Code.

Edwin has not been arrested. He is a proclaimed offender for whose arrest an open warrant has been issued.

The appellant was acquitted under count 1, but was convicted under section 396 and sentenced to undergo six months' rigorous imprisonment.

Although there was no appearance for the appellant, Crown Counsel quite properly brought to my notice certain authorities which, in his opinion, merited consideration.

I find it difficult to follow the reasoning of the Magistrate for not convicting the appellant under section 367 on the facts which he accepted.

The machine in question is supposed to fertilize paddy more quickly than nature. The inventor, who is a Municipal Engineer, had constructed three such machines. The exhibit P1 is one of them. It was painted green. P3, P4 and P5 have all been identified as being parts of the machine P1. At the material date P1 was in use at the Jawatte Experimental Station. In spite of the presence of the watcher Pabilis Gomis a thief or thieves succeeded in stealing the machine P1 on the night of October 22, 1946. The loss was discovered and the watcher reported the loss to his superior officer.

On October 26, *i.e.* four days after the theft, on information received the machine P1 was found in the shop of one Jainul Abdeen at Skinner's Road South. He is a dealer in scrap metal. Abdeen at once produced the receipt P6. His evidence is that on October 26 the appellant and another man sold him P1 for Rs. 25. Abdeen offered to point out the vendors. He was taken to Timbirigasyaya Road junction and there pointed out the appellant who was in a motor car. Manatunga has proved that the car is his and he had given it to the appellant for hiring. Attached to the engine of that car were the exhibits P3 and P4 which are parts of the machine P1. The Government Analyst proved that the paint on P3 and P4 are the same as that on P1.

The prosecution, therefore, has established that this appellant on October 26, was in possession of the recently stolen machine P1, and in the absence of a reasonable explanation from him, the Court would be justified not only in inferring that he was in possession of stolen property, but also that he was the actual thief.

The evidence of the appellant is that an unknown man hired his car and put P1 into it. That unknown man sold him the coil P4 for Rs. 5 and the machine was sold to Abdeen. He admitted that P3 was affixed to his car, but he does not explain how P3 came into his possession. The evidence of Abdeen however is that this appellant and the other man both spoke to him in regard to this sale, and it was this appellant who said " Buy this, mudalali. If you turn this,

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it acts like a dynamo." It is clear that the explanation of the appellant was unsatisfactory and was rightly rejected. What inference should be drawn in cases of this kind was pointed out by the Court of Criminal Appeal in *R. vs. William Perera* (1944) 45 N.L.R. 433. In my opinion the proper inference flowing from all the circumstances of the case is that the appellant was a thief.

Crown Counsel however has drawn my attention to the case of *Rahim vs. Silva* (1934) 2 C.L.W. 476, where Drieberg, J. held that it was a fatal irregularity to join charges of theft (section 367) and assisting in the concealment of stolen property in respect of the same article (section 396). There was no appearance for the respondent in that case, and the attention of the learned Judge does not appear to have been drawn to the three Judge decision of *R. vs. Thambipillai* (1920) 21 N.L.R. 455, where it was laid down that it was not a misjoinder of charges to join a count for murder with one under section 198 of the Penal Code for causing evidence of the offence to disappear by hiding or secreting the murdered body. If such a joinder of charges is justified, it seems to follow that a charge of theft and a charge of assisting in the concealment or disposal of that stolen property may also be joined. In *Rahim vs. Silva* (1934) 2 C.L.W. 476, Drieberg, J. said: "It is not possible to charge the same person with theft and with assisting in the concealment of stolen property in respect of the same article. The latter is an offence in which dishonesty is not necessarily an ingredient. It is intended only to punish acts of assistance which are calculated to thwart the detection of the crime by making away with the *corpus delicti*." Equally, the offence of murder is the killing of a person with a murderous intention, while the offence under section 198 consists in causing evidence of an offence to disappear, knowing or having reason to believe that an offence has been committed. They are as distinct offences as are offences under section 367 and section 396. In the circumstances, I prefer to follow the case of *R. vs. Thambipillai* (1920) 21 N.L.R. 455, and hold that there is no misjoinder in charging offences under section 367 and 396 in the same charge or indictment. Two other cases have to be considered. In *R. vs. Piyasena* (1942) 44 N.L.R. 58, the *only* charge against the accused both at the non-summary inquiry and in the indictment was theft, and he was convicted of that offence. In appeal it was held that the charge of theft had not been established. The Crown then asked that he may be convicted under section 396 under section 181 of the Criminal Procedure Code. This application was refused. In *Mariyanayagam vs. Basnayake* (1944) 45 N.L.R. 479, the accused had originally been charged with theft. The prosecution then added counts under section 394 and 396 *but no new charges were framed*. The Crown attempted to justify the conviction under section 396 under section 182 of the Criminal Procedure Code. This the Supreme Court refused to accept. These cases have no application to the facts of this case.

What has happened here is that the Magistrate ought, on his findings, to have convicted the appellant under the first count of the charge. The evidence also justified a conviction under the second count of the charge. The two counts were alternatives. No injustice or prejudice has been caused to the appellant.

I, therefore, affirm the conviction and dismiss the appeal.

Appeal dismissed.

Present: DIAS, J.

SOLOMON PETER DE SILVA vs. PERERA, S. I. P.

S. C. No. 563 *of* 1947—*M. C. Negombo No.* 49055.
Argued on: 20th June, 1947.
Decided on: 24th June, 1947.

Penal Code, sections 369 *and* 394—*Charge of theft and retaining stolen property—When liability of accused person to give explanation arises—Doubt as to whether such property can be said to be recently stolen—Effect—Evidence of Police witnesses that explanation given to them by accused unsatisfactory in their opinion—Effect of such evidence.*

Held: (i.) That the liability of a person accused of dishonestly retaining stolen property to give an explanation only arises when the prosecution has led admissible and relevant evidence, which if believed would establish the necessary ingredients of the offence.

(ii.) That where there is room for doubt whether the property can be said to be "recently" stolen property, the presumption of theft arising from the possession of recently stolen property cannot be drawn.

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(iii.) That the court should not act on the evidence of police witnesses who merely state that the explanation given by the accused was in their opinion unsatisfactory, without confronting the accused with the statement recorded by them, if inconsistent with the evidence given by him in court.

Cases referred to : *R. vs. Abeywickreme* (1943) 44 N.L.R. at p. 259.
R. vs. Appuhamy (1945) 46 N.L.R. 128.
Attorney-General vs. Rawther (1924) 25 N.L.R. 385.
Fernando vs. Heiler (1945) 46 N.L.R. 406.
Appuhamy vs. Palis (1917) 4 C.W.R. 355.

First accused-appellant in person.
J. G. T. Weeraratna, C.C., for the Crown.

DIAS, J.

The appellant and his wife were jointly charged under three counts ; (1) with committing house-breaking by entering the store room of the Royal Air Force Camp at Katunayaka on some day between July 4 and 17, 1946 with intent to commit theft—section 440 of the Penal Code ; (2) with committing theft therefrom of crockery, cutlery and linen bearing service markings which were the property of the R.A.F. in possession of Flight Officer Parr—section 369 of the Penal Code ; and (3) with dishonestly being in possession of stolen property on January 13, 1947 knowing or having reason to believe that they were stolen property—section 394 of the Penal Code. The Magistrate, who assumed summary jurisdiction under section 152 (3) of the Criminal Procedure Code, acquitted the woman on every count. He convicted the appellant under Count 2 for committing theft of the articles marked P1 to P12. The appellant being an old man of 64, was sentenced to undergo two weeks' simple imprisonment and to pay a fine of Rs. 250 and in default to undergo three months' rigorous imprisonment.

The proof is entirely circumstantial and rests solely on the correct inferences to be drawn from his undoubted exclusive possession on January 13, 1947 of the articles P1 to P12. It is to be observed that the possession of these things by the appellant was about six months after the alleged housebreaking and theft in July, 1946.

It is a cardinal principle that in a case of circumstantial evidence, in order to convict the accused, the Court must be satisfied that the evidence was only consistent with his guilt, and inconsistent with any reasonable hypothesis of his innocence. The prosecution does not displace the presumption of innocence by merely establishing a strong case of suspicion against him—*R. vs. Abeywickreme* (1943) 44 N.L.R. at p. 259, *R. vs. Appuhamy* (1945) 46 N.L.R. 128. In this case before the appellant can be convicted, it was the duty of the prosecution to establish the following ingredients beyond reasonable doubt :—(*a*) that the productions P1 to P12 are stolen property ; (*b*) if so, that they are recently stolen property ; (*c*) that the appellant had exclusive possession of such recently stolen property. When the prosecution has led such evidence, then (*d*) it becomes necessary for the appellant to give a reasonable explanation of his possession of such property. In the absence of a reasonable explanation, a presumption may then arise either that the appellant is the dishonest receiver of stolen property knowing or having reason to believe that it is stolen property under section 394 of the Penal Code, or possibly also that he is a thief of such property under section 369 of the Penal Code.

It must never be overlooked that the liability of an accused person to give an explanation *only* arises when the prosecution has led admissible and relevant evidence which, if believed, would establish the ingredients (*a*), (*b*) and (*c*)—see *Attorney-General vs. Rawther* (1924) 25 N.L.R. 385 and *Fernando vs. Heiler* (1945) 46 N.L.R. 406.

I doubt whether the prosecution has established the ingredients (*a*) and (*b*) that P1 to P12 are recently stolen property. What the prosecution has proved is that information was given to the Police on July 20, 1946 that the R.A.F. Store had been burgled between the 4th and 17th of that month and service property had been stolen and that nearly six months later property similar to that stolen from the R.A.F. Store was found in the possession of the appellant. Parr has not been called. Flight Lieutenant Hamshire, who only assumed duties at Katunayake in January 1947, is unable to give any direct evidence. Worse still, the Magistrate has allowed him to give hearsay evidence which is clearly inadmissible and which Crown Counsel does not seek to justify. Hamshire was allowed to say—" I am definite that no property like P1 to P12 or any china, crockery, glasses or silver were sold by the Disposal Board in Ceylon. *I made enquiries and verified this......* Surplus war department equipment *is sold in the Island.* There has been no sale of N.A.A.F.I. property to my knowledge. No war department cutlery and crockery was sold

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before January 14, 1947. *I confirmed this at the War Disposals Board*—but I brought no proof of that statement." It is a matter of common knowledge that service property has been and is being sold to the public in all parts of the Island. I take it this is an important prosecution, and it was, therefore, all the more incumbent on the prosecuting officers to establish that P1 to P12, even though they bore service markings, are not the kind of property that has ever been sold to the general public. Such evidence should have been available if the facts are as stated by Mr. Hamshire. This is another example of the negligent manner in which public prosecutions are carried out. No question of expense is involved, because the prosecution has the funds of the Treasury at their command. In my opinion, the inadmissible evidence given by Mr. Hamshire alone is sufficient to vitiate this conviction.

There is thus imported into the case a doubt as to whether P1 to P12 are, in fact, stolen property. Furthermore, there is room for doubt whether such property, assuming them to be stolen property, can be said to be "recently" stolen property. Under such circumstances, the presumption arising from the possession of recently stolen property cannot be drawn and the explanation given by the appellant and the witnesses called by him to show how the appellant came to possess P1 to P12, ought to have created reasonable doubts in the mind of the Magistrate, and led to his acquittal.

There is, however an even more serious defect in the proof ot the prosecution. One police officer after another was allowed to testify that the statement of the appellant was recorded and that he was unable to give a satisfactory account of his possession of P1 to P12. No attempt was made when the appellant was under cross-examination to discredit his testimony by confronting him with statements recorded in the Information Book which were inconsistent with the testimony he gave in Court. Had that been done, those statements would not become substantive evidence for the prosecution but would have discredited the appellant and his witnesses. Without so doing, the police witnesses were allowed to divulge that the explanation given by the appellant was, in the opinion of the police, unsatisfactory. I draw the attention of the Magistrate to the case of *Appuhamy vs. Palis* (1917) 4 C.W.R. 355, where Wood Renton, C.J. said: "It is for the accused to explain his possession; but it was not for a police constable to put before the Court any explanation of it the accused may have given him." In this case we do not know what was the explanation which the appellant gave the police. All that we are permitted to know is that the appellant gave some undisclosed explanation which in the opinion of the police was an unsatisfactory account of his possession.

In these circumstances the conviction of the appellant cannot possibly stand. I, therefore, quash the conviction and acquit him.

Accused acquitted.

Present: DIAS, J.

ELIYA LEBBE vs. ABDUL MAJEED

S. C. No. 235 *of* 1946—*C. R. Matale No.* 8816
Argued on: 29th May, 1947.
Decided on: 3rd June, 1947.

Transfer of land by notarial deed—Contemporaneous non-notarial agreement by vendee to retransfer land to vendor—Refusal by vendee to retransfer—Enforceability of non-notarial agreement—Trusts' Ordinance sections 5 *and* 83—*Jurisdiction.*

The plaintiff transferred a certain land woith more than Rs. 300 to the defendant for Rs. 250 by deed. At the time of the execution of the deed, the defendant signed a non-notarial agreement agreeing to retransfer the land to the plaintiff within two years on payment of the said Rs. 250 and the expenses incurred in connection with the deed. The plaintiff tendered the sum as agreed but the defendant refused to retransfer the land. The facts showed that when the deed was executed, it was never intended by either party that the defendant should hold the land as absolute owner but only until such time as his debt was repaid.

Held: (1) That the informal agreement was enforceable as it would enable the defendant to effectnate a fraud if it were shut out.

(2) That though the land was worth more than Rs. 300, the court had jurisdiction as plaintiffs' cause of action was for specific performance of an agreement and was below Rs. 300 in value.

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Cases cited : *Carthelis Appuhamy vs. Saiya Nona* (1945) 46 N.L.R. 313 ; 30 C.L.W. 72.
Fernando vs. Thamel (1946) 47 N.L.R. 297 ; 32 C.L.W. 66.

C. T. Olegasegaram, for the defendant-appellant.

N. E. Weerasooriya, K. C., with *S. R. Wijeyetileke*, for the plaintiff-respondent.

DIAS, J.

The facts of this case lie in a narrow compass and are in the main undisputed.

The plaintiff by deed P1 dated October 20, 1943 conveyed a certain land to the defendant. In form this deed purports to be an out and out sale by the plaintiff to the defendant for a consideration of Rs. 250. In the notary's attestation there is the following statement. "And I further certify that out of the consideration hereof Rs. 100 was paid in my presence, Rs. 100 was set off against the mortgage bond No. 11674...... and the balance acknowledged to have been received previously."

There is evidence to show that the land which was conveyed was worth Rs. 750 at the date of the conveyance, and that it is worth Rs. 1,000 today.

On the same day on which the deed P1 was executed, the non-notarial document P2 was entered into between the parties whereby the defendant agreed to reconvey the land in question to the plaintiff within a period of two years if the latter paid to the defendant the sum of Rs. 250 and the expenses incurred in connexion with the deed.

The plaintiff's case is that within the two years he offered the money to the defendant and asked him for a reconveyance. This the defendant refused to do. The plaintiff therefore has brought the money into Court and asks that the defendant may be ordered to execute a deed at the plaintiff's expense reconveying the property to him.

Two questions emerge for decision. In the first place has the Court of Requests jurisdiction to try this action, the land being worth more than Rs. 300 ? In the second place, the deed P1 being a notarial conveyance by the plaintiff to the defendant, can the plaintiff enforce the informal agreement contained in P2 ?

On the first question, I think the Commissioner of Requests was right in holding that he had jurisdiction to try the case. It may be that the land in question is worth over Rs. 300, but the plaintiff's cause of action is for specific performance of an agreement, and not for a declaration of title to land or any such relief. The plaintiff's cause of action is below Rs. 300 in value, and therefore the Court of Requests had jurisdiction to entertain and try this action.

On the second point the solution to the problem lies in the answer to the question as to what precisely was the nature of the transaction embodied in the deed P1 although it is in the form of an out and out conveyance ?

The plaintiff's evidence is that his father having died, he was in need of money for purposes of administration. He had borrowed money and his creditor had demanded repayment. He therefore turned to the defendant who was his relative and a co-owner of the land in question. He previously owed the defendant a sum of Rs. 100. He thus became the debtor of the defendant in a sum of Rs. 250, and it was agreed between them that the deed P1 was to be executed in favour of the defendant who undertook to retransfer within two years on repayment of the debt. The plaintiff swears that he would not have executed P1 if the defendant had not promised to reconvey the property on payment of the debt. He says that he never surrendered possession of the *corpus* until he was arrested on a charge of murder.

According to the defendant he already had a usufructuary mortgage over the land on bond D1 and he possessed the land and planted cocoanut trees and took the produce from the cocoanut trees. The plaintiff then wanted to borrow more money and told the defendant that if he did not buy the land, the plaintiff would have to sell it to an outsider. According to the defendant P1, was an out and out sale for a money consideration. Then " a little while later " the plaintiff wanted the informal writing in order to show his sister or somebody else. Therefore he gave the plaintiff the document P2. This statement carries no conviction. Who is the man who executes a notarial deed without having first thought out all its implications before-hand ? I think it is clear that the informal document P2 was part and parcel of the same transaction of which the notarial deed P1, was a part, and was not an independent transaction.

The law is quite clear, although its application to a particular set of facts may cause difficulty. If the deed P1, is a genuine sale by a vendor to a vendee for valuable consideration, the informal agreement to retransfer would be of no avail because it refers to immovable property and is not notarially executed—*Carthelis Appuhamy vs. Saiya Nona* (46 N.L.R. 313).*

* 30 C. L. W. 72 (Edd.)

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On the other hand if it appears from the facts that, although the transfer is in form an out and out sale, there exist facts from which it can be inferred that the real transaction was either a money lending transaction where the land was transferred to the creditor as security, or that it was a transfer in trust—a Court of Equity would grant relief in such a case—*Fernando vs. Thamel* (47 N.L.R. 297).*

There are certain tests for ascertaining into which category a case falls. Thus if the transferor continued to remain in possession after the conveyance, or if the transferor paid the whole cost of the conveyance, or if the consideration expressed on the deed is utterly inadequate to what would be the fair purchase money for the property conveyed—all these are circumstances which would show whether the transaction was a genuine sale for valuable consideration, or something else.

Section 83 of the Trusts Ordinance (Chap. 72) enacts that where the owner of property transfers it, and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee must hold such property for the benefit of the owner or his legal representative. Section 5 of the Trusts Ordinance provides that a trust in relation to immovable property must be notarially executed, but section 5 (3) expressly provides that this rule does not apply where it would operate so as to effectuate a fraud.

On the facts and circumstances it is clear that when the plaintiff executed the deed P1 it was never in the contemplation of either party that the defendant was to hold the property as absolute owner, but only until such time as his debt was repaid. To shut out the informal agreement P2 would be to enable the defendant to effectuate a fraud.

In my opinion, the Commissioner was right in finding for the plaintiff. The appeal is dismissed with costs.

Appeal dismissed.

Proctors : *C. S. Rajaratnam*, for the appellant.
S.J.B. *Dharmakeerthie*, for the respondent.

Present : Dias, J.

LYRIS SILVA vs. KARUNARATNE, PRICE CONTROL INSPECTOR

S. C. No. 366 *of* 1947—*M. C. Badulla-Galdumulla No.* 3587.
Argued on : 17th June, 1947.
Decided on : 19th June, 1947.

Decoy—Price Control Inspector acting as—Is he an accomplice—Interest in conviction of accused—Need to accept such evidence with care and caution.

Held : (i.) That whether a person is or is not an accomplice is not a question of law, but one of fact for decision in each case.

(ii.) That where a decoy acts like an ordinary customer, and without tempting the accused to commit the offence, or abetting or instigating its commission, the accused commits the offence, such a decoy cannot be regarded as an accomplice, although being interested in the conviction of the accused or the reward he hopes to obtain, his evidence should be accepted with care and caution.

Cases referred to : *Siriwardene vs. Vanderstraaten* (1938) 39 N.L.R. 527.
Kern vs. Wickremasinghe (1938) 39 N.L.R. 571.
Wijeysuriya vs. Lye (1931) 33 N.L.R. 148.
Beddewella vs. Albert (1940) 42 N.L.R. 136.
R. vs. Tissera (1935) 37 N.L.R. at p. 236.
R. vs. Peris Appuhamy (1942) 43 N.L.R. 412.

H. V. Perera, K.C., with *G. P. J. Kurukulasuriya*, for accused-appellant.
No appearance for respondent.

Dias, J.

The appellant was charged under the appropriate Defence Regulation with selling a pound of bread to a decoy for thirty-five cents when the controlled price was twenty-five cents. He was convicted and sentenced to pay a fine of Rs. 750 and in default to undergo one month's rigorous imprisonment.

The evidence is that on the day in question Price Control Inspector Karunaratne induced his colleague Price Control Inspector Wijeykoon to act as decoy. He was searched by the former officer and given a note the number of which had been noted. Wijeykoon then went to the bakery of Danoris Silva and asked for a pound of loaf. The decoy says that the accused gave him the

* 32 C. L. W. 66 (Edd.)

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loaf, took the rupee note and returned him sixty-five cents change—6 ten-cent coins and one five-cent coin. The decoy says that he had asked the accused for the price of the bread and he was told that it was thirty-five cents. There is no corroboration of this statement of the decoy by any of the other witnesses. The rest of the raiding party then came up and found the loaf and the sixty-five cents in the decoy's possession and the rupee note in the drawer.

The defence admits the sale but denies that the change given to the decoy was sixty-five cents but seventy-five cents—7 ten cents coins and one five-cent coin. It is suggested that it was a simple matter for the decoy to have secreted the extra-ten cent coin between the time of the sale and the arrival of the raiding party; and that as the accused had no cause to suspect the decoy's *bona fides* his attention would not necessarily be fixed on what the customer was doing with the change. This was put to Wijeykoon who denied the allegation.

The first question for decision is whether Wijeykoon is an accomplice, and secondly, if he is an accomplice, whether his evidence on the material point as to whether he was given seventy-five cents or sixty-five cents has been corroborated by independent evidence?

There is a chain of authority on this point. The generally held view was that a decoy who abets a person to commit an offence is an accomplice. In the case of *Siriwardene vs. Vanderstraaten* (1938) 39 N.L.R. 527, however Soertsz, J. pointed out that every decoy or spy must not indiscriminately be dubbed an accomplice and his evidence invariably regarded as that of an accomplice, and that there was no hard and fast rule that one must not convict on the uncorroborated testimony of a decoy. In that case, however, the decoy was in fact corroborated by another independent witness who was not a decoy, as well as by circumstantial evidence. In the same Law Report in *Kern vs. Wickremasinghe* (1938) 39 N.L.R. 571, Hearne, J. said that it was unsafe to convict on the uncorroborated testimony of two decoys. The learned Judge followed the decision in *Wijeysuriya vs. Lye* (1931) 33 N.L.R. 148. In *Beddewella vs. Albert* (1940) 42 N.L.R. 136. Soertsz, J. held that an informer is on a different footing from an accomplice so far as the rule regarding corroboration is concerned, although his evidence should be probed and examined with great care.

The fact of the matter is that whether a person is or is not an accomplice is not a question of law but one of fact for decision in each case. In the case of *R. vs. Tissera* (1935) 37 N.L.R. at p. 236, which is the decision of a Bench of three Judges, Maartensz, J. said: "The Solicitor-General stated that this question was reserved with a view of obtaining a ruling as to the circumstances in which a witness who denies complicity is to be deemed an accomplice. We are of opinion that a general rule or rules cannot be laid down as it is not a question of law but of fact." In *R. vs. Peris Appuhamy* (1942) 43 N.L.R. 412, the Court of Criminal Appeal held that the question whether a person is an accomplice is for the jury to decide, and it was the duty of the Judge to direct the jury as to what association with the crime would constitute a person an accomplice.

While the decoy or an *agent provocateur* is a person whom the Courts rightly regards with suspicion and distaste, he is not always an accomplice of the accused in the sense in which that word is usually understood. Where a decoy acts like an ordinary customer, and, without tempting the accused to commit the offence, or abetting or instigating its commission, the accused commits the offence, I fail to see how such a person can be called an accomplice, although being interested in the conviction of the accused or the reward he hopes to obtain, his evidence should be accepted with care and caution.

I am of opinion that in this case the witness Wijeykoon cannot be regarded as an accomplice of the appellant. While his evidence does not need corroboration, nevertheless, it must be proved and accepted with great caution.

It is submitted that the Magistrate has only written a short judgment and has not really dealt with the main points in regard to the credibility of the witness. All the facts urged before me must have been argued before the Magistrate and he has dealt with them, with the exception of the point that the decoy said that he asked the accused for the price of the loaf and he was told that it was thirty-five cents. The only persons who could have heard that conversation were the appellant and those in the bakery and the decoy, as the other prosecution witnesses were at some distance.

In the circumstances, it is impossible for me to hold that the conviction is wrong. The appeal is dismissed.

Appeal dismissed.

Proctors: *W. L. Pinto* for the appellant.

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Present : CANNON, J.

A. S. RAJENDRA vs. R. VISUVALINGAM

S. C. No. 352—*M. C. Kayts No.* 6996.
Argued and Decided on : 24th May, 1946.

Criminal Procedure—Evidence for prosecution—Contradictions not on material points—Magistrate acquitting accused without calling on defence.

Held : That an accused person should not be acquitted without being called upon for his defence merely because the witnesses for the prosecution contradict themselves on points which do not matter.

J. G. T. Weeraratne, Crown Counsel for the complainant-appellant.
S. N. Rajaratnam, with *S. P. M. Rajendram*, for the accused-respondent.

CANNON, J.

In this case the complainant, a woman, charged the accused, a man, with causing her grievous hurt by fracturing three of her ribs with the handle of an axe.

For the prosecution two eye-witnesses and two medical witnesses gave evidence. The eye-witnesses were the complainant herself and her daughter aged ten. They stated that the complainant was dragged by the accused to a tree to which she was tied and that the accused hit her on the body a number of times with the handle of an axe. On the same day Dr. Chelliah examined the complainant and found on her the following injuries : (1) a contusion on the back of the left chest ; (2) a contusion on her left shoulder blade and (3) an abrasion on her right chest. After three days in Jaffna hospital she left. Two days later she went to Dr. Ponniah complaining of pain and he decided that an X'ray examination was advisable. X'ray examination revealed that her 8th, 9th and 10th ribs were fractured on the back of the left side of the chest. It requires no acute powers of reasoning to understand that the strong probabilities are that the blows which caused the contusions on the back of the left chest which Dr. Chelliah found, also caused the fractures of the ribs, and there is the evidence of the complainant and her daughter that the accused hit her on the body with the handle of an axe. But the Magistrate, without calling upon the accused for his defence, acquitted him. Therefore, it is not surprising that the Attorney-General asks this Court to intervene.

The Magistrate in his reasons states that the evidence of the complainant is contradicted by the daughter. Now, it is conceded by Mr. Rajendram that there is only one contradiction in the evidence of these two witnesses. That contradiction relates to something which happened after the assault. The complainant said that after the accused had gone away she was taken to the hospital by one Sinnadurai whom her child went to bring. The daughter in her evidence stated, " He came there having heard about this. I did not go to tell him." It is very important that a tribunal should direct its mind as to what contradictions matter and what do not. This contradiction seems to have very little bearing on the question whether the accused assaulted the complainant, and had the witnesses been questioned about it the matter may have been explained.

The Magistrate in his judgment further states, " According to complainant's evidence recorded as back as 31-5-45 she makes mention of accused's brother only being at the scene and released her." Now, on the 31st May, the complainant gave evidence; but the record shows that that was evidence tendered merely for the purpose of enabling another Magistrate to formulate a charge and was, therefore, not necessarily exhaustive. After this evidence was given the accused was charged and the trial fixed for the 11th October, on which date the hearing was continued by the Magistrate whose reasons are now being examined. On this latter date the complainant, when she gave evidence, stated in cross-examination that the accused's family were present at the time of the assault. Apparently the Magistrate thinks that because she did not mention this in her evidence given in May that she must be deliberately telling lies. He further states that the complainant's evidence is not supported by the medical evidence given by Dr. Chelliah. I have already dealt with that point. Dr. Chelliah's evidence is clearly not inconsistent with the evidence of Dr. Ponniah and that of the complainant. " It is not possible " the Magistrate goes on " to say whether this accused caused the fracture of the ribs on 10-5-45. When she was examined on the 15th May, 1945, by the J.M.O., Jaffna, under X'rays fracture of the ribs was revealed. She had been discharged from the Pungudutivu hospital on the 12th May." If the suggestion here is that the complainant had had her ribs fractured between the 12th and the

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15th May, I can only say that there is no evidence to support it nor was it suggested in the cross-examination of the complainant, a cross-examination which did not reveal what the nature of the defence was.

This was clearly a case in which the defence should have been called upon.

I set aside the order of acquittal and send the case back for re-trial before another Magistrate.

Order set aside and case sent back.

Present: DIAS, J.

SUB-INSPECTOR OF POLICE, URAGASMANHANDIYA vs. T. CHILINIS MENDIS & 3 OTHERS

S. C. No. 214-217—*M. C. Balapitiya No.* 57437.
Argued and Decided on: 13th June, 1947.

Criminal Procedure—Charges of house-breaking and theft—Summary trial under section 152 (3) *of Criminal Procedure Code—Several accused—Statement of one accused recorded by another Magistrate under section* 134 *of Criminal Procedure Code—Failure to produce such statement at trial—Indications in judgment that Magistrate's mind influenced by such statement—Can conviction stand.*

At the summary trial of several accused on a charge of house-breaking and theft under the provisions of section 152 (3) of the Criminal Procedure, the Magistrate appeared to have read a statement of one of the accused recorded earlier by another Magistrate under section 134 of the Criminal Procedure Code, in which one of the accused implicated the others. This Statement was not produced at the trial. The Magistrate convicted the accused who appealed.

The Supreme Court set aside the convictions and sent the case back for non-summary proceedings.

Colvin R. de Silva, with *E. O. F. de Silva,* for accused-appellants.

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

DIAS, J.

In the case of *Pancha vs. Sub-Inspector of Police Velu,* (1946), 47 N.L.R. 567, after examining the authorities I held, that a summary trial of a charge of house-breaking and theft under the provisions of Section 152 (3) of the Criminal Procedure Code, was lawful. Mr. Colvin R. de Silva, who appears for the 1st, 2nd and 3rd accused appellants, while conceding that that may be the law, has submitted that on the facts of this particular case it is unfair and unjust to allow the conviction of these accused to stand, in view of what transpired at the trial.

I am of opinion, that his contention must prevail. The proceedings apparently began on December 1st, 1946, when Police Sergeant Tennekoon produced the 4th accused before Mr. N. de Alwis, who I am told, is a well-known Proctor, Justice of the Peace and an Unofficial Magistrate at Balapitiya and wanted his statement recorded by Mr. de Alwis, under the provisions of Section 134 of the Criminal Procedure Code. In that statement, which, I may point out, does not appear to have been recorded in the manner indicated in a circular which was sent by the legal Secretary to all Magistrates, the 4th accused implicated the 1st and 2nd accused and probably the 3rd accused. This statement was never produced at the subsequent trial before Mr. Seneratne; but for some reason, it appears as the first page in the judicial record. Mr. Seneratne when he assumed jurisdiction in the case, therefore, had before him a statement made behind the back of the 1st, 2nd and 3rd accused, which he either read or which he could possibly have read. Mr. Colvin R. de Silva suggests that Mr. Seneratne must have read this statement by the 4th accused, because after convicting the accused in regard to the 4th accused, he said, " On January 27th, 1947, the 4th accused had been an unwilling member of the party." Mr. de Silva points out, there was not a tittle of evidence to justify that statement, as the 4th accused never entered the witness box and gave evidence.

It has been pointed out times without number that not only must justice be free from bias, but must be free from the suspicions of any bias. I think, in the circumstances, Mr. Seneratne ought not to have dealt with this case summarily under Section 152 (3). I, therefore, quash all the proceedings and the sentences passed on the accused and direct that non-summary proceedings should be taken against them before another Magistrate.

Convictions quashed and sent back for non-summary proceedings.

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