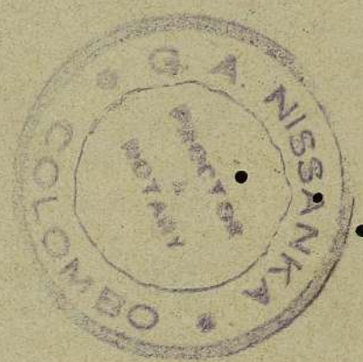
The Ceylon Law Weekly

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



VOLUME XXXV

WITH A DIGEST

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ERRATA.

(1) For 'Cyril de Alwis' under 'Proctors' on p. 23 read M. P. P. Samarasinghe.

(2) For "Evidence Ordinance, Section 34" in headnote to *Rex vs. Sumathipala & Others* on p. 75 read "Penal Code, Section 34."

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The 1st, 2nd, 3rd and 4th defendants and X and Y were owners of a property which they had mortgaged for Rs. 600. X and Y transferred their 1/3 share in the land to the plaintiff, who paid off the mortgage debt of Rs. 600, in circumstances constituting him a *negotiorum gestor*. The 4th defendant paid the plaintiff Rs. 100. The plaintiff then brought an action against the 1st, 2nd, 3rd and 4th defendants jointly for the balance of Rs. 300.

Held : (i.) That the plaintiff is entitled to contribution from the 1st, 2nd and 3rd defendants.

(ii.) That his claim is against each severally for a *pro rata* share.

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(ii.) That it is not necessary that the decree-holder should show that he has a cause of action. The fact that he is a holder of a decree for possession of immovable property is sufficient.

(iii.) That a decree directing delivery of trust property to trustees is executable and not declaratory.

(iv.) That in an action instituted under section 102 of The Trusts' Ordinance, reliefs claimed therein need not be embodied in one decree, but that decree may be issued from time to time.

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P, the administrator of the estate of a deceased person, instituted an action against the defendants to recover money due to the estate. The defendants filed answer and the case was fixed for trial. On the trial date the proctor for plaintiff asked for a postponement on the ground of plaintiff's illness and that it had become necessary to appoint a new administrator. This was granted and order was made removing the case from the trial roll and fixing a date for substituting the new administrator, who was not substituted as plaintiff, and no further steps were taken in the case for over twelve months. Thereupon, the Court entered order of abatement. Later the appellant having obtained letters of administration in his favour and substitution, moved to have the order of abatement set aside. This was refused on the ground that there had been unreasonable delay.

Held : (1) That under section 404 of the Civil Procedure Code, the Court had no power to compel a person to get himself substituted.

(2) That the right of the original administrator to proceed with the action continued, because his successor was not substituted.

(3) That there had been no failure on the part of the original administrator to take a necessary step to prosecute the action inasmuch as the next step was to fix the case for trial, which duty rested with the Court under section 80 of the Civil Procedure Code.

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The plaintiffs, The Ceylon Insurance Co., Ltd., carrying on business in Motor, Fire, Fidelity and Life Insurance, were registered on the 3rd April, 1939. The defendants, who carry on business in Life Insurance, were registered on the 24th May, 1944, as the United Ceylon Insurance Company. The plaintiffs sought by injunction to restrain the use of the defendants' name, as the resemblance of the names was likely to induce deception.

Held : That no case had been made out for an injunction as the use of the word " United " sufficiently distinguished the name of the defendants from that of the plaintiffs.

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A Village Committee, whose jurisdiction extended to only one bank of a river, under an arrangement with the local authority on the other bank, gave the plaintiff the exclusive right of ferry, on an agreement. It imposed, *inter alia*, the duty of erecting sheds, notices, etc. on both banks. The owner of the soil on the other bank prevented the plaintiff from erecting the sheds, etc., and bringing the canoes up to the bank. The plaintiff complained to the defendant and requested it to cancel the agreement or to place the plaintiff in possession of the obstructed bank. The defendant failed to do so, and the plaintiff instituted this action for damages arising from the breach of the agreement.

Held : That the defendant's failure to place the plaintiff in quiet possession of both banks of the river amounts to a breach of the agreement, for which the defendant is liable in damages.

Per HOWARD, C.J.—" In my opinion the appellant did not by entering into the contract with the respondent guarantee, as in the case of landlord and tenant, the quiet enjoyment of the ferry. Nor was it necessary that the appellant should have the property in the soil on either side of the ferry. The respondent must, however, have the right to land on either side."

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Per KEUNEMAN, J.—In *Arnolis Singho vs. Mary Nona* (47 N.L.R. 401) it was held that where a co-owner plants more than his proportionate share of the common property, he is entitled to possess the entire plantation as against the other co-owners until the common ownership is terminated by a partition action.

It is possible that on the authorities this view will have to be modified to this extent, that it will not apply where the improvement has been made against the wishes or without the acquiescence of the other co-owners.

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The appellant, who was 25 years of age and with no record of previous offence of violence committed by him, was convicted of attempted murder by stabbing with a knife and was sentenced to 15 years' rigorous imprisonment.

In passing this sentence the learned trial judge took into account the fact that the stabbing was without premeditation, but appeared to have inferred—

(a) that the knife used by the appellant was a kris knife (when the evidence was not quite clear on the point).

(*b*) that the possession of the kris knife was indicative of his violent temper.

(*c*) that the use of the knife in the way he did showed that the slightest provocation was sufficient for the appellant to use the knife.

Held : That in the circumstances, a sentence of 15 years' rigorous imprisonment was excessive and a sentence of five years' rigorous imprisonment should be substituted.

Conviction for murder—Evidence of grave and sudden provocation—Withdrawal of the issue from the jury—Effect.

Held : That, where there was evidence of grave and sudden provocation, but the learned trial judge withdrew that issue from the jury, a conviction for murder cannot stand and a verdict for culpable homicide not amounting to murder should be substituted.

Penal Code, sections 79 and 296—Evidence Ordinance, section 105—Accused indicted for murder—Defence of drunkenness—Effect of intoxication on the intention of accused—Burden of proof—Direction to Jury.

The accused was indicted upon a charge of murder. There was some evidence for the prosecution that he was smelling of liquor. The trial Judge directed the Jury that the burden was on the accused to prove that he was so drunk as not to be able to form the necessary intention. It was contended, in appeal, that such an observation was a misdirection, and that it was the duty of the prosecution to prove that in spite of the intoxication, the accused had a murderous intention.

Held : (i.) That section 79 of the Penal Code provided an exception to the general rule that a man is presumed to intend the natural and inevitable consequences of his act.

(ii.) That the burden of proving that the accused came within the benefit of such exception and that he was in such a state of intoxication as to be incapable of forming a murderous intention was on the defence.

(iii.) That a direction to the Jury placing the burden of proof, in such circumstances, on the accused was a proper direction.

Evidence—Joint conviction of four persons for murder—Sufficient evidence against one, unsatisfactory evidence against the rest—Common intention—Absence of evidence of a prearranged plan—Evidence Ordinance, Section 34.

Four persons were jointly convicted of murder, the only evidence being that of a young boy, and the deceased's dying declaration. In the latter, the deceased made no mention of the participation in the assault, of the 2nd, 3rd and 4th accused. The boy stated that after the 1st accused dealt a blow, which medical evidence proved to be fatal, the others joined in the assault of the fallen man. He did not, however, mention this to the first person who appeared on the scene, and the statement itself was made to the Police after some delay. There was no evidence of a pre-arranged plan.

Held : That, in the circumstances, a common intention to murder cannot be inferred in order to sustain the conviction against the 2nd, 3rd and 4th accused.

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Held : That the failure to instruct the jury that mere abuse may amount to sufficient provocation was a misdirection.

Court of Criminal Appeal Ordinance No. 23 of 1938, Section 8 (1)—Court of Criminal Appeal Rules 1940, Forms IV and VI—Failure to state grounds in notice of appeal.

Where a ground of appeal not set out in the petition of appeal, or in the supplementary notice setting out a further ground, is raised by the Counsel for the accused at the hearing of the appeal.

Held : That the Court will not entertain a ground of appeal not stated in the notice of appeal.

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The Jury, in returning a verdict of culpable homicide not amounting to murder, stated that "they found the accused inflicted an injury which was likely to cause death without a murderous intention." The trial Judge passed a sentence of twelve years' rigorous imprisonment.

Held : That where there was doubt whether the Jury appreciated the real distinction between intention that the act was likely to cause death and knowledge that the act was likely to cause death, the accused was entitled to the benefit of the doubt.

The Court reduced the sentence to ten years' rigorous imprisonment to bring it within the second part of section 297 of the Penal Code.

Court of Requests

Execution of writ—Obstruction to Fiscal—Order under Section 330 of the Civil Procedure Code against parties not originally before Court—Is such order appealable—Courts Ordinance, Section 36.

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Where a person was charged with having cleared land at the disposal of the Crown, but not included in a reserved or village forest, in breach of Rule 2 of the rules framed under Section 20 of the Forests Ordinance (Chap. 111).

Held : That the failure to refer in the plaint, on which the charge was based, to the Gazette in which Rule 2 was published, is a fatal irregularity although the rule in question is reproduced in the volumes of the Subsidiary Legislations of Ceylon.

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Accused appearing in Court before process on him is issued—Charge framed without examination of complainant or material witness—Regularity of procedure—Criminal Procedure Code, Sections 127, 148, 150, 151 *and* 187.

The proceedings were initiated under section 148 (1) (*b*) of the Criminal Procedure Code and the accused, who had been enlarged on "police bail," was present in Court in terms of his bail bond without process having been issued on him. The Magistrate then framed the charge himself without examining on oath the complainant or some material witness.

Held: That there was no irregularity in the Magistrate's procedure.

Per DIAS, J.—"An appearance in Court to show cause against a complaint when a summons or warrant has been issued is, in my opinion, an appearance on a summons or warrant, even although the summons has not been served or the warrant executed, the issue of the summons or warrant in such a case being the occasion of the appearance."

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Summary trial by Magistrate—Decision to test prosecution evidence by inspection and experiment at the scene of offence—Test carried out by Magistrate personally—Failure to record evidence of proceedings at the scene—Prejudice to accused—Irregularity of procedure—Does it vitiate conviction.

In a summary trial, the Magistrate, after the prosecution evidence had concluded and before calling upon the defence, decided to test a material portion of the prosecution story, by visiting the scene where the alleged offence was committed. He, although a demonstration was made by another person, carried out the test himself at which the accused and his proctor were present without their taking part in the proceedings. After the test, the Magistrate called upon the defence and the accused was convicted.

The person who gave the demonstration was not called as a witness, nor was other evidence recorded of the things said and done at the scene.

Held : That the procedure adopted by the Magistrate was irregular and vitiated the conviction.

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Section 325 (1) (h)—Accused found guilty on his own plea—Order to enter into a bond—Confiscation of production—Defence (Control of Textile) Regulations, sections 14, 59 *and* 61.

Held : (i.) That no appeal lies from an order under section 325 (1) of the Criminal Procedure Code.

(ii.) That a Magistrate has no power to make an order under section 325 (1) of the Criminal Procedure Code after convicting the accused.

(iii.) That under Regulation 61 (2) of the Defence (Control of Textiles) Regulations, a Court has power after the conviction of an accused person to order the forfeiture of the productions in the case.

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Where in an offence triable summarily, the Magistrate, before framing the charge, recorded evidence to satisfy himself that there was sufficient ground for proceeding against the accused as required by section 187 of the Criminal Procedure Code, and after the charge was framed, the evidence so recorded was read over to the accused in the presence of the witness who was thereafter cross-examined at length.

Held : That the evidence of the witness was properly recorded and that the conviction based on such evidence was valid.

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In a prosecution by a Price Control Inspector for selling mutton above the regulated price, the charge was dismissed without calling on the defence, on the grounds that there was no proof that the Inspector was an "authorised officer" under section 1(3) of the Control of Prices Regulations, 1942.

It was also contended that the complainant was not a public servant according to section 148 (1)*b* of the Criminal Procedure Code, although it was admitted that he was a Price Control Inspector.

Held : (1) That proof that the complainant was an "authorised officer" according to section 1(3) of the Control of Prices Regulations was not a necessary ingredient to maintain a charge under the Regulations.

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Acting under rule 62 of the Defence (Control of Textiles) Regulations, the Textile Controller cancelled the licence granted to the petitioner to deal in textiles, on the ground that he was unfit to be allowed to continue as a dealer. Before this order was made, the Controller gave (*a*) notice to the petitioner of what he was accused of, and of the evidence on which the accusation was based (*b*) an opportunity to send his explanation.

An application for a Writ of Certiorari was made to quash the order cancelling the licence.

Held : (i.) That inasmuch as the Controller gave notice of the allegations against the petitioner and an opportunity to tender his explanation thereon before making the order, mere insufficiency of evidence placed before the Controller is not a ground for setting aside the order.

(ii.) That the order cannot be challenged except on the ground that the Controller has acted in a way in which no person performing such functions, in the opinion of the Court, ought to act, or unless a rule laid down by the regulations under which he acts is violated, or failed to pay due regard to the dictates of natural justice.

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Where an accused is asked leading questions in cross-examination, based on alleged statements made by the accused and recorded in the Information Book, without proving such statements,

Held : That where no prejudice is caused to the accused, the omission to prove such statement does not vitiate a conviction.

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In a maintenance action, the statement admitting paternity made by the putative father of two illegitimate children and recorded in the Police Information Book under section 122 (3) of the Criminal Procedure Code, during the investigation of a charge of house-breaking, was admitted as substantive evidence to corroborate the mother's story. This was the only corroboration tendered.

Held : (1) That the statement so recorded in the Police Information Book under section 122 (3) of the Criminal Procedure Code cannot be admitted as substantive evidence to corroborate the applicant's story.

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Where a deed of gift stated as follows : " After the death of both of us our said two children, and their children, and grandchildren, heirs, executors, administrators and assigns are entitled to possess.... but they shall not sell, mortgage, or alienate in any manner the said lands....."

Held : (1) That a valid *fidei-commissum* is created in favour of the donors' children, their children and grandchildren.

(2) That the *fidei commissum* ceased after the death of the great grandchildren of the donor as there is no clear indication of their successors in whose favour the prohibition against alienation is provided.

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Where a person convicted in British India in a Court of Sessions appealed against his conviction and sentence and the appeal was dismissed, and without surrendering to the Sessions Court to serve his sentence, he was found at large in Ceylon, and subsequently arrested in Ceylon on a warrant signed by the Sub-Divisional Magistrate of Negapatam and the Additional District Magistrate, Tanjore District, and endorsed by the Magistrate, Point Pedro.

Held : (i.) That before a warrant issued in India is endorsed for execution in Ceylon under the Fugitive Offenders Act, there should be proof that the person issuing it had lawful authority to do so.

(ii.) That the warrant must be signed by the presiding Judge of the Court in which the person is convicted.

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Held : That the word " building " in section 5 of the Housing and Town Improvement Ordinance does not include a boundary " wall."

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Held : (i.) That the remuneration received by a person nominated to act as arbitrator by a party in

arbitration proceedings forms part of such person's taxable income.

(ii.) That the mere fact that such person had so acted and received remuneration only once does not make it a profit of a "casual and non-recurring nature" within the meaning of section 6 (1) (*h*) of the Income Tax Ordinance.

(iii.) That the word "employment" in section 6 (1) (*b*) of the Income Tax Ordinance includes a case where a person employs himself to earn money.

(iv.) That where a case was transmitted to the Supreme Court on 22nd January, 1947, and notice in writing was sent to the Commissioner on 24th January, 1947, as provided in section 74 (3) of the Income Tax Ordinance, the delay did not deprive the Supreme Court of its jurisdiction to hear the appeal.

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The Kandyan Law Declaration and Amendment Ordinance, Section 10 (1)*—Proviso—Meaning of the word "child"—Paraveni and acquired property.*

Held : (i.) That the word "child" in the proviso to section 10 (1) of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 means both legitimate and illegitimate children.

(ii.) That where a person subject to Kandyan Law died intestate leaving illegitimate children, any immovable property which such person inherited from his father would be "paraveni property" in view of section 10 (1) of the Kandyan Law Declaration and Amendment Ordinance.

Landlord and Tenant

Ejectment—Notice to quit—Acceptance of rent—Waiver of notice—Financial loss to tenant, if ejected.

A landlord who served notice on his tenant on the 30th July, 1946, to quit on 31st August, 1946, accepted the rent for August, and further rents until January, 1947, although the action for ejectment was filed on 3rd September, 1946.

Held : (i.) That though the acceptance of rent until the expiry of the notice to quit is in order, acceptance of further monthly rents amounted to a waiver of the notice to quit.

(ii.) That the Court would refuse to make an order of ejectment where it would cause severe financial loss to the tenant.

(iii.) That the offer of alternative accommodation should be made before the date of action.

Notice to quit—Meaning of calendar month.

Held : That in a written tenancy agreement one calendar month's notice means the period from the date of notice until the numerically corresponding date of the following month.

Meaning of "Landlord" in Rent Restriction Ordinance.
See Rent Restriction 71

Land Surveys Ordinance

Section 6.
See Prescription 43

Local Government Service Ordinance, No. 43 of 1945

Certiorari and Mandamus—Application for writs against Local Government Service Commission and three others—Allegations of misconduct against employee—Inquiry by Commission—Dismissal of employee—Whether decision to dismiss is a judicial or administrative act.

The applicant was an employee of the Kandy Municipal Council and was its Maternity and Child Welfare Officer. By Ordinance No. 43 of 1945 he was transferred to the Local Government Service, of which he became a member as from April 1, 1946, while continuing to act in the same capacity.

Allegations of improper conduct against the applicant were made to the Commissioner of the Municipal Council, Kandy. The Council interdicted him. Subsequently an inquiry was held by a properly constituted Local Government Service Commission. The accused and his lawyers were present. The Commission after hearing evidence decided that the applicant should be dismissed from the service.

The applicant moved the Supreme Court for an order of Certiorari to bring up and quash "the findings and order of the 1st respondent." He further moved for a writ of mandamus on the 1st respondent.

At the hearing, Counsel for the 1st respondent raised the preliminary point that the Court should not proceed with this matter because Certiorari does not lie to the Supreme Court from such an order.

Held : (i.) That the writ of Certiorari does not lie in the circumstances, inasmuch as the dismissal resulted from a decision of the Local Government Commission in the capacity of employer of the petitioner.

(ii.) That the action, although involving the exercise of judgment and discretion, is more of an executive or administrative character than judicial.

SURIYAWANSA vs. THE LOCAL GOVT. SERVICE COMMISSION & THREE OTHERS 36

Maintenance

Maintenance Ordinance Section 6—Corroboration.
See Evidence 78

Marriage Registration Ordinance

Marriage Registration Ordinance (Chap. 95), Section 38 (1)—Registration of marriage as "best evidence" thereof—Its meaning—Effect of non-production of entry in Register—Can evidence of eye-witnesses of marriage in lieu of production of entry in Register be led to prove marriage against a person charged with bigamy.

Where a person was charged with bigamy, the prosecution did not produce the entry in the Register as proof of that person's first marriage, but the first wife and the officiating priest testified to the marriage. It was contended on behalf of the accused person that such proof was inadmissible as the entry in the Register shall be the best evidence of the marriage according to section 38 (1) of the Marriage Registration Ordinance.

Held : (1) That according to section 38 (1) of the Marriage Registration Ordinance, the expression "entry in the Register shall be the 'best evidence' thereof," means that the entry shall prevail over conflicting evidence, and in case of non-production of the entry, other evidence affording strict proof may be adduced.

(2) That in the circumstances, the oral evidence of the first wife and the officiating priest were admissible.

THE KING vs. NONIS 84

Muslim Law

Muslim Marriage and Divorce Ordinance (Chap. 99), Sections 15, 50 and 51 (1)—Effect on general law applicable to Muslims—Divorce by wife without husband's consent—Grounds other than those specified in the Ordinance—Right of Muslim wife to resort to civil Courts,

A Muslim wife, without her husband's consent, brought an action for divorce in the District Court of Kalutara, on the ground of the leprosy of the husband. At the trial, the preliminary point was taken up to decide whether the wife's only remedy was to resort to the Kathi or whether she could seek redress in the Civil Courts. The Judge held that she could not have recourse to the Civil Courts.

Held : (1) That the right conferred on a Muslim wife by the Muslim Mariage and Divorce Ordinance (Chap. 99) to seek a divorce without her husband's consent is limited to the grant of a divorce by a Kathi, on the grounds specified in the Ordinance.

(2) That a Muslim wife can have recourse to the Civil Courts in cases where she seeks a divorce on grounds permitted by the general law applicable to Muslims, but not specified in the Ordinance.

(3) That the principles of Mohammedan Law relating to leprosy as a ground for repudiating the contract of marriage is still part of the Law of Ceylon.

(4) That the Courts will lean against the presumption that the Muslim Marriage and Divorce Ordinance (Chap. 99), being an Ordinance to Amend and Consolidate the law relating to the Marriage and Divorce of those professing the Muslim faith, was intended to alter the common or general law.

NOORUL NALEEFA vs. MARIKAR HADJIAR ... 62

Muslim married woman—Minor—Making promissory note—Liability.
See Promissory Note 98

Negotiorum Gestor

Joint debt paid by a third party.
See Civil Procedure 41

Oaths

Maintenance—Action for—Agreement that respondent should take Oath at Minneriya Temple on the steps near temple door—Oath taken when temple door not open—Can applicant withdraw from undertaking.

The parties to a maintenance case agreed that the case should be decided by taking an oath at the Minneriya Temple on the steps of the Temple near the entrance door. Whether the door should be kept open or not was no part of the agreement. Respondent took the oath, but the applicant sought to get behind the undertaking on the ground that the door was shut at the time.

Held : That the applicant was not entitled to withdraw from the undertaking after the opponent had taken the oath.

JAYEWARDENE vs. KUMARIHAMY 53

Paraveni Property

See under Kandyan Law Declaration and Amendment Ordinance.

Parliamentary Election Petition Rules, 1946

Parliamentary Elections—Petition to declare election void—Number of Charges—Adequacy of Security—Preliminary objections—Parliamentary Elections Order in Council, 1946, sections 56, 58 (1) (c) and (d)—Parliamentary Election Petition Rules 12 (2) and (3)—Meaning of the word "charges."

A petition, praying for a declaration that an election be void, contained the following charges :—

(1) That before and during the election the respondent and his agents and other persons with his knowledge or consent did print, publish and distribute or cause to be printed, published and distributed handbills which did not bear upon the face thereof the name and address of the printers and publishers, etc.

(2) That before and during the election, the respondent and his agents and other persons with his knowledge or consent did make and publish false statements of facts in relation to the personal character and conduct of the other candidate.....for the purpose of effecting the return of that candidate, etc.

(3) That before and during the election the respondent and his agents and other persons with his knowledge or consent, did inflict, or thereafter threaten to inflict injury, damage, harm or loss upon a large number of electors in order to induce or compel them to refrain from voting, etc.

The petitioner gave security in a sum of Rs. 5,000 as required by Rule 12 (2) of the Third Schedule of the said Order in Council.

The respondent, by way of a preliminary objection, contended that the ground No. (1) contained a multiplicity of charges, in that printing, publishing, distribution, etc. constituted separate charges. Similarly he contended that the grounds (2) and (3) contained several separate charges, and that, therefore, the security given was insufficient. For this reason he moved for the dismissal of the petition as provided in Rule 12 (3) of the Parliamentary Election Petition Rules.

Held : (1) That printing, publishing, distributing, etc., as stated in ground No. (1), constituted only one charge.

(2) That similarly, grounds Nos. (2) and (3) each constituted one charge.

(3) That the security given was adequate.

Penal Code

Sections 369 *and* 394—*Seven accused charged with theft—Three convicted of theft and four of dishonestly receiving stolen property—Validity of conviction—Criminal Procedure Code, sections* 181, 182 *and* 184.

Seven accused were charged under section 369 of the Penal Code, with having committed the theft of 18 bags of chillies from a depot. There was evidence that the 2nd, 6th and 7th accused were seen removing the bags from the store to a lorry. The 1st, 3rd, 4th and 5th accused were found soon afterwards in the lorry which contained the bags. The 2nd, 6th and 7th accused were convicted of theft, and the rest of dishonest receipt.

Held : (i.) That the conviction was in order.

(ii.) That the joinder of the accused was justified under the provisions of sections 181, 182 and 184 of the Criminal Procedure Code.

Section 392—*Necessity to prove dishonest misappropriation—Accused's explanation.*

The accused, a railway guard, was convicted for criminal breach of trust of goods entrusted to him to be delivered to the officer at a railway station without direct evidence of dishonest misappropriation or of wilfully suffering others to do something contrary to the terms of the trust. The accused did not give evidence at the trial, but an explanation given by him at a departmental inquiry earlier was produced from which his guilt could not be reasonably presumed.

Held : That the conviction cannot be upheld.

Poisons, Opium and Dangerous Drugs' Ordinance

Section 26—*Unlawful possession of ganja found in house—Conviction of husband and wife—When is wife guilty.*

Where ganja was found in a house in the occupation of a husband and his wife, but at the time of the search, the house was in charge of the wife, who denied at the trial (*a*) that the house was searched, (*b*) that the excise officers visited the house or that anything was found therein.

Held : (i.) That the wife was guilty of unlawful possession of ganja.

(ii.) That the mere fact that the husband is the chief occupant of the house without any other evidence against him cannot support a conviction of the husband for possession of ganja found in such house.

Prescription

Prescription against the Crown—Proof of possession for over 30 *years—Burden of proof—Land Surveys Ordinance* (*Cap.* 316) *section* 6—*Crown Lands Encroachment Ordinance* (*Cap.* 321) *section* 7—*Evidence Ordinance section* 114.

The defendants and their predecessors in title possessed and cultivated for over 30 years paddy fields, which according to plans from the Surveyor General's Office, were parts of an abandoned tank. There was no evidence of the date the tank was abandoned or whether it was a public tank.

Held : (i.) That the provisions of the Encroachments upon Crown Lands Ordinance (Cap. 321) are not operative before 1840.

(ii.) That the defendants have acquired title against the Crown by proof of over 30 years' possession.

(iii.) That in the absence of evidence that the tank was a public one and that the tank existed after 1840, Section 7 of the Encroachments upon Crown Lands Ordinance is inapplicable.

Prescription Ordinance (*Chap.* 55), *Section* 8—*Repairs effected and materials supplied to motor car—Claim due on—Does such claim fall within section* 8 *of the Ordinance.*

Held : That money due for repairs effected and materials supplied to a motor car becomes prescribed in one year under section 8 of the Prescription Ordinance.

Prevention of Frauds Ordinance

Section 2—Does it apply to trusts.
See Trusts 1

Promissory Note

Promissory note given by married Muslim lady under 21 years—Is the maker liable on the note.

Held : That a Muslim minor, though married at the time of the making of a promissory note, is not liable on it.

KALANDAR LEVVE vs. PACKERTHAMBY AVVAUMMA 98

Registration of Documents' Ordinance

Registration of Documents Ordinance, Cap. 101 of 1928, sections 14 (7) and 15 (1)—Two consecutive transfers of same land—Registration of deeds by purchasers in different folios—Misdescription of situation of land by earlier purchaser, but registered in folio dealing with previous transactions—Priority.

A person made two conveyances of the same land. The earlier purchaser registered the deed in the folio dealing with previous transactions in this land, and describing its situation as Inguruwatte. The subsequent purchaser registered the deed in a different folio as being situated at Uda Inguruwatte, which is the correct situation, but without reference to the folio indicating the previous transactions.

Held : That the later purchaser does not gain priority as his deed was not duly registered.

STEPHEN DE SILVA vs. DEWAYALAGE SILVA & ANOTHER 58

Rent Restriction

Writ—Certiorari or Prohibition—Application to Rent Assessment Board for authority to institute proceedings for eviction of tenant—Denial that applicant was landlord—Has the Board authority to grant application—Rent Restriction Ordinance (Cap. 60) of 1942, Sections 8 and 16 (1)—Meaning of the term "Landlord"—Order of Rent Assessment Board authorising institution of proceedings.

The Rent Assessment Board made an order under section 8 of the Rent Restriction Ordinance authorising the institution of eviction proceedings against a tenant on the application of a person, who the tenant alleged is not his landlord. The tenant applied for a writ of *Certiorari* to quash the order of the Board.

Held : (i.) That in section 8 of the Ordinance the words "on the application of a landlord" means "on the application of the person claiming to be landlord."

(ii.) That in granting an order to such person, the Board has acted within its powers.

(iii.) That such a decision by the Board did not preclude the trial Court from determining whether a person instituting such proceedings is a landlord or not.

ZACKERIYA & ANOTHER vs. CROOS RAJ CHANDRA & OTHERS 71

Restitutio-in-Integrum

Compromise of action by Counsel without consent of client—General authority given in proxy to compromise—Its scope.

Held : (i.) That general authority given to Counsel by proxy to compromise or settle a suit is confined to matters that arise within the action.

(ii.) That where the terms of settlement arrived at by counsel in the absence of the client and without his consent dealt with matters which arose within the action and those which did not, it is desirable that the whole of the settlement should be set aside and parties placed in *statu quo ante.*

P. ARUNASALAM vs. ARUMUGAM MUTHATHAMBY & SEVEN OTHERS 8

Petitioner, an internee at Internment Camp during pendency of action—Judgment entered against petitioner—Release long after—Application to Supreme Court—Inability to give proper instructions to lawyers or to provide necessary funds—Is the remedy available.

Petitioner was sued for damages for breach of contract in 1940. Pending trial he was interned at an Internment Camp, later removed to a camp in India and was released only in 1946. During his internment, the action had been decided against him. After his release, he made this application for *restitutio-in-integrum* on the ground that by reason of his internment (*a*) he was not in a position to instruct his lawyers in regard to the steps to be taken and witnesses to be summoned on his behalf at the trial. (*b*) he was not able to place his proctors in funds for the proper conduct of the case to enable them to summon the necessary witnesses.

Held : That in the circumstances the remedy of *restitutio-in-integrum* is not available to the petitioner.

ABDUL HAFEEL vs. DEMBER 89

Sentence

Excessive—Reduced on appeal.
See Court of Criminal Appeal ... 7, 101

False allegations made by accused—Not to be taken into consideration in fixing sentence.

Held : That the fact that an accused person has made false allegations against the police should not be taken into consideration in fixing the sentence.

JOHN vs. P. C. 3072 EKANAYAKE 56

Summons

In English served on defendant who did not understand the language.
See Civil Procedure Code 39

Trusts

Transfer of immovable property by notarial deed subject to parol arrangement that transferee would hold the property in trust and would later reconvey—Death of transferee—Executor repudiating such trust—Is parol evidence admissible to establish the trust—Enforcibility of such agreement to reconvey—Trusts Ordinance, section 5—What amounts to fraudulent conduct—Does section 2 of Prevention of Frauds Ordinance

apply to trusts—Evidence Ordinance (cap.) sections 91 and 92—Their applicability when whole contract not reduced to form of document.

Held : (i.) That the formalities necessary to constitute a trust relating to immovable property are those laid down in section 5 of the Trusts Ordinance (Chap. 72) and not those in section 2 of the Prevention of Frauds Ordinance (Chap. 57).

(ii.) That where immovable property had been conveyed to a person by a disposition in writing executed according to law, with no written conditions, but subject to a parol arrangement that he would hold the property in trust for the benefit of the transferor, it would be fraudulent conduct on the part of such person to repudiate such trust, and parol evidence could be led to establish such trust under section 5 (3) of the Trusts Ordinance.

(iii.) That sections 91 and 92 of the Evidence Ordinance (Chap. 11) do not have any application to such a case inasmuch as only a part of the contract was reduced to the form of a document and as the law did not require the parol part to be so reduced.

Trusts Ordinance

Warrant

Witness

Unduly long examination by Judge—Contradictions so elicited—Judge's views on credibility of witnesses—Weight to be attached to such views.

Where the question for determination in a case depended on testimony of witnesses only and where the Judge indulged in an unduly long cross-examination of the defence witnesses and gave judgment for the plaintiff.

Held : That in the circumstances, it is not possible to attach weight to the views of the judge as regards the credibility of the witnesses.

Words and Phrases

Writ

IN THE PRIVY COUNCIL

Present : LORD THANKERTON, LORD UTHWATT, LORD DU PARCQ, SIR MADHAVAN NAIR, SIR JOHN BEAUMONT.

VALLIYAMMAI ATCHI vs. ABDUL MAJEED

From the Supreme Court of the Island of Ceylon and its Dependencies

Privy Council Appeal No. 15 *of* 1946.

Delivered on : 24th April, 1947

Trust—Transfer of immovable property by notarial deed subject to parol arrangement that transferee would hold the property in trust and would later reconvey—Death of transferee—Executor repudiating such trust—Is parol evidence admissible to establish the trust—Enforcibility of such agreement to reconvey—Trusts Ordinance, section 5—What amounts to fraudulent conduct—Does section 2 of Prevention of Frauds Ordinance apply to trusts—Evidence Ordinance (cap.) sections 91 and 92—Their applicability when whole contract not reduced to form of document.

Held : (i.) That the formalities necessary to constitute a trust relating to immovable property are those laid down in section 5 of the Trusts Ordinance (Chap. 72) and not those in section 2 of the Prevention of Frauds Ordinance (Chap. 57).

(ii.) That where immovable property had been conveyed to a person by a disposition in writing executed according to law, with no written conditions, but subject to a parol arrangement that he would hold the property in trust for the benefit of the transferor, it would be fraudulent conduct on the part of such person to repudiate such trust, and parol evidence could be led to establish such trust under section 5 (3) of the Trusts Ordinance.

(iii.) That sections 91 and 92 of the Evidence Ordinance (Chap. 11) do not have any application to such a case inasmuch as only a part of the contract was reduced to the form of a document and as the law did not require the parol part to be so reduced.

D. N. Pritt, K.C., with *Stephen Chapman*, for defendant-appellant.
C. S. Rewcastle, K.C., with *R. K. Handoo*, for plaintiff-respondent.

SIR JOHN BEAUMONT.

This is an appeal from a judgment* and decree of the Supreme Court of the Island of Ceylon dated the 31st March, 1944, affirming a judgment and decree of the District Court of Colombo dated the 25th September, 1942.

The suit out of which this appeal arises was brought by one O. L. M. Abdul Majeed (hereinafter called " the plaintiff ") against he appellant as executrix of the estate of her late husband, K. M. N. S. P. Natchiappa Chetty (hereinafter called " Natchiappa "). The plaintiff died after the hearing of the appeal in the Supreme Court, and by Order of Revivor made on the 4th June, 1946, the respondent was brought on record as the executor of his estate.

By the plaint filed on the 4th November, 1940, the plaintiff alleged (paragraph 4) that he was entitled (*a*) to movable property of the value of Rs. 250,000 ; (*b*) to a large number of immovable properties specifically described of the value of over Rs. 460,000 ; (*c*) to other immovable property of the value of Rs. 200,000. Paragraph 5 speciffed the debts for which he was liable at that date. In paragraph 7 it was alleged that in February, 1930, it was agreed between the plaintiff and Natchiappa, by his agent and attorney Ramanathan Chetty : (*a*) That the plaintiff should execute a transfer of the properties referred to in paragraph 4 (*b*) in favour of Natchiappa ; (*b*) that the deed of transfer should purport to be for a consideration of Rs. 203,300 ; (*c*) that Natchiappa should hold the said properties in trust for the plaintiff and should collect the rents, profits and income thereof as trustee of and for and on behalf of the plaintiff ; (*d*) that the sum so collected should be devoted by Natchiappa to pay the rates and taxes then due as therein mentioned, a secur d debt of Rs. 1,515 due to a third party, to the payment of rates and taxes and expenses in connection with the repairs of the properties, and that he should pay himself interest at the rate of 12 per cent. per annum on the total sum which would be due to Natchiappa amounting to

* For judgment of the Supreme Court See 28 C.L.W. 81 (Edd.)

Rs. 203,256·66 ; (*e*) that whenever the plaintiff arranged for the sale of any of the said properties Natchiappa should convey and transfer such properties to such purchaser or purchasers so arranged and that the purchase price should be paid to Natchiappa and the same should be applied by him in liquidation of the said sum of Rs. 203,300 due to him from the plaintiff ; (*f*) that on liquidation of the said sum of Rs. 203,300 and interest Natchiappa should reconvey unto the plaintiff or his heirs at the expense of the plaintiff or his heirs the said properties or such of the said properties as remained unsold ; (*g*) that the plaintiff should remain in possession, as true owner of two of the said properties therein mentioned. (Paragraph 8) : That in pursuance of the said agreement the plaintiff executed the Deed dated 3rd March, 1930 (which became Exhibit P21 in the suit), and that thereupon Natchiappa became entitled to hold the said properties in trust for the plaintiff and for the purposes aforesaid. (Paragraph 9) : That within a few weeks of the execution of the Deed of the 3rd March, 1930, Natchiappa came to Ceylon and personally agreed to hold the said properties in trust for the plaintiff and to carry out the terms thereinbefore referred to. (Paragraph 15) : That Natchiappa died on the 30th December, 1938, that the sum due to Natchiappa from the plaintiff in respect of the transaction between the plaintiff and Natchiappa had been liquidated out of the sums collected by Natchiappa, and there was no sum due and owing from the plaintiff to Natchiappa at the time of his death. (Paragraphs 17 and 18) : That Natchiappa, by his last Will dated 3rd December, 1938, appointed his widow, the defendant, to be the executrix of his said Will and that she duly proved the Will. (Paragraph 20) : That in or about January, 1940, the defendant fraudulently and in breach of the trust referred to in paragraph 7 claimed that the estate of Natchiappa was entitled to the properties aforesaid. The plaintiff claimed a declaration that Natchiappa obtained the transfer dated 3rd March, 1930, in trust for the plaintiff on the terms and conditions set out in paragraph 7 of the plaint and held the said properties in trust for the plaaintiff, and other consequential relief.

The suit was tried by the District Judge of Colombo who held that oral evidence of the trust set out in paragraph 7 of the plaint could be given, and that such trust was proved. Accordingly, by decree dated 25th September, 1942, he made the declaration asked for in the plaint, directed the defendant to retransfer to the plaintiff the properties described in Schedule " C " thereto and as many of the properties as remained unsold out of the lands described in Schedule " B " thereto on payment by the plaintiff to the defendant of any sum of money found due on account being taken. The decree then directed that the appropriate accounts should be taken and ordered the defendant to pay the plaintiff the costs of the action.

From this decree the defendant appealed to the Supreme Court of the Island of Ceylon. The Supreme Court agreed with the finding of the trial Judge that the trust alleged in paragraph 7 of the plaint had been proved. The learned Judges discussed the legal aspect of the matter in detail and came to the conclusion that there was nothing in the Evidence Ordinance or elsewhere in the Law of Ceylon to prevent oral evidence being given to prove the trust in the circumstances established in the case.

Before this Board three points were argued : First, that there was no evidence to support the finding that the trust alleged in paragraph 7 of the plaint was proved ; that, at the most, the evidence showed only that the conveyance P 21 was in the nature of a mortgage involving an obligation to reconvey the property to the transferor on payment of the debt due to the transferee. Secondly, that no oral evidence was admissible to contradict, vary, add to or substract from the terms of P 21, and that the alleged arrangement between the plaintiff and Natchiappa, whatever it amounted to, could not be proved. Thirdly, that the object of the arrangement made in 1930 between the plaintiff and Natchiappa was to defraud the unsecured creditors of the plaintiff, and that the Court should have refused any relief to the plaintiff on the principle of the maxim *ex turpi causa actio non oritur*.

Upon the first point their Lordships have been referred to the relevant evidence and they are satisfied that there was ample evidence, if admissible, to justify the finding that the trust alleged in paragraph 7 of the plaint was established They accept the concurrent findings of the Courts in Ceylon upon this point.

This finding confines the question as to the admissibility of oral evidence within narrow limits. The question for determination is whether the land in suit having been conveyed to Natchiappa by a disposition in writing, executed according to law, with no written conditions, but subject to a parol arrangement that he would hold the property upon trust in the events which have happened for the benefit of the transferor, it is open to the executrix of Natchiappa under the Law of Ceylon to maintain successfully that the trust cannot be proved and to retain the land for the

estate of Natchiappa. Both the Courts in Ceylon answered this question in the negative, and their Lordships agree with them.

As the question was presented to the Board, the answer to the problem turns upon Section 2 of the Prevention of Frauds Ordinance and Section 5 of the Trusts Ordinance, and it will be convenient to set out the terms of those sections.

Section 2 of the Prevention of Frauds Ordinance (No. 7 of 1840) is in these terms :—

> " No sale, purchase, transfer, assignment or mortgage of land or other immovable property, and no promise, bargain, contract or agreement for effecting any such object, or for establishing any security, interest or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorised by him or her in the presence of a licensed notary public and two or more witnesses present at the same time and unless the execution of such writing, deed or instrument be duly attested by such notary and witnesses."

Section 5 of the Trusts Ordinance, Ordinance 9 of 1917 is in these terms :—

> "(1) Subject to the provisions of section 107 " (which relates to Charitable Trusts) " no trust in relation to immovable property is valid unless declared by the last Will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed."

Sub-seciion 2 deals with trusts of movable property.

> "(3) These rules do not apply where they would operate so as to effectuate a fraud."

The argument advanced on behalf of the appellant was that the parol agreement made between the plaintiff and Natchiappa in 1930 was an agreement for establishing an interest affecting land within the meaning of Section 2 of the Prevention of Frauds Ordinance, and, not being in writing and executed in accordance with the terms of that section, was of no force or avail in law. It was further contended by Mr. Pritt that as the whole transaction of 1930, namely, the conveyance and the trust, was required by law to be reduced to the form of a document no evidence of the transaction apart from the document could be given under the terms of Section 91 of the Evidence Ordinance. This latter argument appears to their Lordships to be superfluous since, if the verbal trust is of no force or avail in law by reason of Section 2 of the Prevention of Frauds Ordinance the question whether it is capable of proof does not arise. The argument based on the Prevention of Frauds Ordinance assumes that under the Law of Ceylon the beneficial owner under a trust affecting land acquires an interest affecting land, and not merely a right to proceed against the trustee ; an assumption which would seem to involve that the Law of Ceylon recognises the distinction between legal and equitable estates in land so familiar under English Law. No authority in support of this assumption was cited to their Lordships other than the definition of " Trust " in Section 3 (*a*) of the Trusts Ordinance, a definition which must be read with the definition of " Beneficial Interest " in Section 3 (*g*). However, their Lordships find it unnecessary to decide this question because, in their view, the formalities necessary to constitute a trust relating to immovable property are those laid down in Section 5 (1) of the Trusts Ordinance and not those in Section 2 of the Prevention of Frauds Ordinance. The Trusts Ordinance is a later enactment, and it deals expressly with trusts. If a trust disposition of land be executed in the manner required by Section 5 (1) of the Trusts Ordinance it could not be challenged, in their Lordships' view, on the ground that it was not attested by two or more witnesses, as required by Section 2 of the Prevention of Frauds Ordinance. If the formalities required to constitute a valid trust relating to land are to be found in the Trusts Ordinance, then Section 5 Sub-section 3 expressly provides that the rule that the trust must be executed in accordance with Sub-section (1) is not to operate so as to effectuate a fraud. If Natchiappa, in his lifetime, had repudiated the trust upon which the property was conveyed to him, his conduct would have been manifestly fraudulent and the executrix of his estate can be in no better position. She was no doubt entitled to require that the trust be proved against her, who may have had no personal knowledge about the matter, but, once the trust is established, it would be a fraud on her part to ignore the trust and to retain the property for the estate. The position therefore is that as against the appellant it is not necessary that the

trust set out in paragraph 7 of the plaint should be in writing and, if that is so, Sections 91 and 92 of the Evidence Ordinance, which were so much discussed in the Supreme Court, do not come nto the picture. The contract made in 1930 was not reduced to the form of a document; only part of it was so reduced; and the parol part of the contract was not required by law to be reduced to the form of a document.

On the third point argued, both the Lower Courts held that there was no intention on the part of the plaintiff to defraud any of his creditors, and their Lordships see no reason to differ from this conclusion. It was suggested that both the Lower Courts took the view that there was no intention to defraud the creditors because, in fact, no creditor was defrauded, but their Lordships do not think that this is a fair criticism of the judgments. Both Courts no doubt relied strongly on the fact that all the unsecured creditors were paid in full as one of the circumstances negativing a suggestion of intention to defraud, but they also relied on other circumstances, particularly that the plaintiff had explained to the proctor of the largest of the unsecured creditors the arrangement which he had made with Natchiappa.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs of the respondent throughout.

Solicitors : *Freeman & Cooke* (for *N. M. Saheed* for defendant-appellant.)

Pemberton & Lee (for *T. Canagarayar* for plaintiff-respondent.)

Present : Dias, J.

EMMANUEL vs. APPUHAMY

S. C. No. 486—*M. C. Kurunegala* 33256.
Argued on : 27th June, 1947.
Decided on : 30th June, 1947.

Charge—Breach of rule made under the Forest Ordinance—Failure to refer in charge to Gazette in which such rule published—Reproduction of the rule in Subsidiary Legislation—Is the omission fatal.

Where a person was charged with having cleared land at the disposal of the Crown, but not included in a reserved or village forest, in breach of Rule 2 of the rules framed under Section 20 of the Forests Ordinance (Chap. 111).

Held : That the failure to refer in the plaint, on which the charge was based, to the Gazette in which Rule 2 was published, is a fatal irregularity although the rule in question is reproduced in the volumes of the Subsidiary Legislation of Ceylon.

Cases referred to : *Mudaliyar, Pitigal Korale North vs. Kiribanda* (1909) 12 N. L. R. 304.
Sivasampu vs. Juan Appu (1937) 38 N. L. R. 369.
Molagoda vs. Gunaratne (1937) 39 N. L. R. 226.
Zoysa vs. Cumarasuriya (1942) 44 N. L. R. at p. 93.
Perkins vs. Sri Rajah (1940) 41 N. L. R. 475.
Ramalingam Nadar vs. Lewis Appuhamy (1942) 44 N. L. R. 299.
Carolis Appu vs. A. G. A., Haputale (1945) 46 N. L. R. 262.
Appuhamy vs. Ekanayake (1946) 48 N. L. R. 71.

Ivor Misso, for accused-appellant.

Boyd Jayasuriya, Crown Counsel, for the Crown.

Dias, J.

The plaint filed in this case and on which the charge against the appellant is based is to the effect that he did on or about July 3, 1944, clear 20 perches of the land called Kandibidehena which is a land at the disposal of the Crown, but not included in a reserved or village forest *in breach of Rule* 2 of the Rules framed under section 20 of the Forest Ordinance (Chapter 311), and thereby committed an offence punishable under section 21 of the Forest Ordinance.

In view of the objection taken to the charge in this case it is necessary to ascertain what it is the prosecution had to prove in establishing an offence under section 21 of the Forest Ordinance.

Section 20 provides that " No person shall clear, set fire to, or break up the soil of, or make use of the pasturage or of the forest produce of any forest not included in a reserved or village forest, except in accordance with rules to be made by the Governor ", Section 20 in the revised edition of the Legislative Enactments is identical with section 21 of the Forest Ordinance No. 16 of 1907. When the editor of the former relegated the interpretation clause to the end of the statute, section 21 became section 20. In the case of *Mudaliyar, Pitigal Korale North vs. Kiribanda* (1909) 12 N. L. R. 304 a Divisional Court held that in a prosecution under this section or the rules in force under that section, the burden of proving that the " forest " in which the offence is alleged to have been committed is " not included in a reserved or village forest " lies on the accused under section 105 of the Evidence Ordinance. Therefore, what the prosecution had to establish in this case are (*a*) that the land in question is a " forest " which has been defined by section 78 to mean " land at the disposal of the Crown " ; (*b*) that such land was cleared in breach of a rule or rules made under section 20 ; and (*c*) that such land was cleared by the accused. It is for the accused to prove once the prosecution has established these three ingredients that such land is not included in a reserved or village forest. The penal section 21 penalises both the breach of section 20 as well as the breach of any rules made under section 20.

The rules made by the Governor under section 20 were published in the " Government Gazette " No. 8057 dated June 8, 1934, and No. 8059 dated June 15, 1934, and are reproduced at pages 546 *et seq.* in Volume III of the Subsidiary Legislation of Ceylon. Rule 2 says " No person shall cut, clear, or set fire to a chena in any forest subject to these rules without a permit as hereinafter provided, or otherwise than in accordance with the conditions of such permit ". I find that further rules made under section 20 of the Ordinance appear at pages 433 *et seq.* of the 1941 Annual Supplement of the Subsidiary Legislation, but they did not affect Rule 2. I do not know whether Rule 2 was amended after 1941. The chief contention on behalf of the appellant is that as the plaint on which the charge was based contains no reference to the Gazette in which Rule 2 was published, there is, therefore, a fatal irregularity which vitiates this conviction.

In accordance with the provisions of sections 167 and 168 of the Criminal Procedure Code, the appellant was entitled to be given particulars as to where the rule which he is alleged to have broken is to be found. A Divisional Court has held in *Sivasampu vs. Juan Appu** (1937 38 N. L. R 369 that it is not necessary to produce in evidence the Gazette in which the rule or regulation or by-law appears in proof thereof in order to establish the charge ; but there should nevertheless be a reference in the complaint or report or charge to the Gazette in which the rule invoked appears. If in doing so the date and number of the Gazette is wrongly stated, the conviction will not be vitiated unless this has occasioned prejudice to the accused—*Molagoda vs. Gunaratne* (1937) 39 N. L. R. 226, *Zoysa vs. Cumarasuriya* (1942) 44 N. L. R. at p. 93. On the other hand, when neither the rule nor the number and date of the Gazette have been stated at all, the conviction cannot stand—*Molagoda vs. Gunaratne* (1937) 39 N. L. R. 226, *Perkins vs. Sri Rajah* (1940) 41 N. L. R. 475, *Ramalingam Nadar vs. Lewis Appuhamy* (1942) 44 N. L. R. 299, *Carolis Appu vs A. G. A., Haputale* (1945) 46 N. L. R. 262, *Appuhamy vs. Ekanayake* (1946) 48 N. L. R. 71.

I am not aware what validity the volumes containing the Subsidiary Legislation of Ceylon possesses or whether a Court is bound to take judicial notice of these publications. In the preface to Volume I. the editor says that this collection is published " for convenience of reference ". So far as I can see they have no statutory validity, even if section 84 of the Evidence Ordinance can be said to apply to his publication. Therefore, the authorities cited above show that the failure to refer to in the charge to the Gazette in which the rule invoked appears is a fatal irregularity. The Village Headman was permitted to state in evidence that this accused was ordered to give up the land and was " fined " Rs. 5 in 1945 by the Government Agent. Although this is not a judicial fine. I doubt whether it is not an infringement of the rule that the bad character of the accused is inadmissible unless he has put his character in issue. It is best that evidence of this nature should not be admitted except when it is strictly admissible. The fact that the appellant had been repeatedly ordered to leave the land could have been proved without eliciting the fact that he had been " fined " by the Government Agent.

It has been urged that the appellant should be acquitted. I do not agree. I quash the conviction and direct that the accused should be retried on a properly drafted charge. These proceedings will be held before another Magistrate.

Conviction quashed and sent for retrial.

*8 C.L.W. 21. (Edd).

Present : DIAS, J.

SUDU BANDA AND ANOTHER vs. INSPECTOR OF EXCISE, PASSARA

S. C. No. 147-148 *of* 1947—*M. C. Badulla* 2187.
Argued on : 3rd June, 1947.
Decided on : 4th June, 1947.

Poisons, Opium and Dangerous Drugs' Ordinance—Section 26*—Unlawful possession of ganja found in house—Conviction of husband and wife—When is wife guilty.*

Where ganja was found in a house in the occupation of a husband and his wife, but at the time of the search, the house was in charge of the wife, who denied at the trial (a) that the house was searched, (b) that the excise officers visited the house or that anything was found therein.

Held : (i.) That the wife was guilty of unlawful possession of ganja.
(ii.) That the mere fact that the husband is the chief occupant of the house without any other evidence against him cannot support a conviction of the husband for possession of ganja found in such house.

Cases referred to : *Samaraweera vs. Babee* 4 C.L.W. 48.
Inspector of Excise vs. Palanaimuttu (1938) 39 N.L.R. at p. 376.
Dunuwilla vs. Poola (1939) 40 N.L.R. 412.
Cornelis vs. Excise Inspector (1946) 47 N.L.*f*. 407.

N. Kumarasingham, for accused-appellants.
F. Boyd Jayasuriya, Crown Counsel for the Crown.

DIAS, J.

The two appellants, husband and wife, were convicted under section 26 of the Poisons, Opium and Dangerous Drugs Ordinance (Chap. 172) for being in possession without a license on March 6, 1946 of three bags weighing 46 pounds containing various parts of the hemp plant *(cannabis sativa.)* They were convicted and severally sentenced to pay fines of Rs. 250 and in default to undergo three months' rigorous imprisonment.

The evidence is that on the day in question Excise Inspector L. G. Jayawardene accompanied by his guard paid a visit to the house of the appellants. It is a mud walled building, thatched with *mana* grass. The husband was not at home having gone to work in his chena some miles away ; but his wife was there with two children. In the presence of the woman, the house was searched. In the loft amongst some bags of Indian corn and kurakkan were found three bags weighing 46 pounds containing various parts of the *ganja* plant.

The defence is not that these things were introduced, but that the whole story of the raid is a myth, that no excise officers visited the house, that no search was made and that nothing was found. This story the Magistrate has rejected.

After the search the excise Inspector went to the chena and found the husband working there. There is not a scintilla of evidence against him that he possessed the things, except the fact that he is the husband of the second accused, and the master of the house where the things were found.

Crown Counsel invited me to acquit the woman and to affirm the conviction of the man, on the ground that when contraband is found in a house occupied by a man and his wife, there is a *prima facie* presumption that it was in the possession of the husband rather than of the wife—*Samaraweera vs. Babee* 4 C.L.W. 48, *Inspector of Excise vs. Palanaimuttu* (1938) 39 N.L.R. at p. 376 and *Dunuwilla vs. Poola* (1939) 40 N.L.R. 412. In the last case, however, it was pointed out that the position probably would be different *if at the time of the raid*, the wife was the *sole* occupant of the house, and *did not satisfactorily account for the presence of the article.* This is the situation in the case before me. In *Cornelis vs. Excise Inspector* (1946) 47 N.L.R. 407, it was laid down that the mere finding of a contraband article in a house occupied by a husband and wife would be insufficient to establish possession of it by the husband, if there is no other evidence against him except that he was the chief occupier. This case was not cited to me at the argument. On the facts established in this case, it is impossible to hold that this *ganja* was possessed by the husband. There is grave suspicion against him ; but no legal proof. I, therefore, set aside his conviction and acquit him.

In regard to the wife, her evidence has been disbelieved. She was present when the search took place. The contraband was found in the loft of the house where she lived. It is unlikely, if not impossible, for 46 pounds of *ganja* plants in three bags to have been introduced into the loft without her knowledge. She was in charge of the house at the time of the search, and she has not attempted to explain how these things came to be found in the loft. In my opinion, she was rightly convicted, and I affirm the conviction and sentence.

Conviction of 1st accused set aside.
Conviction of 2nd accused affirmed.

IN THE COURT OF CRIMINAL APPEAL.

Present : WIJEYEWARDENE, J. (President), JAYETILEKE, J. & DIAS, J.

REX vs. (1) WARNAKULASURIYA ALPHONSO *alias* ISTHEGU ALPHONSO

C.C.A. Appeal No. 2/1947 ; *with C. C. A. Application No.* 14/1947 *S. C. No.* 103 ; *M. C. Chilaw* 29359/*First Western Circuit* 1947, *Colombo Assizes.*

Argued on : April 28 & 29, 1947.
Decided on : May 1, 1947.

Court of Criminal Appeal—Conviction for attempted murder by stabbing—Excessive Sentence—Age and character of accused.

The appellant, who was 25 years of age and with no record of previous offences of violence committed by him, was convicted of attempted murder by stabbing with a knife and was sentenced to 15 years' rigorous imprisonment.

In passing this sentence the learned trial judge took into account the fact that the stabbing was without premeditation, but appeared to have inferred—

(*a*) that the knife used by the appellant was a kris knife (when the evidence was not quite clear on the point).
(*b*) that the possession of the kris knife was indicative of his violent temper.
(*c*) that the use of the knife in the way he did showed that the slightest provocation was sufficient for the appellant to use the knife.

Held : That in the circumstances, a sentence of 15 years' rigorous imprisonment was excessive and a sentence of five years' rigorous imprisonment should be substituted.

F. A. Hayley, K.C., with *A. H. C. de Silva*, for the appellant.
T. S. Fernando, Crown Counsel, for the Crown.

WIJEYEWARDENE, J., (President).

The Jury found the accused guilty of attempting to murder one Peter by stabbing him with a knife. The Trial Judge, thereupon, addressed the accused as follows before sentencing him to 15 years' rigorous imprisonment :—

> "Whilst this is the first offence of violence you have committed there was no need for you to use a kris knife, and what is more, possession of such a weapon seems to indicate that you are a man of violent temper, otherwise you had no reason to carry a kris knife. Although you did not set out with premeditation, any slight provocation would have been sufficient, as this case shows, to compel you to use the kris knife that you have carried. Having regard to all the circumstances of the case I sentence you to 15 years' rigorous imprisonment."

There is no clear evidence as to the kind of knife used by the accused. The knife was not produced at the trial. Though Peter says that " both edges of the knife are cutting edges," another witness says that he saw the " accused opening the knife." That evidence appears to involve in some doubt the question whether the accused's knife was a kris knife. The accused is a young man of twenty-five years and he has committed no offence of violence before this. Even on this occasion, there was at first an assault with hands and sticks and it was later that the accused used his knife. It was an unpremeditated act. On a consideration of all the evidence in the case we are of opinion that the sentence passed is manifestly excessive.

The Counsel for the appellant argued further that if the Jury were properly directed they might have found (*a*) that the accused acted in the exercise of the right of private defence or (*b*) that the accused stabbed Peter in the course of a sudden fight. We do not think that the plea of the right of private defence was available in this case. As regards the plea of a sudden fight it is somewhat difficult to say that there was such a misdirection or non-direction on a question of fact as would enable us to hold that, if there was no such misdirection or non-direction, the Jury might have returned a verdict that the accused was guilty of attempting to commit culpable homicide not amounting to murder. Even if such a verdict had been returned, we would not have passed a lighter sentence than the one we have decided to pass.

We substitute for the sentence of 15 years' rigorous imprisonment a sentence of 5 years' rigorous imprisonment.

Sentence reduced.

Present : KEUNEMAN, A.C.J. & JAYETILEKE, J.

P. ARUNASALAM vs. ARUMUGAM MUTTATHAMBY & 7 OTHERS

S. C. No. 126/*Revision No.* 136—*D. C. Jaffna No.* 724.
Argued on : 9th July, 1947.
Decided on : 25th July, 1947.

Restitutio-in-Integrum—*Compromise of action by Counsel without consent of client—General authority given in proxy to compromise—Its scope.*

Held : (i. That general authority given to Counsel by proxy to compromise or settle a suit is confined to matters that arise within the action.

(ii. That where the terms of settlement arrived at by counsel in the absence of the client and without his consent dealt with matters which arose within the action and those which did not, it is desirable that the whole of the settlement should be set aside and parties placed in *statu quo ante.*

H. V. Perera, K.C., with *H. W. Thambiah, H. W. Jayewardene* and *Sharvanandan*, for 10th defendant-appellant and petitioner in application.

N. E. Weerasooriya, K.C., with *P. Navaratnarajah*, for plaintiffs-respondents in appeal and application.

JAYETILEKE, J.

There are two matters before us : (1) An application for *restitutio in integrum* dated March 21, 1945, in respect of a consent decree entered by the District Judge on September 30, 1944 ; (2) an appeal against an order made by the District Judge on September 26, 1945, dismissing an application by the 10th defendant to have the said consent decree set aside. The question that arises for our decision in both matters is identical, and we think we should deal with the application for *restitutio in integrum* as it is earlier in date. The facts which give rise to this application shortly stated are these :—

The plaintiffs alleged in their plaint that, at a meeting of the congregation held on September 25, 1937, they and the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th defendants were appointed trustees of the Kirupahara Sri Subramaniaswamy Kovil, and that the 8th, 9th, 10th, 11th and 12th defendants, claiming to be trustees of the said temple, were in wrongful possession of the temple and its temporalities. They prayed that they and the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th defendants may be declared the lawful trustees of the temple, and that the 8th, 9th, 10th, 11th and 12th defendants may be ejected from the temple and its temporalities. The 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, 9th, 10th and 12th defendants filed an answer in which they denied that a meeting of the congregation was held on September 25, 1937, to appoint trustees. They alleged that they were hereditary trustees of the temple and that at a meeting of the congregation held in January 20, 1943, they and the 2nd, 5th and 9th plaintiffs, all the defendants and one Arumugam Muthuthamby were appointed trustees of the temple. They prayed for a dismissal of the plaintiffs' action. The action came up for trial on August 30, 1944. On that day some of the plaintiffs and some of the defendants including the 10th defendant were not present in Court. Messrs. Kulasingham, Sambandan and Subramaniam instructed by Mr. Navaratnarajah appeared for the plaintiffs and Messrs. Ponnambalam and Shanmukam instructed by Mr. Somasunderam appeared for the defendants who had filed answer. While issues were being framed Counsel appearing on both sides informed the District Judge that the case was settled. Thereupon, the District Judge recorded the following terms of settlement :—

1. The temple in question is declared a public charitable trust.
2. That a scheme be settled by this Court for the management of this temple and its temporalities including the election of trustees, the qualification of voters, the qualification of trustees and the holding of meetings, etc.
3. The proceedings of the meetings of worshippers held on 1/1/43 and 20/1/43 are both held to be null and void and all business transacted by those two meetings is held to be illegal and of no force.
4. In view of the settlement arrived at now, the plaintiffs withdrew D. C. 520 Jaffna without costs.
5. After the scheme of management has been adopted by Court and after the trustees are duly appointed as per scheme that will be adopted by Court, the Court will enter a vesting order according to law.
6. No costs.

Thereafter the District Judge made the following entry in the record :—

" Mr. Advocate Ponnambalam agrees to the above settlement on behalf of the defendants for whom he appears and who are absent today. Mr. Kulasingham consents to the above settlement on behalf of the plaintiffs who are absent today."

On November 7, 1944, the 10th defendant filed an affidavit and moved to have the decree entered in the case set aside on the ground that his lawyers had no authority from him to consent to the case being settled on the above-mentioned terms. The District Judge dismissed the application on the ground that Mr. Ponnambalam had the implied authority of the 10th defendant to consent to a reasonable settlement. While the inquiry into his application was pending in the District Court the 10th defendant made an application to this Court to have the consent decree set aside by way of *restitutio in integrum*. In addition to his own affidavit in which he alleged that he and his Proctor were not present at the trial, he filed an affidavit from Mr. Ponnambalam in which the latter has stated the circumstances under which he made the compromise. He says that, as the 10th defendant was not present in Court, he applied to the District Judge for an adjournment to enable him to consult the 10th defendant, but the District Judge refused his application and, he, thereupon, made the compromise on his own responsibility. On the materials before us there can be no doubt that Mr. Ponnambalam made the compromise on his own responsibility in the absence of his client and of his Proctor. There is ample authority that this Court has the power to give relief by way of *restitutio in integrum* in a case where a compromise has been made by a person who had no authority to make it. Where Counsel is employed to conduct a case the ordinary rule is that he has implied authority, subject to any express instructions to the contrary to compromise or abandon the claims of his clients in respect of all matters within the scope of the suit or matter but not in respect of anything beyond the scope thereof—(Bowstead on Agency, 9th edition, page 75).

In *Strauss vs. Francis* L. R. 1 B. 379 at p. 381 Blackburn, J., said :—

> " Mr. Kenealy has ventured to suggest that the retainer of counsel in a cause simply implies the exercise of power for argument and eloquence. But Counsel have far higher attributes, namely, the exercise of judgment and discretion on emergencies arising in the conduct of a cause, and a client is guided in his selection of counsel by his reputation for honour, skill and discretion. Few counsel, I hope would accept a brief on the unworthy terms that he is simply to be the mouthpiece of his client. Counsel, therefore, being ordinarily retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause is to do everything which, in the exercise of his discretion he may think best for the interests of his client in the conduct of the cause : and if within the limits of this apparent authority he enters into an agreement with the opposite counsel as to the cause, on every principle this agreement should be held binding.

In *Swinfen vs. Lord Chelmsford* 29 L. J. Exch. 382 at p. 397 Pollock, C.B., said :—

> " We are of opinion that, although counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, withdrawing a juror, or calling a witness, or selecting such as in his discretion he thinks ought to be called, and other matters which properly belong to the suit, and the management and conduct of the trial, he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it. For instance, we think, in an action for a nuisance between the adjoining lands, however desirable it may be that litigation should cease, by one of the parties purchasing the property of the other, the counsel have no authority to agree to such a sale, so as to bind the parties to the suit without their consent, and certainly not contrary to their instructions, and we think such an agreement would be void."

In the case before us, express authority has been given by the 10th defendant in his proxy to his Proctor to make a compromise. It reads :—

" and generally and otherwise to take all such lawful ways and means and to do and perform all such acts, matters and things as may be useful and necessary in and about the premises as our said Proctor or his or their substitute or substitutes may consider necessary towards procuring or carrying into execution any judgment, or order, or a definitive sentence, or final decree to be made and interposed herein ; and from any judgment, order or decree interlocutory or final of the said Court, to appeal and every bond or recognizance whatsoever necessary or needful in the course of proceedings, for the prosecution of such appeal, or for appearance or for the performance of any order or judgment of the said Court, for and in our name and as our act and deed, to sign and deliver and to appoint, if necessary one or more substitute or substitutes, Advocate or Advocates both in the District Court and in the Supreme Court and again at pleasure to revoke such appointment anew ; and also if the said Proctor shall see cause the said action or suit to discontinue, compromise, settle or refer to arbitration ; and every such compromise, settlement, or reference in our name and our behalf to settle and sign, I hereby promising to release all kinds of irregularities and to ratify, allow,

confirm all and whatsoever the said Proctor or Proctors or his or their substitute or substitutes or the said Advocate or Advocates shall do herein."

The question that arises for our decision is whether the compromise that was made on August 30, 1944, by Mr. Ponnambalam is within the legitimate scope of his authority. What is within the authority of counsel is thus stated by Lord Halsbury in Volume 2 of the Laws of England at page 398 :—

> "The authority of Counsel at the trial of an action extends, unless it is not expressly limited, to the action and all matters incidental to it and to the conduct of the trial, such as withdrawing the record or a juror, calling or not calling witnesses, consenting to a reference or a stet process or a verdict, undertaking not to appeal or on the hearing of a motion for a new trial consenting to the reduction of damages."

In *Matthews vs. Munster* (1887) L. R. 20 Q. B. D. 141 the headnote is as follows :—

> "On the trial of an action for malicious prosecution and defendant's counsel, in the absence of the defendant and without his express authority, assented to a verdict for the plaintiff for £350 with costs upon the understanding that all imputations against the plaintiff were withdrawn. Held that this settlement was a matter within the apparent authority of Counsel and was binding on the defendant."

It appears to me to be clear from the authorities that Counsel's authority to compromise is confined to matters which are raised within the action. In *Kempshell vs. Holland* 14 R. 336 C. A. which was an action for breach of promise of marriage it was held that, although the plaintiff's counsel may settle with the defendant's counsel that money be paid by the defendant to the plaintiff and that judgment be entered for the defendant, he cannot, without the express consent of the plaintiff, settle that the defendant's letters shall be given up and that the plaintiff shall no longer molest him.

In *Ellender vs. Wood* 4 T. L. R. 680 the plaintiff sued the defendant for breach of promise of marriage coupled with seduction. Prior to the institution of the action, the defendant had, by a deed, entered into an agreement to pay plaintiff an allowance of £2/10 a week during her life in consideration of her agreeing not to molest or in any way annoy him. At the trial, a settlement of the action and all claims against the defendant was arranged by plaintiffs' counsel, in the absence of the plaintiff and without her consent, on the terms of the defendant paying to the plaintiff £100 and costs. The plaintiff disputed the validity of the compromise on the ground that Counsel's authority did not extend to the release of her claims against the defendant on the deed. It was held that, though the agreement had been set up by the defendant in a counter claim, the plaintiff's claims under the deed were not distinctly raised in the action and, therefore, her Counsel had no authority to consent to a release of those claims.

The present action is essentially one for ejectment of the defendants from the temple and its temporalities. The questions that arose for the decision of the Court were (1) whether the plaintiffs were the trustees of the temple ; (2) whether the defendants were in wrongful possession. Mr. Perera urged that the matters dealt with in clauses 1, 3 and 5 of the terms of settlement were not raised in the action and that they did not come properly within the authority of Counsel to compromise. I think there is considerable substance in his contention and I agree with it. Though some of the terms of the settlement are binding on the parties I think it is desirable that the whole of the settlement should be set aside and the parties placed in *statu quo ante*. I would, accordingly set aside the decree entered in the case and send the case back for trial in due course. The 10th defendant will be entitled to the costs of this application. I make no order as to the costs of this appeal. The costs of the abortive trial and of the inquiry will be in the discretion of the trial Judge.

Set aside and sent back for trial.

KEUNEMAN, A.C.J.

I agree.

Proctors : *V. Navaratnarajah* for plaintiffs-respondent.
S. Sivasubramaniam for defendant-appellant.

Present : DIAS, J.

HENRY DIAS vs. NADARAJA.

S. C. No. 349 *of* 1947—*M. C. Panadura No.* 44986.
Argued on : 24th June, 1947.
Decided on : 27th June, 1947.

Criminal Procedure—Accused appearing in Court before process on him is issued—Charge framed without examination of complainant or material witness—Regularity of procedure—Criminal Procedure Code, Sections 127, 148, 150, 151 and 187.

The proceedings were initiated under section 148 (1) (*b*) of the Criminal Procedure Code and the accused, who had been enlarged on " police bail ", was present in Court in terms of his bail bond without process having been issued on him. The Magistrate then framed the charge himself without examining on oath the complainant or some material witness.

Held : That there was no irregularity in the Magistrate's procedure.

Per DIAS, J.—" An appearance in Court to show cause against a complaint when a summons or warrant has been issued is, in my opinion, an appearance on a summons or warrant, even although the summons has not been served or the warrant executed, the issue of the summons or warrant in such a case being the occasion of the appearance ".

Cases referred to : *Thomas vs. Insector of Police* (1945) 47 N.L.R. 42.
Cader vs. Karunaratne (1943) 45 N.L.R. 23.
Varghese vs. Perera (1942) 43 N.L.R. 564.
Assen vs. Maradana Police (1944) 45 N.L.R. 263.
Tennekoon vs. Dahanayake (1938) 40 N.L.R. 36.
Hendrick vs. Pelis Appu (1915) 1 C.W.R. 194.

H. W. Jayewardene, for the accused-appellant.
J. G. T. Weeraratne, Crown Counsel, for the Crown.

DIAS, J.

I see no reason to interfere with the Magistrate's findings of fact.

The appeal, however, is pressed on a point of law. It is contended that although the Magistrate framed a charge against the appellant in terms of section 187 (1) of the Criminal Procedure Code, he erred in doing so without first examining on oath the complainant or some material witness or witnesses in terms of *proviso* (ii.) to section 151, and that, therefore, the conviction is vitiated.

Various authorities have been cited to show that the framing of the charge in a summary trial is beset with so many pitfalls that the Magistrate is as likely to commit some blunder as to steer his way safely through the dangers which exist.

The material facts are these : The appellant had been enlarged on " police bail " under section 127 of the Criminal Procedure Code. The bail bond probably was conditioned on the appellant appearing before the Magistrate on December 17, 1946. The police filed a plaint in terms of section 148 (1) (*b*) and on that day the appellant was present in Court in terms of his bail bond without process having been issued on him. The Magistrate then drafted the charge himself. To this the appellant pleaded " Not guilty ". Thereafter the trial proceeded.

Before the authorities are examined the relevant sections of the Criminal Procedure Code should be considered. The proceedings were initiated under section 148 (1) (*b*). This brought into operation the provisions of section 151 (1)—that is to say, when the accused is " not in custody " and is not physically before the Court, the Magistrate will issue either a summons or a warrant in order to secure his attendance. Obviously, this is unnecessary when the accused is present in Court either on remand as was the case in *Thomas vs. Inspector of Police*, Kottawa (1945) 47 N. L. R. 42 or voluntarily appears before the process is served on him or when he is on police bail and voluntarily comes forward as was the case here. For the same reason, the *proviso* (ii) to section 151 (1) can have no application either, because it merely says that in cases initiated under section 148 (1) (a) or (*b*) the Magistrate shall before *issuing a warrant*, and may *before issuing a summons* examine on oath the complainant or some material witness or witnesses. There the issue of a summons or a warrant is rendered unnecessary—as in the present case—by reason of the fact that the accused is already physically before the Court, there is no need to invoke the provisions of *proviso* (ii) to section 151 (1). Where the accused is brought before the Magistrate in custody without process, it is section 148 (1) (*d*) and not section 148 (1) (*b*) that applies. In such cases section 151 (2) pr-

vides that it is the Magistrate's duty forthwith to examine on oath the person who has brought the accused before the Court and any other person who may be present in Court able to speak to the facts of the case. These provisions can have no application to the present case. In my opinion section 151 has no application whatever to a case where the accused voluntarily appears before the Court without process.

The next section which comes into action is section 187 which relates to the framing of the charge in a summary trial. Two situations are envisaged; (*a*) where the accused is before the Court otherwise than on a summons or warrant, and (*b*) where the accused is present on summons or warrant. In the former case the Magistrate shall " after the examination directed by section 151 (2), if he is of opinion that there is sufficient ground for proceeding against the accused, frame a charge against the accused ". With the object of saving time, the *proviso* to section 187 says that where the prosecution commenced on a written report under section 148 (1) (*b*) and the offence disclosed is punishable with not more than three months' imprisonment or a fine of Rs. 50, the Magistrate may, without drafting a charge himself, read such report as a charge to the accused and call upon him to plead. This *proviso* has no application to the present case, because the Magistrate did not act under it. He drafted and framed a charge himself.

There was no need for the Magistrate to hold the examination directed by section 151 (2) because that section only applied when the accused is brought before the Court in custody without process.

It is to be noted that section 187 (1) was amended by section 12 of Ordinance No. 13 of 1938 which substituted the words " by section 151 (2) if he is of opinion that there is sufficient grounds for proceeding against the accused " for the word " by section 149 (4) if he does not discharge the accused under section 151 (1). " Having regard to the previous wording of section 187 (1) and the words of the amendment, it seems that the words " if he is of opinion that there is sufficient ground for proceeding against the accused " refer to the examination under section 151 (2). I do not think the Legislature intended to say that *in all cases* before the Magistrate frames a charge in a summary trial, he must be of opinion that there are sufficient grounds for proceeding against the accused. As I have pointed out, when the accused appears before the Court voluntarily and without process, section 151 has no application when the offence alleged against him is one summarily triable. The instances where the Magistrate must examine witnesses before framing a charge are provided for in the earlier sections *e.g.* section 150 (indictable offences only). Section 151 (1) *proviso* (ii) (in order to issue process on the accused). Section 151 (2) (where the accused is brought before the Court in custody without process).

Section 187 (1) applies to cases where the accused is present before the Court " otherwise than on a summons or warrant ", while section 187 (2) deals with the case where the accused appears before the Court on process. Obviously the present case falls under section 187 (1) for he did not come before the Court on a summons or warrant. There was no necessity to hold any preliminary examination and the Magistrate drafted a charge to which the appellant pleaded Not Guilty. Thereafter the trial proceeded. Nevertheless, it is contended that the procedure is defective.

The case of *Cader vs. Karunaratne* 1943 45 N. L. R. 23 is exactly in point. The proceedings were initiated under section 148 (1) (*b*) and the accused appeared, probably on police bail, before process was issued on him. The Magistrate without holding any preliminary examination framed a charge. It was held that the procedure was in order. I see no reason why I should not follow that decision.

I have carefully considered the other authorities which were cited at the argument. Each of these cases depends on its peculiar facts. For example in *Cader vs. Karunaratne* 1943 45 N. L. R. 23 the case of *Varghese vs. Perera* (1942 43 N. L. R. 564 was cited. As was pointed out by de Kretser J. *Varghese vs. Perera* 1942 43 N. L. R. 564 dealt with an entirely different state of facts. There the accused had been brought up in custody *i.e.* in terms of section 148 (1) (*d*), and, therefore, under section 151 (2) it was the duty of the Magistrate to have examined on oath the person who brought the accused before the Court and any other person who may be present in Court able to speak to the facts of the case. That decision was, therefore, irrelevant in regard to the question which arose in *Cader vs. Karunaratne* (1943,45 N. L. R. 23 and to the question which I have to decide. I may observe in passing that *Varghese vs. Perera* (1942) 43 N. L. R. 564 appears to be in conflict with *Assen vs. Maradana Police* (1944,45 N. L. R. 263 but it is unnecessary to go into that question here. In *Tennekoon vs. Dahanayake* (1938,40 N.L.R. 36 the facts are dissimilar to those which arise here. The plaint had been filled under section 148 (1) (*b*) and summons was issued on the accused, who appeared in Court before the process was served on him.

The Magistrate without proceeding under section 187 (1) to frame a charge, acted under the the *proviso* to section 187 and explained the charge from the unserved summons. It was held that this was not a fatal irregularity. That case has no application whatever to the present case. In *Hendrick vs. Pelis Appu* (1915) 1 C. W. R. 194 a warrant had been issued for the arrest of the accused who could not be found and was proclaimed. He then appeared before the warrant had been executed, and the Magistrate without framing a specific charge, read it from the unexecuted warrant. It was held that no irregularity was committed. This case was considered in the leading three Judge decision of *Ebert vs. Perera* (1922) 23 N. L. R. 362. Ennis, J. said " I would also add that the case of *Hendrick vs. Pelis Appu* (1915, 1 C. W. R. 194 was apparently one falling within section 187 (2). An appearance in Court to show cause against a complaint when a summons or warrant has been issued is, in my opinion, an appearance on a summons or warrant, even although the summons has not been served or the warrant executed, the issue of the summons or warrant in such a case being the occasion of the appearance. If this be so, the statement in the summons or warrant could, under sub-section (2) be deemed the charge ".

In my opinion there has been no irregularity in the Magistrate's procedure. I affirm the conviction and dismiss the appeal.

Appeal Dismissed.

Present : DIAS, J.

MARADANA POLICE vs. ARON SINGHO.

S. C. No. 394 *of* 1947—*M. C. Colombo No.* 34432.
Argued on : 17th and 18th June, 1947.
Decided on : 20th June, 1947.

Criminal Procedure—Summary trial by Magistrate—Decision to test prosecution evidence by inspection and experiment at the scene of offence—Test carried out by Magistrate personally—Failure to record evidence of proceedings at the scene—Prejudice to accused—Irregularity of procedure—Does it vitiate conviction.

In a summary trial, the Magistrate, after the prosecution evidence had concluded and before calling upon the defence, decided to test a material portion of the prosecution story, by visiting the scene where the alleged offence was committed. He, although a demonstration was made by another person, carried out the test himself at which the accused and his proctor were present without their taking part in the proceedings. After the test, the Magistrate called upon, the defence and the accused was convicted.

The person who gave the demonstration was not called as a witness, nor was other evidence recorded of the things said and done at the scene.

Held : That the procedure adopted by the Magistrate was irregular and vitiated the conviction.

Per DIAS J.—"Most important of all, the Magistrate, by personally making the experiment, made himself a witness on a question of fact which enabled him to decide whether to call upon the appellant for his defence or not. The defence had no right or opportunity of cross-examining the Magistrate on this question of fact. Judicial officers should be careful not to leave their lofty and detached position as Judges and descend to the forensic arena by becoming witnesses to facts and thereby become enveloped in the dust of conflict created by the contending parties."

H. V. Perera, K.C., with *Stanley de Zoysa* and *L. Jayetileke*, for accused-appellant.
J. G. T. Weeraratna, Crown Counsel, for the Crown.

DIAS, J.

The appellant, who is a fitter in the Ceylon Government Railway, was convicted under section 369 of the Penal Code with having on January 19, 1947, at the Railway Washing Shed, Maligawatta, Colombo, committed theft of a measure of rice from a goods wagon. He was sentenced to undergo six months' rigorous imprisonment.

The direct evidence was to the effect that the appellant was seen to insert an implement like a spear into the space between the door and the door-frame of a sealed and locked steel goods wagon, and thereby pierced a bag of rice inside it causing the rice to flow down a groove of the spear like water down a chute. This rice the appellant was alleged to have collected in a bag.

It appears to have struck the Magistrate, particularly after the witness Corteling, the immediate superior of the appellant had given evidence, that it would be a very difficult feat to steal rice from

a sealed and locked wagon. After Corteling gave evidence the Magistrate recorded :

"I propose to stop the case to carry out a test with regard to the possibility or otherwise of P 1 (being) inserted through a part of the door or frame. The number of the wagon is agreed to (be) 3682."

The Magistrate then proceeded to record the evidence of certain witnesses who had come from a distance, and on the same day made the further record :

"I shall carry out the test I have stated above before I call on the defence."

At that stage the prosecution evidence had concluded. This being a summary trial, it was the duty of the Magistrate to make up his mind whether to call upon the accused for his defence or not. In order to make that decision, he had to be satisfied (*a*) that the prosecution had established the *corpus delicti* ? and (*b*) if so, whether there was evidence, which if believed, would justify the finding that it was this accused who committed the offence in question ? It is plain from the above minute, that before the Magistrate made up his mind he wanted to carry out a test as to whether the *corpus delicti* had been established, *i.e.* whether it was possible for anybody to abstract rice from a bag contained in a sealed and locked steel goods wagon.

Seven days later there appears the following minute on the record :—

"Accused present. Inspected wagon. Further inquiry 5-3."

This proves that on some day between February 21, 1947, and February 28, the Magistrate had visited the scene and carried out his test. Then on March 5, he had made up his mind for he called upon the appellant for his defence. At that point Mr. Stanley de Zoysa for the appellant took the objection that the Magistrate's procedure was incorrect and cited the case of *R. vs. Senewiratne* (1936) 38 N. L. R. at p. 229. The Magistrate then recorded :

"I do not think the conditions which are stated to have prevailed at the inspection by the Court in that case and that held by the Court in this case are analogous. I shall enlarge on this in my judgment when I come to write it ; but I may say now that at the inspection held by me, even though there was a demonstration by a Railway official as to whether a piece of iron similar to the so-called dagger alleged to be used in this case could be inserted between the door and the frame of the wagon as contended by the prosecution, I carried out that experiment myself with the dagger produced in Court *and found that it was quite an easy matter to insert it in the manner related by the prosecution witnesses.* I, therefore, hold against the defence on this point of law."

In his judgment, the Magistrate reverted to this subject in the following terms :—

"I should refer to the matter of the inspection by Court. This was carried out because the defence contended that it was impossible to insert the dagger between the door and the frame of the wagon as contended by the police. It is true, as the defence pointed out in its objection to the actual inspection and demonstration held that an officer of the Railway produced a similar weapon and introduced it as stated by the prosecution, but the Court did not rely on the demonstration, but *carried out the experiment itself and found there was ample room between the door and the frame for the weapon to be inserted.*"

Mr. Stanley de Zoysa from his place at the bar during the argument of this appeal stated that the Magistrate expressed his intention to go to the scene and intimated that he would do so on a date suitable to counsel. He further stated that he was instructed that thereafter on a day when he was not appearing in the Court the Magistrate informed his proctor that he would be visiting the scene on that day. Mr. de Zoysa further stated that he was instructed that although the appellant and his proctor were present at the scene out of respect to the Court, they took no part in the proceedings at the scene.

The system of reconstructing a crime is foreign to our system of Criminal Procedure, and this was criticised in the case of *R. vs. Senewiratne* (1936) 38 N. L. R. at p. 229. In the case of *R. vs. Weerasamy* (the *Pope Murder case*) (1941) Notable Ceylon Trials p. 108 which was tried at Colombo and the jury expressed a desire to inspect the *locus* at Pussellawa, Soertsz, J. ruled that the only inspection that would occur would be a view by the jury of the scene of the offence. They were to make their own observations. Witnesses were not to be available at the spot for their evidence to be taken on oath or affirmation, and if any witnesses happened to be at the spot, no questions were to be put to them. Both these cases were decided under section 238 of the Crinimal Procedure Code in regard to trials before the Supreme Court.

As was pointed out in *Jayawickrema vs. Siriwardene* (1939) 18 C. L. Rec. 182 there is no provision in the Criminal Procedure Code, except perhaps section 153 which refers solely to non-

summary inquiries in cases of culpable homicide, for the inspection of the scene of an alleged offence by a Magistrate or District Judge.

Nevertheless, section 53 of the Courts Ordinance (Chap. 6) empowers a *Magistrate* to hold *his Court* "at any convenient spot" within the limits of his judicial division. Thus, a Magistrate can hold his Court at a resthouse which has not been proclaimed to be a Courthouse—*Wickremeratne vs. Bastian* (1918) 5 C. W. R. 119, or even in his own bungalow—*Rasiah vs. Sittamparapillai* (1920) 8 C. W. R. 116. In fact, under section 53 of the Courts Ordinance a Magistrate, provided it is within the territorial limits of his judicial division, can hold his Court at *any* convenient spot; but it must be a judicial proceeding. The parties and their legal advisers have the right to attend. The Court staff must be present, and any evidence led must be on an oath or affirmation and subject to cross-examination. Obviously, the Magistrate in this case did not adjourn his Court to the Railway washing shed.

In *Barnes vs. Pinto* (1938) 40 N. L. R. 125 it was laid down that a Court is entitled *to view* the *locus in quo* in order to arrive at a better understanding of the evidence. But it was pointed out that such an inspection must be carried out with great care, and should not be made the occasion for the *taking of fresh evidence.* If anything is said or done which amounts to the taking of fresh evidence and the correction of any doubts in the mind of the Court, *that evidence should be repeated from the witness-box, so that no prejudice may be caused to the accused.* In the unreported case 543 N. C. Chilaw 27230 (S. C. M. October 21, 1946) I followed this case, and came to the conclusion that the procedure was correct because the inspection was held at the request of the defence, and in the presence of the accused and his lawyers, and what transpired at the inspection was duly recorded *as evidence* by subsequently calling the requisite witnesses. In *Jayawickreme vs. Siriwardene* (1939)18 C. L. Rec. 182 it was held that there can be no objection to an *inspection* by a District Judge or a Magistrate provided it is held with due care and caution.

It is obvious that the Magistrate acted quite *bona fide*, but, nevertheless, his procedure is open to criticism. Under section 53 of the Courts Ordinance he might have adjourned the trial from his Court to the scene of the offence. He did not do that. Although the appellant and his proctor were present, things were said and done at the scene which are irregular. The Railway official who made the demonstration has not been called, nor has the implement which that official used been produced as an exhibit. The defence was given no opportunity of cross-examining that Railway official. Most important of all, the Magistrate, by personally making the experiment, made himself a witness on a question of fact which enabled him to decide whether to call upon the appellant for his defence or not. The defence had no right or opportunity of cross-examining the Magistrate on this question of fact. Judicial officers should be careful not to leave their lofty and detached position as Judges and descend to the forensic arena by becoming witnesses to facts and thereby become enveloped in the dust of conflict created by the contending parties.

The conviction, therefore, cannot stand. I cannot, however, accede to Mr. H. V. Perera's submission that the appellant should be acquitted and not placed in peril twice. I quash all the proceedings and send the case back for a new trial before another Magistrate.

Case sent back.

Proctors : *G. Perera* for the appellant.

Coram : Howard, C.J. (President), Jayetileke, J. & Dias, J.

REX vs. K. G. MICHAEL

Application 125 *of* 1947—*S. C.* 57/*M. C. Gampaha* 34474.
Application for leave to Appeal against conviction.
Argued and Decided on : 25th June, 1947.

Court of criminal appeal—Conviction for murder—Evidence of grave and sudden provocation—Withdrawal of the issue from the jury—Effect.

Held : That, where there was evidence of grave and sudden provocation, but the learned trial judge withdrew that issue from the jury, a conviction for murder cannot stand and a verdict for culpable homicide not amounting to murder should be substituted.

D. A. Jayasuriya, for the applicant.
H. Wanigatunga, for the Crown.

HOWARD, C.J.

In this case the accused admitted that he stabbed the deceased and was responsible for his death. The defence, however, was that he acted in self-defence. At the same time he gave evidence to the effect that at about 1 or 1-30 p.m. that day he came home and found his wife and the deceased man sitting on the bed together talking. He asked him what this meant and the deceased got up and he slapped him. The deceased then rushed out of the house. The accused then said that he got angry and was brooding over it. He left home at about 3-30 p.m. and went to the boutique. Then he says that the deceased man came past him on a bicycle and tried to ride him down and struck against his leg. He jumped back and at the same time he kicked the wheel and the bicycle toppled over. The deceased then got off and struck him with his hand. He says that the deceased had a knife in his waist that he was attempting to take out when he pulled out his knife and brandished it sideways, keeping him at bay.

The prosecution conceded that the deceased man was on terms of intimacy with the accused's wife. In dealing with the defence of the accused, the learned Judge, it is true, puts before the Jury the defence of the accused that he was acting in the exercise of the right of private defence and also puts to them the question as to whether there was a sudden fight, but with regard to the question of grave and sudden provocation he deals merely with the incident of the bicycle. He finishes his remarks on that point by saying that the question of grave and sudden provocation really fails. In other words, he has withdrawn that issue from the Jury. We think, however, that there was evidence of grave and sudden provocation which should have been left to the Jury. There was the earlier incident which happened at 1-30 p.m. in the afternoon. Then, having regard to that incident, that the deceased rode his bicycle deliberately in front of the accused and tried to run the bicycle against him, there was provocation in that act itself and it may be that if this question had been left to the Jury they would have said that there was cumulative provocation arising from the earlier incident and the bicycle incident. We think, therefore, that this issue should have been left to the Jury.

In these circumstances we set aside the conviction for the offence of murder and substitute therefore a conviction for culpable homicide not amounting to murder, for which offence we impose a sentence of 15 years' rigorous imprisonment.

Verdict altered.

M. A. ANIS APPUHAMY vs. SIMON BOYD

S. C. No. 403—*M. C. Gampola No.* 10467.
Argued and Decided on : 20th May, 1946.

Criminal Procedure Code, Section 253 *C* (1)—*Power to order complainant to pay compensation to accused.*

Held : That where an accused person is not arrested but appears on summons, a Magistrate has no power to order payment of compensation under section 253 C (1) of the Criminal Procedure Code.

S. W. Jayasuriya, for appellant.

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

CANNON, J.

In acquitting a person accused of causing hurt by stabbing, the Magistrate said : " The accused in this case is really the injured party. He has been in hospital for 15 days. I have no doubt that the complainant inflicted the trivial knife injury on himself in order to forestall a charge against him. I think this is essentially a case where the complainant should pay compensation to the accused who is really the aggrieved party. I order the complainant to pay the accused Rs. 25 as compensation under the provisions of Section 253 C(1) of the Criminal Procedure Code."

Section 253 C(1) of the Code enables the Magistrate to do this only when the person who is ordered to pay compensation has caused a peace officer to arrest another person and there was no sufficient ground for causing such arrest. In this case the acquitted person was not arrested but summoned, as the record clearly shows. Further in ordering the complainant to pay compensation the Magistrate did so without calling upon him to show cause (see 18 N.L.R. at page 213).

The complainant's appeal on both or either of these grounds is not contested by Crown Counsel and must be upheld. The appeal is therefore allowed.

Appeal allowed.

Present : WIJEYEWARDENE, S.P.J.

SETUWA vs. SIRIMALIE AND ANOTHER

S. C. No. 76/1947—*C. R. Matale No.* 8939.
Argued on : July 11, 1947.
Decided on : July 16, 1947.

The Kandyan Law Declaration and Amendment Ordinance, Section 10 (1)—*Proviso—Meaning of the word " child "—Paraveni and acquired property.*

Held : (i.) That the word " child " in the proviso to section 10 (1) of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 means both legitimate and illegitimate children.

(ii.) That where a person subject to Kandyan Law died intestate leaving illegitimate children, any immovable property which such person inherited from his father would be " paraveni property " in view of section 10 (1) of the Kandyan Law Declaration and Amendment Ordinance.

Per WIJEYEWARDENE, S.P.J.—I think the proviso to section 10 (1) was intended to deal with cases where the Court has to consider the nature of the property in order to decide, for instance, the conflicting claims of the widow and the maternal and the paternal relations of a deceased person. This proviso appears to me to have been inserted to give effect to the " relative signification " of the term " acquired property " under the Kandyan Law.

S. R. Wijeyatileke with *R. S. Wanasundera*, for the 1st defendant-appellant.
No appearance for the plaintiff-respondent and 2nd defendant-respondent.

WIJEYEWARDENE, S.P.J.

This is an action for declaration of title to an undivided one-third share of a land. One Puncha was admittedly the original owner of the land by right of purchase under a Deed P 2. He died intestate leaving his three children—Setuwa, Hapuwa and Nanduwa. Nanduwa died intestate about 1943. The plaintiff filed this action as the next friend of three minors who, she alleged, were the children of Nanduwa. The defendants denied that allegation.

I accept the finding of the Commissioner that Nanduwa was the father of the minors. The oral evidence and the document P 1 prove beyond any doubt that the minors were the illegitimate children of Nanduwa.

The Commissioner held, further, that the minors were entitled to Nanduwa's one-third share and gave his reason very briefly as follows :—" This property is the acquired property of Nanduwa *vide* P 2 ". The Commissioner appears to have thought that, as the property had been purchased by Nanduwa's father, it should be regarded as the acquired property of Nanduwa, when the Court considers the succession to the estate of Nanduwa. The question, however, does not admit of such an easy solution under the Kandyan Law Declaration and the Amendment Ordinance which is applicable to the present case.

Section 10 (1) of the Ordinance enacts that " paraveni property " shall mean *inter alia* " immovable property to which a deceased person was entitled by succession to any other person who has died intestate ". The property in question would, therefore, be paraveni property for the purposes of this case, unless it comes under the proviso to section 10 (1), which reads :—

> " Provided, however that if the deceased shall not have left him surviving any child or descendant, property which had been the acquired property of the person from whom it passed to the deceased shall be deemed acquired property of the deceased."

Did Nanduwa die leaving him surviving a " child " within the meaning of the proviso ? The answer depends on the meaning of "child ". Does it mean only a legitimate child or a child, legitimate or illegitimate ?

No doubt, the rule of interpretation is that, in the absence of a contrary intention either expressed or deducible by necessary inference, all provisions respecting " children " contained in any laws or instruments having a legal operation, refer exclusively to legitimate children (*vide* 17 Hailsham para. 1424). But a study of the provisions of the Ordinance shews that the word " child " is used to mean a child, legitimate or illegitimate (*vide* sections 8, 16, 18, 21 and 23). I shall refer to some of these sections in detail. Section 23 says that " when any person shall die intestate after the commencement of the Ordinance leaving no child.....the surviving spouse shall succeed to all the movable property of the deceased ". Now if the " child " in this section is construed to mean only a legitimate child then this section will nullify section 22 which recognises the right of an illegitimate child to succeed to the

movable property of his father, if there is no legitimate child, and to succeed to the movable property of the mother in all cases. Again section 16 provides that, where a person dies leaving no surviving spouse or " child ", the acquired property of the deceased should devolve in a certain manner on his parents, brothers and sisters. If " child " here means only a legitimate child then section 16 cannot be reconciled with section 15 (*b*) which states that an illegitimate child " shall, subject to the interests of the surviving spouse, if any, be entitled to succeed to the acquired property of the deceased in the event of there being no legitimate child.....". Moreover, where the Ordinance has to refer to a legitimate child only, it does not use the word " child " but " legitimate child " or some such expression as " child by a former marriage " (*vide* section 11 (1) (*a*) proviso).

There would have been some room for doubt as to the meaning of " child " in the proviso to section 10 (1), if that section referred only to the estate of a deceased male. In that case it was possible to argue that there was no need to refer in the proviso to the case of the deceased dying without leaving an illegitimate child, as an illegitimate child could not inherit the paraveni property of his deceased father. But section 10 (1) refers to the estate of a " deceased person " and would therefore include the estate of a deceased female. That is made clear by subsections 3 and 4 of section 10. Now in the case of a deceased female, her illegitimate children would become entitled to her paraveni property in certain circumstances (*vide* section 18). It was therefore necessary for the proviso to section 10 (1) to provide for the case of the " deceased person " dying without leaving illegitimate children.

I think the proviso to section 10 (1) was intended to deal with cases where the Court has to consider the nature of the property in order to decide, for instance, the conflicting claims of the widow and the maternal and the paternal relations of a deceased person. This proviso appears to me to have been inserted to give effect to the " relative signification " of the term " acquired property " under the Kandyan Law referred to in the following passage of Hayley's Sinhalese Laws and Customs (page 221) :—

> " It would seem that the term ' acquired property ' has a relative signification, varying in accordance with the classes of heirs who claim a share : for whereas any property descended from a man's father is inherited property for the purpose of distribution amongst his widow and children, when the contest is between maternal uncles and paternal uncles, the former are entitled to the deceased's acquired property, which in that case includes property newly acquired by the deceased's father which has descended to the deceased. This modification is a logical one ; for when such heirs as father's brothers succeed to part of the estate, on the ground not so much of true succession, but rather by virtue of the principle that lands must revert to the source whence they came, there is no reason for assigning to them an interest in property which was acquired separately by their deceased brother and never formed part of the family lands of themselves or their father."

I hold that the proviso to section 10 (1) does not apply to the property in question, as Nanduwa left illegitimate children.

The minors in this case cannot, therefore, get a share of the property in view of section 15 (*a*), as it is a paraveni property within the meaning of the Ordinance.

I set aside the judgment of the Commissioner and direct decree to be entered, dismissing the plaintiff's action with costs here and in the Court below.

Set aside.

Proctors : *S. P. Wijeyatileke* for the appellant.

Present : DIAS, J.

SUB-INSPECTOR OF POLICE, KADUGANNAWA vs. D. B. WIJERATNE.

S. C. No. 1770.—*M. C. Kandy No.* 20680.
Argued on : 27th June, 1947.
Decided on : 1st July, 1947.

Evidence—Cross-examination of accused on statements made to Police and recorded in Information Book—Denial by accused—Failure to prove such statement—Does it vitiate conviction—Evidence Ordinance Section 155 (*c*)*—Evidence in rebuttal in Magistrate's Court.*

Where an accused is asked leading questions in cross-examination, based on alleged statements made by the accused and recorded in the Information Book, without proving such statements.

Held : That where no prejudice is caused to the accused, the omission to prove such statement does not vitiate a conviction.

Quaere—Decision of Moseley, J., *Welipenna Police vs. Pinessa* (1943 45 N. L. R. 540, 26 C. L. W. 72.) that evidence in rebuttal cannot be led in a summary trial before a Magistrate.

R. L. Pereira, K.C., with *Mackenzie Pereira*, for accused appellant.
Boyd Jayasuriya, Crown Counsel, for the Crown.

DIAS, J.

The accused appellant when under cross-examination stated—" I made a statement to the Police Inspector. Ukku Banda did not run after me and strike me with a mammotty. I cannot say if he threw a stone. I did not say that Ranbanda struck me with a mamotty and the blow accidentally struck Heenbanda and that I was assaulted with mamotties by Heenbanda and others. I deny I said my clothes were covered with mud." It is obvious that these were answers to leading questions put by the prosecuting officer in terms of section 155 (c) of the Evidence Ordinance in order to discredit the evidence of the accused based on alleged statements recorded in the Information Book. After the close of the case for the defence, the prosecution did not call the officer who recorded the statement of the appellant to prove such statements.

It is argued that the failure of the prosecution to do this is an irregularity which vitiates the conviction. This contention is based on the following passage in the judgment of Dalton J. in the Divisional Bench of *R. vs. Graniel Appuhamy* (1935) 37 N. L. R. at p. 284—" In our opinion, the questions based upon this statement should not have been put to the accused at all, unless the prosecution was prepared to go further in the event of the accused denying he had made the statement. At the close of the defence no request was made by the prosecution to call any evidence in rebuttal, although the sub-inspector in question was one of the Crown witnesses and had given evidence earlier." The law on this subject is summarised by the Court of Criminal Appeal in *R. vs. Haramanissa* (1944) 45 N. L. R. at p. 540. The written record of such a statement is admissible by virtue of section 122 (3) of Chapter 16 to contradict a witness after such witness has given evidence. (4) The written record of the statement of a witness used as formulated in (3) is not substantive evidence of the facts stated therein, but is available for impeaching the credit of such witness as laid down by section 155 of the Evidence Ordinance ".

I am unable to agree that the failure of the prosecution to prove the statements from the Information Book which were put to the appellant under cross-examination and denied by him necessarily vitiates the conviction. The case of *R. vs. Graniel Appuhamy* (1935) 37 N. L. R. at p. 284 *shows that the learned* trial Judge in that case failed to tell the jury that if the alleged previous inconsistent statement was not legally proved, the jury should disregard the unproved statement in assessing the credit of the witness. Dalton J. said : " The jury were not directed that there was no evidence at all on this point, except his (accused's) denial. This omission on a most material point, was a misdirection." The rule of evidence is that the cross-examiner can ask the witness " Did you on a previous occasion either to the Magistrate or to the investigating police officer or to some other person say so and so ? ". If the witness denies such statement the cross-examiner must elect whether he is going to discredit the witness by proving that previous statement, and in that event he will at once mark the inconsistent statement if it is in writing and duly prove it at the proper time either by calling the person who recorded the statement to produce it, or if the statement was not recorded by calling the person who heard the inconsistent statement made. If he fails to do so, all that happens is that the evidence of the witness stands uncontradicted, and the judge of facts will assess his credibility in the usual way. In the case of an accused witness, in particular, it is the duty of the judge of facts to have addressed to his mind the warning that the alleged unproved statement should be disregarded in assessing the credit to be attached to the evidence of the witness. If that is done, the failure to prove such statement is of no significance. I have no reason to believe that the experienced Magistrate who tried this case failed to address his mind to these principles. I am, therefore, unable to say that any prejudice has been caused to the appellant.

Crown Counsel, however, has drawn attention to another aspect of this matter. He has referred to the case of *Welipenna Police vs. Pinessa* (1943) 45 N. L. R. at p. 540 where Moseley, J. held that evidence in rebuttal cannot be led in a summary trial before a Magistrate. He points out that that is the reason why evidence in rebuttal was not led. He submits that if the view expressed in *Welipenna Police vs. Pinessa* (1943) 45 N. L. R.

at p. 540 is correct, then it will *never* be possible to discredit an accused witness by proving a previous statement against him in order to discredit the evidence he gives at the trial. The prosecution being debarred from leading evidence in rebuttal, the accused can never be contradicted. Sections 212 and 237 (1) of the Criminal Procedure Code provide that in trials before the District Court and the Supreme Court rebutting evidence can be led. The Code is silent, however, as to the calling of such evidence in a summary trial before a Magistrate. Does that mean that in the following cases evidence by way of rebuttal cannot be led by the prosecution in the interests of justice—(1) where the prosecution is taken by surprise by the evidence called for the defence, *e.g.* an *alibi* which can be disproved; (2) *where* under section 155 of the Evidence Ordinance proof is available to rebut a defence raised by the defence for the first time when the accused gives evidence or (3) where a previous statement inconsistent with the present testimony of the accused is available to show that the evidence of the accused is untrue? I doubt if that is the law. Why should there be one standard of proof in the District Court and the Supreme Court and another in a Magistrate's Court? Under certain sections of the Criminal Procedure Code it is open to the Magistrate himself to cause evidence to be called at a summary trial, *e.g.* sections 189 (2), 190 and 429; but a Magistrate is a judge, and will not use his powers in order to fill up gaps in the prosecutor's evidence. In view of the finding I have reached that the failure to call rebutting evidence in this case has caused no prejudice to the appellant, this question does not strictly arise. It is, therefore, unnecessary to decide this question which merits consideration by a Bench of two Judges or a Divisional Court.

I have carefully considered the facts of this case; but can see no reason to interfere with the findings of fact of the Magistrate. I have been asked to consider the sentence passed on the appellant. The offence is a serious one. In the course of a quarrel about a land the appellant took a katty from another and cut the injured man on his face causing a permanent disfigurement. Having regard to the fact that the appellant has no previous convictions, I consider the sentence excessive. I reduce the sentence from three months' rigorous imprisonment to one month's rigorous imprisonment. In all other respects the conviction and sentence will stand affirmed.

Sentence reduced.

Present : DIAS, J.

ARLIS APPUHAMY & OTHERS vs. ANDRAYAS APPUHAMY & OTHERS

S. C. No. 78—*C. R. Matara No.* 495.
Argued on : 30th June, 1947.
Decided on : 2nd July, 1947.

Court of Requests—Execution of writ—Obstruction to Fiscal—Order under Section 330 *of the Civil Procedure Code against parties not originally before Court—Is such order appealable—Courts Ordinance, Section* 36.

Held : That an order made by a Commissioner of Requests under section 330 of the Civil Procedure Code against persons, who, being not bound by the decree, resisted the execution of a writ by claiming rights, is one having the effect of a final judgment within the meaning of section 36 of the Courts Ordinance.

H. W. Jayewardene, for 5th to 10th respondents-appellants.
E. B. Wickramanayake with *Vernon Wijetunge*, for plaintiff-respondent.

DIAS, J.

In this action the plaintiff sued for a declaration of a right of cartway or in the alternative for a right of way by necessity over the land of the 1st to 4th defendants, who are the 1st to 5th respondents to this inquiry. The plaintiff in his prayer also asked that in the event of his being successful that he be placed and quieted in the possession and enjoyment of the said right of way. In November, 1941, decree was entered in his favour and he was declared entitled to a right of way three feet wide through the land Bingegawawatta, and also to a cartway eight feet wide over the said land on payment of compensation as depicted in Plan No. 552, dated February 17, 1940. It was also ordered and decreed " that the plaintiff

be placed and quieted in the possession of the said path and cartway ". There was an appeal against that decree which was affirmed by the Supreme Court in February, 1943. When the plaintiff attempted to obtain execution of his decree it was discovered that obstructions had been placed on the land making it impossible for him to enjoy his right of way. During the pendency of the action some of the defendants had transferred their interests in the land to the 5th to 8th respondents to this appeal. Admittedly the 9th and 10th respondents are squatters and therefore trespassers. Proceedings under section 325 of the Civil Procedure Code were then taken against the respondents and after inquiry the learned Commissioner of Requests treated the case as coming under section 330 of the Civil Procedure Code and directed that the writ should be re-issued for execution. He further held that " if the respondents 5th to 10th have any real interests, they can adopt the course indicated in section 330 ; but they are hereby ordered not to resist delivery of the path and cartway by the Fiscal's officer to the petitioner ". He also ordered that the 5th to 10th respondents should pay the costs of the inquiry which he assessed at Rs. 20. From that order the respondents appeal.

Mr. E. B. Wickramanayake for the plaintiff has taken the preliminary objection that no appeal lies in this case, as the order appealed against is not a final judgment or order having the effect of a final judgment within the meaning of section 36 of the Courts Ordinance, inasmuch as an order re-issuing a writ of execution in a Court of Requests action cannot be called a final judgment or order.

The 5th to the 10th respondents are not bound by the decree in the main action, which was the final judgment entered in the case. Section 330 under which the Commissioner purported to act indicates that he considered that these respondents, excepting the 9th and 10th respondents, were not in occupation of the land over which the right of way runs. Section 330 (2) provides that " The party against whom such order is passed (*i.e.* under section 330 (1)) may within one month institute an action to establish the right which he claims to the present possession of the property, but subject to the result of such action, *the order shall be final* ".

In the case of *Arnolis Fernando vs. Selestina Fernando* (1922) 4 C. L. Rec. 71 Bertram, C.J. held that an order made by a Court of Requests on an application under section 326 of the Civil Procedure Code is not an appealable order, and he expressed the view that an order which has the effect of a final judgment within the meaning of section 36 of the Courts Ordinance would be some order which has some effect upon the original action which practically disposes of the issues in the action, but leaves certain other matters to be worked out by calculation or in some purely ministerial manners. This view was dissented from by Garvin, J. in *Marikar vs. Dharmapala Unanse* (1934) 36 N. L. R. 201 who held that where a stranger to the decree claimed possession of the premises in respect of which the writ of possession was issued in his own right and the resistance offered by him was not at the instigation of the judgment debtor but in assertion of his own rights, an order rejecting his plea and committing him to prison determined the proceedings in which the order was made and would be appealable as such. Garvin, J. further held that the words in section 36 of the Courts Ordinance could not be limited to orders made in the original action. He held that after the decree in a Court of Requests action, there may be execution proceedings in which judgments having the effect of final judgments may be passed. Garvin, J. adopted the test suggested by A. St. V. Jayawardene, J. in *Vyraven Chetty vs. Ukkubanda* (1924) 27 N. L. R. 65 that a judgment or order which can be considered on appeal at a later stage of the proceedings, that is when the case is finally decided, does not fall within the term " final judgment ", but an order which can never be so brought up in appeal is a final judgment. I would respectfully follow the principle laid down in *Marikar vs. Dharmapala Unanse* (1934) 36 N. L. R. 201. Applying this test it seems to me that the order of the Commissioner of Requests in this case is a final judgment as between the plaintiff and the 5th to 10th respondents so far as this case is concerned. If the respondents do not file the action contemplated by section 330 (2) the order made is deemed to be final. If they file the action and lose it, they will have to appeal in that case. They cannot take any further steps in the present case. I am, therefore, of opinion that the preliminary objection fails.

On the merits, I do not think the appellants can agitate the question as to whether the relief claimed by the plaintiff in a right of way action falls under sections 217 (C), (E) or (G) of the Civil Procedure Code. True, the appellants are not bound by the decree in the main action, but that decree was in accordance with the relief claimed in the plaint, and that decree having been affirmed in appeal is now a decree of this Court.

Under that decree the plaintiff was entitled to a writ of possession. Furthermore, some of the appellants derive their title from deeds executed by the defendants to the action during the pendency of that action. Plaintiff not having registered the *lis pendens*, they are not bound. They have now been given the right to show, if they can do so, that the plaintiff cannot have a right of way over this land. In these circumstances I see no reason to interfere with the decision arrived at by the learned Commissioner of Requests.

Appeal dismissed.

Proctors : *Sepala Samarasinghe* for the appellant.
L. Abeyanayake for the respondent.

Present : DIAS, J.

D. B. JAYARATNE, PROCTOR vs. M. D. R. KULAWANSA.

S. C. No. 64—C. R. Colombo No. 3371.
Argued on : 30th June, 1947.
Decided on : 2nd July, 1947.

Landlord and tenant—Ejectment—Notice to quit—Acceptance of rent—Waiver of notice—Financial loss to tenant, if ejected.

A landlord who served notice on his tenant on the 30th July, 1946, to quit on 31st August, 1946, accepted the rent for August, and further rents until January, 1947, although the action for ejectment was filed on 3rd September, 1946.

Held : (i.) That though the acceptance of rent until the expiry of the notice to quit is in order, acceptance of further monthly rents amounted to a waiver of the notice to quit.

(ii.) That the Court would refuse to make an order of ejectment where it would cause severe financial loss to the tenant.

(iii.) That the offer of alternative accommodation should be made before the date of action.

Cases referred to : *Foneka vs. Naiyan Ali* (1920) 22 N. L. R. 447.
Virasinghe vs. Peris (1943) 46 N. L. R. 139.
Wijemanne vs. Fernando (1946) 47 N. L. R. 62.

H. W. Jayewardene, for defendant-appellant.
J. Fernandopulle, for plaintiff-respondent.

DIAS, J.

The plaintiff-respondent sought to recover possession of premises bearing assessment No. 121, Galle Road, Mount Lavinia, of which the defendant is the tenant. The plaintiff claimed possession on two grounds : (*a*) under section 8, proviso (*b*), of the Rent Restriction Ordinance No. 60 of 1942 on the ground that he had given the defendant notice to quit on July 30, 1946, but that in spite of this, the defendant was in wrongful occupation ; and (*b*) under section 8, proviso (*c*), on the ground that the premises are reasonably required for occupation as a residence for himself. The learned Commissioner of Requests has found against the defendant on both points.

In regard to the first point, under the notice to quit, the defendant should have vacated the premises by the end of August, 1946. The plaintiff filed this action on September 3, 1946. Therefore, as the Commissioner of Requests holds, the plaintiff was not waiving the notice to quit by accepting the rent for August, 1946. The plaintiff, however, admits that the defendant paid him rent until the end of January, 1947. Therefore, by accepting that rent even after he had filed action, I am of opinion the plaintiff must be deemed to have waived the notice to quit. The Commissioner deals with this part of the case as follows :—He says : " As notice to quit was given at the end of August, plaintiff's acceptance of rent for August is quite in order. It is not known when the defendant paid the September rent. Defendant should have produced the receipt. The plaintiff filed action on 3-9-46. Receiving rent after action filed is not waiver of rent ". The evidence shows that notice to quit was not given at the end of August but at the end of July. There was no need for the defendant to produce any rent receipts when the plaintiff definitely stated in his evidence " Defendant has paid me rent to the end of January, 1947. Each month's rent was payable by the tenth of the month, but sometimes he paid it towards the end of the month also which I accepted. I am not producing my counterfoil book of receipts ". I do

not follow the Commissioner of Requests when he says that the receipt of rent action filed is not waiver of rent. In *Fonseka vs. Naiyan Ali* (1930) 22 N. L. R. 447, the receipt by the landlord of rent after notice to quit, and after filing an action against the tenant, would amount to a waiver of the notice to quit unless, of course, there is some specific agreement not to waive the notice. It is a question of fact in each case whether there has been a waiver of the notice to quit—*Virasinghe vs. Peris* (1943) 46 N. L. R. 139. In my opinion, in the circumstances of this case, there has been a clear waiver by the plaintiff of the notice to quit.

The burden of proof is on the plaintiff to satisfy the Court after a consideration of all the surrounding circumstances and of the relative position of both the landlord and the tenant, that the need of the plaintiff is greater than that of the defendant. This matter has been considered in a series of judgments of this Court including a decision of a bench of two Judges in *Wijemanne vs. Fernando* (1946) 47 N. L. R. 62. The Court before coming to a conclusion must consider and discuss various matters, such as the alternative accommodation available for the landlord and the tenant; whether injury to the health of either party may result from an order for possession being made or refused or whether some pecuniary loss might directly flow from one being turned out. These are questions of major importance which the learned Commissioner of Requests has failed to refer to or discuss in his judgment.

The defendant is carrying on a school known as the Duke's Correspondence College in these premises and he employs a staff of clerks. There is also a printing press in the premises. Defendant says, and there is no reason to disbelieve him, that he would shift if he was able to obtain another suitable house. To turn him out from the premises would involve him in severe financial loss. The Commissioner of Requests appreciates this for he has not ordered the immediate ejectment of the defendant. I can attach no importance to the fact that after this action was filed, the plaintiff informed the defendant that a client of his, one Jayatilleke, had a house available. The defendant says he saw Jayatilleke who demanded an exhorbitant rent and also demanded an advance of two years' rent. The Commissioner of Requests dismisses this evidence with the observation that it is unlikely that Jayetilleke would demand " black market rent ". The rights of the parties to an action are to be determined as at the date the action was filed. In this case that date is September 3, 1946. The plaintiff told the defendant about Jayetilleke on September 9, 1946—see P 1. Therefore, at the date the action was filed the defendant had no suitable alternative accommodation available to him. There is no proof that he had such accommodation even at the date of trial.

On the other hand, the plaintiff owns two houses—No. 120A of which the defendant is in possession, and No. 120 which is vacant although let to an Excise Inspector who is said to be still paying him rent. It is to be noted that the plaintiff refrained from calling this Excise Inspector, and did not produce his counterfoil book of rent receipts from which it might have been ascertained whether the Excise Inspector was still paying rent to the plaintiff. Furthermore, the plaintiff is living in premises No. 313, Galle Road. He says that his landlord, one Abeyratne, has given him notice to quit, but the plaintiff who is a proctor and knows the value of evidence, failed to produce the notice to quit.

Had the Commissioner of Requests considered the position of the two parties in the light of principles laid down for his guidance, he would have come to the conclusion that the defendant's need was far greater than that of the plaintiff.

I set aside the decree appealed against and dismiss plaintiff's action with costs both here and below.

Set aside.

Proctors : *Clive Abeywardene* for the appellant.
Cyril de Alwis for the respondent.

Present : Keuneman, A.C.J. & Wijeyewardene, S.P.J.

W. DON JOHN APPUHAMY vs. L. MATHTHES

S. C. No. 300 *M.—D. C. F. Panadure No. T. K.* 422/24409.
Argued on : 15th July, 1947.
Decided on : 16th July, 1947.

Co-owners—Improvements effected by one co-owner on undivided land—Jus retentionis—*When is it not available to an improving co-owner—Rights of a lessee from such co-owner.*

Held : That where a co-owner of land effected improvements on undivided land with the consent of another co-owner, the former's lessee, is entitled to the benefit of such improvements until common ownership is terminated by a partition decree.

Per KEUNEMAN, J.—In *Arnolis Singo vs. Mary Nona* (47 N. L. R. 401) it was held that where a co-owner plants more than his proportionate share of the common property, he is entitled to possess the entire plantation as against the other co-owners until the common ownership is terminated by a partition action.

It is possible that on the authorities this view will have to be modified to this extent, that it will not apply where the improvement has been made against the wishes or without the acquiescence of the other co-owners.

Cases referred to : *Silva vs. Silva* (15 N. L. R. 79).
Podi Sinno vs. Alwis (28 N. L. R. 401).
Arnolis Singo vs. Mary Nona (47 N. L. R. 401).

H. A. Koattegoda, for the defendant-appellant.
Vernon Wijetunga, for the plaintiff-respondent.

KEUNEMAN, A.C.J.

The plaintiff brought this action, claiming to be declared entitled to possess the rubber plantation on the land in question, under lease P 1 of the 28th December, 1942, from Bastian Peiris, and asking for damages. The District Judge entered judgment for plaintiff, and the defendant appeals.

The land at one time belonged to Machohamy, the wife of Bastian Peiris, and to her sister Nonohamy. Nonohamy sold her half share by P 2 of 10th July, 1921, to Bastian Peiris. Later Machohamy died leaving as her heirs Bastian Peiris and her son the defendant. The defendant who claimed title to a 1/4th share of the land and the rubber trees forcibly took possession of 30 rubber trees out of the plantation of 130 trees.

The District Judge has held on the evidence that Bastian Peiris planted the rubber after his purchase from Nonohamy, and in his own right and not of his wife. Bastian Peiris himself gave evidence to this effect, and his evidence was accepted by the District Judge, and I see no reason to disagree with this finding. It is also in evidence that immediately after the execution of P 1, Bastian Peiris placed the plaintiff in possession of the whole rubber plantation of 130 trees, and the defendant subsequently dispossessed him in respect of 30 rubber trees.

Counsel for appellant argued that as the defendant was a co-owner of the land, he was entitled to a 1/4th share of the rubber trees as well as the soil, and that the action of the plaintiff is misconceived.

For the defendant it is argued that the improving co-owner was entitled to be in possession of the whole plantation and was entitled to mesne profits, and that an alienee from the improving co-owner was entitled to the same rights, at any rate till the rights of the parties were finally determined in a partition action.

In *Silva vs. Silva* (15 N. L. R. 79) Lascelles, C.J. said : " It is difficult to see on what principle an improving co-owner, who is entitled to compensation, can be excluded from the benefit of the *jus retentionis* ". He held that the improving co-owner was entitled to retain the portion of the property improved until compensation is paid, as ascertained in a partition action. " But it is a different matter when the claim takes the form of refusing to give up possession, while the property is still undivided, until a specific sum is paid by the other co-owners as compensation ". In other words the amount of the compensation payable has to be determined in a properly constituted partition action, and not in another suit.

In *Podi Sinno vs. Alwis* (28 N. L. R. 401), it was held that an improving co-owner is entitled to the fruits of the improvement effected by him. It must follow that he is entitled to retain possession of the improvement. In this case apparently conflicting decisions were considered and reconciled.

In *Arnolis Singo vs. Mary Nona* (47 N. L. R. 564), it was held that where a co-owner plants more than his proportionate share of the common property, he is entitled to possess the entire plantation as against the other co-owners until the common ownership is terminated by a partition action.

It is possible that on the authorities this view will have to be modified to this extent, that it will not apply where the improvement has been made against the wishes or without the acquiescence of the other co-owners. In the present case, however, this particular consideration cannot arise, for it is clear that Machohamy acquiesced in the making of the plantation.

In this case then I hold that Bastian Peiris was entitled to possession of the improvement made by him, *i.e.* the rubber plantation, and that his lessee, the plaintiff has been rightly declared to be entitled to possess this plantation, until the rights of the parties are finally decided in a partition action. The claim for damages can therefore be sustained.

The appeal is dismissed with costs.

Appeal dismissed.

WIJEYEWARDENE, S.P.J.

I agree.

Proctors : *Thirimane* and *Meegama* for the appellant.
G. G. Perera for the respondent.

Present : HOWARD, C. J. & JAYETILEKE, J.

THE KING vs. (1) JAYASENA AND OTHERS.

S. C. No. 43-44—*D. C.* (*Cril.*) *Colombo No.* 977.
Argued on : 28th May, 1947.
Decided on : 11th June, 1947.

Penal Code, sections 369 *and* 394—*Seven accused charged with theft—Three convicted of theft and four of dishonestly receiving stolen property—Validity of conviction—Criminal Procedure Code, sections* 181, 182 *and* 184.

Seven accused were charged under section 369 of the Penal Code, with having committed the theft of 18 bags of chillies from a depot. There was evidence that the 2nd, 6th & 7th accused were seen removing the bags from the store to a lorry. The 1st, 3rd, 4th & 5th accused were found soon afterwards in the lorry which contained the bags. The 2nd, 6th and 7th accused were convicted of theft, and the rest of dishonest receipt.

Held : (i.) That the conviction was in order.

(ii.) That the joinder of the accused was justified under the provisions of sections 181, 182 and 184 of the Criminal Procedure Code.

Cases referred to : *Wijeyeratne vs. Menon* (48 N. L. R. at p. 164).
Inspector Sourjah vs. Hinnihamy (8 C. L. W. 20).
P. Albertu Fernando vs. S. E. Fernando (1 Ceylon Criminal Appeal Reports 30).
Police Sergeant vs. Semijah (3 Balasingham's Notes of Cases 61),
Jonklaas vs. Somadasa (43 N. L. R. 284).
Bishnu vs. Empress (1897) 1 C. W. N. 35.
Abdul Majid vs. Emperor (1906) 33 Calcutta 1256.
In re A. David (1880) 5 C. L. R. 574.
Ohi Bhusan Adhikary and Another vs. Emperor I. L. R. 46 Calcutta 741.
R. V. Abramovitch (84 L. J. K. B. 396).
Fernando vs. Heiler (46 N. L. R. 406).

E. F. N. Gratiaen, K.C., with *G. E. Chitty* and *A. E. Keuneman (jr.)*, for 1st accused-appellant.
F. A. Hayley, K.C., with *Stanley Alles*, for 5th accused-appellant.
Cherubim, Crown Counsel, for Attorney-General, respondent.

HOWARD, C.J.

In this case seven accused were charged with committing theft of 18 bags of dried chillies to the value of Rs. 900, property in the possession of R. J. Jayaratna, Storekeeper, Subsidiary Foodstuffs Depot, Maradana, contrary to the provisions of section 369 of the Penal Code. The 2nd, 6th and 7th accused were found guilty of this offence and sentenced to a term of 1 year's rigorous imprisonment. The 1st, 3rd, 4th and 5th accused were convicted under section 394 of the Penal Code of dishonestly receiving or retaining stolen property or having reason to believe the same to be stolen property and were also sentenced to a term of 1 year's rigorous imprisonment. The 1st and 5th accused have appealed against their convictions.

The first point taken on behalf of the appellants is that there was a misjoinder of charges and that it was not open to the District Judge to find any of the accused guilty of an offence under section 394 of the Criminal Procedure Code. Section 184 of the Criminal Procedure Code deals with the joinder of charges against more persons than one and is worded as follows :—

> " When more persons than one are accused of jointly committing the same offence or of different offences committed in the same transaction or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence, they may be charged and tried together or separately as the Court thinks fit ; and the provisions contained in the former part of this chapter shall apply to all such charges."

The accused in this case were charged with committing the same offence and hence *prima facie* there would appear to be no misjoinder. Again there would be no misjoinder if some of the accused had been charged under section 369 and some under section 394, provided that these different offences were committed " in the same transaction ". Section 184 of the Criminal Procedure Code must be read with sections 181 and 182 which are worded as follows :—

> " 181. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with all or any one or more of such offences and any number of such charges may be tried at one trial and in a trial before the Supreme Court or a District Court may be included in one and the same indictment ; or he may be charged with having committed one of the said offences without specifiying which one."

Illustration

"A is accused of an act which may amount to theft or receiving stolen property or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust, and cheating, or he may be charged with having committed one of the following offences, to wit: theft, receiving stolen property, criminal breach of trust and cheating."

"182. If in the case mentioned in the last preceding section the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it."

Illustration

"A is charged with theft. It appears that he committed the offence of criminal breach of trust or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be) though he was not charged with such offence."

The first point that arises for decision is whether in the event of its being doubtful whether some of the accused are guilty of theft or dishonestly receiving stolen property, it is open to the Crown to join all of them in one charge even if the "theft" and dishonest receiving were not committed in the same transaction. Counsel have not been able to cite any authority covering this point. Can it be said in this case that the "act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute?" I am of opinion that it can be said in the case of the 1st, 3rd, 4th and 5th accused. It was proved at the trial by the witness Wappu, a watcher employed by the Marketing Department that the 2nd accused who was employed as a watcher at the Panadure Motor Transit Company Garage came to him about midnight and told him that they were going to do a certain thing and wanted him to be quiet. Then he saw the 6th and 7th accused who were watchers at the Subsidiary Foodstuffs Depot, remove in conjunction with the 2nd accused 24 bags of chillies in all from the Depot to the Panadure Motor Transit Company Garage and from the garage to the lorry. This witness although saying that there were others helping the 2nd, 6th and 7th accused states that he did not see the 1st, 3rd, 4th or 5th accused. The evidence of Sub-Inspector Basnayake was to the effect that about 2-30 a.m. the same morning he was in ambush at Darley Road-McCallum Road Junction with other police when lorry No. X 1115 came from the direction of the Subsidiary Foodstuffs Depot and turned into Darley Road and proceeded in the direction of Union Place. The Sub-Inspector followed in a patrol car and overtook the lorry which had no lights other than a hurricane lamp burning by the side of the driver. The lorry was overtaken and stopped. The 5th accused was the driver, whilst the 1st accused was in the front seat. The 3rd and 4th accused were behind. The lorry was loaded with 18 bags of chillies. The 5th accused handed the Sub-Inspector Rs. 100 in Rs. 10 notes. On statements made by the 1st and 5th accused the Sub-Inspector went to the Subsidiary Foodstuffs Depot in McCallum Road. There he found an open shed with bags of chillies in them. The 1st accused is a trader having a boutique in Dean's Road. The 3rd accused is a mechanic working in McCallum Road, the 4th accused is a servant employed by the 1st accused, whilst the 5th accused was a lorry driver who worked for the Panadure Motor Transit Company and at the time of this offence was employed by Messrs. Brooke Bond Ltd. The interval of time between the actual removal of the bags from the shed and their removal from the garage in the lorry was very short. In these circumstances all the accused, if guilty knowledge was established, were in possession of recently stolen property and could therefore have been found guilty of theft. In fact the District Judge in his judgment says: "it would seem that all the seven accused have planned jointly with one common purpose to commit this theft". In the circumstances I think there was, so far as some of the accused were concerned, a measure of doubt as to whether the Court could draw the inference that the facts constituted theft or dishonest receiving of property. In this connection I would refer to the decision of Canekeratne, J. in *Wijeyeratne vs. Menon* (48 N. L. R. at p. 164). The joinder of all the accused in one charge was therefore in order. In this connection the use of the word "accused" in section 181 includes both the singular and the plural, *vide* section 2 (*x*) of the Interpretation Ordinance, Cap. 2. If such joinder is legal, I am of opinion it follows that it is open to the Court to find some guilty of dishonest receiving. Section 182 must be read with section 181. Thus if after evidence has been given it is found that the accused committed a different offence with which they might have been charged under section 181, then section 182 can be availed of.

I am also of opinion that the offence namely dishonest receiving of which the 1st, 3rd, 4th and 5th accused were found guilty was committed "in the same transaction" as the offence namely theft, of which the 2nd, 6th and 7th accused were found guilty. Hence joinder of such offences was permissible under section 184 of the Criminal

Procedure Code. Various decisions have been cited by Counsel for the appellants, but none of them seem to be exactly in point so far as the facts of this case are concerned. In *Inspector Sourjah vs. Hinnihamy* (8 C. L. W. 20). Soertsz, J. held that the joinder of charges of house-breaking and theft against one accused with a charge of retaining stolen property against another is a fatal irregularity. In this case, however, all the accused were charged with theft. The judgment of Soertsz, J. does not deal with the position that arises when the case comes within the ambit of section 181 of the Criminal Procedure Code. In *P. Albertu Fernando vs. S. E. Fernando* (1 Ceylon Criminal Appeal Reports 30) two persons were charged together, the one with stealing a bull the other with dishonestly receiving the animal from the first. It was held that the offences were distinct and the accused could not be charged together at one trial. The interval of time precluded a presumption that the two offences formed one transaction. Moreover, in the present case the accused were charged with the same offence. In *Police Sergeant vs. Semijah* (3 Balasingham's Notes of Cases 61). Wood Renton, C.J. held that there was a misjoinder where in the same charge one accused was charged with the theft of a bull and the other with unlawful possession of beef, there being no evidence to connect the beef with the bull alleged to have been stolen. In *Jonklaas vs. Somadasa* (43 N. L. R. 284) it was held by Wijeyewardene, J. that community of purpose and continuity of action are essential elements necessary to link together different acts so as to form one and the same transaction within the meaning of section 184 of the Criminal Procedure Code. In this case I am of opinion that there was continuity of action. The community of purpose was the theft and disposal of the chillies. Our attention was also invited to various Indian decisions. It has been a matter of some difficulty to reconcile these decisions. In *Bishnu vs. Empress* (1897) 1 C. W. N. 35, it was held that when goods are stolen and subsequently received, it will depend on the circumstances whether the theft and the receipt are parts of one and the same transaction. So that the thief and the receiver can be tried together. Reference was made to the case of *Bishnu vs. Empress* in the judgment of Stephen, J. in *Abdul Majid vs. Emperor* (1906, 33 Calcutta 1256) in the following passage on pages 1263-1264 :—

> "The question then arises were they accused of different offences committed in the same transaction. It is to be noticed that the four of them, whose charges alone are before us, were charged with retaining only and not as they might have been, with retaining and receiving. It may be, however, that in this case this makes no difference, because an illegal receiving may be presumed from an illegal retention. Taking this to be so, and that we are to consider retaining to be the same thing as receiving, it appears from the case of *In re A. David* (1880) 5 C. L. R. 574 that where one prisoner stole and another received, they committed different offences in the same transaction, but this is subject to the qualification mentioned in *Bishnu vs. Empress* (1897 1 C. W. N. 35, that the offence of receiving must have been committed simultaneously with, which must mean very soon after, that of stealing. In the present case there is no evidence as to the circumstances under which the receiving took place; it may have taken place several days after the theft; the property may even have passed through several hands before it came into the possession of the accused. It is therefore impossible to hold that the offence of receiving by the petitioner and the offence of stealing by the unknown thief were offences committed in the same transaction within the meaning of section 239. Still less, as it seems to me, can it be held that the offences of the different accused were so connected. Consequently it follows that the joint trial of the accused was not according to law."

The two Indian cases I have cited were also followed in the case of *Ohi Bhusan Adhikary and another vs. Emperor* I. L. R. 46 Calcutta 741.

In the present case in my opinion the offence of receiving must have been committed very soon after that of stealing and hence the two offences form parts of one and the same transaction so that the thief and the receiver can be tried together.

Apart from the question of misjoinder Counsel for both the appellants have contended that the prosecution have not discharged the burden of proof. In *R. V. Abramovitch* (84 L. J. K. B. 396). it was held that :

> "The onus of proving guilty knowledge always remains upon the prosecution. The Judge, in directing the Jury should, where the circumstances of the case require it, tell them that, upon the prosecution establishing that the prisoner was in possession of goods recently stolen, they may, in the absence of any explanation by the prisoner of the way in which the goods came into his possession, which might reasonably be true, find him guilty, but that, if an explanation be given which the Jury think might reasonably be true, and which is consistent with innocence, although they are not convinced of its truth, the prisoner is entitled to be acquitted, inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the Jury beyond reasonable doubt of the guilt of the prisoner."

This decision represents the law as always followed in Ceylon *vide Fernando vs. Heiler* (46 N. L. R. 406). The appellants were entitled to be acquitted if the District Judge combining the functions of Judge and jury thought that their explanations might reasonably be true inasmuch as in such circumstances the Crown would have failed to discharge the duty cast upon it to satisfy the Court beyond reasonable doubt of the guilt of the accused. The District Judge has held that the explanations of the appellants were not

reasonably true. It is impossible to say that he was not justified in coming to this conclusion. In regard to the 5th accused on his own admission when giving evidence he consented to drive the lorry belonging to the Panadure Motor Transit Company at a very late hour at the request of the watcher. He had previously been an employee of the Company and hence must have known that what was going on was not above board. Moreover on arrest he handed Rs. 100 to the Sub-Inspector. I consider the District Judge was right in holding that his explanation was not reasonably true. A fortiori the explanation given by the 1st accused was not one that could be reasonably accepted by the District Judge.

It has also been contended by Counsel for both the appellants that exclusive possession necessary for their conviction was not established in the case of the 1st and 5th accused. Guilty knowledge of these accused was established beyond reasonable doubt. In my opinion a conspiracy to remove the stolen articles in the lorry was proved. In these circumstances the exclusive possession of the 1st accused who was the buyer of the goods and the 5th accused who was the driver of the lorry transporting them was established. For the reasons I have given the appeals are dismissed.

Appeals dismissed.

JAYETILEKE, J.
I agree.

Present : DIAS, J.

DIAS BANDARANAIKE, A. S. P., KANKESANTURAI vs. KANTHASWAMY

S. C. No. 339—*M. C. Point Pedro.*
In Revision re *the Extradition of R. A. Kandasamy.*
Argued on : 25th August, 1947.
Decided on : 26th August, 1947.

Fugitive Offenders Act, sections 13 *and* 14—*Person convicted of criminal offence in British India—Admitted to bail pending appeal—Conviction and sentence of imprisonment affirmed in appeal—Escape to Ceylon without surrendering to Indian Court—Warrant issued by Indian Court brought to Ceylon—Endorsed by Magistrate for execution—Validity of warrant.*

Where a person convicted in British India in a Court of Sessions appealed against his conviction and sentence and the appeal was dismissed, and without surrendering to the Sessions Court to serve his sentence, he was found at large in Ceylon, and subsequently arrested in Ceylon on a warrant signed by the Sub-Divisional Magistrate of Negapatam and the Additional District Magistrate, Tanjore District, and endorsed by the Magistrate, Point Pedro.

Held : (i.) That before a warrant issued in India is endorsed for execution in Ceylon under the Fugitive Offenders Act there, should be proof that the person issuing it had lawful authority to do so.

(ii.) That the warrant must be signed by the presiding Judge of the Court in which the person is convicted.

H. V. Perera, K.C., with *H. W. Thambiah, H. Wanigatunge* and *S. Mahadevan*, for petitioner.

H. Deheragoda, Crown Counsel, for Attorney-General, on Notice.

DIAS, J.

The petitioner was tried in the Court of Sessions, East Tanjore Division, at Negapatam (a place within what was known as "British India") for the offence of criminal intimidation under section 506 of the Indian Penal Code. After trial he was convicted and sentenced to undergo two years' rigorous imprisonment and to pay a fine of Rs. 1,000 and in default to undergo 6 months' rigorous imprisonment (see exhibit P 3). The petitioner then appealed to the High Court of Madras, which ordered the Sessions Judge to admit the petitioner to bail pending the determination of the appeal.

The High Court affirmed the conviction but set aside the fine, but the substantive sentence of two years' rigorous imprisonment was confirmed (see P 4).

The petitioner thereafter applied to the Privy Council for special leave to appeal. This application was refused (see P 5 of October 25, 1945).

It is alleged that the petitioner thereafter without surrendering to the Indian Court and serving his sentence is unlawfully at large in Ceylon before the expiry of his sentence.

An earlier abortive attempt by the Indian Authorities to secure the surrender of this peti-

tioner is reported in 47 N. L. R. 470. This Court then held that the proceedings culminating in the order for the surrender of the alleged fugitive were defective and directed the petitioner to be forthwith discharged and freed from all restraint so far as those proceedings were concerned.

The Indian Authorities thereupon started *de novo*. The warrant issued by the Indian Court is the exhibit P 1. That warrant bears the signatures of the Sub-Divisional Magistrate of Negapatam and of the Additional District Magistrate, Tanjore District. Both these signatures have been authenticated by the respective seals of the two Magistrates' Courts. There is also appended the affidavit of K. Marimuthu Pillai, the escort, to the effect that the Subdivisional Magistrate of Negapatam signed and sealed the warrant in his presence.

Marimuttu Pillai, who is a head constable of the Tanjore Police Force, brought this warrant and the connected papers to the Magistrate at Point Pedro who thereupon under Part II. of the Fugitive Offenders Act 1881,44 and 45 Vict. C 69 endorsed the warrant for execution to Sub-Inspector Rossairo of the Ceylon Police and K. Marimuttu Pillai of the Tanjore Police and every Police officer in Ceylon for the arrest of the person named in the warrant.

Mr. H. V. Perera for the petitioner has taken objection to the summary way in which the Point Pedro Magistrate endorsed the Indian warrant. Section 13* of the Fugitive Offenders Act provides the procedure to be followed by the Ceylon Magistrate when such a warrant is produced before him for "backing" or endorsement. The relevant words of section 13 of the Act read as follows :— "A Magistrate in the last mentioned Possession (*i.e.* in Ceylon) if satisfied that the warrant was issued by a person having lawful authority to issue the same may endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be sufficient authority to apprehend within the jurisdiction of the endorsing Magistrate the person named in the warrant and bring him before the endorsing Magistrate or some other Magistrate in the same Possession." Mr. H. V. Perera contends that there is nothing on record to show that before the Point Pedro Magistrate endorsed the warrant P 1 he was "satisfied that it was issued "by a person having lawful authority to issue the same". It is unnecessary to consider this aspect of the matter further, in view of what follows :—

This petitioner was apprehended under the warrant P 1 and produced before the Point Pedro Magistrate. The proceedings culminating in the endorsement of the warrant were necessarily *ex parte*. When the alleged fugitive is arrested the procedure to be followed thereafter is *inter partes* and is laid down by section 14 of the Act†. That procedure can be summarised as follows :—

It is the duty of the person demanding the surrender of the prisoner to make out his case for the surrender of the fugutive. The onus is on him to prove that this is a proper case in which the surrender of the person arrested should be granted. The points requiring proof are :

(*a*) that the warrant was duly "authenticated" as directed by the Act ;

(*b*) that it was issued by a person having lawful authority to issue the same ; and

(*c*) that the Magistrate should be satisfied by the evidence that the prisoner then before the Court is the person named or otherwise described in the warrant.

Although under section 14 of the Act a Magistrate may, on proof of the foregoing, direct the surrender of the fugitive, yet under section 19 of the Act the Magistrate (or the Supreme Court in the exercise of its revisional powers or on an

* **Section 13** : Where in a British possession of a group to which this part of this Act applies a warrant has been issued for the apprehension of a person accused of an offence punishable by law in that possession, and such person is or is suspected of being in or on the way to another British possession of the same group, a Magistrate in the last mentioned possession, if satisfied that the warrant was issued by a person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be a sufficient authority to apprehend, within the jurisdiction of the endorsing Magistrate, the person named in ths warrant, and bring him before the endorsing Magistrate or some other Magistrate in the same British possession

† **Section 14** : The Magistrate before whom a person so apprehended is brought, if he is satisfied that the warrant is duly authenticated as directed by this Act and was issued by a person having lawful authority to issue the same, and is satisfied on oath that the prisoner is the person named or otherwise described in the warrant, may order such prisoner to be returned to the British possession in which the warrant was issued, and for that purpose to be delivered into custody of the persons to whom the warrant is addressed, or any one or more of them, and to be held in custody and conveyed by sea or otherwise into the British possession in which the warrant was issued, there to be dealt with according to law. Such order for return may be made by warrant under the hand of the Magistrate making it, and may be executed according to the tenor thereof.

A Magistrate shall, so far as is requisite for the exercise of the powers of this section, have the same power, including the power to remand and admit to bail a prisoner, as he has in the case of a person apprehended under a warrant issued by him.

application for a writ of *habeas corpus*) can go into the merits of the case in respect of which the surrender is demanded.

Mr. Perera admits that the warrant has been authenticated and he also admits that the petitioner is the identical person named in the warrant. But he contends that there is a total absence of proof that the warrant P 1 was issued by a person having lawful authority to issue it within the meaning of section 14.

Considering the precision with which this Act has been drafted and the simple nature of the procedure provided, there should be no difficulty as to whether the warrant was issued by a person having lawful authority to issue it. As I have pointed out, before, when the Point Pedro Magistrate endorsed the warrant he ought to have satisfied himself on that point, and normally, therefore, when the fugitive appeared before the Court, proof of this fact should have been purely formal and should have created no difficulty. On the other hand, if the three ingredients of proof under section 14 of the Act or any one of them are or is not established, the whole proceedings will be vitiated and the prisoner would be entitled to his discharge. It is, therefore, necessary to consider whether the warrant P 1 was issued by a person having lawful authority to issue the same.

One point at once strikes the eye. This petitioner was convicted by the Court of Sessions at Negapatam. When the High Court of Madras in its appellate jurisdiction and the Privy Council affirmed the conviction, one would normally expect it would be for a Judge of the Court of Sessions at Negapatam to issue the extradition warrant. But P 1 has not been issued by a Judge of the Court of Sessions at Negapatam but by the Sub-Divisional Magistrate and Additional District Magistrate of Negapatam, and, therefore, Mr. H. V. Perera argues that these two officers have no authority to issue a warrant for and on behalf of the Judge of the Court of Sessions at Negapatam. If we take a Ceylon analogy, once the Magistrate commits an accused to the District Court for trial he is *functus officio* and loses *sesin* of the record. Thereafter the District Judge will hold the trial and the accused, if convicted, will appeal to the Supreme Court. If the Supreme Court affirm the conviction, under section 350 of the Criminal Procedure Code the Supreme Court will certify its order under its seal to the District Court " which shall thereupon make such orders as are conformable to the order so certified ". If the accused does not appear before the District Court to serve his sentence and is unlawfully at large in India the extradition warrant will be signed not by the committing Magistrate but by the District Judge. It is only he who is authorised either to issue a warrant for the arrest of the accused in Ceylon or to issue a warrant under Part II of the Fugitive Offenders Act for his arrest in India.

Now, Indian Law is " foreign law ". Although the Ceylon Criminal Procedure Code is based on the Indian Criminal Procedure Code the Judges in Ceylon are not bound to take judicial notice of Indian law. It is a question of fact to be proved by the person demanding the surrender of the fugutive. What the escort has done in this case is to produce copies of the Indian Penal Code and the Indian Criminal Procedure Code and expect Ceylon Courts to ascertain as best as they can what the Indian Procedure Code lays down in a case of this kind. Neither the researches of Mr. H. V. Perera, nor of the Crown Counsel have shown me any section or provision in the Indian Criminal Procedure Code which authorises a Sub-Divisional or Additional District Magistrate to issue a warrant for or on behalf of the Sessions Judge.

I have studied the provisions of the Indian Criminal Procedure Code in order to ascertain whether any power exists in a Sessions Judge to delegate to a District Magistrate or to a Sub-Divisional Magistrate any of his powers generally, or the special powers conferred on him under section 425 of the Indian Code when the High Court in its appellate jurisdiction returns the record of a case to the Sessions Judge who tried the case to carry out the judgment of the High Court in appeal.

A " Sessions Judge " is defined by section 9 (1) of the Indian Code, a " District Magistrate " and an " Additional District Magistrate " by section 10. A " Sub-Divisional Magistrate " is defined by section 13 (2).

Section 17 of the Indian Code subordinates these officers to certain higher authority, but section 17 (5) provides that " Neither District Magistrate nor the Magistrates or Benches appointed or constituted under sections 12, 13, 14 and 15 shall be subordinate to the Sessions Judge *except to the extent and in the manner hereinafter expressly provided* ". Chitaley & Rao in their commentary on the Indian Criminal Procedure Code (1946 edition) Vol. 1, page 289, say that " express provision to the contrary " has been made by ss. 123, 193, 195, 408, 435 and 436 of the Indian Criminal Procedure Code. I have studied these provisions but they contain nothing relevant to the matter now under consideration. Sections 435 and 536 confer on a Sessions Judge the right

to call for and revise the proceedings of an inferior Court within his jurisdiction and to make the requisite orders. The exercise of no such powers was called for in the case now under consideration.

Section 75 of the Indian Code deals with the issue of warrants of arrest. It is provided that every warrant of arrest issued by a Court under this Code shall be in writing *and signed by the presiding officer*. Chitaley (Vol. 1, pages 406-407) " A warrant of arrest in order to be valid must fulfil the following requirements :—(*a*) It must be in writing, (*b*) it must be signed by the presiding officer. A warrant which is not signed by the authority issuing it is invalid, and any arrest made in execution of such warrant is illegal..... The signature must be that of *the presiding officer of the Court*, and not that of any other Magistrate."

Section 193 (1) of the Indian Code provides that " except as otherwise expressly provided.....no Court of Sessions shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf ". Section 206 indicates what Magistrates commit cases for trial before the Sessions Court. Section 218 indicates that once the case is committed, the committing Magistrate is *functus officio*. The procedure to be followed at a trial in the Court of Sessions is provided by section 268 *et seq* of the Indian Code.

Appeals from an Assistant Sessions Judge go to the Court of Sessions. Section 408, while appeals from a Sessions Judge or Additional Sessions Judge go to the High Court—Section 410. When the appeal is disposed of by the High Court, the judgment or the order made is certified to " the Court by which the finding, sentence, or order appealed against was recorded and passed "—Section 425 (1). The Court to which the High Court certifies its judgment or order " shall thereupon make such orders as are conformable to the judgment or order of the High Court "—Section 425 (2). There is no power or jurisdiction given to the Court of trial to delegate the duty of the issue of a warrant for the arrest of an absconding accused (*e.g.* under section 92 of the Indian Code). to the committing Magistrate or other subordinate officer.

Whether such power exists under the Indian Extradition Acts we do not, and cannot be expected to, know. It is for the person demanding the surrender of the fugitive to make these things plain—See de Mello's Law of Extradition & Fugitive Offenders (1933 edition), p. 64.

Mr. Perera rightly complains that an item of inadmissible evidence has been allowed to be produced which must have prejudiced the mind of the Magistrate in these proceedings. This is the exhibit P 2. It is a letter written by the Additional District Magistrate, Tanjore, to the Inspector-General of Police, Ceylon, and reads as follows :—" This is to inform you that the Sub-Divisional Magistrate at Negapatam has issued the annexed warrant of arrest on S. A. Kandasamy on orders of the Court of Sessions, East Tanjore, at Negapatam ". In the first place this document was produced by Mr. Dias Bandaranaike, Superintendent of Police, and not by the Inspector-General of Police. In the second place no authority is cited for the proposition that the Court of Sessions has power either under the Indian Law or under the Fugitive Offenders Act to authorise a Magistrate to issue a warrant like P 1 on behalf of the Sessions Judge. Can a District Judge authorise a Magistrate to issue a warrant on behalf of the District Judge ? I think the Magistrate erred in admitting P 2 as evidence. This is reflected in his judgment in the following passage :—" P 2 is a document received by the A. S. P. in the course of his official duties. There it is stated that the Court of Sessions has directed the Sub-Divisional Magistrate to issue the warrant. In the absence of any provision to the contrary I have to hold that the person issuing the warrant had the authority to do so ". I think this is fallacious reasoning and has prejudiced the petitioner. Section 14 of the Act provides that he must be satisfied *inter alia* that the warrant was issued by a person having lawful authority to issue the same. Simply because the Additional District Magistrate, Tanjore, informed the Inspector-General of Police, Ceylon, that the Sub-Divisional Magistrate at Negapatam issued the warrant P 1 on the orders of the Court of Sessions, East Tanjore, it does not prove that this Magistrate was lawfully authorised to issue it.

Mr. Perera stresses two sections in the Indian Criminal Procedure Code. Section 92 of that Code corresponds to our section 65. Section 92 of the Indian Criminal Procedure Code provides that when " any person who is bound by any bond taken under this Code to appear before a Court does not so appear, *the officer presiding in such Court* may issue a warrant directing that such person be arrested and produced before him." Suppose this petitioner instead of coming to Ceylon did not surrender to his bail in India, under section 92 of the Indian Code it is the Judge of the Court of Sessions who would have to issue the warrant for his arrest. The extradition warrant is only an extension of this principle. If the Indian Law is that in spite of section 92 some other officer would have lawfully issued the

warrant referred to in that section, it is for the person demanding the surrender of the accused to satisfy the Ceylon Courts on that point. I have not been able to find any such provision.

The second section of the Indian Criminal Procedure Code relied on by Mr. Perera is section 425 which corresponds to our section 350. Section 425 provides that " whenever a case is decided on appeal by the High Court.....it shall certify its judgment or order to *the Court by which the finding, sentence or order appealed* against was recorded or passed.....the Court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or the order of the High Court ". *Delegatus non potest delegari.* Obviously when the Court of Appeal certified to the Court of Sessions that the conviction of this petitioner was affirmed it was for the Sessions Court to make such orders so as to carry out the directions of the High Court.

I, therefore, regretfully come to the conclusion that in terms of section 14 of the Fugitive Offenders Act a case has not been made out for the surrender of this fugutive. I say I come to this conclusion with regret because once it is admitted that this petitioner is the convict referred to in the warrant and in the judgment of the Indian Courts it is quite clear that for a great many years he has been circumventing the processes of the Law by being unlawfully at large before the expiry of his sentence, but that is no reason for slurring over a defect in procedure of this kind. I, therefore, set aside the order for the surrender of this accused and direct that he be freed from further restraint so far as these proceedings are concerned.

Set aside.

Present : Dias, J.

De SARAM, INSPECTOR OF POLICE, AMBALANGODA vs. WIMALASINGHE & ANOTHER

S. C. No. 773-774/1947—M. C. Balapitiya No. 57702.
Argued on : 29th August, 1947.
Decided on : 2nd September, 1947.

Criminal Procedure Code, sections 148 (1) (*b*) *and* 187—*Offence triable summarily—Plaint filed under section* 148 (1) (*b*)—*Evidence of witness recorded under section* 187 *before framing of charge—Previous evidence read over after framing of charge and witness cross-examined at length—Legality of procedure—Prejudice to accused.*

Where in an offence triable summarily, the Magistrate, before framing the charge, recorded evidence to satisfy himself that there was sufficient ground for proceeding against the accused as required by section 187 of the Criminal Procedure Code, and after the charge was framed, the evidence so recorded was read over to the accused in the presence of the witness who was thereafter cross-examined at length.

Held : That the evidence of the witness was properly recorded and that the conviction based on such evidence was valid.

Cases referred to : *Rex vs. Weerasamy* (1941) 43 N. L. R. at p. 184.
Herath vs. Jabbar (1940) 41 N. L. R. 217.
Rex vs. Beyal Singho (1946) 47 N. L. R. at p. 456.
Mussfer vs. Wijeyesinghe (1941) 43 N. L. R. 61.
Abeysinghe vs. Menika (1942) 43 N. L. R. 419.
Rex vs. Mohottihamy (1941) 42 N. L. R. 124.
Dhanapala vs. D. R. O., Vavuniya (1946) 47 N. L. R. 478.
Pitche vs. Rajasuriya (1946) 47 N. L. R. 566.
Somadasa vs. Jehoran (1946) 48 N. L. R. 304.
Dionis vs. Piyoris (1942) 43 N. L. R. 236.
Wilfred vs. Inspector of Police, Panadure (1945) 46 N. L. R. 553.
Derby Union vs. The Metropolitan Life Assurance Society (1897) A. C. 647).

A. H. C. de Silva with *K. C. de Silva*, for 2nd accused-appellant.
No appearance for 1st accused-appellant.
B. C. F. Jayaratne, Crown Counsel, for Attorney-General.

Dias, J.

These appeals disclose no merits on the facts. On January 18, 1947, the police arrested Kalumahatmaya and Sumathipala for committing criminal trespass and being drunk and disorderly in a public place. When they were being conveyed under arrest to the police station in a motor car which had to halt temporarily owing to a deflated tyre, Kalumahatmaya seeing the 1st accused riding on a cycle called out to him and at the same time immobilised the car by removing the switch key. The 1st accused dismounted from his cycle and going up to the car opened the door of the vehicle and demanded the release of both men. When the police sergeant refused, the 1st accused pulled the men out of the car. When the police officers endeavoured to prevent their rescue, the 1st accused called out to the 2nd accused who was standing near, and both of them assaulted the police officers and rescued the two men. The police officers bore marks of the assault. The Magistrate in a careful judgment has given reasons for his finding that the charges have been proved. I see no reason for holding that he has come to a wrong conclusion on the facts. Each appellant was sentenced to undergo four months' rigorous imprisonment. Having regard to the high-handed nature of the offences proved against them, it cannot be said that the sentences are excessive.

The appeal, however, has been pressed on another ground. It is urged that the Magistrate has committed such an irregularity in his procedure that the convictions cannot stand, and that, at least, the convictions must be set aside and the case sent back for a re-trial before another Magistrate.

The offences were committed on January 19. On January 21 the police filed a plaint under section 148 (1) (*b*) of the Criminal Procedure Code. On that day both appellants were present in Court, probably on police bail, and were represented by proctors. There was thus no necessity for the Magistrate to hold any examination of witnesses under section 151 of the Code prior to formulating the charge. The offences were summarily triable. Therefore under section 187 before formulating the charge, the Magistrate had to be " of opinion that there was sufficient ground for proceeding against the accused ". Therefore, police constable Wakista was called and examined in chief in the presence of the accused and their proctors. Immediately after this examination the Magistrate framed charges to which each accused pleaded not guilty. The Magistrate then fixed the trial. When the trial was resumed witnesses were called for the prosecution. Police constable Wakista also was recalled, the previous evidence given by him was read over, and he was cross-examined at length by the defence when he went over the ground already referred to by him in chief. He now amplified that evidence by giving a fuller picture of the facts.

It is submitted that the whole trial is vitiated because the Magistrate failed to record *de novo* his examination in chief on Wakista's recall. The question is whether this submission is sound?

The law draws a distinction between the commencement of the " proceedings " leading up to an inquiry or trial, and the commencement of the " inquiry or trial "—see per Soertsz, J. in *R. vs. Weerasamy* (1941) 43 N. L. R. at p. 184 and the observations of the Court of Criminal Appeal in the same case in 43 N. L. R. at pp. 209-210. Chapter XV of the Criminal Procedure Code is headed " Of the Commencement of Proceedings before Magistrate's Courts ". In a non-summary inquiry, therefore, the proceedings commence by the Magistrate under section 156 reading over to the accused the charge or charges in respect of which the inquiry is being held. A summary trial before a Magistrate under *Chapter XVIII* commences with the framing of the charge against the accused, and the recording of his plea. When a Magistrate decides under section 152 (3) of the Criminal Procedure Code to try summarily an offence which is non-summary, the proceedings commence when the Magistrate assumes such jurisdiction and frames the charge against the accused. A trial before a District Court and the Supreme Court commences when the accused is arraigned on the indictment which is read and explained to him, and his plea is recorded. All evidence recorded before the commencement of the inquiry or trial are proceedings preliminary to the inquiry or trial.

In the leading case of *Herath vs. Jabbar* (1940) 41 N. L. R. 217 a Divisional Bench had to decide where certain witnesses had been examined in the absence of one of the accused preliminary to his trial and such evidence was not recorded under the provisions of section 151 or section 407 of the Criminal Procedure Code, whether those witnesses should have given their evidence *de novo* in the presence of the accused after his arrest, or whether the mere reading over of their previous evidence in the presence of that accused with the opportunity given of cross-examining them, was a sufficient compliance with the law? The facts in *Herath vs Jabbar* are material in order to appreciate the principle laid down by the Divisional Court: The proceedings were initiated under section 148 (1) (*b*). There were two

accused, one of whom appeared while the 1st accused was absent. On May 30 the Magistrate after recording some evidence in the presence of the 2nd accused ordered a warrant to issue against the 1st accused. In so doing the Magistrate was clearly acting under section 151 (1) proviso (ii.) which directed him, before issuing a warrant on the absent 1st accused, to examine on oath the complainant or some material witness or witnesses. On June 14, however, the Magistrate made a slip. The 1st accused was still absent. On that day the Magistrate in the absence of the 1st accused, but in the presence of the 2nd accused, took the evidence of certain further witnesses. In so doing he did not act so far as the 1st accused was concerned under section 407 of the Criminal Procedure Code. Nor could he act under section 151 because that section was exhausted when he issued the warrant for the arrest of the 1st accused In fact, the evidence recorded on June 14, so far as the absent 1st accused was concerned, was not taken under the provisions of any section of the Code which permitted such evidence to be taken against him. The question was whether the evidence of the witnesses recorded on June 14 could merely be read over to the 1st accused when he appeared, or whether those witnesses should be examined *de novo*? The Court held that the answer to this question is to be found in section 297 of the Criminal Procedure Code which reads:—

> "Except as otherwise expressly provided, all evidence taken at inquiries or trials under this Ordinance shall be taken in the presence of the accused, or when his personal attendance 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."

The Court held that the word "evidence" in the proviso to section 297 "clearly refers to evidence which has been *properly recorded* against an accused in *his absence*", *e.g.* under section 151 (1) proviso (11) or under section 407 On the facts it was held that the evidence taken in the absence of the accused had been improperly recorded, *i.e.* in a manner not provided by law, and that it was not a compliance with the provisions of section 297 merely to read the previous evidence of such witnesses when the accused appeared for trial or inquiry. Such witnesses should have been examined *de novo* in the presence of the accused. The conviction was therefore quashed and the case was sent back for a new trial before another Magistrate.

The basis of the decision in *Herath vs. Jabbar* (1940) 41 N. L. R. 217 is that if evidence has been given in the absence of an accused before an inquiry or trial commences, and if that evidence has been taken improperly, that is to say, where no provision has been made by law for the recording of such evidence in the absence of the accused, then when the accused appears and the inquiry or trial commences, the witnesses who had given evidence in the absence of the accused must be recalled and their evidence taken *de novo* in the presence of the accused. The failure to do this vitiates the conviction of the accused. On the other hand, if in the absence of the accused, the evidence of witnesses has been properly recorded, that is to say in a manner provided for by law, then when the accused appears and the inquiry or trial commences, it will be sufficient to recall the witnesses and in their presence to read their previous evidence over to the accused, who should be allowed to cross-examine them.

It is sometimes difficult to decide into which category a given case falls. In *R. vs. Beyal Singho* (1946) 47 N. L. R. 456 when evidence was recorded in the absence of an absconding accused in terms of section 407 of the Criminal Procedure Code, it was held that the witness need not be examined *de novo* when the accused appeared in Court as the witness was examined in the absence of the accused under a legal provision which expressly provided for this being done. That this view is correct is made clear from the language used in *Herath vs. Jabbar* (1940) 41 N. L. R. 217 when the Divisional Court said (at p. 220): It is to be noted that the 1st accused was not regarded as having absconded. In that event different consideration would apply (section 407)". In *Mussfer vs. Wijeyesinghe* (1941) 43 N. L. R. 61 where evidence was recorded in the absence of the accused in the manner provided by section 151 (1) *proviso* (*ii.*) it was held that the witness need not be examined *de novo* when the accused appeared. That case was followed with approval in *Abeysinghe vs. Menika* (1942) 43 N. L. R. 419. Where a Magistrate proceeded to the scene of culpable homicide and recorded the evidence of witnesses at the scene in the absence of the accused, the Court of Criminal Appeal expressed the view that such evidence could be read over to the accused when he appeared—*R. vs. Mohottihamy* (1941) 42 N.L. R 124. In *Dhanapala vs. D. R. O., Vavuniya* (1946) 47 N. L. R. 478 the accused had been brought before the Court under the provisions of section 148 (1) (*d*). The Magistrate, as he was bound to do under section 150 (2), examined certain witnesses. It was held that there was no need to examine those witnesses *de novo* after the accused had been arrested. This case appears to be in conflict with the cases of *Pitche vs. Rajasuriya*

(1946) 47 N. L. R. 566 and *Somadasa vs. Jehoran* (1946) 48 N. L. R. 304.

The question also arose in a different form. When a Magistrate, in order to decide whether he should assume jurisdiction under section 152 (3) of the Criminal Procedure Code to try summarily a non-summary offence, examines a witness, should the evidence of such witness be recorded *de novo* after the Magistrate had assumed jurisdiction under section 152 (3)? This question was answered in the affirmative in *Dionis vs. Piyoris* (1942) 43 N. L. R. 236 and in the two Judges' decision of *Wilfred vs. Inspector of Police, Panadura* (1945) 46 N. L. R. 553. The *ratio decidandi* is contained in the following passage :—"Learned Counsel for the Crown contended that the proviso (to section 297) impliedly excludes from the operation of the section evidence that has been recorded in the presence of the accused. On a careful consideration of the terms of the section and of the effect of the proviso with reference to the substantive words of the section we are of opinion that there is no force whatsoever in this contention..... The language of section 297 is clear and unambiguous, and according to the authority I have quoted (*West Derby Union vs. The Metropolitan Life Assurance Society* (1897) A. C. 647), the construction that the proviso impliedly excludes evidence recorded in the presence of the accused from the operation of the section cannot be supported. We fully appreciate that it seems inconsistent that evidence recorded *in the presence of the accused* cannot be read over, whilst evidence recorded in his absence can be read over. But we cannot be affected by it. All we can do is to construe the section. The matter may well be one for the attention of the Legislature to remedy the defect. We agree with the view held by Hearne, J. in *Dionis vs. Perera* (1942) 43 N. L. R. 236 that in the absence of a proviso covering such evidence it has to be recorded *de novo*. The question we are considering seems to have arisen incidentally in the case of *Abeysinghe vs. Menika* (1942) 43 N. L. R. 419 and in the course of his judgment Howard, C.J. has dealt with the inconsistency we have referred to. He has, however, not decided the question. For these reasons we are of opinion that Mr. Jayawardene's contention must be upheld". It was held that a defect of this kind was fatal to the conviction and a new trial was ordered. It is to be observed that the case of *Herath vs. Jabbar* (1940) 41 N.L.R. 217, although cited at the argument, was not considered in the judgment of *Wilfred vs. Inspector of Police, Panadura* (1945) 46 N. L. R. 553. When a Magistrate takes up a non-summary case for inquiry, and then decides to assume an entirely new jurisdiction under section 152 (3), it would seem on principle that after that new jurisdiction has been assumed the accused is entitled to have all the witnesses previously examined recalled and examined *de novo*.

In passing I may be permitted to observe that the dictum in *Somadasa vs. Jehoran* (1946) 48 N. L. R. 304 that " any evidence recorded before the commencement of the trial, even in a summary case, cannot be made use of against the accused at his trial, even though the evidence be read over to him, and even if the accused is afforded an opportunity of cross-examining the witnesses who gave such evidence " appears to be too wide. There are cases when this may properly be done.

Coming to the facts of the case before me. the Magistrate under section 187 of the Criminal Procedure Code before forming charges against the appellants had to be satisfied that there was sufficient ground for proceeding against them. The Magistrate could not form that judicial opinion except on evidence. In order to enable him to do so, the Magistrate, as he was entitled to do under section 187, caused police constable Wakista to be examined in the presence of the accused and their legal advisers. The trial then began when the Magistrate framed charges against the appellants. Wakista was recalled and his evidence was read over in the presence of the witness to the appellants who, thereupon, cross-examined the witness who amplified his examination in chief and gave a fuller account of the transaction.

This is not a case where the Magistrate was examining a witness in order to decide whether he was to assume a new jurisdiction under section 152 (3) of the Code. What the Magistrate did was to record evidence previous to the commencement of the trial under section 187 which empowered him to do so. The evidence therefore was not recorded improperly. It seems to me, therefore, that the case comes within the principle laid down in *Herath vs. Jabbar* (1940) 41 N. L. R. 217 by the Divisional Court. I, therefore, hold that no irregularity was committed when Wakistas' evidence was read over to the appellants after the charge was framed. Furthermore, no prejudice whatever was caused to the appellants by the procedure adopted. In fact, this point was not taken in the petitions of appeal.

The appeals are dismissed.

Appeals dismissed.

Present : CANEKERATNE, J.

SURIYAWANSA vs. THE LOCAL GOVT. SERVICE COMMISSION & 3 OTHERS

Application for Writs of Certiorari and Mandamus on the Local Government Service Commission and 3 others (283).
Argued on : 1st September, 1947.
Decided on : 15th September, 1947.

Certiorari and Mandamus—Application for writs against Local Government Service Commission and three others—Allegations of misconduct against employee—Inquiry by Commission—Dismissal of employee—Whether decision to dismiss is a judicial or administrative act—Local Government Service Ordinance No. 43 of 1945.

The applicant was an employee of the Kandy Municipal Council and was its Maternity and Child Welfare Officer. By Ordinance No. 43 of 1945 he was transferred to the Local Government Service, of which he became a member as from April 1, 1946, while continuing to act in the same capacity.

Allegations of improper conduct against the applicant were made to the Commissioner of the Municipal Council, Kandy. The Council interdicted him. Subsequently an inquiry was held by a properly constituted Local Government Service Commission. The accused and his lawyers were present. The Commission after hearing evidence decided that the applicant should be dismissed from the service.

The applicant moved the Supreme Court for an order of Certiorari to bring up and quash " the findings and order of the 1st respondent ". He further moved for a writ of mandamus on the 1st respondent.

At the hearing, Counsel for the 1st respondent raised the preliminary point that the Court should not proceed with this matter because Certiorari does not lie to the Supreme Court from such an order.

Held : (i.) That the writ of Certiorari does not lie in the circumstances, inasmuch as the dismissal resulted from a decision of the Local Government Commission in the capacity of employer of the petitioner.

(ii.) That the action although involving the exercise of judgment and discretion is more of an executive or administrative character than judicial.

Per CANEKERATNE, J.—" The absolute right which a master might have had, has been cut down by the statute which confers upon the servants of the Municipality transferred to the Local Government Service Commission a certain measure of fixity of tenure. They can only be dismissed in accordance with the procedure laid down by section 23 (1) and (2). If the applicant complains that he was wrongfully or illegally dismissed (*i.e.* not in accordance with the provisions of the contract of employment or of the Ordinance), there would be nothing to preclude him from bringing an action to obtain such relief as a Court can give for breach of contract. Nothing I say in the course of this order should affect this right."

Cases referred to : *Short vs. Poole Corporation* (1926) 1 Ch. 66 at p. 85.
Rex vs. Woodhouse (1906) 2 K. B. 501.
Rex vs. Electricity Commissioners (1924) 1 K. B. p. 205.

H. V. Perera, K.C., with *U. A. Jayasundera* and *H. W. Jayawardene*, for petitioner.
E. F. N. Gratiaen, K.C., with *D. W. Fernando*, for 1st respondent.

CANEKERATNE, J.

This is an application for an order of Certiorari to bring up and quash " the findings and order made by the 1st respondent ", namely the document marked P 4 whereby the applicant was informed that he was guilty of the charges framed against him and that he was dismissed from its service. The applicant further asks for a writ of mandamus on the 1st respondent.

The applicant started his career as a Medical Officer to the Municipal Council of Kandy and was in the employ of the Council on March 31, 1946 ; he was then employed as its Maternity and Child Welfare Medical Officer. By Ordinance No. 43 of 1945 which came into operation about November 21, 1945, a Local Government Service Commission was established ; this is an incorporated body. By the provisions of this Ordinance the applicant was transferred to and became a member of the Service of the 1st respondent as from April 1, 1946, continuing in the same capacity as before.

The facts which emerged, of which the Court was informed when the case came up for hearing, were these : while the applicant was a member of the service of the 1st respondent allegations of a serious nature were made against him to the Commissioner of the Municipal Council of Kandy, the complaint was forwarded to the 1st respondent and he was interdicted by that body on April 3, 1947 ; on or about April 12, 1947, he was given an opportunity of showing cause why he should not be dismissed from service or otherwise punished on the ground that he had been guilty of improper conduct in respect of one Mrs. P. N. Gunawardene ; of being heard at the inquiry into the allegations and stating his case and view. He had notice of the date of inquiry which was

held in the presence of the applicant and his lawyers by the 2nd, 3rd and 4th respondents who thereafter made a report ; and at a meeting of the Commissioners held on May 19, 1947, the members after considering the report and evidence, unanimously decided that the applicant should be dismissed from the service of the 1st respondent, and this decision was communicated to him.

The Local Government Service Commission is composed of the Commissioner of Local Government and four other persons nominated by the Minister of Local Government. The 2nd, 3rd and 4th respondents are three of the persons so nominated. At the hearing before me Counsel for the 1st respondent took the preliminary point that the Court should not proceed with this matter because certiorari does not lie to the Supreme Court from this order and it was agreed that this preliminary point should be first discussed.

Mr. Gratiaen contends that the decision of the 1st respondent was an administrative act and cannot be challenged by certiorari. Mr. Perera contends that this was a judicial or quasi-judicial act and that the 1st respondent acted without jurisdiction or in excess of jurisdiction. It was contended on behalf of the applicant that no legally constituted meeting of the 1st respondent was held inasmuch as the person specified as the Chairman was not present at the inquiry. It is contended further that one member of the Commission conducted himself with regard to the inquiry in such a way that he may reasonably be supposed to have had a bias which would render him unfit for deciding the important issue.

The question of the issue of a mandamus would only arise if the *rule nisi* for a certiorari is made absolute. In its application mandamus is confined to cases where no effectual relief can be obtained in the ordinary course of an action. The answer of the applicant to the objection of the respondent being that the remedy by action was useless. It was further urged that the remedy by mandamus was ancillary to certiorari.

The terms of a contract of employment would be found in the contract, express or implied, between the parties. If there is no question of notice the master could dismiss the servant at any time and without any notice at all. A servant may hold office at the pleasure of the master ; it is then important to consider whether the master is a private individual or a statutory body. A statutory body cannot act outside the ambit of the statute which sets it up. Where an authority is constituted under statute to carry out statutory powers with which it is entrusted, there are cases which show that if an attempt is made to exercise these powers corruptly,—as under the influence of bribery or *mala fide*—for an improper purpose such an attempt must fail. Where the tribunal has exercised discretion, not arbitrarily or illegally, the Courts cannot interfere : *Short vs. Poole Corporation* (1926) 1 Ch. 66 at p. 85. A person may also hold an office or post during good behaviour. Continued good conduct by the servant seems then to be a condition of the contract of service, a breach of this condition would entitle the master to terminate the employment, the servant can be dismissed only for cause.

The applicant was a member of the Local Government Service and was therefore a servant of the 1st respondent. The remedy open to an ordinary servant who had been wrongfully dismissed is an action for damages ; sometimes an action may be brought for a declaration that the notice given of termination of the contract was invalid and the contract is still subsisting. The position of a member in the Local Government Service differs widely from that of a servant in the ordinary sense. Broadly speaking, the former contracts at his appointment that he will serve his employer in accordance with the statute and the regulations from time to time operative. These regulate in great detail the conditions and the terms of his service. Once placed upon the fixed establishment, he retains his position until duly removed or superannuated.

The power generally possessed by a master to dismiss a servant was restricted by the provisions of section 23 (1) and (2) of Ordinance No. 43 of 1945 and the master had no power to dismiss him except upon the grounds which the rules prescribe. The Ordinance and the regulations—those that have been framed—which deal with the servant contain elaborate provisions regarding the removal of members of the service, from which it follows that one can only be removed in accordance with these provisions. The procedure to be followed in matters of discipline and dismissal has been prescribed. Courts of law will not inquire into the merits of the decisions reached by such bodies, but they will give relief in certain cases, as for instance, where the provisions of the Statute have not been followed. As there were no regulations in force at the time of the inquiry, section 2 of Ordinance No. 5 of 1946 would be applicable. There was no written law in force at the time in respect of the matter of a dismissal ; the Commission was thus empowered by sub-paragraph " b " to determine the matter in its discretion. Mr. Perera contended that the Court should look at the regulations which had been framed although not brought into operation. Mr. Gratiaen

objected to this procedure being adopted and I do not think I am justified in doing so. The absolute right which a master might have had, has been cut down by the statute which confers upon the servants of the Municipality transferred to the Local Government Service Commission a certain measure of fixity of tenure. They can only be dismissed in accordance with the procedure laid down by section 23 (1) and (2). If the applicant complains that he was wrongfully or illegally dismissed (*i.e.* not in accordance with the provisions of the contract of employment or of the Ordinance), there would be nothing to preclude him from bringing an action to obtain such relief as a Court can give for breach of contract. Nothing I say in the course of this order should affect this right.

Originally, no doubt, the writ of certiorari was issued only to inferior Courts. As statutory bodies were brought into existence exercising legal jurisdiction, so the issue of the writ came to be extended to such bodies. The Court will issue the writ to a body exercising judicial functions, though that body cannot be described as being in any ordinary sense a Court. Certiorari lies only in respect of judicial, as distinguished from administrative acts: *Rex vs. Woodhouse* (1906) 2 K. B. 501. Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in this writ: *Rex vs. Electricity Commissioners* (1924) 1 K.B. p. 205. If the tribunal proceeded to encroach jurisdiction to themselves greater than the statute warrants, the Court could send a certiorari to them to have their proceedings returned to the Court. Judicial action is an adjudication upon the rights of parties who appear before the tribunal and upon whose claims some decision is rendered. Thus certiorari lies to examine the legality of the decision of a tribunal in a dispute between two or more persons, over and beyond whom the tribunal stands as an arbiter; it lies to a body which is entrusted with power to grant a privilege or licence to a subject and the subject can make an application to the body. It lies too to a statutory authority on whom far reaching powers affecting individuals as well as property are conferred and rights vested in private persons will be affected by the exercise of the powers. New obligations may be imposed on them or their existing rights may be withdrawn An example of such an authority is the Electricity Commissioners (1924, 1 K. B. 171).

The question in this case is whether the statutory authority in question (the 1st respondent) has a duty to act in a manner similar to that in which Courts of Justice act. This is of necessity a differentiation which is not capable of very precise limitation. It is clear that the functions of some tribunals bring them near the line on one side or the other. The 1st respondent was dealing with a person who was its servant, a member of its service, one who had been associated for some years with a local body and whose character up to the time of this complaint was respectable. It received a complaint forwarded by the Municipal Council, it set proceedings in motion against the applicant and after what is called an inquiry into a charge, which the applicant alleges is false, in respect of a married woman who was then seven months with child—an inquiry conducted according to the applicant perfunctorily, and by persons who acted as prosecutors and judges—arrived at a decision against the applicant. It was a decision made by a master against its servant. The action although involving the exercise of judgment and discretion is more of an executive or administrative character than judicial. To hold that a writ of certiorari would lie when a master made an order of this nature against a servant would lead to consequences of the most manifest inconvenience. The 1st respondent was not exercising any judicial function in determining whether it should dismiss its servant or not. It may be bound "to act judiciously but not judicially". (Words used at the argument.)

On these grounds I discharge the *rule nisi* for a certiorari and mandamus but in the circumstances of the case with half costs.

Rule nisi discharged.

Proctors: *Prosper Abraham* for the petitioner.
Trevor de Saram for the 1st respondent.

Present : WIJEYEWARDENE, S.P.J.

ANA HABBEBU MOHAMADO *et al* vs. KAWANNA HAMMEDU LEBBE MARIKKAR

S. C. No. 123/1947—*C. R. Kandy No.* 1845.
Argued on : July 11, 1947.
Decided on : July 28, 1947.

Civil Procedure Code, sections 806 *and* 823 (2)—*Courts Ordinance, sections* 36 *and* 78—*Action for damages in Court of Requests—Summons in English served on defendant who did not know English—Absence of defendant on returnable date—Judgment by default entered without* ex parte *hearing—Regularity of procedure—Judgment set aside later on the ground that summons served on defendents not in language they understood—Can plaintiff appeal from such order setting aside judgment.*

Held : (i.) Section 806 of the Civil Procedure Code does not require the summons served on a defendant, who does not understand English, to be in the vernacular.
(ii.) Where the relief claimed depends on the right to possession of land, the Court should not enter judgment without *ex parte* hearing even though the defendant is absent.
(iii.) That an order setting aside a judgment entered by default is not an appealable order.

Cases referred to : *Victoria vs. The Attorney-General* (1920) 22 N.L.R. 33).
Amarasekere vs. Mohamadu Uduma (1929) 31 N.L.R. 36).
Baron Appuhamy vs. Tivanhamy (1938) 40 N.L.R. 149.
Perera et al vs. Silva et al.

H. W. Thambiah with *S. Sharavananda*, for the plaintiff-appellant.
S. R. Wijetileke, for the defendants-respondents.

WIJEYEWARDANE, S.P.J.

The plaintiff claimed in this action a sum of Rs. 300 as damages suffered by him by reason of the defendants' wrongful possession of a land described in the schedule at the foot of the plaint. The Court issued summons returnable on August 23, 1946. On that date the defendants were absent though it was reported that they were served with summons " on being pointed out ". On August 30, 1946, the plaintiff filed an affidavit stating that he pointed out the defendants to the process server for service of summons, and the Court, thereupon entered judgment by default against the defendants. On September 12 the defendants filed an affidavit and moved to have the judgment set aside on the grounds (1) that they were not served with summons, and (2) that " the summons, issued had been in the English language and is not in conformity with the provisions of the Civil Procedure Code ". They stated, further, that they were not in possession of any land belonging to the plaintiff. At the inquiry evidence was led to shew that the first defendant did not " know English " and the second defendant could not " read or write Tamil or English ". The Commissioner held against the defendants with regard to the service of summons but set aside the judgment entered by default, as the summons served on each of the defendants was in English. The plaintiff appeals against that order.

I am unable to uphold the view of the Commissioner that the summons served on a Tamil speaking defendant under section 806 of the Civil Procedure Code should be in Tamil. That section states merely that the summons shall state "therein the names and residence of the parties, the substance of the claim and the number of the case " and " shall be in form No. 16 in the First Schedule ". The section does not provide for a translation. That section applies to Courts of Requests, and by reason of section 801, the earlier general provisions in the Code regarding summons would not be applicable to Courts of Requests where such general provisions are inconsistent with the special provisions of section 806. A Bench of Three Judges expressed the view that even section 55 which is one of the sections containing the " general provisions " referred to in section 801 did not require the duplicate of the summons to be in any language other than English (see *Victoria vs. The Attorney-General* (1920) 22 New Law Reports 33). In view of the contrary opinion favoured in certain decisions, I directed the Registrar to ascertain the practice followed in the Courts of Requests, Colombo, Galle, Kegalle and Kandy. From the replies received, it is found that in Colombo a translation of the summons is not served on the defendant ; in Kandy and Galle no translation is served " but there have been instances in which this has been done when the (plaintiff's) Proctor submits the summons in the language of the defendant ". In Kegalle a somewhat strange practice seems to have grown up. There, a Sinhalese translation of the summons is served on a Sinhalese speaking defendant but the Tamil speaking Tamil or Moor is served only with a summons in English.

I hold that the summons served on the defendants need not have been in Tamil.

There are however other matters to be considered. Though the plaintiff's claim is one for recovery of damages, it involves " the right to possession of a land ". The plaintiff cannot succeed in his claim for damages unless his right to the possession of the land is proved by him or admitted by the defendants. The affidavit of the defendants states that the defendants are not in possession of any land belonging to the plaintiff. The Court would have to decide (*a*) whether the plaintiff was entitled to the land, (*b*) whether the defendants were in wrongful possession of that land, and (*c*) what damages have been caused to the plaintiff. In such circumstances, even where the defendants are absent, the Commissioner must fix the case for *ex parte* hearing and then give judgment " on such merits as justice shall require, and without reference to the default that has been committed " (*vide* proviso to section 823 (2)). The Commissioner did not follow that procedure in this case. It was urged by the appellant's Counsel that, in these circumstances, the proper order to be made would be to send the case back for the Commissioner to hear evidence *ex parte*. But, in S. C. No. 154 ; C. R. Badulla 1444 (*vide* S. C. Minute of May 30, 1913), where a similar question arose, de Sampayo, J. vacated the judgment by default and sent the case back directing the Commissioner " to allow the defendant to file answer and enter upon his defence ". (See also *Amarasekere vs. Mohamadu Uduma* (1929 31 New Law Reports 36).

In this case, moreover, the journal entries do not show that the plaintiff was present on the summons returnable date. The Commissioner could have dismissed the plaintiff's action in spite of the default of the defendants, if the plaintiff did not " sufficiently excuse his absence " (*vide* section 823 (1)).

Though the point was not argued before me, I cannot ignore the question whether the order appealed against is an appealable order. This question has to be answered in the negative in view of the provisions of sections 36 and 78 of the Courts Ordinance (see *Baron Appuhamy vs Tivanhamy* (1938) 40 New Law Reports 149 and *Perera et al vs. Silva et al.*

I dismiss the appeal with costs.

Appeal dismissed.

Present : HOWARD, C.J. & JAYETILEKE, J.

ABEYWARDENA vs. DE ZOYSA ABEYSIRIWARDENE

S. C. No. 145—*D. C.* (*F*) *Colombo No.* 44/Z.
Argued and Decided on : 19th June, 1947.

Civil Procedure Code Section 247—*Evidence necessary to discharge burden of proof.*

In an action under section 247 of the Civil Procedure Code, the evidence given by the judgment-creditor only raised a suspicion that the property seized belonged to the judgment-debtor.

Held : That such evidence was not sufficient and that the judgment-creditor had not discharged the burden of proof resting on him.

H. V. Perera, K.C., with *E. B. Wickremanayake*, for the defendant-appellant.
N. K. Choksy, with *Ivor Misso*, for the Plaintiff-respondent.

HOWARD, C.J.

This was a case under section 247 of the Civil Procedure Code. The burden was on the judgment creditor to prove that the motor car which had been seized was the property of the judgment debtor. In order to discharge that onus the judgment creditor gave evidence to the effect that she had seen the judgment debtor using the motor car in question. The motor car was registered in the name of a man called Amarasekere, who, it is true, was the brother-in-law of the judgment debtor. The only other evidence led to prove that the motor car belonged to the judgment debtor was the fact that he procured petrol coupons for this motor car. In the circumstances we think that only a suspicion is raised that the motor car was the property of the judgment debtor. That is not sufficient. We think, therefore, that it is impossible to support the order of the District Judge. This order is set aside and there must be judgment entered for the defendant with costs in this Court and the Court below.

Order set aside.

JAYETILEKE, J.
I agree.

Present : KEUNEMAN, A.C.J. & JAYETILEKE, J.

DINGIRI APPU vs. (1) PUNCHI APPUHAMY & 3 OTHERS.

S. C. No. 260/*M*—*D. C.* (*F*) *Avisawella No.* 4061.
Argued on : 18th July, 1947.
Decided on : 25th July, 1947.

Civil Procedure—Joinder of parties and causes of action—Joint debt paid by third party—Rights of third party against co-debtors—Negotiorum gestor.

The 1st, 2nd, 3rd and 4th defendants and X and Y were owners of a property which they had mortgaged for Rs. 600. X and Y transferred their 1/3 share in the land to the plaintiff, who paid off the mortgage debt of Rs. 600, in circumstances constituting him a *negotiorum gestor*. The 4th defendant paid the plaintiff Rs. 100. The plaintiff then brought an action against the 1st, 2nd, 3rd and 4th defendants jointly for the balance of Rs. 300.

Held : (i.) That the plaintiff is entitled to contribution from the 1st, 2nd and 3rd defendants.
(ii.) That his claim is against each severally for a *pro rata* share.
(iii.) That the plaint is bad in law owing to misjoinder of parties and causes of action.

Cases referred to : *Silva vs. Punchirala* (3 C. L. Rec. 67).
Dias vs. Silva (34 N. L. R. 108).
Kuthdoos vs. Joonoos (15 C. L. Weekly 133).

H. W. Jayawardene, for plaintiff-appellant.

E. A. P. Wijeratne with *H. Wanigatunge*, for the 1st and 2nd defendants-respondents.

KEUNEMAN, A.C.J.

The 1st, 2nd, 3rd and 4th defendants together with William and Marthelis were the owners of the land referred to in this case. They executed a usufructuary mortgage bond for Rs. 600 on 7th June, 1919, in favour of Podiappuhamy, who by P 1 of 1927 assigned his rights to M. J. Perera now dead, whose estate was administered by his son N. W. Perera as administrator. William and Marthelis by P 2 of 1931 and P 3 of 1943 transferred a $\frac{1}{3}$ share of the land to the plaintiff, who has paid off the sum of Rs. 600 due on the mortgage bond. Plaintiff alleged that out of the Rs. 400 due to him, a sum of Rs. 100 was paid to him by the 4th defendant. Plaintiff sued the 1st, 2nd, 3rd and 4th defendants for the balance sum of Rs. 300.

The evidence led for the plaintiff was accepted in its entirety and two matters of law were raised by the defendants, contained in the following issues :—

"3. Is there a misjoinder of parties and causes of action ?

4. Can the plaintiff not being a co-debtor and not having obtained a cession of action maintain this action ? "

The facts underlying issue 4 were not in dispute, viz. that plaintiff was not a co-debtor with the defendants, and that he had not obtained a cession of the mortgage.

The District Judge decided both these issues against the plaintiff, and dismissed his action with costs. The appeal is from that judgment.

In respect of issue 4, the District Judge conceded to a co-debtor the right to claim a rateable contribution from his co-debtors, even though he had not obtained cession of action. But he held that the plaintiff not being a co-debtor, could not maintain an action for contribution against the defendants, unless he obtained cession of action. The District Judge depended on a passage in Voet 20-4-5.

In this section Voet begins with the case of co-heirs :—

> " If one of a number of heirs has in consequence of the indivisible nature of the pledge held by him, alone satisfied in full a creditor suing by the hypothecary action, there is no doubt but that a right of action *pro rata*, against the other heirs, should be ceded to him just as cession of action against other co-sureties for the same debt is made to one of them who is prepared to pay the whole of it. Besides which he can without cession obtain indemnity from the others by the '*actio negotiorum gestorum*' or '*familiae erciscundae*'." (Berwick's Voet, p. 382)."

Now, in this passage Voet is dealing with the rights of the co-heir, and has mentioned two remedies which he possesses, viz.: (1) The right of demanding cession of action, and (2) without cession, the right of claiming contribution from the co-heirs by an action such as *actio negotiorum gestorum*.

In the rest of the section Voet deals with the right to demand cession of action, in certain special cases. In the course of this discussion appears the passage on which the District Judge relies, viz. :—

> "It cannot indeed be denied that a stranger, who spontaneously (sponte sua) offers to pay another's debt to the creditor on behalf of a debtor, has no legal right to have the obligation (*i.e.* the mortgage) transferred to him (by the creditor whose claim he thus satisfies)."

Voet however draws a distinction where the payment is made in pursuance of a contract, as in the cases of guaranty and suretyship, or under the apprehension of losing possession of any kind (Berwick's Voet p. 384).

In this passage Voet appears to be discussing the right of a "stranger" who has paid the debt to claim cession of action. I cannot read into the passage a denial to the "stranger" of the right to bring an action such as the *actio negotiorum gestorum*, and I think the District Judge was in error in so thinking. Wessels in the Law of Contract in South Africa sets out the position as follows :—

> "2142. Can a third party, who makes a payment in his own name, but on behalf of the debtor, recover from the latter the amount so paid?
>
> "According to Vinnius and Voet the third party can recover from the debtor what he has paid for his benefit, if he acted either as an agent or *as a negotiorum gestor*, but if he did not act in either of these capacities but paid the creditor against the debtor's wish, he must be held to have intended to donate the amount to the debtor."

In Nathan's Common Law of South Africa the position of *a negotiorum gestor* is dealt with (2nd Edition Vol. 2, p. 1151, para. 1080) :—

> "Voet more briefly defines *negotiorum gestor* as a person who transacts the business of a person who is absent or unaware of it without mandate to that effect. In other words it is an unauthorised agency."

He adds :—

> "The following are the requisites for a *negotiorum gestio* : (1) the act must be done for the benefit of the principal (*dominus negotiorum*) ; (2) it must be undertaken without his request ; (3) it must be gratuitous on the part of the gestor ; (4) the gestor must have performed the service *animo obligandi*, for if the act be done *animo donandi* with respect to expenses or the like, it becomes an act of benevolence or gift ; (5) the gestor must have reasonable cause, from the nature of the services rendered, to presume ratification on the part of the principal, for it is this presumption on the part of the gestor which is necessary to bind the principal. Under such circumstances the principal is bound by the acts of the *gestor*."

In my opinion the conditions are satisfied according to which the plaintiff must be regarded as *negotiorum gestor* in respect of these defendants who have not authorised the payment of the debt. There is evidence in the case, that one defendant, the 2nd defendant, was actually present at the time of the payment, and approved of the payment. As regards the 2nd defendant, the plaintiff can be regarded as having acted in the capacity of agent. (See Wessel's Vol. I, p. 659) :—

> "2137. If the payment is not made by the third party *mero motu*, he must act either as the debtor's agent or as a *negotiorum gestor*. If he makes the payment with the knowledge of the debtor, he acts as his implied agent, if without his knowledge as a *negotiorum gestor* (Vinnius)."

In my opinion the District Judge has wrongly decided issue 4, and I hold that the plaintiff is entitled to claim contribution against the 1st, 2nd and 3rd defendants. According to the plaint, the 4th defendant has already paid his share of Rs. 100 and the action against him is misconceived and must be dismissed.

Issue 3 has now to be considered. Voet says (20-4-6) "It is less open to doubt that one who pays the entire debt does not recover it *in solidum* from other possessors of other things mortgaged, but only *pro rata*."

In *Silva vs. Punchirala* (3 C. L. Rec. 67) Shaw, J. held that where one judgment-debtor who was jointly and severally liable with others paid the whole claim, and subsequently sued his co-debtors for contribution in one action, his cause of action against each defendant was separate and that there was a misjoinder of parties and causes of action :

> "Although the original liability to the Basnayake Nilame was a joint and several one, the liability of the defendants to repay the plaintiff what he has paid on their account is not.
>
> He is only entitled to recover from such of his co-defendants in the previous suit the amount he has paid on behalf of each of them respectively. His cause of action against each of the defendants is for their proportion of the debt only."

In *Dias vs. Silva* (34 N. L. R. 108) Garvin, S.P.J. deals with the case of one of a number of debtors who has paid without demanding cession of action. "Such a person is not debarred from claiming in his own right from each of his co-debtors a share of the debt for which each is liable. (See Sande's Cession of Action, pp. 123, 124)."

I agree with these findings, and on principle I do not see why this rule should be restricted to the case of co-debtors, nor has any authority been cited to us to that effect. The passage in Voet 20-4-6 has, I think, by implication a wider significance. Also the Roman-Dutch Law appears to have extended this to the claim of one surety who has paid the whole debt to recover from each of

his co-sureties a proportionate share. See the comments in Sande's Session of Action (translation by P. C. Anders, p. 129).

I hold that the plaintiff could enforce his claim only against each of the defendants separately for a *pro rata* share, and that there has been a misjoinder of parties and causes of action in this case.

It was, however, argued that the District Judge should not have dismissed the plaintiff's action, but that he should have permitted the plaintiff to elect to go against one of the defendants, and to strike out the others. *Kuthdoos vs. Joonoos* (15 C. L. Weekly 133) was referred to in this connection. I think the argument fails for two reasons. No application was made to the District Judge or to us, to strike out any parties wrongly joined, and to restrict the claim to a share *pro rata* against one particular defendant, I do not think an opportunity should now be given to the plaintiff to make such an election. Further it seems clear that an action against a single defendant should have been brought in the Court of Requests and not in the District Court, where the scale of fees is materially different.

The appeal is dismissed with costs. As I have already pointed out the action as against the 4th defendant could never have been maintained. As regards the 1st, 2nd and 3rd defendants, the plaintiff will be at liberty to bring separate actions against each of them for the *pro rata* amounts for which they are liable.

Appeal dismissed.

JAYATILEKE, J.
I agree.

Present : HOWARD, C.J. & WINDHAM, J.

THE ATTORNEY-GENERAL vs. KIRIMUDIYANSE & ANOTHER.

S. C. No. 395/*L*—*D. C.* (*F*) *Kurunegala No.* 2937.
Argued on : 2nd September, 1947.
Decided on : 9th September, 1947.

Prescription against the Crown—Proof of possession for over 30 *years—Burden of proof—Land Surveys Ordinance* (*Cap.* 316) *section* 6—*Crown Lands Encroachment Ordinance* (*Cap.* 321) *section* 7—*Evidence Ordinance section* 114.

The defendants and their predecessors in title possessed and cultivated for over 30 years paddy fields, which according to plans from the Surveyor-General's Office, were parts of an abandoned tank. There was no evidence of the date the tank was abandoned or whether it was a public tank.

Held : (i.) That the provisions of the Encroachments upon Crown Lands Ordinance (Cap. 321) are not operative before 1840.
(ii.) That the defendants have acquired title against the Crown by proof of over 30 years' possession.
(iii.) That in the absence of evidence that the tank was a public one and that the tank existed after 1840, Section 7 of the Encroachments upon Crown Lands Ordinance is inapplicable.

Cases referred to : *The Attorney-General vs. Punchirala* (21 N. L. R. 31).
The Attorney-General vs. Sardiel (6 C. L. R. 149).
Hamid vs. The Special Officer appointed under the Waste Lands Ordinance (23 N. L. R. 150).

H. V. Perera, K.C., with *Titus Goonetilleke*, for the 1st defendant-appellant.
Douglas Jansze, Crown Counsel, for the plaintiff-respondent.

HOWARD, C.J.

In this case the appellant, the 1st defendant, appeals from a judgment of the District Court, Kurunegala, declaring that certain lands described as lots 6, 7 and 8 in the schedule to the plaint are the property of the Crown. The 2nd defendant is not in actual possession of any of the lands, but has mortgaged her interests to the 1st defendant. The case for the Crown that the lots in dispute are Crown lands is based on the contention that, though they are now paddy lands, they are in fact part of abandoned tanks. The evidence in support of this contention is contained in a plan No. 2903 of 1903 produced from the Surveyor-General's Office by the Government Surveyor of Anuradhapura. This plan (P 1) shows lots I 1228, 12995 and 12996 are described in the plan as abandoned tanks. The other lots

are described as paddy fields and there is also a note in the Remarks column to say that the Headman states that they are encroachments on Badahelagama Tank. The Surveyor also gave evidence to the effect that he made a tracing (x) of the lots in question and that lots 6, 7 and 8 depicted on x are the lots in dispute. Lot 6 is part of lot J 1228. Lot 7 is part of lots 12994 and J 1228 and lot 8 is part of the old bund. Lot 6 depicted in P 1 as a paddy field is now a threshing floor. Lot 7 is a paddy field while lot 8 is still part of the old bund. The Surveyor visited the land in 1943 and is unable to say how long ago the tanks in question were abandoned. The Village Headman also gave evidence for the Crown and states that the lots claimed by the defendants were at one time part of the tank. He also states that he has known these lands for the last 20 to 25 years and the defendants have always possessed them. He has not seen any tank in the area, but he can say there has been a tank there. The tank, he says, may have been abandoned in the time of the Sinhalese Kings. The evidence called by the defendants established possession by them and their predecessors in title for a period exceeding 30 years.

As the defendants are in possession, the burden of proof of title lies on the Crown and the only question for decision is whether the District Judge was right in holding that this burden has been discharged. Mr. Jansze relies first of all on the provisions of section 6 of the Land Surveys Ordinance (Cap. 316). This provision is worded as follows :—

> "If any plan or survey offered in evidence in any suit shall purport to be signed by the Surveyor-General or officer acting on his behalf such plan or survey shall be received in evidence and may be taken to be *prima facie* proof of the facts exhibited therein ; and it shall not be necessary to prove that it was in fact signed by the Surveyor-General or officer acting on his behalf, nor that it was made by his authority, nor that the same is accurate, until evidence to the contrary shall have first been given."

Hence the plan must be received as *prima facie* proof of the facts exhibited therein. Mr. Jansze contends that the remarks of the Surveyor as to the fields in question forming part of an abandoned tank and his record of what the Headman told him must be taken as *prima facie* proof of the facts stated. I agree that the plan does supply *prima facie* proof that the fields were at one time part of a tank. But I am of opinion that too great a strain is being put on the words of the section when it is contended that an entry as to what the Headman said, when the survey was made, must be taken as *prima facie* evidence of the facts deposed to by the Headman. Having proved that the fields formed part of an abandoned tank Mr. Jansze then proceeds to call in aid section 7 of the Crown Lands Encroachment Ordinance (Cap. 321). This section is worded as follows :—

> "All forest, waste, unoccupied, or uncultivated lands shall be presumed to be the property of the Crown until the contrary thereof be proved, and all chenas and other lands which can be only cultivated after intervals of several years shall, if the same be situate within the districts formerly comprised in the Kandyan provinces (within no thombo registers have been heretofore established), be deemed to belong to the Crown and not to be the property of any private person claiming the same against the Crown, except upon proof only by such person—
>
> (*a*) of a sannas or grant for the same, together with satisfactory evidence as to the limits and boundaries thereof ; or
>
> (*b*) If such customary taxes, dues, or services having been rendered to the Crown or other person for the same as have been rendered for similar lands being the property of private proprietors in the same districts ; or
>
> (*c*) of his or his predecessor in title having made and maintained a permanent plantation in and upon the same for a period of not less than thirty years, or of his having otherwise improved the same and maintained it in such improved state for such period, and in either case of his having held uninterrupted possession of the same during the whole of the said period.
>
> In all other districts in this Island chena and other lands which can only be cultivated after intervals of several years shall be deemed to be forest or waste lands within the meaning of this section."

Mr. Jansze contends that the lands in dispute being part of abandoned tanks are unoccupied or uncultivated lands and therefore by reason of this provision presumed to be the property of the Crown until the contrary is proved. Mr. Jansze concedes that there is a difference between the two parts of the section and that, whereas in respect of chena lands situated in the Kandyan provinces, private persons can establish their rights in the manner prescribed in paragraphs (*a*), (*b*) or (*c*) and not by prescription ; in regard to "forest, waste, unoccupied or uncultivated lands," private persons can establish their rights by prescription. That this difference exists is manifest from a perusal of the judgments in the *Attorney-General vs. Punchirala* (21 N. L. R. 31). The period of prescriptive possession necessary for the acquisition of rights against the Crown would appear to be 30 years. Mr. Perera contends that the Crown has not established that the fields formed part of a public tank, that it is not established when the tank was abandoned, and the defendants have established their rights by reason of over 30 years' occupation. With regard to the question as to whether it has been established

that the tank was a "public" one Mr. Jansze relies on the case of *Attorney-General vs. Sardiel* (6 C. L. R. 149). In this case it was held that the bed of an abandoned tank, the name of which appears on the list of public tanks, must be presumed to be the property of the Crown. In my opinion this case is distinguishable as the name of the tank appeared in the register of tanks as a public tank, whereas in this case there is no evidence that the tank is a public one. There is no presumption on the evidence in this case arising from section 114 of the Evidence Ordinance. The Crown in these circumstances has only proved that the land in dispute formed part of an abandoned tank. It has not established when the tank was abandoned, or whether it was a public tank. In regard to the date of abandonment, Cap. 321 was enacted in 1840 and according to the decision of the Privy Council in *Hamid vs. The Special Officer appointed under the Waste Lands Ordinance* (23 N. L. R. 150) it is doubtful whether the operation of the Ordinance is to date from the date of the Ordinance or from the time when the claim is made. Its provisions however are not operative before 1840. In these circumstances as there is no proof that the lands were tanks after 1840, it has not been established that section 7 of Cap. 321 is applicable. I am, therefore, of opinion that Mr. Perera's contention must succeed.

For the reasons I have given, the appeal is allowed and the plaintiff's claim and objections must be dismissed with costs in this Court and the Court below.

Appeal allowed.

Windham, J.

I agree.

Proctors: *K. C. W. Perera* for the appellant.

Present: Howard, C.J. & Jayatileke, J.

THE CEYLON INSURANCE Co., Ltd. vs. THE UNITED CEYLON INSURANCE Co., Ltd.

S. C. No. 221/M—D. C. (F) Colombo No. 128.
Argued on: 26th August, 1947.
Decided on: 4th September, 1947.

Companies Ordinance (No. 51 of 1938), section 18 (1) (a)—Registered Insurance Company—New Company—Resemblance in name—Both Companies engaged in Insurance—Injunction to restrain use of name by older Company.

The plaintiffs, The Ceylon Insurance Co., Ltd., carrying on business in Motor, Fire, Fidelity and Life Insurance, were registered on the 3rd April 1939. The defendants, who carry on business in Life Insurance, were registered on the 24th May, 1944, as the United Ceylon Insurance Company. The plaintiffs sought by injunction to restrain the use of the defendants' name, as the resemblance of the names was likely to induce deception.

Held: That no case had been made out for an injunction as the use of the word "United" sufficiently distinguished the name of the defendants from that of the plaintiffs.

Cases referred to: *Ouvah Ceylon Estates Limited vs. Uva Ceylon Rubber Estates Limited* (103 L. T. 416).
North Cheshire & Manchester Brewery Company Limited vs. Manchester Brewery Company Limited (1899) A. C. 87.
Meikle vs. Williamson (1909) (26 Reports of Patent Cases 775).
Hendricks vs. Montagu (17 C. D. 638).
Colonial Life Assurance Company vs. The Home & Colonial Assurance Company Limited (10 L. T. 448).
British Vacuum Cleaner Company (Limited) vs. New Vacuum Cleaner Company (Limited) (23 L. T. 587).
The London Assurance vs. The London & Westminister Assurance Corporation (Limited) (8 L. T. N. S. 497).

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

Howard, C.J.

This is an appeal by the plaintiff from a judgment of the District Court, Colombo, dismissing the action with costs. The plaintiff and defendant are Insurance Companies. The former carries on business in motor, fire, fidelity and life insurance and was registered on the 3rd April, 1939, as the Ceylon Insurance Company. The defendant Company carries on business in life insurance and this Company was registered on the 24th May, 1944, as the United Ceylon Insurance Company. The plaintiff Company has

brought this action to restrain the defendant Company from using the name, style or title of the "United Ceylon Insurance Company" or any other style or name which includes the plaintiff Company's name or so nearly resembles the same as to be calculated to induce the belief that the business carried on by the defendant Company is the same as the business carried on by the plaintiff Company or in any way connected therewith. The District Judge held that the plaintiff Company, having no right to the monopoly of either "Ceylon" or "Insurance", could not object to the use of those words by the defendant Company provided the latter used some further word or words to distinguish itself from the former. The addition of the word "United" would in the opinion of the District Judge be sufficient to distinguish it from the plaintiff Company. He, therefore, held that the plaintiff Company had failed to make out a case for an injunction and dismissed the action with costs.

In asking for an injunction the plaintiff Company maintains that the defendant Company has contravened section 18 (1) (*a*) of the Companies' Ordinance (No. 51 of 1938). This provision is worded as follows :—

> "18. (1) No Company shall be registered by a name which—
>
> (*a*) is identical with that by which a Company in existence is already registered or so nearly resembles that name as to be calculated to deceive except where the Company in existence is in the course of being dissolved and signifies its consent in such manner as the Registrar requires."

Mr. H. V. Perera contends that the name taken by the defendant Company so nearly resembles that of the plaintiff Company as to be calculated to deceive. In support of this contention he has cited various cases. The first of these cases is that of *Ouvah Ceylon Estates Limited vs. Uva Ceylon Rubber Estates Limited* (103 L. T. 416). In this case the Court of Appeal held that the two Companies must be viewed as Companies carrying on or proposing to carry on identical business and the name which the defendant Company proposed to use was substantially identical with that already used by the plaintiff Company. This could not be allowed. In his judgment Cozens Hardy, M.R. stated that the defendant Company had taken the entire name of the plaintiff Company and merely added that which is a common ingredient to both Companies, namely that they deal in rubber. The Master of the Rolls also adopted certain observations from the judgment in *North Cheshire and Manchester Brewery Company Limited vs. Manchester Brewery Company Limited* (1899) A. C. 83. These observations are as follows :—

> "What appears to me to be perfectly plain is this—that in the meantime the respondent Company are exposed to every possible inconvenience which can arise to their trade from the fact of a rival Company starting afresh in the same trade in the same locality and under substantially the same name with themselves."

Farwell, L.J. in his judgment in the Uva case stated that he was convinced by the use of the words alone that there is a probability of deception and being a *quia timet* action there was, therefore, no question arising on evidence of persons who have or have not been actually deceived. There is in the present case some evidence that letters intended for the defendant Company have been received by the plaintiff Company. This, however, may indicate either inaccurate recollection of the addressor or official negligence and does not amount to evidence of actual deception which in fact is non-existent. In this connection I would refer to the case of *Meikle vs. Williamson* (1909) (26 Reports of Patent Cases 775) in which it was held that the mere fact of liability to misdirection of correspondence does in itself not show either an intention to divert business or any probability that business will be diverted. In my opinion the grounds on which the Uva case was decided are not present in this case. The business carried on by the two Companies is the general one of Insurance and not a particular one like the manufacture of rubber. The locality in which the business was carried on in the Uva case was also limited and not general as in the present case. Moreover, it is not a case where deception is probable from the words alone. In these circumstances, I am of opinion that the case cited is not an authority for the proposition put forward by Mr. Perera.

Mr. Perera also cited the case of *Hendricks vs. Montagu* (17 Ch. D. 638). In that case the Universal Life Assurance Society were the plaintiffs and succeeded in obtaining an injunction against the defendants for using the name Universe Life Assurance Association. In this case also the Court of Appeal held that there was such a similarity between the names as that the one is in the ordinary course of human affairs likely to be confounded with the other and that persons who have heard of the Universal were likely to be misled into going to the Universe. I do not consider that persons who have heard of the Ceylon Insurance Company were likely to be misled into going to the United Ceylon Insurance Company.

Our attention has been invited by Counsel to various other cases. In the *Colonial Life Assurance Company vs. The Home and Colonial Assurance Company Limited* (10 L. T. 448) the plaintiffs failed to succeed. In that case the Master of the Rolls held the names used as descriptive only of the character of the business carried on by the parties and no exclusive right to trade under that description could be acquired. He also held that there was really as much difference between the names of the plaintiffs and defendants as there was between the names of any other existing Companies. The same principle in regard to the use of descriptive names formulated in *British Vacuum Cleaner Company (Limited) vs. New Vacuum Cleaner Company (Limited)* (23 L. T. 587. So in the present case no exclusive right to the use of the word "Insurance" which is descriptive of the business carried on by both parties could be acquired. In *The London Assurance vs. The London and Wesminister Assurance Corporation (Limited)* (8 L. T. N. S. 497) the Vice-Chancellor held that in spite of the resemblance between the two titles there was no case for an injunction.

For the reasons I have given, I am of opinion that the District Judge came to a correct conclusion and the appeal must be dismissed with costs.

Appeal dismissed.

Jayetileke, J.

I agree.

Present : Dias, J.

THE HIGHLAND TEA COMPANY OF CEYLON, Ltd. vs. JINADASA.

S. C. No. 264/1946—*C. R. Nuwara Eliya* 16681.

Argued on : 2nd and 8th September, 1947.

Decided on : 9th September, 1947.

Landlord and tenant—Notice to quit—Meaning of calendar month.

Held : That in a written tenancy agreement one calendar month's notice means the period from the date of notice until the numerically corresponding date of the following month.

Cases referred to : *Thassim vs. Careem* (1946) 47 N. L. R. 440.
Migotti vs. Colville (1879) 4. C. P. D. 233.
Burne vs. Munisamy (1919) 21 N. L. R. 193.
Perera vs Mackinnon Mackenzie & Co. (1922) 24 N. L. R. 381.
Forbes vs. Rengasamy (1940) 41 N. L. R. at p. 295.

S. P. Wijewickreme, for defendant-appellant.

Ivor Misso, for plaintiff-respondent.

Dias, J.

The defendant became the tenant of a boutique and a bakery on Glenorchy Estate, Ambewela, on two written agreements P 1 and P 2 entered into by him with the Superintendent of the estate, who was acting as the agent of the plaintiff Company. In each agreement, the defendant stipulated that "the tenancy hereby created may be terminated at any time on one calendar month's notice". Such notice was to be deemed to have been duly given, if sent by registered post or delivered to him personally.

The Superintendent of the estate on July 31, 1945, sent to the defendant by registered post notice dated August 1, 1945, in the following terms :—"I hereby give you one month's notice as from today to vacate the Glenorchy Bakery and No. 4, Kandy, at present occupied by you". These notices, the Commissioner of Requests holds, were received by the appellant on August 1.

The Commissioner of Requests holds that the receipt by the defendant on the 1st August of the notices to quit would not constitute a "calendar month's notice", but taking into consideration

all the circumstances, he thought that the defendant has had reasonable notice. He, therefore, gave judgment for the plaintiff.

We are here dealing with a written contract solemnly entered into between two parties. No question of a local custom or usage, therefore, arises in this case as it did in *Thassim vs. Careem* (1946) 47 N. L. R. 440. The question is what is meant by " one calendar month's notice " in the documents P 1 and P 2 ? In *Migotti vs. Colville* (1879) 4 C. P. D. 233 it was held that a " calendar month " is a legal and technical term, and in computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days. Therefore, " one calendar month's imprisonment " is to be calculated from the day of the imprisonment to the day numerically corresponding to that day in the following month. When there is no such corresponding day in the last month of imprisonment, the prisoner's term will end on the last day of such last month. This case was followed in *Burne vs. Munisamy* (1919) 21 N. L. R. 193 where notice was given on June 11, and it was held that the " calendar month " expired at midnight on July 11. *Burne vs. Munisamy* (1919) 21 N. L. R. 193 has been cited with approval in *Perera vs. Mackinnon Mackenzie & Co.* (1922) 24 N. L. R. 381 and *Forbes vs. Rengasamy* (1940) 41 N. L. R. at p. 295.

Therefore, when the defendant received the notices P 1 and P 2 on August 1, his duty was to vacate the premises on September 1, but not earlier—c.f. *Thassim vs. Careem* (1946) 47 N. L. R. 440.

The appellant seeks to escape from this situation by pointing to the letter P6 dated August 18, written by the Superintendent in reply to a letter from the appellant's proctor which is in the following terms :—" I have no intention whatsoever of withdrawing the notices given to Mr. G. H. Jinadasa to vacate No. 4, Glenorchy kadday and bakery on the 31st of August, 1945 ; and if he decides to remain after that period against my wishes, I shall immediately put the matter in the hands of my solicitors ". It is argued that P 6 amounts to a variation or a waiver of the terms of the notice to quit. It is contended that the defendant having been told under the threat of being sued to leave earlier than September 1, he was not bound to leave on August 31, and that he is therefore entitled to stay on until proper notice to quit is given him. This point appears not to have been taken in the lower Court. What is the plaintiff's cause of action as set out in his plaint ? In paragraph 4 of the plaint it is stated that the notices required the defendant to quit and vacate the premises on the 31st of August, 1945. In paragraph 5 it is pleaded that the defendant having failed to do so, a cause of action has accrued to the plaintiff to sue the defendant for ejectment.

I am of opinion that the defendant's contention is entitled to succeed. No doubt P 1 and P 2 on August 1 gave the defendant proper notice to quit on September 1 ; but the plaintiff's agent, acting on behalf of his principal, made the defendant clearly understand that he was expected to quit the premises on August 31. The defendant has been sued for not quitting on August 31. In law the plaintiff was not entitled to make this demand of the defendant who under the terms of the agreement was entitled to a " calendar month's notice " which expired on September 1.

Various other questions were raised at the trial such as to the right of the defendant to claim compensation for improvements, and to have a *jus retentionis* until he was paid for those improvements, &c. The Commissioner has held against the appellant on those points, and counsel for the appellant stated that he could not advance those claims in appeal.

I set aside the judgment and decree appealed against and dismiss plaintiff's action in so far as it relates to the plaintiff's claim for ejectment and damages. The findings on the other claims in reconvention will stand affirmed. Each party will bear his own costs both here and below.

Set aside.

Proctors : *A. J. M. de Silva* for the defendant-appellant *F. V. T. La Brooy* for the plaintiff-respondent.

IN THE COURT OF CRIMINAL APPEAL

Present : HOWARD, C.J. (President), SOERTSZ, S.P.J., JAYETILEKE, J., DIAS, J. & WINDHAM, J.

REX vs. VELAIDEN

Application No. 193 *of* 1947—*S. C.* 46/*M. C. Balapitiya* 57354.
Argued on : 27th August, 1947.
Decided on : 8th September, 1947.

Penal Code, sections 79 *and* 296—*Evidence Ordinance, section* 105—*Accused indicted for murder—Defence of drunkenness—Effect of intoxication on the intention of accused—Burden of proof—Direction to Jury.*

The accused was indicted upon a charge of murder. There was some evidence for the prosecution that he was smelling of liquor. The trial Judge directed the Jury that the burden was on the accused to prove that he was so drunk as not to be able to form the necessary intention. It was contended, in appeal, that such an observation was a misdirection, and that it was the duty of the prosecution to prove that in spite of the intoxication, the accused had a murderous intention.

Held : (i.) That section 79 of the Penal Code provided an exception to the general rule that a man is presumed to intend the natural and inevitable consequences of his act.

(ii.) That the burden of proving that the accused came within the benefit of such exception and that he was in such a state of intoxication as to be incapable of forming a murderous intention was on the defence.

(iii.) That a direction to the Jury placing the burden of proof, in such circumstances, on the accused was a proper direction.

Cases referred to : *The King vs. Rengasamy* (25 N. L. R. 438).
The King vs. James Chandrasekera (44 N. L. R. 97).
Rex vs. Monkhouse 4 Cox 55.
Director of Public Prosecution vs. Beard 14 Criminal Appeal Report 159.
Nga Tun Baw vs. Emperor (1912) 13 Criminal Law Journal Report 864 at pages 868 and 869
Rex vs. Kaukani (South African Law Reports 1947 (2) May, page 897).
Pillay vs. Krishna and another (1946 A. D. not yet reported).
Rex vs. Ngxongo (1947 A. S. A. R. 152).

Overruled: *The King vs. Punchi Banda*, 48 N. L. R. 313.

Mackenzie Pereira with *G. L. L. de Silva* and *Cecil Jayetileke*, for applicant.

M. F. S. Pulle, Acting Solicitor-General, with *T. S. Fernando, Crown Counsel*, and *D. Janze, Crown Counsel*, for the Crown.

HOWARD, C.J., (President.)

The main ground of the appeal of the applicant in this case, who was convicted on a charge of murder, is based on the contention that the learned Judge misdirected the Jury in regard to the burden of proof. It was also contended by the applicant's Counsel that the question as to whether the applicant committed the act when he had lost his power of control by reason of grave and sudden provocation should have been put to the Jury. The learned Judge did not put such an aspect of the case to the Jury. We do not consider that it was incumbent on him to do so. The question of grave and sudden provocation was not raised by Counsel for the applicant at the trial. This would not relieve the Court from doing so if there was any evidence to support such a plea. Such evidence does not, however, appear either in the case put forward by the Crown, or in the unsworn statement made by the applicant from the dock. In the circumstances, there were no materials on which the Jury could come to the conclusion that the act was committed by the applicant when he had lost his power of self-control by reason of grave and sudden provocation. This question was not, in our opinion, one to be left for the Jury's decision.

The contention in regard to the burden of proof raises the question as to the effect of intoxication on the intention of an accused person. The applicant did not elect to go into the witness-box and give evidence on oath. He made an unsworn statement from the dock. In that statement he says : " As a result of the toddy I drank I lost complete control of my senses. I cannot completely say how I must have acted. I was in a state of unconsciousness. I was semi-conscious at one time". "The applicant was seen by the Inspector at one time ". The applicant was seen by the Inspector and the Doctor about 4 or 5 hours after the stabbing had taken place. The Inspector says that the applicant was smelling

of liquor, while the Doctor says that he was not drunk. The defence was raised that the applicant was so drunk that he could not form an intention to kill. This defence has been dealt with by the learned Judge at page 14 of the charge in the following passage :—

> " The burden is on the accused to prove that he was so drunk as not to be able to form the necessary intention and in this case you have to ask yourself how has the accused proved it ? "

In other similar passages in the charge, the trial Judge has placed the burden of proof in regard to his intention on the accused. Mr. Mackenzie Perera's main support, in his contention, that the trial Judge has misdirected the Jury, is the judgment of Wijeyewardene, J. in the present Court of Criminal Appeal case of *The King vs. Punchi Banda*, 48 N. L. R. 313. The headnote of this case is as follows :—

> " In all cases of self-induced intoxication it is a question of fact whether, in spite of the intoxication, the accused entertained a criminal intention. The burden of proving this intention lies on the prosecution and in deciding the question, the Court must bear in mind the drunkenness of the accused.
>
> " Further, section 79 of the Penal Code does not enable an accused to put forward a mitigatory or exculpatory plea and does not, therefore, create a general or special exception such as is contemplated by section 105 of the Evidence Ordinance."

At p. 315 of the judgment Wijeyewardene, J. says :—

> " In all such cases of self-induced intoxication it remains a question of fact to be decided whether, in spite of the intoxication, the accused entertained a criminal intention (*vide The King vs. Rengasamy* (25 N. L. R. 438).
>
> " On whom then lies the onus to prove the facts necessary to establish whether or not an accused, in such a case, had the necessary criminal intention ? The accused would have to prove the fact of drunkenness, as that is a matter especially within his knoweldge (*vide* Evidence Ordinance, section 106). He may prove it either by evidence led by him or through the evidence of Crown witnesses. He would discharge this burden by establishing the fact of drunkenness on a balance of evidence. If the Court is so satisfied that the accused was drunk, the Court would then examine, taking the fact of drunkenness into consideration, whether the prosecution has proved the necessary criminal intention beyond reasonable doubt. For instance in ordinary cases of murder, the Court usually decides this question by taking into consideration, the weapon used in inflicting the injury, the nature of the injury, the position of the injury and similar matters. In such cases the Court would also make use of the legal maxim that a normal man is presumed to intend the natural and inevitable consequences of his acts. But where the Court is dealing with the case of an accused in a state of intoxication, the Court will also have to take into consideration the fact of drunkenness and see how far the legal maxim mentioned by me could be applied in his case. In other words, while the burden of proving drunkenness rests on the defence, the burden of proving criminal intention rests throughout the case on the prosecution, and in deciding that question, the Court has to bear in mind the drunkenness of the appellant.
>
> " Section 105 of the Evidence Ordinance discussed by this Court in *The King vs James Chandrasekera* (44 N. L. R. 97) does not apply to the present case, as this is not a case where an appellant seeks to claim the benefit of any general or special exception referred to in that section. I may add that, in any event, it is not possible to regard section 79 of the Penal Code as such an exception, as that section does not enable an accused person to put forward a mitigatory or exculpatory plea.
>
> " The Court was not concerned with the question of burden of proof in *The King vs. Rengasamy* (supra) but there are certain passages in the judgments in that case which support the view taken by us.
>
> " In our opinion, it is a misdirection of law to state that the appellant must satisfy the Jury on a balance of evidence ' that his drunkenness had obscured his idea of intention.' ".

It has, therefore, been held in *The King vs. Punchi Banda* that as it is not possible to regard section 79 of the Penal Code as a general or special exception. Section 105 of the Evidence Ordinance interpreted as in *The King vs. James Chandrasekera* (44 N.L.R. 97) does not apply. The burden of proving criminal intention rested, therefore, throughout the case on the prosecution.

The question which we have to decide is whether the Court, in *The King vs. Punchi Banda*, was correct in law, in holding that section 79 of the Penal Code was not a general or special exception. Apart from *The King vs. Punchi Banda*, Mr. Mackenzie Pereira was unable to call in aid any other authority. He invited our attention to the case of *The King vs. Rengasamy* (25 N. L. R. 438). But as Wijeyewardene, J. states at p. 316, in his judgment in *The King vs Punchi Banda*, the Court in that case was not concerned with the question of the burden of proof. Mr. Mackenzie Perera has however argued that certain passages from the judgment of Garvin, J. support the argument that he has adduced. In particular he relies on the following passage that appears at p. 446 :—

> " In the very few instances in which a particular knowledge and not a particular intention is essential before an act is punishable as an offence, whether or not the doer of the act possessed the necessary knowledge is a question of fact, and must be determined accordingly. It is, I think, desirable to add that where the prosecution has established a *prima facie* case it is for the person charged if he relies on intoxication as a defence, to satisfy the Jury that he had reached a state of intoxication which rendered him incapable of forming the required intention, or to prove facts or point to circumstances which are necessarily sufficient to raise a real doubt in the minds of the Jury, as to his capacity to form the intention imputed to him in the charge."

We do not consider that by the use of the words " or point to circumstances which are necessarily sufficient to raise a real doubt in the minds of the Jury as to his capacity to form an intention imputed to him in the charge " threw the burden of proof in each case on the Crown. Those words must, of necessity, refer to a case in which the evidence adduced by the Crown points to a reasonable doubt as to the capacity of the accused. The passage from the judgment of Garvin, J. read as a whole supports the argument put forward by the Solicitor-General. The latter has moreover put forward arguments and produced authorities supporting the contention that the trial Judge's directions to the Jury was a correct statement of the law. Section 79 of the Penal Code appears in Chapter IV. which is headed " General Exception ". The section is worded as follows :—

> " In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will."

The section refers to cases where an act done is not an offence unless done with a particular knowledge or intent. It then provides that if the act is committed in a state of intoxication, that person, in the case of self-induced intoxication, shall be liable to be dealt with as if he had the same knowledge as a sober man. The inference to be drawn from this provision is that in cases where intent is an ingredient of the offence, the principle formulated in cases where knowledge is an ingredient does not apply. Without section 79 the ordinary law would apply, namely that a person would be presumed to intend the ordinary and natural consequences of his act. Section 79 therefore enables a person to put forward a plea of a mitigatory and exculpatory character. Support for the argument that section 79 does provide an exception to criminal responsibility can also be derived from Gour's Classification of General Exceptions in the 4th Edition Vol. 1 Chapter IV. p. 414. In paragraph 567 the learned author states that the first main principle is " where there is an absence of criminal intent (sections 81 to 88 and 92 to 94) ". The wording of section 86 of the Indian Penal Code is similar to that of section 79 of the Ceylon Penal Code. In his commentary in section, 86 Gour at page 560 states that where intention is a constituent of an offence, the question must be dealt with on the general principles of law which are the same both here and in England. It is, therefore, relevant to inquire what principles have been formulated in English cases in regard to the burden of proof. In this connection our attention has been directed to the case of *Reg vs. Monkhouse* 4 Cox 55. In this case the accused was charged with discharging a loaded pistol with intent to murder. The question arose whether by reason of drunkenness the accused had the necessary intent. The following passage from the charge of Coleridge, J. to the Jury is in point :—

> " Drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention."

This case, therefore, places the burden of proving that intoxication produced complete lack of control or incapacity to form any specific intention squarely on the accused. The leading case in English Law in regard to the defence of drunkenness, where intention is one of the ingredients of the charge, is the House of Lords case of *Director of Public Prosecution vs. Beard*, 14 Criminal Appeal Report 159. The judgment of their Lordships delivered by Lord Birkenhead, L.C. reviewed in comprehensive manner the history of English Law in regard to this matter. The appeal to the House of Lords was instituted on a certificate of the Attorney-General, that the decision of the Court of Criminal Appeal involved a point of exceptional importance. The Court of Criminal Appeal had held that the direction of the trial Judge, Bailhache, J. was calculated to mislead the Jury by imposing a test applicable only to the defence of insanity, instead of the test imagined to be generally laid down in *Meade's Case*, 2 *Criminal Appeal Reports* 54 for application to the defence of drunkenness. The relevant part of the trial Judge's direction to the Jury appears on page 186 of the report and is as follows :—

> " It is no defence to say : ' I should not have done that wicked thing if I had not been so drunk '. But if he has satisfied you by evidence that he was so absolutely drunk at the time that he really did not know what he was doing or did not know that he was doing wrong, then the defence of drunkenness succeeds to this extent—that it reduces the crime from murder to manslaughter. What I mean by that is a sort of thing like this : Supposing he cuts a woman's throat under the impression that he is cutting the throat of a pig, then the crime of murder is reduced to the crime of manslaughter. But if a man says : ' I was mad, and turned into a brute by drink ', it is no defence unless he satisfies you that he was so far out of his senses that he did not know what he was doing."

With regard to this direction it will be observed that Bailhache, J. placed the burden of proof on the accused and applied the same test with regard

to the effect of the accused's intoxication as if the defence had been one of insanity. On pages 197 and 198 of the report, the Lord Chancellor deals with the direction of Bailhache, J. He held that the test of insanity should not be applied to a case of drunkenness, which a concessis did not amount to insanity. This distinction had been preserved throughout the cases and it ought to be preserved, for the result of insanity is not a conviction. The Lord Chancellor further went on to say that Bailhache's direction on this point was an innovation which is not supported by authority and which should not be repeated or imitated. On the other hand there was no criticism by the Lord Chancellor on that part of the charge that placed the burden of proof on the accused. In fact the Lord Chancellor held that the summing-up was unduly favourable to the prisoner, and he the Lord Chancellor was not prepared to hold that the Jury were disclosed from reaching a true conclusion upon the matters which required decision. The appeal was, therefore, allowed and the conviction of murder restored.

It has been contended by Mr. Mackenzie Pereira that the two English cases I have cited have no bearing on the point at issue inasmuch as the Ceylon Penal Code requires as one of the ingredients of the offence of murder, proof of an intention to cause death or deal such bodily injury as is sufficient in the ordinary course of nature to cause death, whereas in English law such offence is committed if the accused had an intention to kill or an intention to do grievous bodily harm or commit some felony. The point at issue, however, is the burden of proof when an accused raises the defence that intoxication deprived him of the necessary intention. Intention is a necessary ingredient of the offence of murder whether the latter offence is defined by Ceylon or English Law. In these circumstances there is no substance in Mr. Mackenzie Pereira's contention.

If we turn to the law as expounded by Judges in India, we find the same principle applied to the burden of proof. In *Nga Tun Baw vs. Emperor* (1912) 13 Criminal Law Journal Report 864 at pages 868 and 869 the following passage from the judgment of Fix, C.J. is relevant :—

> " It may be gathered from the above cases that from the year 1819, the English Law has been that the drunkenness of an accused person at the time he committed the act charged as an offence may be, and should be taken into consideration on the question whether he did the act with the intention necessary to constitute the offence charged, and that law does not require that the intention, which would be ascribed to a sober man in connection with an act, must necessarily be ascribed to a drunken man who does the same act. The English Law, as stated in the above extracts, appears eminently reasonable ; it does not involve blind adherence to any rule of law, it recognises that there are degrees of intoxication, and that a drunken man may have the capacity for forming the intention necessary to constitute an act an offence. A voluntary drunkard, like every other person, is in the first instance presumed to have intended the natural consequences of his act, but this presumption may be rebutted by his showing that at the time he did the act his mind was so affected by the drink he had taken that he was incapable of forming the intention requisite for making his act the offence charged against him. The result of such law is that the question of intention must be determined in each individual case according to the principles laid down. The Indian Law has, in section 86 of the Penal Code, made an express provision regarding the knowledge which should be imputed to a voluntary drunkard committing an act which is an offence when done with a particular knowledge or intent. The effect of the omission to make any expressed provision regarding the intention which is to be attributed to such a man doing such an act appears to me to be that the question of intention is left to be dealt with on the general principles of law, and the general principles of Indian Law on the matter do not appear to me to differ from the general principles of the English Law as stated in the judgment and summings-up I have quoted from."

Mr. Pulle has also invited our attention to the South African case of *Rex vs. Kaukani* (South African Law Reports 1947 (2) May, page 897). In this case decided by the Appellate Division, the Court decided that both in the case of insanity or drunkenness the burden is on the accused to prove such defence by a preponderance of probability. In this connection the following pasage at p. 816 from the judgment of David, J.A. is most relevant :—

> " And I would again emphasize the correctness of Wigmore's statement (3rd ed. Vol. 9, section 2486 in fin.) which was accepted in *Pillay vs. Krishna and another* (1946, A. D., not yet reported), that rules as to the incidence of proof rest ' for their ultimate basis upon broad reasons of experience and fairness '. The learned author had said earlier in the same section that—
>
> " In criminal cases the innovation, in some jurisdictions of putting upon the accused the burden of proving his insanity has apparently also been based on an experience in the abuses of the contrary practice."

In my opinion the same consideration—as well as that of common sense : *Rex vs. Ngxongo* (1947 A. S. A. R. 152) requires that the onus should be on the accused, not only in a defence of insanity but also in one of drunkenness. The latter defence is one which is so easy to raise, and so difficult entirely to disprove, that it seems to me that the dictates of reason and of justice, based upon one's own experience of presiding at criminal sessions, whether in a large town or on circuit, requires that the onus should be on the accused to prove this defence by a preponderance of probability, and not upon the Crown to disprove it beyond all reasonable doubt.

For these reasons I come to the conclusion that in a defence of drunkenness, as in one of

insanity, the onus is on the accused and not on the Crown. I may add that I have the authority of the Chief Justice and of his brother Greenberg, who sat in Ndhlovu's case, to say that they concur in this result. And it is fatal to the argument advanced on behalf of the accused in the present case, which consequently fails.

The authorities cited, whether from Ceylon, England, India or South Africa, have satisfied us that the burden of proof in a case of murder, in which the defence of drunkenness is put forward rests on the accused, who must prove that by reason of intoxication there was an incapacity to form the intent necessary to commit the crime. Evidence of drunkenness falling short of this and merely establishing that the mind of the accused was affected by drink, so that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his act. In the circumstances we have come to the conclusion that there was no misdirection and the application must be dismissed. In conclusion we feel constrained to say that, if the Crown had presented the same line of reasoning and produced the same arguments as in this case, the decision in *The King vs. Punchi Banda* would have been different.

Appeal dismissed.

Present : DIAS, J.

JAYEWARDENE vs. KUMARIHAMY

S. C. No. 887—*M. C. Panwila Case No.* 3122.
Argued and decided on : 16th September, 1947.

Maintenance—Action for—Agreement that respondent should take Oath at Minneriya Temple on the steps near temple door—Oath taken when temple door not open—Can applicant withdraw from undertaking.

The parties to a maintenance case agreed that the case should be decided by taking an oath at the Minneriya Temple on the steps of the Temple near the entrance door. Whether the door should be kept open or not was no part of the agreement. Respondent took the oath, but the applicant sought to get behind the undertaking on the ground that the door was shut at the time.

Held : That the applicant was not entitled to withdraw from the undertaking after the opponent had taken the oath.

Cases referred to : *Chelliah vs. Sinnammah* (1947, 48 New Law Reports 262).
Eliza vs. Jokino (1917, 20 New Law Reports 157).
Muttusamy vs. Muttukaruppen (1911, 14 New Law Reports 397).
Palaniappa vs. Sinnathamby (1914, 16 New Law Reports 236).

Cyril E. S. Perera with *Christie Seneviratne*, for respondent-appellant.
No appearance for applicant-respondent.

DIAS, J.

This is a maintenance case. It is settled law that although the procedure in a maintenance case is governed by the Criminal Procedure Code, the proceedings are in their nature civil—see the cases quoted in *Chelliah vs. Sinnammah* (1947—48 New Law Reports 262). In *Eliza vs. Jokino* (1917—20 New Law Reports 157) where in a maintenance case the parties agreed to take an oath at a temple but owing to the absence of the monk the oath could not be administered, the Supreme Court sent the case back to the Magistrate with the direction that the oath should be administered as agreed to between the parties. In *Muttusamy vs. Muttukaruppen* (1911—14 New Law Reports 397) and *Palaniappa vs. Sinnathamby* (1914—16 New Law Reports 236) it has been held that the person who had challenged his opponent to take an oath could not withdraw from his undertaking after the opponent consented to take the oath.

In this case the parties agreed that the oath was to be taken at the Minneriya temple on the steps of the temple near the entrance door. Nothing is said in that consent order as to whether the door was to be open, shut or kept ajar. The respondent took the oath but the applicant now seeks to get behind this order by stating that the door was shut. Instead of rejecting this plea out of hand, the Magistrate appears to have treated the consent order as of no effect and proceeded with the inquiry. He had no right to do so. The respondent having taken the oath in terms of the consent order, the applicant must withdraw this action. I therefore, dismiss, the applicant's application with costs.

Appeal dismissed.

Present : HOWARD, C.J. & WINDHAM, J.

WICKREMASINGHE VS. THE COMMISSIONER OF INCOME TAX

S. C. 2/S—Income Tax. Case Stated.
Argued on : 24th September, 1947.
Decided on : 2nd October, 1947.

Income Tax—Remuneration paid to Arbitrator—Does it form part of his income or profits chargeable with tax—Income Tax Ordinance, Cap. 188 of 1932, section 6 (1) (a), (1) (b) and (1) (h)—Delay in sending notice to Commissioner as required by section 74 (3) of the Ordinance.

Held : (i.) That the remuneration received by a person nominated to act as arbitrator by a party in arbitration proceedings forms part of such person's taxable income.

(ii.) That the mere fact that such person had so acted and received remuneration only once does not make it a profit of a "casual and non-recurring nature" within the meaning of section 6 (1) (*h*) of the Income Tax Ordinance.

(iii.) That the word "employment" in section 6 (1) (*b*) of the Income Tax Ordinance includes a case where a person employs himself to earn money.

(iv.) That where a case was transmitted to the Supreme Court on 22nd January, 1947, and notice in writing was sent to the Commissioner on 24th January, 1947, as provided in section 74 (3) of the Income Tax Ordinance, the delay did not deprive the Supreme Court of its jurisdiction to hear the appeal.

Cases referred to : *Commissioner of Income Tax Madras vs. M. Ahmed Badsha Saheb* (*A. I. R.*) (1944) *Madras* 63.
In the matter of Chunni Lal Kalyan Das A. I. R. (1925) *Allahabad* 469.
Thornhill vs. The Commissioner of Income Tax (41 N. L. R. 313).
Ryall vs. Honeywill (8 Tax Cases 524).
Partridge vs. Mallandaine (2 Tax Cases 180).
Cosmas vs. The Commissioner of Income Tax (39 N. L. R. 457)

H. V. Perera, K.C., with *N. M. de Silva* and *Sam Wijesinghe*, for the assessee-appellant.
H. H. Basnayake, K.C., Acting Attorney-General, with *H. W. R. Weerasooriya, Crown Counsel*, for the Commissioner of Income Tax.

HOWARD, C.J.

This application is made by the appellant under section 74 of the Income Tax Ordinance (Cap. 188) on a point of law by way of case stated by the Board of Review. The appellant is the widow of the late Mr. C. L. Wickremasinghe, who as an *ex*-member of the Ceylon Civil Service was a pensioner of the Government. In the year preceding the year of assessment 1944-1945, the deceased agreed with the Municipal Council of Colombo to act as the Arbitrator nominated by the Council in arbitration proceedings connected with the purchase by the Council of the Colombo Tramways. For acting as Arbitrator the deceased received the sum of Rs. 15,000, which was included in the assessment of Income Tax made on the deceased's income. Despite appeals by the appellant this assessment was confirmed by the Commissioner of Income Tax and the Board of Review.

On behalf of the appellant, Mr. H. V. Perera has contended that the sum of Rs. 15,000 did not form part of the deceased's income or profits chargeable with tax on the ground that it did not come under any of the descriptions of profits or income in section 6 (1) (*a*)-(*g*) of the Ordinance, and that it was excluded from section 6 (1) (*h*) as being of 'a casual and non-recurring nature.' The Acting Attorney-General, on the other hand, maintains that the sum earned by Mr. Wickremasinghe is taxable under each of paragraphs (1) (*a*), (1) (*b*) and (1) (*h*) of section 6. He relies mainly on section 6 (1) (*h*) and argues that it was not a profit of a casual and non-recurring nature. In connection with the expression "casual and non-recurring" nature our attention has been invited to various authorities. In the *Commissioner of Income Tax, Madras vs. M. Ahmed Badsha Saheb* (1944) (A. I. R.) Madras 63 it was held by Leach, C.J. that there can be no rule laid down with regard to what is of a casual and non-recurring nature. Each case must be decided on its particular facts. In that particular case the assessee was a merchant dealing in hides and he entered into an agreement to act as an arbitrator. This agreement was entirely apart from his business and was made with no stipulation for remuneration but as a friend of the family. The task involved more time than anticipated, and though there was no legal obligation the Court decided to grant the arbitrators a reward for their services. In these circumstances the Court held that the remuneration was of a casual and non-recurring nature. *In the matter of Chunni Lal Kalyan Das* A. I. R. (1925) Allahabad 469 it was held that the adventure of a business man who is enabled through his business associations, to negotiate a large transaction and thereby to earn a heavy commission, may undoubtedly be in fact non-recurring in the sense that so successful an adventure would not be likely to occur again. But on the other hand, it is a class of transaction which

might occur to any such business man once only or half a dozen times again, during the course of the year. Profits arising from such a transaction are not of a casual or non-recurring nature. In his judgment Walsh, J. invited attention to the use in the exemption of the word "nature" rather than "occurrence". If the word occurrence had been used there would have been much to be said for the contention of the assessee. The use of the word "nature" connoted a class of dealing which might occur several times. The word "nature" was used independently of the accident of the event happening in fact once only or more often in a fortunate year. Again in *Thornhill vs. The Commissioner of Income Tax* (41 N. L. R. 313) it was held that income tax is payable on proceeds of the sale of coupons issued under the Tea and Rubber Control Ordinances. At p. 318 Soertsz, J. who gave the judgment stated as follows :—

> "Examined in this way, the amount in question appears to me to be "profits and income' derived from a business, namely, an agricultural undertaking, and assessable to income tax under section 6 (1) (*a*) of the Income Tax Ordinance.
>
> "If, however, this view is incorrect and the amount is not assessable under that sub-section, I am clearly of opinion that it is not a receipt which escapes altogether from the Ordinance. I find it impossible to resist the conclusion that this is a taxable receipt for, as very pertinently observed by the Board, 'if the appellant's contention is accepted, the owner of a 500-acre estate may get it registered, refrain from harvesting its produce, receive coupons, derive large sums of money thereby, and escape taxation altogether in respect of the money he receives in connection with his owning and maintaining an estate'. I agree with the Board that if it is assumed that this amount does not fall within the scope of section 6 (1) (*a*), it is caught up by the 'residuary' sub-section (1) (*h*), for this amount is not something casual or something in the nature of a windfall. It is something that will recur, or, at least, that can be made to recur as long as the Tea and the Rubber Control Ordinances continue in operation".

It is conceded by Mr. Perera that the sum earned by Mr. Wickremasinghe would have attracted tax in England although it is of a casual nature. This is clear from the judgment of Rowlatt, J. in *Ryall vs. Honeywill* (8 Tax Cases 524). Mr. Perera contends, however, that the law in Ceylon in regard to a transaction of this character is by reason of the wording of the Income Tax Ordinance different from that in England.

In my opinion it is, without departing from the principle formulated in the Madras case that each case must be decided on its particular facts, difficult to distinguish the present case from *Thornhill vs. The Commissioner of Income Tax* and the Allahabad case. The employment of the late Mr. Wickremasinghe as an arbitrator was something that could be made to occur again. It was not a class of dealing which might occur only once, but might occur several times. It did not exhaust itself in one effort. In these circumstances the sum of Rs. 15,000 was not a profit of a 'casual and non-recurring nature.'

Although it is unnecessary to decide the point I think the Attorney-General was correct in his contention that the transaction came within the words "any employment" as used in section 6 (1) (*b*) of the Ordinance. Mr. Perera contends that the word "employment" connotes an engagement by someone else. In this connection the following passage from the judgment of Denman, J. in *Partridge vs. Mallandaine* (2 Tax Cases 180) is in point :—

> "The words are 'profession, employment or vocation'. I do not feel myself disposed to put so limited a construction upon the word 'employment' as Mr. Graham desires us to put upon it. I do not think 'employment' necessarily means a case in which a person is set to work by other means to earn money. A man may employ himself in order to earn money in such a way as to come within that definition."

The Acting Attorney-General has also taken a technical objection to the hearing of this application. Under section 74 (3) of the Ordinance, the applicant is required "at or before the time" when he transmits the stated case to the Supreme Court, to send the other party notice in writing of the fact that the case has been stated on his application and shall supply him with a copy of the stated case. The stated case was transmitted to the Supreme Court on 22nd January, 1947 ; on the same day notice in writing of such transmission was sent to the Clerk to the Board of Review, an officer in the Department of Income Tax. On the 24th January, 1947, notice in writing was sent to the Commissioner. The Acting Attorney-General has argued that notice in writing to the Commissioner as provided in section 74 (3) was a "condition precedent" to the hearing of this appeal. He referred us to *Cosmas vs. The Commissioner of Income Tax* (39 N. L. R. 457). The headnote of this case is as follows :—

> "Where a person, on whose application a case was stated for the opinion of the Supreme Court under section 74 of the Income Tax Ordinance, transmitted the case to the Supreme Court on January 17, 1938, and gave notice to the Income Tax Commissioner on March 21, 1938."
>
> "**Held**: That the appellant had failed to comply with the requirement of section 74 (3) that the notice should be given at or before the time he transmits the case to the Supreme Court."

It will be observed that the delay in giving the required notice to the Commissioner was, in that case, over two months. In this case, it amounts to two days. In his judgment at p. 458 Poyser, J. stated that the words "at or before the time" though they might possibly give some latitude,

certainly do not permit of a delay of some five weeks in complying with the provisions of this sub-section. I do not regard this case as an authority for the proposition that a delay of a day or two in giving the notice under section 74 (3) of the Ordinance will deprive the Court of jurisdiction to hear this application.

For the reasons I have given I am of opinion the application should be dismissed with costs.

Appeal dismissed.

Proctors : *De Silva* and *Mendis* for the appellant.

CASE STATED

Under the provisions of Section 74 of the Income Tax Ordinance (Ch. 188) for the opinion of the Honourable the Supreme Court of the Island of Ceylon upon the application of Mrs. E. Wickremasinghe of Colombo, Appellant.

1. The appellant is the widow of the late Mr. C. L. Wickremasinghe, hereinafter referred to as the deceased.

2. In the year preceding the year of assessment 1944-45 it was agreed between the deceased and the Colombo Municipal Council that the deceased would act as the arbitrator nominated by the Council in arbitration proceedings connected with the purchase and sale of the Colombo Tramways.

True copies of the Council's letter to the deceased, dated 16th December, 1943, and of the deceased's reply thereto, dated 18th December, 1943, are contained in the Annexure hereto, marked X 1,* which forms part of this case.

3. The deceased acted as arbitrator as aforesaid and duly received the stipulated fee of Rs. 15,000, which was included in the assessment of income tax made on the deceased's income.

4. The said assessment was confirmed by the Commissioner of Income Tax on appeal to him, and the appellant appealed against the Commissioner's determination to the Board of Review constituted under the Income Tax Ordinance on the grounds set out in her letter, dated 23/24th August, 1946, a true copy of which, marked X 2,* is annexed hereto as part of this case.

5. At the hearing before the Board of Review—

(*a*) the appellant contended that the said sum of Rs. 15,000 did not form part of the deceased's income or profits chargeable with tax on the ground that it did not come under any of the descriptions of profits or income in section 6 (1) (*a*)-(*g*) of the Income Tax Ordinance and that it was excluded from section 6 (1) (*h*) as being of a casual and *re*-curring nature; and (*b*) the respondent contended that the sum of Rs. 15,000 was chargeable with tax under section 6 (1), generally, and that, in particular, sub-sections 6 (1) (*b*) and (*h*) applied.

6. We, the members of the Board who heard the appeal confirmed the determination of the Commissioner and dismissed the appeal, holding that the said sum of Rs. 15,000 was a profit from employment and also that being the result of bargain and agreement, it was not a profit of " a casual and non-recurring nature ".

7. The appellant, being dissatisfied with the decision of the Board, has duly applied that a case be stated for the opinion of the Honourable the Supreme Court on the question of law arising on the appeal, namely, whether the sum of Rs. 15,000 received by the deceased in the aforesaid circumstances is chargeable with income tax under sections 5 and 6 of the Income Tax Ordinance and we have accordingly signed and stated this Case.

Colombo, January 9, 1947.

1. (Sgd.) W. S. DE SARAM
2. (Sgd.) A. G. TILLEKERATNE
3. (Sgd.) ROSSLYN KOCH.

Members of the Board of Review, Income Tax.

Present : DE SILVA, J.

JOHN vs. P. C. 3072, EKANAYAKE

S. C. No. 469—*M. C. Colombo No.* 13295
Argued and Decided on : 26th June, 1946.

Sentence—False allegations made by accused—Not to be taken into consideration in fixing sentence.

Held : That the fact that an accused person has made false allegations against the police should not be taken into consideration in fixing the sentence.

M. M. K. Subramaniam, for the accused-appellant.
J. G. T. Weeraratne, Crown Counsel, for the the Attorney-General.

DE SILVA, J.

In this case, the accused has been convicted of having had in his possession 1¾ lbs. of made tea valued at Rs. 2 suspected to have been stolen from the Lake Side Warehouse, Colombo, and sentenced to rigorous imprisonment for a term of three months.

The conviction is supported by the evidence, and there is no reason to interfere with it, but the Magistrate appears to have been influenced, in imposing a sentence of three months' rigorous imprisonment, by the circumstance that the accused made some utterly false allegations against the police. This, in my opinion, is not a circumstance which should be taken into consideration in punishing the accused for the offence committed by him. If he has committed any other offence by making false allegations, he should be charged and punished for that separately. The accused has no previous convictions and, in view of the trifling value of the goods stolen, I would set aside the sentence of imprisonment and sentence him to pay a fine of Rs. 100 or in default three months' rigorous imprisonment.

Sentence varied.

* Not reproduced (Edd.)

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

REX vs. FOENANDER.

S. C. No. 78—*D. C.* (*Cril.*) *Kegalle No.* 2679/11998.
Argued on : 3rd July, 1947.
Decided on : 11th July, 1947.

Penal Code, section 392—*Necessity to prove dishonest misappropriation—Accused's explanation.*

The accused, a railway guard, was convicted for criminal breach of trust of goods entrusted to him to be delivered to the officer at a railway station without direct evidence of dishonest misappropriation or of wilfully suffering others to do something contrary to the terms of the trust. The accused did not give evidence at the trial, but an explanation given by him at a departmental inquiry earlier was produced from which his guilt could not be reasonably presumed.

Held : That the conviction cannot be upheld.

Cases referred to : *Koch vs. Nicholas Pulle* (3 N. L. R. p. 198).
Emperor vs. Ramaya (1 Crim. L. J. 908).

E. F. N. Gratiaen, K.C., with *G. E. Chitty*, for the accused-appellant.
J. A. P. Cherubim, Crown Counsel, for the Attorney-General.

JAYETILEKE, J.

The accused has been convicted on an indictment under section 392 of the Penal Code with having committed criminal breach of trust in respect of two bales of textiles entrusted to him on or about December 7, 1944, and sentenced to undergo rigorous imprisonment for a period of six months. The accused is a railway guard; on the day in question, he was in charge of the guard's van which was attached to the up-country night mail train. The evidence shows that at the Fort railway station he was entrusted with the following parcels by Pelis, a railway policeman, to be delivered to the officer in charge of the Rambukkana railway station :—

1. A bag of forage ;
2. A parcel of newspapers ;
3. A letter with a cheque enclosed ;
4. (*a*) Two bundles of beedies ;
   (*b*) Two bales of textiles ;
5. Three service letters.

Pelis issued to him four way-bills in respect of items 1, 2, 3, 4, namely, P 4, P 5, P 6 and the original of P 2. No way-bill was issued for the service letters as it was not usual to do so. Pelis prepared a summary of the way-bills and parcels handed over by him to the accused (P 2) and obtained the accused's signature to it. P 2 shows that, in addition to the parcels referred to above, various other parcels were entrusted to the accused to be delivered at other stations. The accused's duty was to deliver the way-bills and the parcels to the officers in charge of the respective stations to which the parcels were consigned.

When the train reached Rambukkana station the accused delivered to the officer in charge P 4, P 5, P 6 and the articles referred to in items 1, 2, 3, 4 (*a*) and 5. The officer in charge says that he asked the accused for the original of P 2 and the accused gave him a bundle of way-bills and asked him to search for it but P 2 was not in it. Just then Rayappen, the consignor of the two bales of textiles, turned up and inquired about the goods consigned by him. The accused requested him to search for the goods in the van. Rayappen did so, but did not find them. At a departmental inquiry held on January 5, 1945, the accused made a statement P 14 which was read in evidence at the trial. In that statement he has admitted that the two bags of textiles were entrusted to him, and he has stated that after taking charge of the Fort parcels he had to take charge of the Colpetty parcels and to check and accept ice and various other things loaded in the waggons. He has also stated that two railway porters travelled in his van from the Fort as far as Polgahawela. The statement taken as a whole shows that the accused could not explain what happened to the goods. and that he believed that the goods had been stolen either by someone at the Fort railway station, when he was attending to the work referred to by him, or by the two railway porters between the Fort and Polgahawela railway stations. One of the witnesses called by the Crown supported the accused's statement that two railway porters travelled in the accused's van that night. On these facts the question arises whether the charge can be sustained. Two elements are necessary to constitute the offence of criminal breach of trust : (1) There must be a trust ; (2) there must be dishonesty. The accused

was, no doubt, entrusted with property, but he would not be guilty of criminal breach of trust unless he dishonestly misappropriated or converted the property to his own use, or dishonestly used it or disposed of it in violation of any direction of law prescribing the mode in which the trust he undertook was to be discharged, or wilfully suffered some other person so to do. There is no direct evidence of dishonest, misappropriation of the property by the accused in this case, nor are any circumstances from which dishonest misappropriation may be inferred. The alterations in the road-bill P3, to which Mr. Cherubim invited our attention do not prove any dishonesty on the part of the accused even if they were made by the accused. The District Judge says in has judgment that the accused has failed to explain what happened to the goods. In saying so he has obviously lost sight of P 14. In *Koch vs. Nicholas Pulle* (3 N. L. R. page 198) Lawrie, J. said :

> " In all cases under this Section the explanation by the servant is an important part of the evidence before the jury or the Court. Does the explanation satisfy the Court that there has been no dishonesty, no criminal breach of trust or does it contain admissions or statements from which either the guilt of the accused is proved or guilt may reasonably be presumed ? "

The explanation given by the accused seems to be a reasonable one, and I think it should be accepted. It is possible that the two railway porters stole the goods, but the accused cannot be convicted in the absence of evidence that he wilfully suffered them to do so. In *Emperor vs Ramaya* (1 Crim. L. J. 908) the accused, who was the tindal of a cargo boat, was entrusted with 200 hides to be carried to a steamer. On delivery on the steamer twenty-two hides were missing upon which the accused was convicted of criminal breach of trust. It was held that there was no evidence of dishonesty nor could dishonesty be inferred from the mere fact that some of the hides disappeared from the boat. The accused may have been negligent but he was not dishonest. The crew or some of them may have committed the theft but the accused could not be convicted unless there was evidence of, at least, wilful sufferance which must, at least, amount to abetment.

In *Koch vs. Nicholas Pulle* (supra) it was held that mere deficiency in the quantity of the goods entrusted to a servant is not of itself sufficient proof of criminal breach of trust. It must be shown that the accused disposed of the property in some way or other than that in which he was bound to apply it and that in so disposing of it he did so dishonestly.

I would set aside the conviction and sentence and acquit the accused.

Conviction set aside.

KEUNEMAN, A.C.J.
I agree.

Present : HOWARD, C. J. & WINDHAM, J.

STEPHEN DE SILVA vs. (1) DEWAYALAGE SILVA AND ANOTHER

S. C. No. 369—*D. C.* (*F*) *Kurunegala No.* 1842.
Argued and decided on : 4th September, 1947.

Registration of Documents Ordinance, Cap. 101 *of* 1928, *sections* 14 (7) *and* 15 (1)—*Two consecutive transfers of same land—Registration of deeds by purchasers in different folios—Misdescription of situation of land by earlier purchaser, but registered in folio dealing with previous transactions—Priority.*

A person made two conveyances of the same land. The earlier purchaser registered the deed in the folio dealing with previous transactions in this land, and describing its situation as Inguruwatte. The subsequent purchaser registered the deed in a different folio as being situated at Uda Inguruwatte, which is the correct situation, but without reference to the folio indicating the previous transactions.

Held : That the later purchaser does not gain priority as his deed was not duly registered.
Cases referred to : *De Silva vs. Lapaya* (29 N. L. R. p. 177).

H. V. Perera, K.C., with *C. R. Gunaratna*, for the plaintiff-appellant.
N. E. Weerasooriya, K.C., with *C. V. Ranawake* and *S. R. Wijayatilake*, for the defendant-respondent.

HOWARD, C.J.

We are of opinion that this appeal must be allowed. It would appear that Punchi Banda, the added defendant, gave two conveyances of the same piece of land. On the 15th of May, 1941, he conveyed it to the defendant by a deed and by another deed dated the 9th of August, 1941. he conveyed it to the plaintiff. With regard to

registration, it would appear that the plaintiff described the plot of land as being situated in Inguruwatte. The registration made by the defendant, however, described the land as being situated in Uda Inguruwatte. It was proved in evidence that the land was actually situated in Uda Inguruwatte and at the present time there was no village known as Inguruwatte. On the other hand, all the previous transactions with regard to this land, dating from 1895, had been with reference to a land situated in Inguruwatte and were registered in a folio which described the land as being situated in Inguruwatte.

The learned District Judge in finding for the defendant has applied the case of *de Silva vs. Lapaya* (29 N. L. R., p. 177). The headnote of that case is as follows :—

"Where, owing to a misdescription of the village in which a land is situated, a deed affecting the land is registered in a folio different from that in which it would have been registered had the correct village been given.

Held: That the deed was not duly registered in accordance with the provisions of the Land Registration Ordinance and would not have the benefit of priority conferred by the Ordinance."

Now, we are of opinion that this case has no application to the present case. Even assuming for one moment that there is a misdescription of the village in which the land is situated, this did not lead to the deed being registered in a folio different from that in which it would have been registered had the correct folio been given.

Section 15 (1) of the Registration of Documents Ordinance provides that, when an instrument is presented for registration, that instrument must be registered in the book allotted to the division in which the land affected by the instrument is situated and in, or in continuation of, the folio in which the first registered instrument affecting the same land is registered. Section 14 (7) also provides that when an instrument is presented for registration there must be a reference made to previous transactions relating to the same land. So, assuming that the plaintiff had described the land as being situated in Uda Inguruwatte and not in Inguruwatte as he did, the deed would have been registered in the same folio as it was registered, having regard to the fact that it must be placed in the folio in which other instruments are registered. In the defendant's registration there is no reference to previous transactions with regard to this land. It seems to me that if the defendant were to succeed in this action the whole object of the Registration of Documents Ordinance would be nullified, because the idea underlying it is that a prospective purchaser when he comes and inspects the Register should find in front of him a record of previous transactions with regard to that particular piece of land. The registration of the defendant made no reference to any previous transactions and therefore a prospective purchaser would get no knowledge of those previous transactions by inspecting the defendant's registration.

For the reasons I have given the order of the District Judge is set aside and there must be judgment for the plaintiff as claimed together with costs in this Court and the Court below.

Set aside.

Proctors: *Perera* and *Perera* for the appellant.

Windham, J.

I agree.

Present : Canekeratne, J,

HORANA POLICE vs. (1) ABRAHAM SINGHO & ANOTHER.

S. C. No. 872-873—*M. C. Horana No.* 2071.
Argued on : 27th August, 1947.
Delivered on : 5th September, 1947.

Criminal Procedure Code, section 152 (3)—*Summary trial—Penal Code, sections* 443 *and* 369—*Discretion of Magistrate.*

Where it is contended that a Magistrate has erred in trying summarily an accused charged with housebreaking and theft.

Held: That the exercise of jurisdiction under section 152 (3) of the Criminal Procedure Code is within the discretion of the Magistrate, and where this discretion is properly exercised, the Court will not interfere.

Cases referred to: *Silva vs. Silva* (1904) (7 N. L. R. p. 191).
Gardner vs Jay (1885) (29 Ch. D. p. 58).
Puncha vs. Veloo (1946) (47 N. L. R. 567).
Fernando et al vs. Perera (1947) (48 N. L. R. 203).

U. A. Jayasundera, for 2nd accused-appellant.

B. C. F. Jayaratne, Crown Counsel, for Attorney-General.

CANEKERATNE, J.

On December 5, 1946, the police instituted proceedings against the appellants by filing a written report under section 148 (*b*) of Ch. 16 that they had committed offences under sections 443 (house-breaking by night by entering into the house of Peter Singho), and 369 (theft of articles) of the Penal Code. On this date, the 1st accused who had been remanded on November 29 was present in Court, while the 2nd accused surrendered to Court.

The Magistrate, after hearing the evidence of Peter, formed the opinion that the facts were simple and decided to proceed under section 152 (3) of Ch. 16. He read the charge to the accused, took their pleas and postponed the trial. On the postponed date the case came on for trial before another Magistrate, who postponed the trial to the 27th March. When the case was called on the postponed date, another Magistrate was officiating and presumably as he was leaving the district, he stated that he would not be able to conclude the case and postponed it for the 26th June. On this date the trial was taken up before another Magistrate. The two accused were present and each was represented by counsel. The Magistrate listened to the story of Peter anew. Peter stated in detail all the circumstances connected with the robbery. At the close of his evidence he decided to try the case as A. D. J. Counsel for the 1st accused apparently urged, at the close of the evidence of Peter, that the proceedings should be non-summary. The Magistrate considered what counsel had to say, and decided against it.

Peter was cross-examined, evidence was then given by Nonahamy, the mother of Peter, by one Romanis, and by the official witness. Peter in cross-examination gave details as to how the 1st accused caught him and squeezed his neck. The evidence shows that three men entered the house of Peter Singho : two were identified, the 1st accused by Peter Singho, the 2nd accused by Nonahamy who was sleeping in an inner room of the house. Romanis testified that he saw three men coming along a ridge. Shortly after, he heard cries from the direction of Peter's house, and one of the three was the 1st accused. Each of the accused gave evidence at the trial. The Judge was impressed by the evidence of the prosecution witnesses and at the close of the trial on June 26, 1946, convicted the accused.

At the hearing of the appeal two legal objections were urged against the conviction by Counsel for the 2nd accused. The first was that the Judge erred in trying the accused summarily. Counsel laid great stress on the note appearing on page 10 of the record. But this must be read with what appears on page 39—the charge sheet. What is the intention to be gathered from the language used in page 10 ? The Judge replying to the contention of counsel for the 1st accused says, in effect, that ordinarily he would have agreed with the objection of counsel for the 1st accused, but in the circumstances of this case he has come to a contrary view, especially as the case has now become an old case on account of the delay and because of what had been done by the Magistrate who heard the evidence of Peter first. On page 39, the Judge stated as follows :—" No difficult points of law or fact are involved. This is now an old case in which the Magistrate originally took proceedings as A. D. J. Expeditious ". He then framed charges, read out the charges to each of the accused and took their pleas. The exercise of the jurisdiction under section 152 (3) is a matter of discretion with the Magistrate and each case must, as de Sampayo, J. well expressed, depend on its own circumstances. *Silva vs. Silva* (1904) 7 N. L. R., p. 191. As there is no indication in the Ordinance on the ground upon which the discretion is to be exercised, it is a mistake to lay any rules with a view to indicating the particular grooves in which the discretion should run. It must be exercised according to common sense and justice (*Gardner vs. Jay* (1885) 29 Ch. D. p. 58. The rules, if any, which have been established by a long series of decisions may also be considered. It is hardly possible for me to say that the discretion has been improperly exercised. Counsel for the appellant did not go so far as to contend that a charge of house-breaking under section 443 of the Penal Code can, in no circumstances, be tried summarily by a Magistrate under section 152 (3) in view of the decision in *Puncha vs. Veloo* (1946) 47 N. L. R. 567, referred to by him, the latest judgment where most of the previous decisions are reviewed. What he did urge was that the ground on page 10 of the record " the case has become an old one " was not a proper ground and that the Magistrate had merely followed the view of his predecessor. For reasons already given I am unable to say that the discretion has not been properly exercised in this case.

The second ground urged by counsel is based on the fact that the evidence given by Peter in

"examination-in-chief" was not recorded *de novo* after the framing of the charge. It is urged that this is contrary to section 189, Ch. 16 and counsel referred me to the decision in *Fernando et al vs. Perera* (1947) 48 N. L. R. 203. Should the evidence given by a prosecution witness in the circumstances found in this case be recorded *de novo* after the charge is framed? Assuming that this evidence ought not to be taken into consideration in arriving at a verdict as *Fernando et al vs. Perera* (supra) decides, the "improper evidence" only affects the case of the 1st accused. The 2nd accused was identified by Nonahamy and I see no reason for interferring with his conviction. Crown Counsel took the preliminary objection that the appeal of the 1st accused had been presented out of time. There is ample evidence against him without taking into consideration what Peter Singho said before the charge was framed. I see no reason for reversing the finding of the Magistrate against him.

The appeals are dismissed.

Appeals dismissed.

Present : Dias, J.

P. C. 867, FERNANDO vs. SENARATNE.

S. C. No. 746/1947—*M. C. Kandy No.* 26467.
Argued on : 1st September, 1947.
Delivered on : 2nd September, 1947.

Defence (Control of Textile) Regulations, sections 14, 59 *and* 61—*Criminal Procedure Code, section* 325 (1) (*h*)—*Accused found guilty on his own plea—Order to enter into a bond—Confiscation of production.*

Held : (i.) That no appeal lies from an order under section 325 (1) of the Criminal Procedure Code.

(ii.) That a Magistrate has no power to make an order under section 325 (1) of the Criminal Procedure Code after convicting the accused.

(iii.) That under Regulation 61 (2) of the Defence (Control of Textiles) Regulations, a Court has power after the conviction of an accused person to order the forfeiture of the productions in the case.

Cases referred to : *Cassim vs Abdurasak* (1937) 38 N. L. R. 428.
Marthelis vs. James (1929) 10 C. L. R. 36.
Chelliah vs. Samman (1921) 3 C. L. Rec. 37.
Eversfield vs. Story (1924) 1 K. B. 437.
White vs. Hurrell Stores Ltd. (1941) 164 L. T. 334.

No appearance for complainant-appellant.
V. S. A. Pullanayagam, for accused-respondent.
Boyd Jayasuriya, Crown Counsel, as amicus curiae.

Dias, J.

The accused was charged under the Defence (Control of Textiles) Regulations with having in his possession certain textiles in excess of that which a customer could purchase, and alternatively with transporting the same and failing on demand to produce the invoice, debit note or cash receipt for inspection in terms of section 14 of the Regulations and punishable under section 59 thereof.

The accused who had originally pleaded "Not Guilty" to the charge subsequently retracted his plea and pleaded "Guilty". Thereupon the Magistrate recorded :

"I find accused guilty. In the circumstances as the accused is not a dealer in textiles, I order accused to enter into a bond under section 325 (1) (*b*) with one surety in a sum of Rs. 150 for a period of eighteen months. I confiscate the productions and forward to the Controller of Textiles."

I agree with counsel for the respondent that the complainant has no right of appeal in this case. There are conflicting single-Judge decisions on the point, but Soertsz, J. in the case of *Cassim vs. Abdurasak* (1937) 38 N. L. R. 428 considered the earlier cases and came to the conclusion that no appeal lies from an order under section 325 (1) of the Criminal Procedure Code, because it is not a "final order" within the meaning of section 338

(1) of the Criminal Procedure Code. If I may respectfully say so, I think the reasoning in *Cassim vs Abdurasak* (1937) 38 N. L. R. 428 is sound, and I follow it.

The complainant having no right of appeal, it is open to me to consider the case by way of revision. Crown Counsel has kindly appeared as *amicus curiae* to assist the Court.

Unlike section 325 (2) which applies to trials on indictment, a Magistrate can only make an order under section 325 (1) "without proceeding to conviction". When the accused pleaded guilty the Magistrate knew that the charge was "proved". If he then decided, for any of the reasons stated in section 325 (1), to bind over the accused, he had to do so "without proceeding to conviction". Therefore, the question is, when the Magistrate after the accused pleaded guilty recorded "I find the accused guilty" whether he thereby proceeded to convict the accused? In the case of *Marthelis vs. James* (1929) 10 C. L. R. 36 this question was answered in the affirmative. What is more, the fact that the Magistrate thereafter went on to confiscate the textiles shows that he regarded that the accused had been convicted, because such an order of forfeiture can only be made under the Regulations after "conviction" —see section 61 (2) of the Regulations.

The applicability of section 325 (1) was, therefore, ousted. The Magistrate having convicted the accused could not act under 325 (1). He should have proceeded to impose a sentence on the accused according to law—*Chelliah vs. Samman* (1921) 3 C. L. Rec. 37.

In England the Probation of Offenders' Act 11907 contains a provision almost identical with the terms of section 325 (1) of our Code. In Stone's Justices' Manual (1946 edition), pages 142 and 2772, it is stated that "This provision is not to be used as a means of evading the law, or to encourage persistent offenders in their contumacy. It cannot properly be applied to an offence under section 4 (2) of the National Service Act, 11941—*Everfield vs. Story* (1942) 1 K. B. 437. A deliberate breach of the Rationing Order, 1939 is not "trivial"—*White vs. Hurrell Stores Ltd.* (1941) 164 L. T. 334.

In the present case I cannot hold that section 325 (1) was resorted to in order to evade the imposition of the heavy fine provided for by section 59 of the Regulations for a first offence; nor is there any proof that the accused has been guilty of a deliberate or persistent breach of the Regulations. The Magistrate apparently formed the view that there were "extenuating circumstances". I cannot say that he has erred in coming to that conclusion.

Section 59 (*a*) of the Regulations provides for a first offence a fine not less than Rs. 500 and not more than Rs. 5,000 or with imprisonment of either description for a term not exceeding one year, or with both such fine and imprisonment.

I set aside the Magistrate's order subsequent to the words: "I find the accused guilty" and direct that the bond given by the accused should be cancelled and discharged. In place of the order made I sentence the accused to imprisonment until the rising of the Court.

Accused convicted.

Proctors: *Ernest de Silva* for the accused-respondent.

Present: Canekeratne, J. & Dias, J.

NOORUL NALEEFA vs. MARIKAR HADJIAR

S. C. No. 170—*D. C. Kalutara No.* 26076
Argued on: 9th and 10 h September, 1947
Decided on: 2nd October, 1947

Muslim Marriage and Divorce Ordinance (*Chap.* 99), *Sections* 15, 50 *and* 51 (1)—*Effect on general law applicable to Muslims—Divorce by wife without husband's consent—Grounds other than those specified in the Ordinance—Right of Muslim wife to resort to civil Courts.*

A Muslim wife, without her husband's consent, brought an action for divorce in the District Court of Kalutara, on the ground of the leprosy of the husband. At the trial, the preliminary point was taken up to decide whether the wife's only remedy was to resort to the Kathi or whether she could seek redress in the Civil Courts. The Judge held that she could not have recourse to the Civil Courts.

Held: (1) That the right conferred on a Muslim wife by the Muslim Marriage and Divorce Ordinance (Chap. 99) to seek a divorce without her husband's consent is limited to the grant of a divorce by a Kathi, on the grounds specified in the Ordinance.

(2) That a Muslim wife can have recourse to the Civil Courts in cases where she seeks a divorce on grounds permitted by the general law applicable to Muslims. but not specified in the Ordinance.

(3) That the principles of Mohammedan Law relating to leprosy as a ground for repudiating the contract of marriage is still part of the Law of Ceylon.

(4) That the Courts will lean against the presumption that the Muslim Marriage and Divorce Ordinance (Chap. 99), being an Ordinance to Amend and Consolidate the law relating to the Marriage and Divorce of those professing the Muslim faith, was intended to alter the common or general law.

Cases referred to : *Beebee vs. Pitche* (1924) 26 N. L. R. 277.
Ayesha Umma vs. Abdul Carim (1880) 4 S. C. C. 13, p. 14.
The King vs. Miskin Umma (1925) 26 N. L. R. 330.
Hamidoola vs. Fekunnissa (1882) 8 Cal. 327.
Deut. 24—1.
2 *Ameer Ali* (4th Ed.) 529, 581.
Ayatunessa Beebee vs. Karam Ali (1908) 36 Cal. 23.
Wilson-Anglo Muhammadan Law (4th Ed.) 143, 144, 151, 153, 154, 432.
Minhaj (Howard's translation) 322, 299 and 300 (right of option.)
M. Buzul-ul-Raheem vs. Lateefutoon Nissa, 8 Moo. I. A. 378, p. 296.
Driver : Deuteronomy, 270, 271.
Glasson ; La marriage Civil, 149, quoting the Talmud.
Bank of England vs. Vagliano (1891) A. C. 107, p. 144.
Re *Budget* (1894) 2 Ch. 557.
D. C. Colombo 54376 (1871) Vanderstraaten, p. 196.
Rabiya Umma vs. Saibu (1914) 17 N. L. R. 338.

H. V. Perera, K.C., with *M. I. M. Haniffa, U.A. Jayasundera, G. Samarawickrema* and *M. S. Abdulla*, for plaintiff-appellant.

N. E. Weerasooriya, K.C., with *E. F. N. Gratiaen, K.C., H. W. Jayewardene* and *M. Rafeek*, for defendant-respondent.

CANEKERATNE, J.

This is an appeal from a decision of the District Judge of Kalutara, dismissing a wife's action for divorce on the ground of the leprosy of the defendant. The parties are Muslims of the Shafei sect, and were married on December 28, 1938, the wife being then about 20 years old ; there has been consummation of the marriage.

The plaintiff, it appears, discovered that the defendant was suffering from leprosy and about the end of the year 1945 she started living separately from him.

On the date of trial 33 issues were framed and on the suggestion of the defendant's Counsel, the trial Judge decided to hear issues 12, 13, 19 and 20, as preliminary issues on the ground that they go to the root of the case. Issue No. 19 refers to the proceedings and orders in Kathi case No. 375 ; it was decided against the defendant and no attempt was made at the argument in appeal to show that the decision was erroneous. The other three issues deal with the right of the plaintiff to institute this action and was decided against her. There was an alternative claim to relief put forward by the plaintiff that she was entitled to a Kathi divorce.

The question for our decision is, whether a Muslim wife can have recourse to the civil courts for the purpose of obtaining a dissolution of her marriage. It is contended that the provisions of Chapter 99 C.L.E. preclude her from doing so. Prior to January, 1937, the date when Ordinance No. 27 of 1929 came into operation, the civil courts of the Island were as much open to a Muslim married woman as to her sister subject to what is known as the common law of the Island to obtain relief in matrimonial disputes ; thus she could sue him for recovery of dower or maggar, for maintenance and for divorce. In the latter case the application would be made to a District Court ; these Courts have exclusive jurisdiction in matrimonial matters (section 62 of the Courts Ordinance, Ch. 6 C.L.E.) ; " the sitting Magistrate " or " Competent Judge " of the Mohammedan Code of 1806 corresponds to the District Judge. The general rules of Civil Procedure, not those in Chapter XLII of the Code. (Ch. 86 C.L.E.), would be applicable in an action instituted by her. *Ayesha Umma vs. Abdul Carim* (1880) 4 S.C.C. 13, p. 14. *The King vs. Miskin Umma* (1925) 26 N.L.R. 330.

Marriage is, in Mohammedan Law, simply a contract; it is likened to a contract of sale, or exchange. A purchaser of goods had a right to rescind the contract on the discovery of some hidden fault, or on breach of a condition relating to certain defects ; these were called options of defect—redhibitory defects. Redhibitory defects are those which either destroy or impair the usefulness of the thing sold for the purpose for which things of that kind are ordinarily intended to be used. The purchaser can bring an action for the rescission of the contract and recovery of

the purchase money. The parties to a contract of marriage may agree on the terms of the contract, and if the terms are of a reasonable nature and are not opposed to the policy of the law, they will be binding. Thus an agreement entered into before marriage by which it is provided that the wife should be at liberty to divorce herself from her husband under certain specified contingencies would be valid if the conditions are reasonable. *Hamidoola vs. Feizunnissa* (1882) 8 Cal. 327.

It may be useful to start with the law that was in force in the adjoining country, Palestine. The right of divorce rested entirely with the man, and the grounds of it in Deuteronomy are very vaguely expressed. " If she find no favour in his eyes because he hath found some unseemly things in her, he shall write her a bill of divorcement." Deut. 24-1. This expression gave grounds for much difference of interpretation. In later times there was considerable divergence of opinion among the rabbis themselves. The school founded by Shammai (first century B.C.) pressing the words " unseemly thing " (the most literal rendering of the word being " nakedness ") understood of it unchastity ; the school of Hillel pressing the word " thing " and the clause " if she found no favour in his eyes " supposed the most trivial causes to be included, declaring for instance, that a wife might be divorced, even if she burnt her husband's food. It may be doubted, however, how far the latter opinion was literally acted upon. It is most natural to understand the word (" nakedness ") of immodest or indecent behaviour. The grounds mentioned in the Misnah as justifying divorce are violation of the law of Moses, or of the Jewish customs. The Hillelite doctrines were, according to *2 Ameer Ali* (4th Ed.) 529, chiefly in force among the Jewish tribes at the time of the Prophet's appearance and repudiations of wives by husbands were as common among the pagan Arabs. Mohamed set himself to ameliorate the position of women. " Ye men " he said " ye have rights over your wives, and your wives have rights over you." Free divorce the Prophet was compelled to tolerate. " The thing which is lawful but is disliked by God is divorce." There are certain cases in which divorce appears to be compulsory but even apart from them, the husband may divorce his wife without assigning any cause. The wife, however, is protected by the dower, or more strictly, the bride price, of which a portion is deferred, and which may be claimed by the wife if she is divorced without cause.

The husband may divorce his wife at his mere will and pleasure, without assigning any reason. The contract of marriage may be dissolved by him in three ways :—

I. By the husband at his will. A divorce proceeding simply from the husband or from another in pursuance of authority given by the husband, the person may be the wife of a third party, is called talak, *Hamidoola vs. Feizunnissa* (1882) 8 Cal. 327, *Ayatunnessa Beebee vs. Karam Ali* (1908) 36 Cal. 23. Divorce by talak may be effected in the following ways—

(1) by a singhe declaration of talak, followed by abstinence from sexual intercourse for the period called iddat ;
(2) by a declaration of talak repeated three times, during successive intervals of purity ;
(3) by a declaration of talak, repeated at shorter intervals or even in immediate succession ;
(4) by a declaration of talak pronounced once, provided it shows a clear intention that the divorce shall immediately become irrevocable.

II. A divorce by mutual agreement of the parties. When there is dissension between married persons (" when married parties disagree ") the woman can release herself from the marriage tie by giving up some property in consideration of which the husband is to give her a Khula-Minhaj (Howard's translation) 322. She takes the initiative in asking to be repudiated. The divorce is the sole act of the husband though granted at the instance of the wife, and purchased by her, *M. Buzul-ul-Raheem vs. Lateefutoon Nissa*, 8 Moo. I.A. 378, p. 396. Some valuable consideration passes from the wife as the party seeking the divorce to the husband. The wife offering, and the husband accepting, compensation out of her property for the release of his marital rights. It is called a divorce by Khu'a. Wilson op. cit. p. 151.

III. A divorce by mutual consent. No consideration passes from the wife to the husband. It is called Mubarat divorce.

There is no mention in the law (Jewish law) of divorce by the wife. A wife could not legally separate herself from her husband but in later times her condition evidently improved. Among the later Jews, she could claim a divorce under certain circumstances, namely, if her husband were a leper or affilicted by a polypus or engaged in a repulsive trade, Driver : Deuteronomy, 270, 271, if he refuses to perform his conjugal duty, if he continues to lead a disorderly life after marriage, if he proves impotent during ten years, if he suffers from an insupportable disease, or if he leaves the country for ever. Glasson ; La marriage Civil, 149, quoting the Talmud.

The wife can never divorce herself from her husband without his consent ; but she may under certain circumstances, obtain a dissolution or cancellation of the marriage Ameer Ali opp. cit. 581, (1) when the husband is guilty of conduct which makes the matrimonial life intolerable to her *e.g.* as ill-treatment, neglect to perform the duties which the law imposes on him as obligations resulting from marriage; (2) on the ground of her husband's impotence, proved to have existed at the time of the marriage, provided that she then did not know of it, and that it has not since been removed ; but not if she knew of its existence at the time of the marriage, nor if it commenced only after the marriage had both been contracted and consummated. Wilson op. cit. 153, 154.

The Shafei law permits dissolution also in the following case : 1. Where the husband is unable to afford her maintenance on even the lowest degree of the three recognised scales. Wilson op. cit. 432. 2. Where the husband is afflicted with madness or leprosy. Wilson op. cit. 432.

The proceedings for obtaining a divorce on the ground of impotence of the husband, or of his insanity, or leprosy, or inability to afford maintenance are not classed with divorce in the law books, but are assimilated to the "option of defect" (actio redhibitoria) allowed to the purchaser of goods on the discovery of some hidden defect. Wilson op. cit. 432. Minhaj 299. In the Minhaj they are referred to as grounds for repudiating a marriage. Wilson op. cit. 432.

Any one who becomes aware that he has married a person afflicted with madness, elephantasis or leprosy has a right to renounce the marriage. A wife may renounce her husband on discovering him to be impotent or castrated. A wife's right to renounce her marriage is not limited to defects existing at the time of the marriage contract, but extends to such as he may have acquired subsequently : with the exception of impotence, for a husband who becomes impotent after cohabiting with his wife can no longer be renounced by her. Minhaj 299.

The right of dower is affected by the exercise of the option. If the renunciation of marriage on account of redhibitory defects takes place previous to all carnal intercourse, the woman loses her right to dower. If renunciation takes place after consummation, proportional dower is due whether the defects existed at the time of the contract, or whether they became manifest between the time of the contract and the first coition : fixed dower is due only where renunciation is based upon defects ascertained after the first coition. Minhaj 300 (right of option.) The sum of money or other property that the wife is entitled to claim from the husband by way of consideration for the surrender of her person is called dower, or maggar or mahr in Ceylon.

The Code of Mohammedan law observed by the Moors in the province of Colombo obtained statutory recognition by the decision of the Council on August 5, 1806. It was later extended to Mohammedans residing in other parts of Ceylon by Ordinance No. 5 of 1852, section 10. The provisions contained in the Code were binding on Mohammedans for a long time. Articles 74-79 and 92 deal with the question of a divorce by a wife. Articles 87-90 with the question of a divorce by a husband. Article 79, with the question of a divorce by mutual consent. Dissension between married persons is referred to in Articles 80 and 81-85. The wife was entitled to obtain a divorce on the ground of the leprosy of the husband whether it was discovered before the consummation of the marriage (Art. 74), or after cohabitation had taken place (Art. 77) ; in the former case the woman had to restore the marriage gift (maggar), if she received no maggar she cannot claim it (Arts 76, 78) : in the latter case the wife was entitled to keep it (Arts. 77, 78).

Ordinance No. 8 of 1886 made provision for the registration of the marriage of persons professing the Mohammedan faith.

When the Code or Mohammedan Law was passed leprosy was a ground of relief according to Mohammedan Law and the legislature must be presumed to have left matters as they were not intending to restrict the rights of a wife.

In 1925 it was held that the marriage of a Muslim woman could be dissolved only by a divorce effected by her husband or by a divorce granted by a District Court. (*The King vs. Miskin Umma*) (1925) 26 N.L.R. 330. Some time after the decision in this case, the Legislature after consideration of the question, passed in December, 1929 Ordinance No. 27 of 1929. The Ordinance did not come into operation till long after an amending Ordinance had been passed. It is an Ordinance to provide for the registration of Muslim marriages and divorces contracted and effected in the Island. It made provision for the appointment of Kathis. It repealed sections 64 to 102 (first paragraph) of the Mohammedan Code of 1806 and the whole of the Mohammedan Marriage Registration Ordinance (section 48). Section 14 (with the rules in the Second Schedule) deals with a divorce by a husband and section 15 (with the rules in the Third Schedule) with a

divorce by a wife. A Kathi was given power to adjudicate upon—(*a*) claims for payment of mahr, not over Rs. 1,000 for maintenance, (*b*) actions for (i.) restitution of conjugal rights (ii.) for jactitation of marriage, a declaration that a person is not married to a certain man or woman. The provisions contained in " b " were repealed by Ordinance No. 9 of 1934. The Ordinance contained procedure for registration of Fasah divorce effected before a Muslim priest prior to April 1, 1925. It contained no definition of the words Fasah divorce ; this defect was remedied by Ordinance No. 9 of 1934 entitled " An Ordinance to amend the Muslim Marriage and Divorce Registration Ordinance 1929 " which was passed in July, 1934.

The Statute Law is now contained in Chapter 99 of the C.L.E. It is entitled an Ordinance to amend and consolidate the Law relating to the Marriage and Divorce of His Majesty's subjects in Ceylon professing the Muslim faith—the words —Ordinances Nos. 27 of 1929, and 9 of 1934— appear in the margin. Mr. Weerasooriya contended that the principle enunciated by Lord Hershell (in *Bank of England vs. Vagliano*) (1891) A.C. 107 p. 144, applied to this statute. Consolidation is the reduction into a systematic form of the whole of the statute law relating to a given statute, as illustrated and explained by judicial decisions. The consolidation merely places together in a later volume of the statute book enactments previously scattered together within many volumes : Chitty, J. said " I am here to deal not with an Act of Parliament codifying the law, but with an Act to amend and consolidate the law and therefore it is, I say, these observations " (*i.e.* the observations of Lord Herschell in Vagliano case) " do not apply : and I think it is legitimate in the interpretation of the sections in this amending and consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the legislature." *Re* Budgett (1894) 2 Ch. 557. The Court will lean against any presumption that such an act was intended to alter what would be the common or general law. Section 14 refers to a divorce by a husband and section 15 to a Fasah divorce by a wife. Mr. Weerasooriya's contention at the start was that the whole law affecting Mohammedan spouses was to be found in Chapter 99 and that one could not resort to the general principles of the Mohammedan Law in elucidating the rights of parties. Mohammedans, he said, attach such great importance to attempts at reconciliation of disputes between spouses, that a special court composed of members of their faith who were conversant with the customs of the community was appointed, to which all matrimonial disputes were relegated. The civil courts, he argued, had power of inquiry only where the jurisdiction of the Court was specially left unaffected and as no such power was reserved by the Ordinance no application for relief could be made.

The husband may divorce his wife at his mere will and pleasure, without assigning any reason : this rule of the Mohammedan law is recognised by the Ordinance and section 14 prescribes the procedure to be followed by the husband. What has to be done is laid down by the rules in the Second Schedule—declaration of talak must be made on three occasions. If he obtains a permit from the Kathi he must register it. There is a material difference in the language used in the next section, which is the one dealing with a wife's application. The section provides what the wife is to do if she desires to effect a Fasah divorce from her husband. She has to appear before the Kathi. It is the duty of the Kathi, to try to settle the matter by all lawful means (r. 3 of the third schedule). She has a limited right of relief—she can obtain a Fasah divorce. This is defined in section 51 (1), a divorce originating in an application made by a wife without the consent of her husband for divorce on the ground of ill-treatment or on account of an act or omission on his part amounting to a " fault " under the Mohammedan law. If the ground for a divorce is ill-treatment by the husband or an act or omission on his part amounting to a fault under the Muslim law, then she must make an application to the Kathi : in these cases this is the only relief available to a complaining wife. It is not possible to apply the provisions of the section (section 15) to cases, if any, in which a Muslim woman had a right to obtain a divorce or dissolution of her marriage from her husband on other grounds. Limited jurisdiction is conferred on the Kathi. It was contended that the Ordinance impliedly took away the right, if any, to apply for a divorce or dissolution on any other ground : sections 20, 43, were referred to in this connection : also that the object of the Ordinance was to have a complete register and that this object will become impossible of attainment if divorce could be obtained otherwise. Section 43 has hardly any application to this question ; the latter part of section 20 contains wide language : its effect is to penalise a Muslim who aids or abets another Muslim to do certain acts. It was contended further that section 49 expressly provides for an action being brought in a civil court in certain cases and that resort cannot be had to civil courts in other cases. Much stronger

language than that contained in section 20 or section 49 would be required to deprive a person of a right, if any, which she had before the promulgation of the Ordinance.

Section 50 has to be considered—the language of the section is as follows :—The repeal of sections 64 to 102.....shall not affect the Muslim Law of marriage and divorce, and the rights of Muslims thereunder. Mr. Weerasooriya would restrict the applicability of the general principles of the Mohammedan Law to an action for nullity of marriage only. Leprosy was, he argued, a redhibitory defect and a married woman's right to get relief on this ground was analogous to the right of a purchaser of goods complaining of a hidden defect. The defect should be in existence at he time when the contract was made. Reference was made in this connection to the passage in Wilson p. 432 (4th Edition).

A woman who had entered into a contract of marriage could seek relief in certain cases : an option of defect, or an option of repudiation was available to her ; she could take steps to rescind the contract. It is possible to arrange the grounds under the following heads :—

(1) Circumstances negativing reality of consent such as coercion, fraud, option of puberty the fact that a minor has not attained puberty.

(2) Certain defects of the body, even though these only became manifest after the marriage. The impotence of the husband may be classed under this. These are really redhibitory defects and the general rules attaching to redhibitory defects in the contract of sale would probably apply—the defects should have been in existence at the time when the contract was made or the defect though originating after taking possession should be the consequence of some previous defect.

(3) Madness or leprosy of the husband. The cases where relief can be obtained on the ground of leprosy have already been discussed. It is only as a convenient form of expression that the term " redhibitory defects " seem to be applied to the grounds on which the option could be exercised.

The principles of the Mohammedan law relating to leprosy as a ground for repudiating the contract of marriage is still part of the law of Ceylon. Cogent reasons were adduced by Mr. Weerasooriya to show that the proceeding known as a divorce by Khula amounts to nothing more than an offer by the wife to the husband to divorce her ; the offer does not result in legal rights unless an until it is accepted by the husband and no steps can be taken by her in a Court of law if the husband refuses to accept the offer. A Khula divorce though it is, in form, a divorce of the husband by the wife, operates in law as a divorce of the wife by the husband.

The question whether the plaintiff is entitled to relief is a question of fact to be determined on the evidence. The order on issues 12, 13, 19 and 20 is set aside and the case is sent back for trial. The appellant is entitled to the costs of appeal and of the contest in the lower Court.

DIAS, J.

I agree with my brother Canekeratne that the judgment of the District Court which has been appealed against should be set aside and the case sent back for trial, and that the respondent should pay to the appellant the costs of appeal and of the contest in the lower Court.

In view, however, of the importance of the questions raised, I would like to make a few observations of my own.

Under the Mohammedan Law there are four forms of divorce which are recognized :—

(1) By the husband pronouncing " Talak " without assigning any cause. In such a case it is the husband who divorces the wife—see *Beebee vs. Pitche* (1924) 26 N. L. R. at p. 280.

(2) The " Mubarat " divorce where the spouses agree and consent to being divorced. In this case also it is the husband who gives the divorce by pronouncing " Talak "—see *Beebee vs. Pitche* (1924) 26 N. L. R. at p. 280.

(3) The " Kulah " divorce which is a dissolution of the marriage at the instance of the wife who on compensating her husband, he pronounces the "Talak " —see *Beebee vs. Pitche* (1924) 26 N. L. R. at p. 280 and *Rex vs. Miskin Umma* (1924) 26 N. L. R. at pp. 335, 338-340 and *Rabiya Umma vs. Saibo* (1914) 17 N. L. R. at pp. 339 and 341.

(4) There was a fourth form of divorce granted at the suit of the wife by the Kathi or Judge for which there is no special name but which is called by the Commentators " a judicial divorce "—see *Rex vs. Miskin Umma* (1925) 26 N. L. R. 330.

It is to be noted that the first three forms of divorce, *i.e.* by the husband, do not come before any judicial tribunal. It is also to be noted that if the husband refused to give his wife either a " Mubarat " or " Khula " divorce, the only right the wife had of obtaining a divorce was by the fourth method.

Then came the unsatisfactory and incomplete Mohammedan Code of 1806. Sections 64 to 102 of that Code dealt in an incomplete manner with Mohammedan marriage and divorce. There was no special tribunal appointed which could grant

to a Mohammedan wife the fourth form of divorce. This was pointed out in the case of *Rex vs. Miskin Umma* (1925) 26 N.L.R. at pp. 335, by Bertram, C.J.—" When on the assumption of British Rule in India and Ceylon, the Mohammedan community retained their own system of law, that law was to be administered by the regular tribunals. In Ceylon the District Judge, therefore, as the competent authority for a divorce under Section 64 of the Courts Ordinance, is the competent Judge for Mohammedan divorces in so far as these require a judicial decree."

In the year 1871 in D. C. Colombo 54376 (1871) Vanderstraaten p. 196, and in the full court decision of *Ageska Umma vs. Careem* (1880) 4 S.C.C. page 13, Muslim wives sued for divorces from their Mohammedan husbands in the District Court. Referring to these cases A. St. V. Jayewardene, J. said in *Rex vs. Miskin Umma* (1925) 26 N. L. R. at 343. " The matrimonial jurisdiction conferred on the sitting Magistrate by the Mohammedan Code is now vested in the District Courts of Ceylon (*Ageska Umma vs. Abdul Careem*) which have exclusive jurisdiction in matrimonial matters. The fact that the application of Ch. XLII of the Civil Procedure Code dealing with matrimonial causes is expressly excluded in the case of Mohammedan marriages is of no consequence. The provisions of that Chapter are such that they cannot be applied to cases between Muslim spouses. But in view of the definition of the terms " action " in Section 6 of the Code, an action by a Muslim wife to obtain a divorce can be prosecuted under the general rules of Civil Procedure."

In the year 1886 was enacted the Mohammedan Marriage Registration Ordinance No. 8 of 1886, but this enactment was not concerned with the law of divorce.

In the year 1914 in the case of *Rabiya Umma vs. Saibu* (1914) 17 N.L.R. 338, the Supreme Court held that the Shafei Law, which is applicable to the Mohammedans of Ceylon, recognised the right of the wife in certain cases to divorce her husband on the ground of desertion and the case was sent back to ascertain how far, if at all, and subject to what conditions that right has been admitted as a matter of custom in Ceylon. Obviously this refers to the fourth form of divorce and the law at that date in regard to this form of action was uncertain.

This uncertainty came to a head in 1925 when the matter was fully considered in *Rex vs. Miskin Umma* (1925) 26 N. L. R. at 330. A " practice " had been intruding itself into the life of the Mohammedan community in Ceylon under which certain persons purported to grant or certify divorces between husband and wife at the instance of the wife. A Muslim wife having been divorced by such a person remarried. She was then charged with bigamy and convicted. In appeal therefore the whole legal question came up for decision. It was held that in regard to the fourth form of divorce it could only be granted by the decree of a Court, and that that Court was the District Court acting under its general matrimonial jurisdiction. It was also held that the Code of 1806 was incomplete and had to be read in the light of the general principles of Mohammedan jurisprudence. Pausing at that point it is quite clear that up to the year 1925 it was the District Court and the District Court only which had the requisite jurisdiction to grant the fourth form of Mohammedan divorce, *i.e.* an action by the wife against her husband without his consent.

This led to the enactment of Ordinance No. 27 of 1929 as amended by Ordinance No. 9 of 1934 and which now appears as Ch. 99 in the revised edition of the Legislative Enactments.

It is to be noted, however, that the Editor of the revised edition has called Ch. 99 ; " An ordinance to amend and consolidate the law relating to the Marriage and Divorce of His Majesty's subjects in Ceylon professing the Muslim faith." There is no warrant for this description either in Ordinance No. 27 of 1929 or Ordinance No. 9 of 1934 both of which became law on 1-1-37—*vide* Govt. Gazette 8256 of 13-11-1936. On the contrary the provisions of section 50 of Ch. 99 clearly show that the Ordinance is not exhaustive because that section definitely says that the Muslim Law of Marriage and Divorce and the rights of Muslims thereunder are not affected by the repeal of Sections 64 or 102 of the old code of 1806.

So far as the law of Mohammedan Divorces was concerned, this statute made two important changes :—

(1) In regard to divorce by the husband, *i.e.* the first three forms of divorce, section 14 of Ch. 99 made it obligatory that the procedure in Schedule II. of the Ordinance was to be adopted. No decree of a judicial tribunal was necessary.

(2) In regard to the fourth class of divorce, *i.e.* by the wife against her husband without his consent, these were to be dealt with by the newly created Kathi Court following the procedure laid down in Schedule III. of the Ordinance. An appeal lies from the decision of the Kathi to the Board of Kathis, and therefrom to the Supreme Court.

It is to be specially noted that the draftsman of Ordinance No. 27 of 1929 did not attempt to

define the expression "Fasah Divorce" used in section 15, which gave a Muslim wife the right to institute divorce proceedings in the Kathi Court. It was wrongly assumed at the argument that the definition of "Fasah Divorce" now appearing in Section 51 of Ch. 99 was introduced by Ordinance No. 27 of 1929. That is not correct. This definition was brought into the Ordinance by Ordinance No. 9 of 1934 which added to the interpretation clause the definition of what the draftsman of that Ordinance thought was a Fasah divorce. I have called for and perused the statement of objects and reasons of Ordinance No. 9 of 1934. This states: "The definition of Fasah Divorce is new and is inserted on the recommendation of the Committee and in accordance with their views regarding the implications of the term."

* It seems that if this definition had not been inserted in the main Ordinance the difficulties which arise in the present case would never have occurred.

Two Sections of Ch. 99 create the difficulty. Section 51 (1) defines a Fasah Divorce to mean :— "A divorce of spouses subject to Muslim Law effected in accordance with the procedure prescribed in the 3rd Schedule in a case where proceedings originate in an application made by a wife without the consent of her husband for a divorce on the ground of illtreatment or on account of an act or omission on his part amounting to a "fault" under the Muslim Law." What such a "fault" is under the Mohammedan Law the legislature did not attempt to define. Furthermore, the "fault" to afford a cause of action in favour of the wife must be due to an act or omission on the part of the husband. Obviously a husband who contracts leprosy or insanity cannot very well be said to be a guilty of a fault due to an act or omission on his part. The draftsman also forgot to notice the provisions of Section 50 (which originally was the proviso to Section 48 of the original Ordinance). Section 50 says: "The repeal of Sections 64 to 102 (1st paragraph) inclusive of the Mohammedan Code of 1806 which is effected by this Ordinance shall not affect the Muslim Law of Marriage and Divorce and the rights of Muslims thereunder." The effect of Section 50 appears to be that notwithstanding the repeal of Sections 64 to 102 of the old Mohammedan Code, the common law of the Muslims in Ceylon and their rights thereunder in regard to the Mohammedan Law of marriage and divorce are preserved intact. The effect of Ch. 99 is to oust the jurisdiction of the District Courts (which was recognized in all judicial decisions up to *Rex vs. Miskin Umma* (1925) 26 N. L. R. 330 to entertain actions for divorce by Muslim women in regard to the fourth class of divorce, and to vest exclusive jurisdiction in the Kathi Court to try Fasah Divorces brought by a wife against her husband (Section 15). But when Ordinance No. 27 of 1929 defined what was meant by a Fasah Divorce the combined effect of that definition read with Section 50 of Ch. 99 was to revest in the District Courts the matrimonial jurisdiction to try actions for divorce by wives against their husbands in cases which do not fall within the ambit of the definition of Fasah Divorce. For example, if it is a valid cause of action for a woman to sue her husband for leprosy contracted after the consummation of the marriage and such leprosy was not due to an act or omission on his part amounting to a fault under the Muslim Law, obviously the Kathi Court has no jurisdiction and the case must be tried by the District Court under its ordinary matrimonial jurisdiction and not under Ch. 99; no decree nisi can be pronounced, no order for alimony can be made, no order regarding the custody of the children can be made and it is doubtful whether the wife will be entitled to ask that the husband should provide her costs of action.

The resulting position is unsatisfactory and was, I think, never intended by the Legislature. Today a Muslim wife who wants to obtain a divorce from her husband without his consent has to decide whether she has to go before the Kathi Court or whether she should file her action in the District Court. These are matters for the Legislature.

I am, therefore, of opinion that the order appealed against cannot stand.

Proctors: *J. A. W. Kannangara* for the plaintiff-appellant.

P. A. Cooray for the defendant-respondent.

* I have examined the reason given by the Committee in its interim report of December 21, 1933. It is "that it is desirable that the meaning of the expression should be made clear by a special definition"—see Sessional Paper IV. of March, 1934. This Committee consisted of Messrs. P.E. Pieris, (Chairman), M. C. Abdul Cader, S. M. Aboobucker, Mohammed Macan Markar, A. H. M. Ismail, M. I. M. Haniffa, T. B. Jayah and P. D. Ratnatunge.

Present : HOWARD, C.J.

AMARASINGHE vs. DE ALWIS

S. C. No. 143—*C. R. Colombo No.* 4531
Argued on : 3rd October, 1947
Decided on : 10th October, 1947

Prescription Ordinance (Chap. 55), Section 8—Repairs effected and materials supplied to motor car—Claim due on—Does such claim fall within section 8 of the Ordinance.

Held : That money due for repairs effected and materials supplied to a motor car becomes prescribed in one year under section 8 of the Prescription Ordinance.

E. S. Amerasinghe, for the plaintiff-appellant.

S. Canagarayer, for the defendant-respondent.

HOWARD, C.J.

The plaintiff appeals in this case from a decision of the Commissioner of Requests, Colombo dismissing his action with costs. The plaintiff who carries on business at No. 128, Lauries Road, Bambalapitiya, under the name and style of British Motors brought this action against the defendant for a sum of Rs. 70 on account of certain repairs effected and materials supplied to the defendant's motor car on or about the 28th January, 1944. The defendant filed answer pleading *inter alia* that the cause of action was prescribed under the provisions of the Prescription Ordinance (Chapter 55). It was agreed that this issue of prescription should be tried as a preliminary issue. The Commissioner considering himself bound by the case of *Walker, Sons & Co., Ltd. vs. Kandiah* (21 N.L.R. 317) held that the plaintiff's claim is barred by prescription under section 8 of the Prescription Ordinance.

Section 8 of the Prescription Ordinance is worded as follows :—

> " No action shall be maintainable for or in respect of any goods sold and delivered, or for any shop bill or book debt, or for work and labour done, or for the wages of artisians, labourers, or servants, unless the same shall be brought within one year after the debt shall have become due."

Counsel for the appellant contends that this section only applies to manual labour and that the question of prescription in the present case is governed by section 7 of the Ordinance. In *Walker, Sons vs. Kandiah* the plaintiffs instituted an action to recover a sum of Rs. 2,677·42 for repairs effected to a motor car. The order of the defendant requesting the plaintiffs to effect the repairs was given by a letter, and the acceptance of the order by the plaintiffs was also by a letter. It was held that the contract between the parties was not a written contract within the meaning of section 6 of the Prescription Ordinance nor an unwritten contract falling under section 7, but fell under that class of unwritten contract specially provided for by section 8. Actions for work and labour done and goods sold and delivered, though these are unwritten contracts, come under section 8 and not under section 7. It was also held that, as the defendant within a year from the date of action acknowledged his indebtedness and promised to pay Rs. 2,000 in full satisfaction, the plaintiffs were entitled to recover only Rs. 2,000 and not the full amount of the claim. The facts in regard to the nature of the claim are exactly the same in this case as in *Walker, Sons vs. Kandiah.* Counsel for the appellant has pointed out that the latter decision was contrary to a long line of cases which decided that section 8 referred only to manual labour or work of a menial character. It did not refer to a case where the work of repairs required a certain amount of engineering skill. In view of the fact that it was held in *Walker, Sons vs. Kandiah* that there was an acknowledgment as to the Rs. 2,000 of the amount claimed counsel for the plaintiff asked me to say that the decision in regard to the ambit of section 8 was obiter and not binding on me. I am unable to say that the decision is obiter. If it had been, the plaintiff would have had judgment for Rs. 2,677·42 the whole amount claimed.

Counsel for the plaintiff has cited a number of cases decided before the decision in *Walker, Sons vs. Kandiah* to show the previous to that case the Courts had held that section 8 referred only to manual labour or work of a menial character. The cases cited in *Walker, Sons vs. Kandiah* are *Alvapillai vs. Sadayar* (1 Balasingham 143), *Gunasekera vs. Ratnaike* (1 Curre t Law Reports 264) *Mack vs. Wickramaratne* (5 N.L.R. 142), *Silva vs. Ritchie* (3 Lorenz 115), and *Baker vs. Siman Appu* 8 Supreme Court Circular 185). In spite of these decisions the Court held that the plaintiffs' claim

was within the ambit of section 8 of the Ordinance and not within sections 7 or 8.

Counsel for the plaintiff has also suggested that I should dot follow Walker, Sons vs. Kandiah, by reason of the fact that De Sampayo, J. in his judgment has misinterpreted the judgment of Moncrieff, J. in *Horsfall vs. Martin* (4 N.L.R. 70). In the latter case it was held that though money due for goods and delivered on three months credit may be money due upon an unwritten promise but the action brought for its recovery falls within section 8 of the Prescriptio Ordinance and as such is prescribed within one year after the debt became due. In his judgment Moncrieff, J. held that any action " for or in respect of goods sold and delivered " whether it be upon an unwritten or even on a written contract is excluded from the operation of sections 6 and 7 respectively by the provisions of section 8. It was to this part of the judgment of Moncrieff, J. that De Sampayo, J. referred in his judgment in *Walker, Sons vs. Kandiah.* As pointed out by Garvin, S.P.J. in *Assen Cutty vs. Brooke Bond, Ltd.* (36 N.L.R. 169) at p. 189, the extent to which Moncrieff, J. held that an action for or in respect of goods sold and delivered fell under section 8 to the exclusion of section 6 when the action was based on a written contract his judgment was in conflict with the principle of the decision in *K. P. V. Louis de Silva vs. A. P. Don Louis* (4 S.C.C. 89) which is a judgment of the Full Court. It would appear that the judgment of Moncrieff, J went further than than the law warranted so far as written contracts are concerned. But this fact does not in my opinion afford a reason for not following the judgment of De Sampayo, J. in *Walker, Sons vs. Kandiah.* The learned Judge in that case was not relying on that part of the judgment of Moncrieff, J. which Garvin, J. states in *Assen Cutty vs. Brooke Bond, Ltd.* was not in accordance with the law. Like the Commissioner I feel I am bound by *Walker, Sons vs. Kandiah.* In reaching the decision that I have I do not in any way depart from the principle laid down by Lawrie, A.J. in *Mack vs. Wickremaratne* (5 N.L.R. 142) that work and labour contemplated by section 8 does not include the work of educated men. The work and labour done in the present case would not fall into this category.

The appeal is dismissed with costs.

Appeal dismissed,

Proctors : *Samarasinghe* and *de Silva* for plaintiff-appellant.

F. Seneviratne for defendant-respondent.

Present : WINDHAM, J.

ZACKERIYA AND ANOTHER vs. CROOS RAJ CHANDRA AND OTHERS

Writ of Prohibition or a Writ of Certiorari on Croos Raj Chandra, Advocate and 4 Others (No. 122)

Argued on : August 1, 1947

Decided on : 25th *August,* 1947

Writ—Certiorari or Prohibition—Application to Rent Assessment Board for authority to institute proceedings for eviction of tenant—Denial that applicant was landlord—Has the Board authority to grant application—Rent Restriction Ordinance (Cap. 60) of 1942, *Sections* 8 *and* 16 (1)—*Meaning of the term " Landlord "—Order of Rent Assessment Board authorising institution of proceedings.*

The Rent Assessment Board made an order under section 8 of the Rent Restriction Ordinance authorising the institution of eviction proceedings against a tenant on the application of a person, who the tenant alleged is not his landlord. The tenant applied for a writ of *Certiorari* to quash the order of the Board.

Held : (i.) That in section 8 of the Ordinance the words " on the application of a landlord " means " on the application of the person claiming to be landlord ".

(ii.) That in granting an order to such person, the Board has acted within its powers.

(iii.) That such a decision by the Board did not preclude the trial Court from determining whether a person instituting such proceedings is a landlord or not.

Cases referred to : *W. E. de Pinto vs. Rent Assessment Board, Dehiwala-Mount Lavinia*, reported in 46 N. L .R. at page 396.

H. W. Jayawardene with *Rafeek*, for petitioners.
C. V. Ranawake, for 1st to 4th respondents.
M. I. M. Haniffa, for 5th respondent.

WINDHAM, J.

This is an application for a writ of *Certiorari* for quashing an order of the Colombo Rent Assessment Board, whereby the fifth respondent was authorised under Section 8 of the Rent Restriction Ordinance, No. 60 of 1942, to institute eviction proceedings against the applicant. Section 8 provides that, subject to certain exceptions, no such proceedings shall be instituted in any Court unless the Board, " on the application of the landlord ", has in writing, authorised them. The objection of the applicant to the Board's order in the present case is that the fifth respondent was not his landlord, and that accordingly the Board was not empowered to make it, since it was not made " on the application of the landlord ". The Board, after considering the legal position, came to the conclusion that the fifth respondent was the landlord. This question will be in the pending proceedings. For this reason I do not think it proper to enter into the question whether the Board was right in its conclusion.

It is argued for the applicant that the Board exceeded its jurisdiction in making an order in favour of one who was not a landlord. But that is not, in my view, the proper construction to place Section 8 of the Ordinance. It cannot be held that by authorising a person claiming to be landlord to institute an action, the Board is making a judicial decision that such person is in fact the landlord, and that such decision will be binding upon the Court before which that issue is to be determined in the pending action. To hold that would be to enable the Board to predetermine what in many cases may be, and in the present case is, a vital issue in the pending proceedings. In the present case, it would appear, the question whether the fifth respondent is the landlord will depend upon whether the phrase " the person for the time being entitled to receive the rent of such premises ", which constitutes the definition of " landlord " under Section 16 (1) of the Ordinance, is to be restricted to the person entitled to receive an agreed rent, or can be construed to extend to a person entitled to receive an estimated or reasonable rent. And that is a point of law and construction which, in my view, the Board is not required or empowered to determine under Section 8. I consider that the proper and reasonable construction of the phrase " on the application of the landlord " in Section 8 is " on the application of the person claiming to be landlord ". The powers of the Board are specifically set out elsewhere in the Ordinance, and such a subordinate clause as " on the application of the landlord " cannot be held to confer on the Board additional power to determine judicially such an issue.

It follows that in making their order the Board were not acting beyond their powers. It also follows that, notwithstanding that order, it is still open to the Court of trial to decide as a fact (with such legal results as may follow therefrom) that the fifth respondent is not the landlord of the applicant.

I have been referred to the judgment of this Court in *W. E. de Pinto vs. Rent Assessment Board, Dehiwala-Mount Lavinia*, reported in 46 N. L. R. at page 396, wherein a writ of *Certiorari* was granted quashing a decision of the Board on the ground that it had usurped jurisdiction which the provisions of Section 6 (*b*) of the Ordinance did not allow it. There, however, the position was quite different, for the Board was purporting to exercise a power specifically conferred upon it by Section 6, namely, the power to direct that the standard rent should not be increased. Its decision on that point, had it been made *intra vires*, would therefore admittedly have been conclusive by virtue of Section 12 (12). Not so, however, in the present case, for the reasons I have given.

The application is accordingly dismissed with costs.

Appeal dismissed.

Present : HOWARD, C.J. & JAYETILEKE, J.

SOLOMON SILVA vs. THE VILLAGE COMMITTEE OF THE MAMPE-KESBEWA VILLAGE AREA

S. C. No. 234—*D. C. Colombo* 15744/*M*
Argued on : 26th and 29th August, 1947.
Decided on : 18th September, 1947.

Contract—Ferry rights—Agreement by a local body with the purchaser of the exclusive right of ferry—Use of land at both ends—Prevention of user by owner of soil at one end—Is purchaser entitled to quiet possession and the right to land at both ends—Damages for breach of agreement.

A Village Committee, whose jurisdiction extended to only one bank of a river, under an arrangement with the local authority on the other bank, gave the plaintiff the exclusive right of ferry, on an agreement. It imposed, *inter alia*, the duty of erecting sheds, notices, etc. on both banks. The owner of the soil on the other bank prevented the plaintiff from erecting the sheds, etc., and bringing the canoes up to the bank. The plaintiff complained to the defendant and requested it to cancel the agreement or to place the plaintiff in possession of the obstructed bank. The defendant failed to do so, and the plaintiff instituted this action for damages arising from the breach of the agreement.

Held : That the defendant's failure to place the plaintiff in quiet possession of both banks of the river amounts to a breach of the agreement, for which the defendant is liable in damages.

Per HOWARD, C. J.—" In my opinion the appellant did not by entering into the contract with the respondent guarantee, as in the case of landlord and tenant, the quiet enjoyment of the ferry. Nor was it necessary that the appellant should have the property in the soil on either side of the ferry. The respondent must, however, have the right to land on either side."

Cases referred to : *Peter vs. Kendal* (108 E. R. 610).

H. V. Perera, K.C., with *N. M. de Silva* and *Sam Wijesinghe*, for defendant-appellant.
N. E. Weerasooriya, K.C., with *S. R. Wijayatileke*, for plaintiff-respondent.

HOWARD, C.J.

In my opinion the appellant did not by entering into the contract with the respondent guarantee, as in the case of landlord and tenant, the quiet enjoyment of the ferry. Nor was it necessary that the appellant should have the property in the soil on either side of the ferry. The respondent must, however, have the right to land on either side. In this connection I would refer to *Peter vs. Kendal* (108 E. R. 610). In the judgment in the case the following passage occurs at pp. 612-613 :

" Then it is said that this is not a good ferry, because the land on both sides does not belong to the owner of the ferry. I am of opinion that it is not necessary that the owner of a ferry should have the property in the soil on either side. He must have a right to land upon both sides, but he need not have the property in the soil on either. It is sufficient if the landing-place be in a public highway. This is perfectly consistent with the principle laid down in Saville. That principle is, that a ferry is in respect of the landing-place, and not of the water. But I cannot agree to what is stated as a conclusion resulting from that principle. " That every owner of a ferry must have the land on both sides of the water, for otherwise he cannot land." The reason given for his having the property in the soil is sufficient for he may have a right to land on both shores without having any property in the soil of either."

I agree with my brother Jayetileke that the appellant has not proved that the Council had the right to land on both sides of the ferry. In these circumstances the appeal must be dismissed with costs.

JAYETILLEKE, J.

The defendant in this case is the Village Committee of the Mampe-Kesbewa village area. The Bolgoda Lake is partly within the limits of the defendant and partly within the limits of the Urban Council of Moratuwa. The Willorawatte Road, which is on the Moratuwa side of the lake, ends at the Northern bank of the lake, and the Kitalandaluwa Ferry Road, which is on the Kesbewa side of the lake, ends at the Southern bank of the lake.

One Caldera, who owns a land by the side of the bank at the end of the Willorawatte Road, claims to be entitled to the bank adjoining his land. For about 25 years prior to 1943, the Village Headman of Deltara conducted a ferry service between the ends of the said roads. The headman, in the course of his evidence, said that Caldera refused to allow passengers to land on the bank adjoining his land, and he was obliged to take a lease of a land adjoining Caldera's land and disembark the passengers there. This evidence shows that for several years prior to 1943, Caldera had been in possession of the bank at the end of the Willorawatte road. In the year 1943 the defendant and the Urban Council of Moratuwa decided to establish a ferry between the ends of the two roads. By an indenture D2, dated August 30, 1943, the Urban Council of Moratuwa agreed that the defendant should have the administration and control of the said ferry service. On October 5, 1943, the defendant sold by public auction the exclusive right of ferry for the year 1944 between the said points. At the sale the plaintiff purchased the said rights for the

sum of Rs. 1,400 payable in twelve monthly instalments of Rs. 116.67, and entered into the agreement A. It provides *inter alia*:—

1. That the plaintiff shall not levy more than the amounts set out in the agreement.
2. That the plaintiff shall post a copy of the rates in a frame with a glass face at each end of the ferry and keep and maintain the same in good and legible condition and all protected from water and sun.
3. That the plaintiff shall cause to be erected in front of the toll station, or if there is no toll station on either end of the ferry, on the bank as near to the road as possible so as to be conspicuously visible to passengers, a post bearing at a height of six feet from the road and set at right angles to the road and having painted on it on both sides in block letters not less than one inch in size, the name of the ferry and toll station in English and Sinhalese.
4. That the plaintiff shall pay any fines or imposition inflicted or imposed by the Chairman by reason of any breach of the conditions in the agreement.

The plaintiff says that as the ferry rights had not been claimed by the defendant prior to 1943, and as he had to put up buildings and to erect posts, he thought the defendant should place him in possession of the two ends of the ferry, and he accordingly called upon the defendant to do so. The defendant placed him in possession of the Kesbewa end, but failed to place him in possession of the Moratuwa end. He put up a shed at the Kesbewa end, and, when he attempted to put up a shed at the Moratuwa end, Caldera drove him away, and did not allow him to remove the materials he took with him. Thereupon, he wrote P3 dated January 4, 1944, informing the defendant that Caldera would not allow him to erect the shed, or to remove his materials, or to take his canoes up to the bank, and requesting the defendant to cancel the agreement and refund his deposit. He received no reply to that letter from the defendant. He then wrote another letter P4 informing the defendant that, owing to Caldera's dispute, he could not charge the passengers any fare and that he was suffering a loss of about Rs. 10·50 a day. On March 6, 1944, he wrote P5 inquiring from the defendant whether he could stop the service. This letter shows that P4 was sent on January 4, 1944, under registered cover. In reply to P4 and P5 the defendant sent P6 dated March 8, 1944, calling upon the plaintiff to pay the rent for January, February and March. The plaintiff sent a reply P7 dated March 13, 1944, through his Proctor, refusing to pay rent on the ground that the defendant failed to place him in quiet possession of the ferry. On March 29, 1944, the plaintiff's Proctor by his letter P8 invited the defendant's attention to P7 and requested the defendant to place the plaintiff in possession of the Willorawatte end of the ferry. To that, too, there was no reply. On April 24, 1944, and on May 2, 1944, the plaintiff sent to the defendant statements P9 and P10 of the losses sustained by him. On September 20, 1944, the plaintiff instituted this action for the recovery of a sum of Rs. 6,332·10 as damages up to December 31, 1944. The cause of action pleaded by him in the plaint is that the defendant committed a breach of the agreement by failing to place him in quiet possession of the two ends of the ferry. After instituting the action the plaintiff, on the advice of his lawyers, continued the ferry service up to the end of December in terms of his agreement.

The District Judge held that the landing place on the Moratuwa side was not the end of the Willorawatte road, but the bank between the water's edge and the road, and that the defendant committed a breach of the agreement by failing to place the plaintiff in quiet possession of that land. He awarded to the plaintiff a sum of Rs. 4,152·10 as damages. This amount represents the actual out of pocket expences of the plaintiff. The finding of the District Judge that the landing place is the bank is supported by the evidence of the Headman and by the documents D2 and A.

At the argument before us, Mr. Perera contended that the defendant was under no obligation to place the plaintiff in quiet possession of the two ends of the ferry. On the facts of the case it seems to me that this contention is not well founded. The agreement provides that the plaintiff shall erect in front of the toll stations or on the banks of the lake two posts giving the name of the ferry and toll station in English and Singhalese, and that, if he fails to do so, he shall be liable to pay a fine. The evidence shows that, owing to Caldera's opposition, the plaintiff could not erect the toll station or the post at the Willorawatte end. The Chairman of the defendant admitted in cross-examination that he had to give the plaintiff possession of the two ends of the ferry in order to enable him to erect the stations. He, however, withdrew this admission when he realised that it would destroy his defence. In my opinion the agreement implies that the defendant was under an obligation to place the plaintiff in quiet possession of the two ends of the ferry. It follows, therefore, that the defendant's failure to place the plaintiff in quiet possession of the bank at the Willorawatte end is a breach of the agreement, for which the defendant is liable to in damages. Mr. Perera conceded that, if the Urban Council of Moratuwa was not entitled to the landing place at the Willorawatte end of the ferry, the plaintiff would be entitled to succeed. In view of my decision

on the interpretation of the agreement, it is unnecessary for me to consider whether Caldera had title to the bank at the Willorawatte end. No issue has been framed on this point though evidence has been led on both sides. Caldera has undoubtedly been in possession of the bank for several years. When he was charged by the plaintiff in the Magistrate's Court he produced a plan of his land which included the bank. He also produced some tax receipts which show that he paid rates for the land depicted in that plan. The Chairman of the Urban Council of Moratuwa did not make any attempt to prove that the Council was entitled to the bank. His evidence shows that he was not aware of the existence of the bank.

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

Appeal dismissed.

Proctors : *Fernando* and *Fernando* for the appellant.
S. R. Amarasekera for plaintiff-respondent.

IN THE COURT OF CRIMINAL APPEAL

Present : HOWARD, C.J. (President), JAYATILEKE, J. & DIAS, J.

REX vs. SUMATHIPALA & OTHERS

Appeals 42-45 *of* 1947 *with Applications* 116-119 *of* 1947—*S. C. No.* 70/*M. C. Colombo* 20265
Argued on : 9th June, 1947
Stated on : 18th June, 1947

Court of Criminal Appeal—Evidence—Joint conviction of four persons for murder—Sufficient evidence against one, unsatisfactory evidence against the rest—Common intention—Absence of evidence of a pre-arranged plan—Evidence Ordinance, Section 34.

Four persons were jointly convicted of murder, the only evidence being that of a young boy, and the deceased's dying declaration. In the latter, the deceased made no mention of the participation in the assault, of the 2nd, 3rd and 4th accused. The boy stated that after the 1st accused dealt a blow, which medical evidence proved to be fatal, the others joined in the assault of the fallen man. He did not, however, mention this to the first person who appeared on the scene, and the statement itself was made to the Police after some delay. There was no evidence of a pre-arranged plan.

Held : That, in the circumstances, a common intention to murder cannot be inferred in order to sustain the conviction against the 2nd, 3rd and 4th accused.

Cases referred to : *Mahbub Shah vs. Emperor A. I. R.* (32) Privy Council 118.
King vs. Ranasinghe (47 N. L. R. 373).
King vs. Herashamy (47 N. L. R. 83).
Gouridas Namasudra vs. Emperor (I. L. R. 36 Calcutta 659).
Rex vs. Price and Others (8 Cox 96).

F. A. Hayley, K.C., with *M. M. Kumarakulasingham* and *A. Jayasuriya*, for all the appellants.
Mr. H. W. Jayawardene appears as junior to Mr. Hayley, for the 2nd accused-appellant in addition to the other junior counsel,
T. S. Fernando, Crown Counsel, with *E. L. W. de Zoysa, Crown Counsel*, for the Crown.

HOWARD, C.J.

This appeal by the four accused from their convictions on a charge of murder was argued on the 9th June. After argument, we affirmed the conviction of the 1st accused, but set aside the convictions of the other three accused for the offence of murder and substituted therefor convictions for the offence of intentionally causing grievous hurt under Section 317 of the Penal Code, for which offence we imposed sentences of 4 years rigorous imprisonment. Mr. Hayley who appeared on behalf of all the accused based his argument on behalf of the 1st accused on a question of fact. The only evidence for the Crown was that of the small boy, Piyadasa, and the dying declaration of the deceased. There was a discrepancy between the dying declaration and the testimony of Piyadasa, arising from the fact that the deceased in his declaration implicated only the 1st accused, whereas the small boy implicated all four accused. Piyadasa also failed to mention the name of the assailants to the witness Marthelis Appu, the driver of a car, who picked up the deceased and Piyadasa soon after the assault on the deceased

had taken place. There was also delay on the part of Piyadasa in making a statement to the Police. In spite of these shortcomings, in the evidence tendered by the Crown, we think that there was ample material on which the Jury could find the 1st accused guilty. It is impossible to say that the verdict so far as the 1st accused was concerned was unreasonable. The conviction of the 1st accused was, in these circumstances, affirmed.

Different considerations apply in regard to the other three accused. The only evidence implicating them was that of Piyadasa, the small boy, who stated that after the deceased had been hit on the head by the 1st accused with an iron rod and fallen down, the other three accused came and struck him with iron clubs. He cannot say where the blows alighted. The 1st accused also joined in the assault on the deceased whilst he lay fallen. The medical evidence revealed two fatal injuries on the head. There was also another injury on the head which was not serious and three injuries on the legs. It was contended by Mr. Hayley that, in these circumstances, the Crown had not proved there was a common intention to commit the offence of murder. We think that there is considerable force in this contention. In *Mahbub Shah vs. Emperor A. I. R.* (32) Privy Council 118, it was held that " common intention within the meaning of Section 34 of the Indian Penal Code implies a pre-arranged plan. To convict the accused of an offence applying section 34, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. It is no doubt difficult if not impossible to procure direct evidence to prove the intention of an individual ; it has to be inferred from his act or conduct or other relevant circumstances of the case. Care must be taken not to confuse same or similar intention with common intention ; the partition which divides " their bounds " is often very thin ; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice. The inference of common intention within the meaning of the term in section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case." *Mahbub Shah vs. Emperor* was cited in the case of the *King vs. Ranasinghe* (47 N. L. R. 373). At p. 375 Soertsz, Actg. C.J., stated as follows :—

> " In the circumstances of the case before Their Lordships, they refused to draw that inference and it appears to us that, in the circumstances of the case before us too, it would be safer not to draw the inference of a common intention. There is no evidence at all of any pre-arrangement, or even of any declaration or of any other significant fact at the time of the assault to enable one to say more than that the assailants had the same or similar intentions entertained independently by each of them. The first appellant said that he ran up from the Co-operative Stores on hearing the women's cries ; There is nothing to contradict this statement. Indeed, that is very probable. The second appellant, therefore, must have come up from elsewhere and independently. It may, therefore, well be that if the Jury had their attention called to this distinction, they might have differentiated between the offences of the two appellants."

Again in the *King vs. Herashamy* (47 N. L. R. 83) it was held by this Court that to convict all of the accused of the offence of attempted murder, each one of them at the time of the assault must be actuated by a common intention, not merely to beat the deceased, but to cause his death or such bodily injuries as were likely to cause his death. The same principle was formulated in *Gouridas Namasudra vs. Emperor* (I. L. R. 36 Calcutta 659) as follows :—

> " Where several accused persons struck the deceased several blows, one of which only was fatal, and it was not found who struck the fatal blow, it was held that in the circumstances it could not be said that those who did not strike the fatal blow contemplated the likelihood of such a common object, and that they were all guilty under section 326, and not under section 302, of the Penal Code."

The case of *Rex vs. Price & Others* (8 Cox 96) is also in point. The headnote of this case is as follows :—

> " Six men assaulted another man. In the course of the assault one of them inflicted a stab and killed the person assaulted. They were jointly indicted for murder."

The Judge instructed the Jury :—

> 1st : That the man who stabbed was guilty of murder, wheteher he intended to killl or not.
>
> 2nd : That the other five would be guilty of murder if they participated in a common design to kill.
>
> 3rd : If there was no common design to kill, if the knife was used in pursuance of a common design to use it, they would all be guilty of murder.
>
> 4th : If there was no common design to use the knife, if being present at the moment of stabbing, they assented, and manifested their assent by assisting in the offence, they were guilty of murder.
>
> 5th : If neither of the last three modes of putting the case be proved against the five, they must find the stabber guilty, and acquit the rest.
>
> 6th : If they cannot ascertain which of them stabbed, they must acquit all."

In the present case there is really no evidence of a pre-arranged plan. There is no evidence of any connection between the 1st accused and the three others prior to the assault. It is not clear what the 2nd, 3rd and 4th accused were doing and where they had been prior to their arrival on the scene. Nor during the assault did the four

accused say anything to indicate that they were acting in furtherance of a pre-arranged plan. It is true that they all seem to have been armed with the same type of weapon. Moreover the 2nd, 3rd and 4th accused joined in the attack on the deceased very soon after he had been hit on the head by the 1st accused. This circumstantial evidence does not in our opinion place beyond all reasonable doubt the question as to whether they all shared a common intention to commit the offence of murder. In these circumstances we have substituted for the conviction of the offence of murder a conviction under section 317 for which we have imposed on the 2nd, 3rd and 4th accused a sentence of 4 years' rigorous imprisonment.

Sentence varied.

IN THE COURT OF CRIMINAL APPEAL

Present : KEUNEMAN, A.C.J. (President), WIJEYEWARDENE, S.P.J. & JAYETILEKE, J.

REX vs. PATHIRANAGE KIRIGORIS

Application 159 *of* 1947—*S. C.* 35/*M. C. Walasmulla* 616.
Argued on : 22nd July, 1947.
Decided on : 23rd July, 1947.

Court of Criminal Appeal—Misdirection—Penal Code, Section 294*—Conviction for murder—Defence of grave and sudden provocation—Mere abuse unaccompanied by physical acts—Omission in direction to Jury—Validity of conviction.*

In a charge of murder, the accused pleaded grave and sudden provocation, caused by mere abuse unaccompanied by physical acts. In the address to the jury, the trial Judge appeared to have drawn attention mainly to the fact whether the act committed was proportionate to the provocation, without definite directions that mere abuse may, in the circumstances, amount to sufficient provocation.

Held : That the failure to instruct the jury that mere abuse may amount to sufficient provocation was a misdirection.

Cases referred to : *Mancini's case* (28 Cr. A. R. 65).
King vs. Coomarasamy (41 N. L. R. 289).

Mackenzie Pereira in support.
T. S. Fernando, Crown Counsel, with *E. L. W. de Zoysa, Crown Counsel.* for the Crown.

KEUNEMAN, A.C.J.

The accused in this case was convicted of the murder of T. Babahamy. According to the story for the prosecution, the accused had struck the woman on the head with a rice-pounder and caused her death, and no mitigating circumstances were disclosed. The accused admitted the act, but raised the plea of grave and sudden provocation. He said he went to the house of the deceased and asked her daughter Podihamy, who was his mistress, to return home with him. The deceased then intervened.

> " She is a very interfering sort of woman. On that day when I called Podihamy to go, my mother-in-law abused me unmercifully in bad language. The abuse was unbearable and I became so provoked that I struck her. I had completely lost control of myself and I struck my mother-in-law. I struck her with a door-bar."

The accused gave some details of the language used by the deceased, which the trial Judge described as " uttering obscene words and attributing immorality to one's mother."

The trial Judge in his charge dealt with the plea of grave and sudden provocation. He pointed out that provocation must be both grave and sudden, and must by its gravity and suddenness deprive the accused of his power of self-control. The trial Judge continued :—

" There must be adequate cause for the provocation. The test is, was the provocation in the circumstances of the case likely to result in a normal, reasonable man losing control of himself to such an extent as to cause such an injury as was inflicted in this case? Would the normal villager of the country say in the particular circumstances of the case, that there was grave and sudden provocation? Apart from words or gesture, there was only abuse here. Could insult, even by words or gestures, afford sufficient pro-

vocation for a person to act in the way he had done. Uttering obscene words and attributing immorality to one's mother must not be understood to be trivial provocation, but would that justify the commission of an act of an outrageous nature beyond all proportion to the provocation? In such circumstances grave and sudden provocation would be hardly any defence, and where death has been caused the offence would be murder notwithstanding the little provocation that had been given."

It seems possible that the trial Judge was trying to emphasize the fact that the act committed should not be "beyond all proportion" to the provocation, or, to use the words of Viscount Simon in *Mancini's case* (28 Cr. A. R. 65), "the mode of resentment must bear a reasonable relationship to the provocation, if the offence is to be treated as manslaughter." But the charge is subject to this criticism, namely, that it may have led the Jury to believe that mere abuse, or insult by words or gestures may never be regarded as sufficient provocation, as to support the plea of grave and sudden provocation. This is not the law of Ceylon. Here it has been held that mere abuse unaccompanied by some physical act may be sufficient provocation to reduce the offence of murder to culpable homicide not amounting to murder. See the *King vs. Coomarasamy* (41 N. L. R. 289). The trial Judge has failed to direct the Jury that this is the law of Ceylon, and the Jury may well have been left with the impression that there were no circumstances under which mere abuse would be a sufficient provocation. The trial Judge has used these words :—

> "In such circumstances grave and sudden provocation will be hardly any defence, and where death has been caused the offence would be murder notwithstanding the little provocation that had been given."

The use of the words later "whether there was provocation in this case for the accused to have committed the act" is also a question of fact, and the warning to the Jury that they were the sole judges of the facts in the case, do not cure the failure to explain the law on this subject. The Jury were not definitely instructed that mere abuse may, in certain circumstances, be regarded as sufficient provocation, and that they were the sole judges as to whether there was sufficient provocation to support the plea of grave and sudden provocation.

In our opinion this failure amounts to a misdirection, and we do not think it is possible to say that if the Jury had been properly instructed, they would still have brought in a verdict of murder.

In these circumstances we have already set aside the verdict of "Guilty of murder" and the sentence of death, and substituted a verdict of "Guilty of culpable homicide not amounting to murder", and imposed a sentence of 12 years' rigorous imprisonment.

Verdict and sentence set aside.

Present : DIAS, J.

ZOYSA vs. WILBERT

S. C. No. 831/1947—*M. C. Balapitiya* 58755
Argued on : 31st October, 1947
Decided on : 4th November, 1947

Evidence—Maintenance Ordinance 1889 (*Chap.* 76), *Section* 6—*Necessity to corroborate applicant's testimony—Statement by putative father under section* 122 (3) *of the Criminal Procedure Code—Is such statement admissible to corroborate the applicant's testimony.*

In a maintenance action, the statement admitting paternity made by the putative father of two illegitimate children and recorded in the Police Information Book under section 122 (3) of the Criminal Procedure Code, during the investigation of a charge of house-breaking, was admitted as substantive evidence to corroborate the mother's story. This was the only corroboration tendered.

Held : (1) That the statement so recorded in the Police Information Book under section 122 (3) of the Criminal Procedure Code cannot be admitted as substantive evidence to corroborate the applicant's story.

(2) The provisions of section 122 (3) of the Criminal Procedureare applicable to both criminal and civil proceedings.

Cases referred to : *Ponnammah vs. Seenitamby* (1921) 22 N. L. R. 395.
Sinnatangam vs. de Silva (1926) 28 N. L. R. 212.
Dona Carlina vs. Jayakoddy (1931) 33 N. L. R. 165.
Maxwell (*6th ed.*) pp. 93-94.

Chitty vs. Peries (1940) 41 N. L. R. 145.
Attorney-General vs. Ellawala (1926) 29 N. L. R. 13.
R. V. Haramanisa (1944) 45 N. L. R. 532.
R. V. Sudu Banda (1946) 47 N. L. R. 183.

F. A. Hayley, K.C., with him *H. W. Jayawardene* and *Vernon Wijetunge*, for respondent-appellant.

G. P. J. Kurukulasuriya, with *Conrad Dias*, for applicant-respondent.

Dias, J.

The question for decision is whether the statement of the putative father of two illegitimate children, recorded in the Police Information Book under section 122 (3) of the Criminal Procedure Code, in the course of an investigation into a charge of housebreaking, is admissible *as substantive evidence* in order to corroborate the testimony of the mother under section 6 of the Maintenance Ordinance 1889 (Chap. 76), when he is sued for maintenance?

The mother gave evidence to the effect that she had been the mistress of the appellant for several years, that she bore him two children, and that she registered the birth of one child giving the appellant's name as being the father. She also stated that the appellant had maintained both the children until six months previous to the filing of the maintenance case. No attempt, however, was made by her to establish these facts by independent evidence.

There had been an alleged burglary in the applicant's house, and she complained to the Police who held an inquiry under *Chapter XII.* of the Criminal Procedure Code. In the course of that investigation, the Police questioned the appellant and recorded his statement. This statement P 1 was tendered as substantive evidence by the applicant and admitted by the Magistrate despite an objection to its admissibility on behalf of the appellant. The relevant portion of P 1 reads: "Josaline Jayatissa was my mistress for about eight or ten years. I have two children by her and they are with her..... After this incident I left Josaline as I learnt that she was visiting the house of Victor....."

If the statement P 1 is legally admissible as *substantive evidence*, the case against the appellant is established, because P1 would be independent corroboration of the mother's evidence by an admission of the father of the illegitimate children. On the other hand, if P1 is not legally admissible, it is conceded that there being no independent corroboration of the mother's evidence, the claim must fail.

Section 6 of the Maintenance Ordinance requires that when a claim for maintenance is made on behalf of an illegitimate child, before liability can attach it is necessary that the evidence of the mother shall be "corroborated in some material particular by other evidence to the satisfaction of the Magistrate". Clearly, the words "other evidence" means legally admissible evidence. In the case of *Ponnammah vs. Seenitamby* (1921 22 N. L. R. 395 a Divisional Court held that the necessity for corroboration of the woman's evidence would be satisfied by any kind of corroboration *which is recognised by law.*

In *Sinnatangam vs. de Silva* (1926) 28 N. L. R. 212 a statement made by the mother to the Police, who were investigating a charge against her of attempted abortion, was held not to be corroboration of her story in the maintenance case, because it was not a material question at the Police inquiry to ascertain whether the respondent was the father of the child. The question was not raised or decided whether the mother's statement, having been recorded under section 122 (3) of the Criminal Procedure Code, was at all admissible. The decision turned on the question whether the statement was admissible as corroboration under section 157 of the Evidence Ordinance. In *Dona Carlina vs. Jayakoddy* (1931) 33 N. L. R. 165 two statements of the woman recorded in the Police Information Book under section 122 (3) of the Criminal Procedure Code were relied on as furnishing corroboration of her story. In that case too the question whether such statements were admissible at all in view of the terms of section 122 (3) of the Criminal Procedure Code was not considered. The decision turned on whether the statements came within the provisions of section 157 of the Evidence Ordinance.

In the present case, however, it is not a statement of the mother which is relied on as furnishing corroboration, but a statement by the alleged father amounting to an admission that he was keeping the mother as his mistress who bore the two illegitimate children to him. Unless there is some legal bar to the admissibility of the statement P 1, it would supply corroboration of the applicant's evidence.

Section 122 (3) of the Criminal Procedure Code provides that "No statement made by any person to a police officer in the course of any investigation under this Chapter *shall be used otherwise*

than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it. But any *criminal Court* may send for the statements recorded in a case under inquiry or trial in such Court, and may use such statements or information *not as evidence* in the case, but to aid it in such inquiry or trial." The sub-section goes on to create two exceptions when statements recorded under section 122 (3) can be used as *substantive evidence*, namely, in order to prove a dying declaration under section 32 (1) of the Evidence Ordinance, or as evidence in a charge under section 180 of the Penal Code.

I cannot accede to the argument of the respondent's counsel that the provisions of section 122 (3) apply only to criminal cases, and that in a civil proceeding (which a maintenance case is) a statement recorded under section 122 (3) can be used as substantive evidence in order to corroborate the person making the statement *or some other person*.

It is true that section 122 (3) appears in the Criminal Procedure Code, and that the majority of instances when that sub-section has come before this Court for consideration are criminal cases. I can, however, find no warrant for restricting the first four lines of section 122 (3) to criminal cases. The fact that the Legislature in the very next sentence refers to a "criminal Court" implies that the general words which preceded it are of general application. "It is to be taken as a fundamental principle, standing as it were at the threshold of the whole subject of interpretation, that the plain intention of the Legislature, as expressed by the language employed, is invariably to be accepted and carried into effect, whatever may be the opinion of the judicial interpreter of its wisdom or justice. If the language admits of no doubt or secondary meaning, it is simply to be obeyed"—*Maxwell* (*6th ed.*) pp. 93-94. Section 122 (3) says in effect that no statement recorded under its provisions shall be used either in a civil, criminal, or other legal proceedings except in the following cases:—(*a*) As substantive evidence to prove a dying declaration under section 32 (1) of the Evidence Ordinance or to establish a charge under section 180 of the Penal Code; and (*b*) in order to discredit the maker of such statement under section 155 (*c*) of the Evidence Ordinance or to refresh the memory of the officer who recorded the statement. It is, however, open to a criminal Court to send for and peruse the statements recorded under section 122 (3) not as evidence, but merely to aid it in such inquiry or trial. Except in the two cases specially provided for, a statement recorded under section 122 (3) cannot be used as *substantive evidence* in any proceeding, civil or criminal. Under no circumstances can a statement recorded under section 122 (3) be used *to corroborate* the maker of the statement or some other person; although it can be used *to contradict* the maker of the statement when he gives evidence

That section 122 (3) can be utilised in a civil action in order to discredit a witness is to be seen in *Chitty vs. Peries* (1940) 41 N. L. R. 145. In a proceeding to strike a proctor off the rolls for misconduct, a Divisional Court held that the law prohibits the reception in evidence of statements recorded under section 122 (3) *except for the purposes specified in that section.* In that case because the statement was sought to be utilised for purposes not specified in section 122 (3) the evidence was rejected—*Attorney-General vs. Ellawala* (1926) 29 N. L. R. 13.

It is a settled rule of evidence that once a statement recorded under section 122 (3) has been utilised in order to impeach the credit of a witness, the force of that statement is exhausted, and cannot thereafter be relied on as substantive evidence in the case—*R. V. Haramanisa* (1944) 45 N. L. R. 532, *R. V. Sudu Banda* (1946) 47 N. L. R. 183. No doubt, there are criminal cases, but the principle is of general application. Therefore, the fact that P1 was put to the appellant under cross-examination and denied by him, cannot make that statement substantive evidence in the case.

In a maintenance case it is not enough for the Magistrate to say "I believe the applicant and I disbelieve the respondent; and I, therefore, find for the applicant." He must be able to say "I believe the applicant, and she is corroborated in some material particular by such and such legally admissible independent evidence." In this case he cannot so hold, because the only independent evidence relied on as corroboration is P1, which is not admissible as substantive evidence in the case. The evidence of the woman, therefore, stands uncorroborated, and the claim must necessarily fail. This appears to be a hardship, but in reality it is not so. If it is the fact that the appellant was openly keeping the applicant as his mistress for a great many years, and was actually maintaining the two children as his own, these facts should have been capable of proof by independent evidence.

The order appealed against is, therefore, set aside and the claim for maintenance is dismissed. As the appellant succeeds on a legal technicality and his case discloses no merits, I direct that each party shall bear their own costs both here and below.

Order set aside.

IN THE COURT OF CRIMINAL APPEAL

Present : JAYETILEKE, J. (President), CANEKERATNE, J. & DIAS, J.

REX vs. BELLO SINGHO & 3 OTHERS

C. C. A. Applications Nos. 236-239 *of* 1947—*S. C. No.* 55/*M. C. Dandagamuwa Case No.* 18885.
Second Midland Circuit, 1947/*Kandy Assizes.*
Argued on : 20th and 23rd October, 1947.
Decided on : 28th October, 1947.

Court of Criminal Appeal Ordinance No. 23 *of* 1938, *Section* 8(1)—*Court of Criminal Appeal Rules* 1940, *Forms IV and VI—Failure to state grounds in notice of appeal.*

Where a ground of appeal not set out in the petition of appeal, or in the supplementary notice setting out a further ground, is raised by the Counsel for the accused at the hearing of the appeal.

Held : That the Court will not entertain a ground of appeal not stated in the notice of appeal.

Cases referred to : *Rex vs. Steane* (1947) 1 A.E.R. 213.
Rex vs. Wyman 13 C.A.R. 165.
Rex vs. Cairns 20 C.A.R. 44.
King vs. Seeder de Silva 41 N.L.R. 337.
King vs. Burke 43 N.L.R. 465.
King vs. Marthino 43 N.L.R. 521.
King vs. Hemasiri 43 N.L.R. 457.
King vs. James Singho 44 N.L.R. 53.
Rex vs. Sellathurai 73-83 Mallakam 1092 S.C.M. 20-10-47.

H. V. Perera, K.C. with *M. M. Kumarakulasingham, Mahesa Ratnam* and *L. G. Weeramantry*, for applicants.

T. S. Fernando, Crown Counsel with *E. L. W. de Zoysa, Crown Counsel*, for the Crown.

JAYETILEKE, J., (*President*).

The accused in this case were charged on an indictment which contained three counts. The first count charged them with being members of an unlawful assembly, the common object of which was to commit robbery. The second count charged them with being members of an unlawful assembly, and, in prosecution of the common object, having committed murder by causing the death of one Bempy Singho. The third count charged them with having committed murder by causing the death of Bempy Singho in furtherance of the common intention of all. The Jury unanimously found them guilty on counts 1 and 2 and not guilty on count 3. On the second count, the accused were convicted purely on circumstantial evidence. The material witnesses for the Crown were Ukku Banda, a brother of the deceased, Jayasekera, a son of Ukku Banda, and Nonohamy, a sister of the deceased.

Ukku Banda said that he lived at Pethigoda-gedera in the District of Kurunegala with his wife, who was insane, his son Jayasekere, and daughter Podi Nona. On March 28, 1946, he slept in the office room, his wife and son slept on the outer verandah, and his daughter in a room. Between 10 and 12 p.m. he was awakened by the report of a gun. He got up and went to the verandah when he was seized by someone, dragged into the compound, and struck several blows with clubs. He raised cries and fell on the ground. He then heard the sound of doors being broken open inside the house. There was starlight, and he was able to identify the 3rd accused as one of those who struck him, and the 4th accused as one of those who went inside the house. After the thieves left, he saw Bempy lying dead on the compound, and several persons gathered there.

Jayasekere said that he was awakened by the report of a gun and almost immediately he was held by four persons, pressed against the wall, and struck several blows with clubs. One of them forced open the door of the house with a stone which he had brought with him from the firewood shed, and several of the thieves went inside the house. He then released himself, picked up his sword from under his mat, rushed up to a thief who was in the compound with a gun in his hand, and attacked him with the sword. The thief fell down, whereupon, he took the gun and ran towards the house. He then saw his uncle Bempy lying in the compound bleeding profusely, and also his father lying fallen in the compound. When he saw them he fell down in the compound in a faint. There was starlight at the time, and he clearly identified the 1st accused and 2nd accused among the thieves.

Podi Nona, who was called by the accused, said that, as soon as the thieves entered the house, she ran out of the house into the jungle and came back towards morning.

Nonohamy, a sister of the deceased, said that the deceased lived in her house. On the night in question, hearing gunshots and shouts from the direction of Ukku Banda's house, the deceased went out of the house taking with him the club P10. After the thieves left she went up to Ukku Banda's compound and saw her brother lying dead.

The medical evidence shows that the deceased had a pond-shaped depressed fracture on the right side of the head, roughly about two inches in diameter, with radiating fractures from the sides of this fracture running to either side of the base of the skull. Dr. Thamotheram was of opinion that a very great degree of force had been used to inflict the injury. He was also of opinion that it was more probable that it was caused by the ring end of a mammotty then by the butt-end of a gun. A mammotty belonging to Ukku Banda was found by the side of the deceased, but there was no blood on any part of it.

Mr. Perera contended that, upon this evidence, it was not open to the jury to say that every reasonable hypothesis consistent with the innocence of the accused on the charge of murder had been eliminated and that, therefore, the verdict is unreasonable. He said that the deceased may have been mistaken for a thief and struck by the wife of Ukku Banda or by someone who came up hearing cries. It must be remembered that the witnesses said that there was starlight at the time, which enabled them to identify these accused. It is, therefore, improbable that deceased could have been mistaken for a thief. Having regard to the nature and position of the injury, it is equally improbable that it was inflicted by Ukku Banda's wife. She is over 50 years of age and has not been in possession of her senses for sometime. It is unlikely that she could have struck a blow with a very great degree of force. The suggestion that a neighbour may have inflicted the injury is not supported by the evidence. None of the witnesses said that any one came up before the thieves left. We, therefore, think that the first ground cannot be sustained.

The next point taken by Mr. Perera was that the presiding Judge failed to direct the jury as to the facts and circumstances on which the jury could have based a finding as to the intention of the unknown assailant of the deceased.

On the question of intention, there is the following passage in the summing up :—

> " You have to ask yourselves first of all, was the assailant of Bempy one of the members of the unlawful assembly? If he was a member of the unlawful assembly, did he intend to cause the death of Bempy or did he intend to cause Bempy bodily injury sufficient in the ordinary course of nature to cause death. In regard to intention, it is a matter for inference, and the case for the Crown, as established by the medical evidence is that Bempy had received the wound on his head which made death inevitable. He must have died within a few minutes of having received that injury. In fact, I recall the very vivid manner in which Crown Counsel referred to that part of the case, because he said when he was opening his case that Bempy's head had been bashed in. It was a very grievous injury that was inflicted on Bempy. He must have died more or less on the spot—so to speak—certainly he was dead by morning. His corpse was taken into the house of his brother at dawn. Now every man is presumed to intend the natural and probable consequences of his acts. So that, when you are considering the matter of intention, you will ask yourselves the question whether the assailant of Bempy intended to kill him or intended to cause bodily injury sufficient in the ordinary course of nature to kill. If you are satisfied on that point, then the assailant of Bempy would be guilty of murder. But in a case of this kind where the assailant of Bempy had not been identified, where the Crown alleges that a member of the unlawful assembly was the assailant of Bempy, you have to be satisfied that it was a member of the unlawful assembly that caused the death of Bempy, and you have also to be satisfied that the intention of that member was to cause death or to cause bodily injury sufficient in the ordinary course of nature to cause death..... But, suppose you are in doubt as to whether the assailant of Bempy intended to cause his death or to cause him bodily injury sufficient in the ordinary course of nature to cause death, then you may not find the assailant of Bempy or any other member of the unlawful assembly guilty of murder; in that event, you will go on to ask yourselves the question whether the assailant of Bempy knew what he was doing was likely to cause the death of Bempy, and in that case, the assailant of Bempy would be guilty of culpable homicide not amounting to murder which is the lesser offence."

Relying on the case of *Rex vs. Steane* 1947-1 A.E.R. 213, Mr. Perera argued that, on the evidence taken as a whole, there was room for more than one view as to the intent of the assailant, and, therefore, the rule of the law that a person must be taken to intend the natural and probable consequences of his acts did not apply. For instance, he said, the assailant may not have known where the blow would alight or he may have inflicted the injury in the course of a struggle.

We do not think that it was possible for the jury to take the view that the assailant may not have known where the blow would alight, as they had accepted the evidence that there was sufficient light at the time; nor do we think that it was possible for them to return a verdict favourable

to the accused, even if they took the view that the assailant inflicted the injury in the course of a struggle, as the exception relating to private defence is not available to a person who enters another's house with intent to commit robbery. We are of opinion that the directions given by the presiding judge on the question of intention were quite adequate.

Mr. Perera sought to raise another point, namely, that, in the circumstances of the case, it could not be said that the commission of the offence of murder was involved in the common object of robbery. Crown Counsel objected to the point being argued on the ground that it was not taken either in the petition, which was filed on September 25, 1947, or in the supplementary notice setting out a further ground of appeal which was filed, out of time, by assigned Counsel on October 19, 1947, and he stated that, in any event, he was not ready to argue the point on that day. Mr. Perera said that he could not take the point earlier as he had not studied his brief. We did not think that the reason given by Mr. Perera for not raising the point within the time prescribed was sufficient in law, and we decided to uphold the objection.

The law on the subject seems to be fairly clear. Section 8(1) of the Court of Criminal Appeal Ordinance No. 23 of 1938 provides that where a person convicted desires to appeal under this Ordinance to the Court of Criminal Appeal, or to obtain the leave of that Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal, in such manner as may be directed by rules of Court, within 14 days of the date of conviction. Rule 3 of the Court of Criminal Appeal Rules, 1940, provides that the forms set out in the Schedule to the Rules, or forms as near thereto as circumstances permit, shall be used in all cases to which such forms are applicable. The forms relevant to appeals on questions of law and to applications for leave to appeal on the facts are Now. IV and VI. They show that the grounds must be fully set out.

There are several decisions under the corresponding Section of the English Act.

In *Rex vs. Wyman* 13 C.A.R. 165, the following passage appears in the judgment of Darling, J. :—

> "The Court wishes it to be understood that in future substantial particulars of misdirection, or of other objections to the summing-up, must always be set out in the notice of appeal, even if the transcript of the shorthand note of the trial has not been obtained. Such particulars must not be kept back until within a few days of the hearing of the appeal. If Counsel has a genuine grievance regarding a summing-up, he knows substantially what it is as soon as the summing-up is finished, and can certainly specify his general objection when he settles the notice of appeal."

In *Rex vs. Cairns* 20 C.A.R. 44, an application was made for leave to add misdirection to the grounds of appeal. The Court granted leave as it was a capital case. The Lord Chief Justice, after citing the passage quoted above, said :—

> "This direction the Court has repeated in later cases. In future it will act upon it."

There are several local decisions, too, on the point. In the *King vs. Seeder de Silva* 41 N.L.R. 337, which was the first case to be heard under the Court of Criminal Appeal Ordinance No. 23 of 1938, Howard, C.J., said :—

> "Generally speaking this Court will refuse to give effect to grounds not stated in the notice, but where the appellant is without means to procure legal aid and had drawn his own notice the Court will not as a rule confine him to the grounds stated in his notice."

In the *King vs. Burke* 43 N.L.R. 465, in which the appellant was convicted of attempted rape, an application was made for leave to amend the notice of appeal on questions of law by adding a further ground. After consideration of *Rex vs. Wyman* (supra) and *Rex vs. Cairns* (supra), the application was refused.

In the *King vs. Marthino* 43 N.L.R. 521, an application to amend an application for leave to appeal on the facts by alleging misdirection in the charge to the jury was refused on the authority of *Rex vs. Wyman* (supra) and *Rex vs. Cairns* (supra).

In the *King vs. Hemasiri* 43 N.L.R. 457, four grounds of appeal were set out in the notice of appeal. After a copy of the proceedings was obtained, a supplementary notice setting out a further ground of appeal was filed. In the course of the argument in appeal, Counsel sought to address the Court on a point not set out in the notice of appeal. It was held that, the case not being a capital case, application to argue the new ground of appeal should not be allowed as there was delay in applying for a copy of the proceedings. It does not appear from the judgment whether the observations of the Lord Chief Justice in *Rex vs. Cairns* (supra), quoted above, were considered by the Court.

In the King vs. James Singho 44 N.L.R. 53, a statement filed out of time setting forth four additional grounds of appeal was rejected. In the course of his judgment, Soertsz, J. said :—

> "This Court has repeatedly laid down that it will not entertain additional grounds of appeal, except in very exceptional circumstances, unless a substantial question of law is seen to arise."

These decisions show that the practice of raising points which are not set out in the notice, which, we regret to say, seems to be growing,

has been condemned in no uncertain terms. In *Rex vs. Sellathurai* 73-83 Mallakam 1092 S.C.M. 20-10-47, the Court had to adjourn to enable Crown Counsel to study a question which was raised by Counsel for the appellant without previous notice. We think it is desirable that this Court should act upon the words of the Lord Chief Justice in *Rex vs. Cairns* (supra), and insist on a strict compliance with the provisions of the Ordinance.

The applications are refused and the appeals are dismissed.

Dismissed.

Present : HOWARD, C.J. & WINDHAM, J.

THE KING vs. NONIS

S. C. No. 126—*D. C. Avissawella No.* 352/38092.
Argued on : September 30, 1947.
Decided on : 10th November, 1947.

Marriage Registration Ordinance (*Chap.* 95), *Section* 38 (1)—*Registration of marriage as "best evidence" thereof—Its meaning—Effect of non-production of entry in Register—Can evidence of eye-witnesses of marriage in lieu of production of entry in Register be led to prove marriage against a person charged with bigamy.*

Where a person was charged with bigamy, the prosecution did not produce the entry in the Register as proof of that person's first marriage, but the first wife and the officiating priest testified to the marriage. It was contended on behalf of the accused person that such proof was inadmissible as the entry in the Register shall be the best evidence of the marriage according to section 38 (1) of the Marriage Registration Ordinance.

Held : (1) That according to section 38 (1) of the Marriage Registration Ordinance ,the expression "entry in the Register shall be the 'best evidence' thereof," means that the entry shall prevail over conflicting evidence, and in case of non-production of the entry, other evidence affording strict proof may be adduced.

(2) That in the circumstances, the oral evidence of the first wife and the officiating priest were admissible.

Cases referred to : *Nicholas de Silva vs. Shaik Ali* (1 N. L. R. 228).
Mampitiya vs. Wegodapola (unreported).
Seneviratne vs. Halangoda (22 N. L. R. 472).
Rex vs. Allison (R. & R. 109).

H. Wanigatunge, for accused-appellant.
Boyd Jayasuriya, Crown Counsel, for Attorney-General.

WINDHAM, J.

The appellant was convicted of bigamy, contrary to section 362C of the Penal Code. The sole point arising on appeal is whether his first marriage was properly proved, having in view section 38 (1) of the Marriage Registration Ordinance (Chap. 95), Section 38 (1) provides as follows :—

"38. (1) The entry made by the Registrar in his marriage register book under sections 32, 33 and 37 shall constitute the registration of the marriage, and shall be the best evidence thereof before all Courts and in all proceedings in which it may be necessary to give evidence of the marriage."

The prosecution produced no such entry in the marriage register book in proof of the appellant's first marriage, nor even any copy of it, but they proved the marriage *aliunde*, calling in evidence the first wife herself and the officiating Catholic priest, both of whom testified to the marriage and both of whom the Court believed. The appellant neither gave nor called evidence in contradiction, or at all.

It is argued for the appellant that this first-hand oral evidence of the marriage was inadmissible, because section 38 (1) states that the entry in the marriage register book shall "constitute the registration of the marriage and shall be the best evidence thereof." At this point I would state that, from the context of the section, I consider that the word "thereof" means "of the marriage" and not "of the registration of the marriage." It is contended for the appellant that the phrase "best evidence" of the marriage means the only admissible evidence of it. If this contention means that no marriage which, if registered, would be registered under the Marriage Registration Ordinance (Chap. 95), can be proved except by production of the registration entry, then it cannot be acceded to. For there would then be no means of proving such a marriage at all if it had not been registered, although such a marriage is none the less valid if not so registered. That it is valid though not registered was laid down in *Nicholas de Silva vs.*

Shaik Ali (1 N. L. R. 228); it will also be noted that the Marriage Registration Ordinance Chap 95 lacks any provision similar to section 8 of the Kandyan Marriage Ordinance (Chap. 96) which renders marriage void if not registered under the latter Ordinance.

What, then, does "best evidence" in section 38 mean? The same expression appears in the same context in section 36 of the Kandyan Marriage Ordinance, which provides that—"The entry as aforesaid in the register of marriage and in the register of divorce shall be the best evidence of the marriage contracted or dissolved by the parties and of the other facts stated therein.....' "With regard to its meaning in the latter section two cases are in point, namely, *Mampitiya vs. Wegodapola* (unreported), followed in *Seneviratne vs. Halangoda*, (22 N. L. R. 472). In both of these cases the question at issue, so far as concerns the meaning of "best evidence" in section 36, was whether the character of a Kandyan marriage would be proved by oral evidence to be other than that stated in the register, and the decision in both cases was that it could not. In so deciding, the learned Judges said in the earlier case—and their dicta was approved in the later one—that the expression "best evidence" in the section was "used in the English law sense, and excluded all evidence of an inferior character." But it seems to me clear, bearing in mind the point decided in those cases, that what the learned Judges meant by the somewhat ambiguous phrase "excludes all evidence of an inferior character" was not that the register entry is the only evidence which may be adduced to prove a marriage, but rather that it prevails over any other conflicting evidence as to the marriage. Section 8 of the Kandyan Marriage Ordinance, rendering void unregistered Kandyan marriages, should not be allowed to confuse the issue. It is a provision of the substantive law, whereas section 36 is concerned with evidence only. The above meaning of "best evidence" is precisely the meaning which I would give to it in the similar context of section 38 of the Marriage Registration Ordinance (Chap. 95).

In any case what is the meaning of "best evidence" in the English law sense? It certainly does not, and never did, mean that no other direct evidence of the fact in dispute could be tendered. Its meaning is rather that the best evidence must be given of which the nature of the case permits. If one were to apply that meaning of the phrase to the present case, it might be held that the entry in the register ought to have been produced, since it would appear from the evidence of the first wife herself that the marriage was registered. But the "best evidence" rule in England has been subjected to a whittling-down process for over a century, and today it is not true that the best evidence must be given, though its non-production, where available, may be a matter for comment and may affect the weight to be attached to the evidence which is produced in its stead. It should be noted at this point that the "best evidence" rule is not to be confused (as it often is) with the rules as to "primary evidence" in connection with documents, and as to the exclusion of oral by documentary evidence, to which special considerations apply which in this country are embodied in the Evidence Ordinance (Chap. II.).

It is true that the old rule of best evidence does to some extent survive in England in certain cases; and one of these is the very one now under consideration, namely, the proof of marriage in charges of bigamy. But in such cases it only survives to this extent, that *strict* proof of the marriage is required. Strict proof, however, is not confined to production of the registration entry, but covers the evidence of an eye-witness to the marriage, which indeed is more direct evidence than a register entry; *vide Rex vs. Allison* R. & R. 109.

I would therefore construe the expression "best evidence" in section 38 of the Marriage Registration Ordinance as follows:—The registrar's entry of the marriage in the register shall prevail over any other evidence as to the marriage in case of conflict, *i.e.* conflict as to whether the marriage was celebrated at all or as to its character or any particulars regarding it. It would thus prevail as a matter of law over the evidence of an accused in a bigamy charge who denied the marriage. But if the registrar's entry is not produced, whether or not the marriage was in fact registered and whether or not (if registered) the non-production of the entry is satisfactorily accounted for, then the marriage may be proved by any other evidence affording strict proof, and this would include (as in the present case) the evidence of an eye-witness. The learned District Judge was accordingly right in admitting and accepting the oral evidence of the first wife and of the officiating priest (which be it noted was not contradicted) in proof of the first marriage.

For these reasons this appeal must be dismissed, and the conviction and sentence confirmed.

HOWARD, C.J.
I agree.

Appeal dismissed.

Present : HOWARD, C.J.

RAZIK MARIKAR vs. MOHAMED ABDULLA.

S. C. No. 610—*M. C. Galle No.* 4453
Argued on : 3rd October, 1947.
Decided on : 8th October, 1947.

Defence (Control of Prices Supplementary Provisions) Regulations, 1942—*Sections* 1(3) *and* 16 (1) —*Prosecution by Price Control Inspector—Is proof necessary that he is an "authorised officer"—Public servant within meaning of section* 148(1)b *of the Criminal Procedure Code.*

In a prosecution by a Price Control Inspector for selling mutton above the regulated price, the charge was dismissd without calling on the defence, on the grounds that there was no proof that the Inspector was an "authorised officer" under section 1(3) of the Control of Prices Regulations, 1942.

It was also contended that the complainant was not a public servant according to section 148 (1)*b* of the Criminal Procedure Code, although it was admitted that he was a Price Control Inspector.

Held : (1) That proof that the complainant was an "authorised officer" according to section 1(3) of the Control of Prices Regulations was not a necessary ingredient to maintain a charge under the Regulations.
(2) That the Court is entitled to take judicial notice of the fact that a Price Control Inspector is a pubic servant within the meaning of section 148 (1)*b* of the Criminal Procedure Code.

Cases referred to : *Hameed vs. Thuraisamy Nadar* (48 N.L.R. 119).
Perera vs. Alwis (45 N.L.R. 136).
R. V. Cresswell (13 Cox 126.)
R. V. Morris Rogers (14 Cox 101).

T. S. Fernando, C.C., for the complainant-appellant.
Cyril E. S. Perera with *Vernon Wijetunge*, for the accused-respondent.

HOWARD, C.J.

In this case the complainant, with the sanction of the Attorney-General, appeals from an order of the Magistrate's Court at Galle. The Magistrate, after hearing the evidence for the prosecution, acquitted the accused respondent on the ground that there was no proof that the complainant appellant was an authorized officer within the meaning of the Defence (Control of Prices) Supplementary Provisions) Regulations. The respondent was charged with selling on the 7th January, 1947, to one A. Jayawardene 17 ozs. of mutton, in excess of the maximum price of Rs. 1·06 in breach of the order made by the Controller of Prices published in Government Gazette No. 9573 of the 1st July, 1946, and thereby committing an offence punishable under section 5 of the Control of Prices Ordinance No. 39 of 1939 as amended by the Defence (Control of Prices Supplementary Provisions) Regulations 2 (2) now appearing in the Consolidated Reprint of the Defence Miscellaneous Regulations of the 1st May, 1944. The evidence submitted by the prosecution in support of this charge consisted of that of A.W.M. Razik Marikar, who stated that he was the Price Control Inspector at Galle on the day the offence was committed, that he watched the transaction of sale between Peon Jayawardene and the respondent, and that the respondent charged more than the control price. The only other witnesses were Peon Jayawardene, who spoke as to the transaction with the respondent, and also A. B. Abayewickrema, an Examiner of weights and measures, who weighed the mutton sold to Jayawardene. The Magistrate without calling on the defence, acquitted the respondent on the ground already stated. In doing so the Magistrate considered he was bound by the decision in *Hameed vs. Thuraisamy Nadar* (48 N.L.R. 119).

The Defence (Control of Prices) (Supplementary Provisions) Regulations, Regulation 1(3) of the schedule defines an "authorised officer" as "..... any other officer or person (other than a Controller or any Deputy or Assistant Controller) appointed by the Controller by a notification published in the Gazette to be an "authorised officer."....." Under Regulation 1(3) of the Control of Prices Regulations, 1942, an "authorised officer" is defined as follows :—

> "The expression 'authorised officer' when used in any of these Regulations—
>
> (*a*) means the Controller or any Deputy or Assistant Controller ; and
>
> (*b*) includes any other officer or person appointed by the Controller by notification published in the Gazette to be an authorised officer for the purposes of the Regulation in which the expression occurs."

Regulation 16 (1) is worded as follows :—

> " Where any person is suspected to have contravened the provisions of any Order or of any of these Regulations, it shall be lawful for the Controller or any authorised officer to enter the premises in which, and to seize any article in respect of which, that contravention is suspected to have occurred."

Now the question in issue in this case is not whether the complainant was justified in law in taking the mutton and balance from the respondent's stall, but whether the respondent had committed an offence against the Regulations. His evidence on this question was for acceptance or not by the Magistrate, irrespective of the question as to whether he was an " authorized " officer. The proof that the complainant was an authorized officer was not one of the ingredients of the charge. In the case of *Perera vs. Alwis* (45 N.L.R. 136) the accused was charged under section 183 of the Penal Code with obstructing the complainant in the discharge of his duty and preventing him from searching the premises of the Welcome Stores. Unless the complainant was an authorised officer he was not obstructed in the discharge of his duties. It was not proved that the complainant was an authorised officer. Hence one of the ingredients was not established. In the circumstances I do not consider that the decision in *Perera vs. Alwis* was so wide in its scope as the Court considered it was in *Hameed vs. Thuraisamy Nadar.*

The further point has been raised that there was no proof that the complainant, who claimed to be a Price Controller, was a public servant within the meaning of section 148 (*b*) of the Criminal Procedure Code, entitling him to file the plaint. The complainant in his evidence has stated that he was Price Controller, Galle, on the 7th January, 1947. This evidence was not challenged and is proof that the complainant was a Price Controller. I think the Court should without formal proof take judicial notice of the fact that Price Controllers are public servants. In this connection the maxim " omnia praesumuntur rite acta " applies vide *R. V. Cresswell* (13 Cox 126) and *R. V. Morris Rogers* (14 Cox 101). In the latter case Coleridge, L.C.J. at p. 103). stated as follows :—

> " One of the best recognised principles of law, *Omnia praesumuntur esse rite et Solemniter acta donec probetur* in contrarium is applicable to public officers acting in discharge of public duties. The mere acting in a public capacity is sufficient *prima facie* of their proper appointment ; but it is only a *prima facie* presumption, and it is capable of being rebutted."

For the reasons I have given, the order of acquittal is set aside and the case is remitted to the Magistrate so that he should call upon the defence.

Acquittal set aside.

Present : CANEKERATNE, J. & DIAS, J.

(1) GAUDION vs. ROMPI SINGHO AND ANOTHER

S. C. No. 434-435—*D. C. Ratnapura* 8036.
Argued and Decided on : 29th September, 1947.

Witnesses—Unduly long examination by Judge—Contradictions so elicited—Judge's views on credibility of witnesses—Weight to be attached to such views.

Where the question for determination in a case depended on testimony of witnesses only and where the Judge indulged in an unduly long cross-examination of the defence witnesses and gave judgment for the plaintiff.

Held : That in the circumstances, it is not possible to attach weight to the views of the judge as regards the credibility of the witnesses.

Cases referred to : *Yule vs. Yule* 1944, 29 C.L.W. 102.

H. W. Thambiah, for the appellant.
Colvin R. de Silva, for the respondent.

CANEKERATNE, J.

This is an appeal from a judgment of the District Judge of Ratnapura, pronounced in favour of the plaintiff in an action brought by him for the recovery of a sum of Rs. 275, as damages for wrongful dismissal and Rs. 600 damages sustained by the wrongful transfer of the plaintiff's labourers. The defence was that

the plaintiff left the services of the first defendant of his own free will. The main question was whether the plaintiff was instructed to cease work entirely or to take over the weeding section. The determination of this question depends on the testimony of the plaintiff and of the conductor. The second defendant testified that he instructed the conductor of the estate, in writing, to send the plaintiff to the weeding field towards the end of January. The Judge appears to accept this part of the evidence. The conductor, in his evidence, stated that he got instructions in writing from the second defendant and later told the plaintiff that he should stop work in the tapping field and take over the weeding section. What the Judge's finding on this evidence amounts to is this—that the conductor changed the message he received from the superintendent and told the plaintiff something entirely different: this was done apparently for no valid reason. There is evidence to show that it was usual for a kangany to be put into various fields.

The plaintiff was represented at the trial by counsel from Colombo, (Mr. K. C. Nadarajah). The first defendant and the second defendant were represented by proctors of the court. The plaintiff gave evidence and called two witnesses. The Judge put no questions to the plaintiff or his witnesses. The second defendant gave evidence and was cross-examined by counsel for the plaintiff and was reexamined. The Judge then started examining him and his examination covers one page and six lines of the typescript, while the cross-examination took one page and two lines of the typescript. The next witness was the conductor. After the cross-examination and the re-examination, the Judge took this witness in hand and his examination covers a little over one and half pages of the typescript. The conductor's cross-examination covers a little over one page of the typescript. The Judge, who was the sole judge of facts, accepted the evidence of the plaintiff and rejected the evidence of the conductor principally because of the contradictions in his evidence. The contradictory answers were elicited by the Judge himself in the cou se of a prolonged examination of the witness, in which sometimes the same question was asked more than once. Answers obtained in one or two places by, as he himself states, "pressing the witness further." It may not be undesirable in dealing with this case to refer to the following passage from the judgment of a Court of Appeal in England. *Yule vs. Yule* 1944, reported on page 102 of the 29 C.L.W.:

> "A Judge who observed the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course, he, so to speak, descends into the arena and is liable to have his version clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked as everyone who had experience of these matters knows, that the demeanour of a witness is apt to vary when he is being questioned by the Judge particularly when the Judge's examination is as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue."

A Judge is entitled to put questions, and invariably would do so where it is necessary to clear up anything that is left indefinite, or indistinct, or not well explained.

The trial in this case is a very unsatisfactory one and it is a matter of regret that the Judge should have conceived himself justified in adopting the course he took in this trial. In these circumstances it is not possible to attach weight to the views of the Judge as regards the credibility of the witnesses.

One course open to us is to examine the evidence afresh and come to a decision on the facts. The other is to send the case back for a re-trial. It seems fairer to the parties to adopt the latter course.

The result will be that the action will come on for trial anew and in these circumstances it is desirable that the Court should confine its opinion strictly to the requirements of the appeal so as not to prejudice the case of either party, at the trial. The judgment of the trial judge is set aside and the case will go back for trial by another judge. The costs of the proceedings in the Court below and of the appeal will be costs in the cause.

DIAS, J.

I agree.

Set aside and sent back.

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

ABDUL HAFEEL vs. DEMBER

Application for Restitutio-in-Integrum *in D. C. Colombo No.* 12416 (26)
Argued on : 23rd October, 1947
Decided on : 12th November, 1947

Restitutio-in-Integrum—*Petitioner, an internee at Internment Camp during pendency of action—Judgment entered against petitioner—Release long after—Application to Supreme Court—Inability to give proper instructions to lawyers or to provide necessary funds—Is the remedy available.*

Petitioner was sued for damages for breach of contract in 1940. Pending trial he was interned at an Internment Camp, later removed to a camp in India and was released only in 1946. During his internment, the action had been decided against him. After his release, he made this application for *restitutio-in-integrum* on the ground that by reason of his internment (*a*) he was not in a position to instruct his lawyers in regard to the steps to be taken and witnesses to be summoned on his behalf at the trial. (*b*) he was not able to place his proctors in funds for the proper conduct of the case to enable them to summon the necessary witnesses.

Held : That in the circumstances the remedy of *restitutio-in-integrum* is not available to the petitioner.

Per CANEKERATNE, J.—"It was open to the petitioner to make an application to have his evidence taken on commission and this matter was adverted to in the order made by this Court on March 30, 1944, when this case was remitted to the District Court. That he was not able to make such an application may be due to his lack of means at the time ; it may be his misfortune, but that is really no ground for differentiating his case from that of another, who is not able to get the funds necessary for prosecuting appeal in time."

Referred to : Sohm, Roman Law, 88.
Grotius, Introduction 3-48-3 4 ; 3-49-1, 2.
Vander Linden, Introduction (Henry's translation), pp. 466, 275, 467, 468.
Grotius, *op. cit.* 2-7-2.
Maasdorp, Vol. iii. (1st Ed.) 70.
Grotius, *op. cit.* 3-49-5.
Schorer, note D XXVII.
3 Burge (1st Ed.) 1059.

E. F. N. Gratiaen, K.C., with *Ivor Misso*, for defendant-petitioner.
H. V. Perera, K.C., with *V. A. Kandiah*, for plaintiff-respondent.

CANEKERATNE, J.

This is an application to have the judgment and proceedings in action No. 12416/M of the District Court of Colombo set aside ; the action was one instituted about September 30, 1940, against the petitioner by the respondent for recovery of damages for breach of a contract of sale of "old, clean and unused newspapers". The petitioner denied liability on certain grounds. He had been interned in the Internment Camp at Diyatalawa and by the end of the year 1942 was transferred to a camp in India. After certain earlier proceedings the case ultimately came on for trial on November 30, 1944. Issues were then framed and evidence led on behalf of the respondent, but no evidence was called on behalf of the petitioner who was represented by his proctor ; he, however, raised an issue as regards a term of the contract. The trial was concluded and about a fortnight later judgment was entered against the petitioner.

In the present application which was filed on January 23, 1947, the petitioner states (*a*) that he was released from internment in August, 1946, and that by reason of the internment he was not in a position to instruct his lawyers in regard to the steps to be taken and witnesses to be summoned on his behalf at the trial ; and (*b*) that as a result of being interned, he was not able to place his proctors in funds for the proper conduct of the case and to enable them to summon the necessary witnesses. It was contended at the argument that in the interests of justice, the judgment alleged to have been pronounced in the absence of the petitioner should be set aside as the Roman Dutch Law allowed restitutio-in-integrum in respect of proceedings of this nature.

In-integrum-restitutio, in Roman Law, was a branch of the praetor's equitable jurisdiction and one of the most remarkable cases of his *cognito extraordinaria*. It denotes the act not of a private party, but of a magisterial authority. It is the restitution by the praetor to his original legal condition, in cases where some injury has been done to a person by operation of law. The interposition in such cases of the highest Roman Minister of Justice bears some analogy to the use

made of the prerogative of the Crown in early English legal history. The function of thus overriding the law where it collided with equity was only confided to the highest magisterial authority, and even in his hands was governed by the principle that he was only supposed to act in a ministerial not in a legal capacity. Five grounds or titles (*justae causae*) to extraordinary relief (*extraordinarium auxilium*) were recognised and enumerated in the Edict., Dig. 4, 1 : intimidation (*metus*), fraud (*dolusmalus*), absentia, error, minority (*aetatis infirmatas*). Two, however, of these titles, fraud and intimidation, had additional remedies in the ordinary course of procedure where they were recognised as grounds of exception and personal action—the *actio* and *exceptio metus*, the *exceptio* and the *actio doli*. The effect of a grant of restitution was simply to reinstate a person to a legal right which he had lost, not to give damages on account of the violation of a right. It is to be observed that the praetor expressly avowed his magisterial discretion to be limited by statutory law, Sohm., Roman Law, 88.

The remedy of *restitutio-in-integrum* became part of the law of Holland. It is the reinstatement of an individual in the position he occupied before some occurrence that had resulted to his prejudice—the act of rescission is called *restitutio-in-integrum*. The remedy was obtained by an application made at the commencement of the action, but if the application was pleaded after an action has been commenced, by obtaining permission to make a civil application to the Court for relief. In the case of a principal transaction, as Schorer states, restitution is granted by the Sovereign or by the High Council to whom the function is delegated, the practice being for the applicant to be referred to the inferior Courts to enquire whether it is based on truth and is a sufficiently just one, and if it be found so, the restitution is confirmed ; if not, it is refused. He gives as examples of a principal transaction, a contract, or compromise or adiation of an inheritance.

There are three conditions of restitution : (1) The first condition is a laesio by the operation of law, *i.e.*, a disadvantageous change in civil rights or obligations brought about by some omission or disposition of the person who claims relief; (2) a second condition of relief is the absence of various disentitling circumstances. Thus relief is granted against the effect of legal dispositions and omissions, but in Roman Law not against the effect of delicts. Again the extraordinary relief of restitution-in-integrum is not granted when the Courts of law can administer an adequate remedy. If restitution will be more effective than the ordinary remedy it may be granted ; (3) a third condition is some special or abnormal position of the person who claims relief when such special circumstance is the cause of the loss which he has suffered. Such abnormal positions are minority, compulsion, fear, fraud, error, absence. Thus a minor may be relieved against an injudicious bargain, but not against the casual destruction of the thing he has purchased, for this loss was occasioned by his minority or inexperience.

Grotius after stating that obligations may be rendered invalid by intrinsic or extrinsic causes proceeds to discuss the reliefs available. Intrinsic causes for relief are fear, fraud and minority. Under extrinsic causes he discusses decrees or *quasi*-decrees of Court, Grotius, Introduction 3-48-3 4 ; 3-49-1,2. The cases in which relief may, according to Vander Linden, be obtained can, broadly speaking, be grouped under two heads : (1) Relief relating to the original matter itself (substantial relief) ; relief, or relieving a party from any act or contract and replacing him in his former situation is granted on the ground of his having been induced through fear, fraud, minority error or other sufficient reasons to do the act against which he prays relief ; among good reasons for obtaining relief he had earlier mentioned these —fear, violence, fraud, minority, absence, excusable error and prejudice in above half the value of the thing and further, such equitable grounds as may justify the resolution or cancellation of the contract ; (2) relief relating merely to some omission or error in the process or pleadings (judicial relief) Vander Linden, Introduction, (Henry's translation) pp. 466, 275, 467, 468. A Court will grant relief where one has been barred from pleading, where there has been delay or default in taking proceedings, as filing a petition of appeal or prosecuting it within the time limited (ten or twenty days respectively), a creditor omitting to file his claim in insolvency. It is necessary to refer again to absence and the effect of a judgment. In consequence of his absence a person may have lost a right of action by limitation or some property through adverse possession on the part of a third person. As regards the former, relief by way of restitution does not seem to have been necessary in Grotius' time, the rule, broadly stated, being limitation cannot run against a person who is not competent to sue. Relief against prescription in respect of property could be applied for where there were lawful reasons such as unavoidable absence Grotius, *op. cit.* 2-7-2. Restitution is granted, according to

Maasdorp, Maasdorp, Vol. iii. (1st Ed.) 70, in some matters in which a person has suffered damage through absence, such as in matters of default in legal proceedings, or in the acquisition of property by prescription. But relief against an absent person is only granted if the absent person has not left behind one with power to act for him (2 Nathan 165 quoting Voet.)

A judgment has, according to Grotius, the force of a final and definite sentence when it does not admit of appeal or reformation, or when the time for such appeal or reformation is passed, unless indeed the judgment is altered by revision. A judgment though *ipso jure* null and void is valid unless appealed against, and has the effect or *res judicata* unless indeed its nullity is due to want of jurisdiction or of service of summons or of power to sue. A judgment, however, may be rescinded by a *restitutio-in-integrum*, so as to lose all the effect of *res judicata* and the cause is then heard *de novo* just as if the Judge had known nothing about it before ; restitution was not, as a general rule available, according to Grotius, Grotius, *op. cit.* 3-49-5, on account of the discovery of fresh evidence but in Schorer's time the law had gone further ; restitution will be allowed whenever it was not owing to any negligence on the part of the applicant that the documents were not discovered, for instance, if they were in the possession of a third person without any act on his part and without any possibility of his knowing of it, especially if it was due to the fraud of the opposite party that they were not discovered, Schorer, note D XXVII. In the jurisprudence of Holland and of those countries, as Burge states, which adopt the civil law, the exception of *res judicata* could be avoided only on the ground of fraud or nullity consisting in the want of jurisdiction either in respect of the subject of the suit or on account of the party against whom the sentence was pronounced not having been duly cited and afforded an opportunity of defending himself, 3 Burge (1st Ed.) 1059).

The cases in which application for relief by way of restitution in respect of judgments of original Courts have been made in Ceylon can, broadly speaking, be classed under two heads : (*a*) Where a judgment has been obtained by fraud or where there has been a discovery of fresh evidence ; (*b*) where a judgment has been entered of consent and there has been an absence of a real consent such as in cases of fraud, fear, excess of authority and mistake. It was open to the petitioner to make an application to have his evidence taken on commission and this matter was adverted to in the order made by this Court on March 30, 1944, when this case was remitted to the District Court. That he was not able to make such an application may be due to his lack of means at the time ; it may be his misfortune but that is really no ground for differentiating his case from that of another who is not able to get the funds necessary for prosecuting appeal in time. It can hardly be said that the present application comes within the rule as laid down by the Roman Dutch law writers or the decisions of this Court.

The application is refused with costs.

Soertsz, S.P.J.

I agree.

Application refused.

Proctors : *P. D. A. Mack* for the appellant.
A. H. M. Sulaiman for the respondent.

Present : Howard, C.J. & Windham, J.

CHINNATHAMBY & OTHERS vs. SOMASUNDARA AIYAR & OTHERS

S. C. No. 74—*D. C. (F) Jaffna No.* 74/*A*
Argued on : September 24th & 25th, 1947
Decided on : 2nd October, 1947

Civil Procedure Code, Sections 325, 327—*Execution of decree—Resistance to Fiscal—Petition to Court—What a Court has to investigate—Decree-holders' rights.*

Action under section 102 *of the Trusts Ordinance—Vesting order authorising trustees to take charge and possess temple and its temporalities and to eject parties therefrom—Is it an executable decree or merely declaratory—Reliefs claimed in action under section* 102—*Can they be decreed from time to time.*

Held : (i) That under section 327 of the Civil Procedure Code, the claim to be investigated is the claim of the person offering resistance to the decree and not the decree-holder's own right.

(ii) That it is not necessary that the decree-holder should show that he has a cause of action. The fact that he is a holder of a decree for possession of immovable property is sufficient.

(iii) That a decree directing delivery of trust property to trustees is executable and not declaratory.

(iv) That in an action instituted under section 102 of The Trusts Ordinance, reliefs claimed therein need not be embodied in one decree, but that decree may be issued from time to time.

Cases referred to : *Fernando vs. Fernando* 24 N. L. R. 502).
Varadaiah Chetty vs. Narasimhalu Chetty A. I. R. 1932 Madras 41.

H. V. Perera, K.C., with *G. C. Thambyah* and *C. Shanmuganayagam*, for plaintiff-appellants.

S. J. V. Chelvanayagam, K.C., with *M. M. Kumarakulasingham*, for 1, 2, 3, 4, 7, 9, 10, 11 and 12-20 defendants-respondents.

N. E. Weerasooriya, K.C., with *M. M. Kumarakulasingham*, for 5, 6 & 8 defendants-respondents.

WINDHAM, J.

The plaintiffs-appellants, who are persons interested in a place of worship known as the Kumpalavalai Pillaiyar Temple, after due compliance with the provisions of section 102 of the Trusts Ordinance, instituted an action No. 72 (Trust) in the District of Jaffna against the first and second defendants-respondents. The action was settled between the parties, and judgment by consent was entered, whereunder the Temple was declared to be a public charitable trust. In accordance with the terms of the settlement, a scheme of management was framed, trustees of the temple and its temporalities were duly elected, their appointment confirmed by the Court, and on 20th October, 1943, a vesting order was made vesting the temple and its temporalities in them. This vesting order, which was attached to the decree of the Court as Schedule 2, and was expressed to form part of that decree, contained the following clause :—

> "Further the trustees thus appointed are hereby authorised to take all necessary steps according to law to take charge and possession of the said temple and properties and temporalities and collect incomes derived from all sources as aforesaid and to act in terms of the said scheme of management confirmed by this Court and to eject parties therefrom."

On 18th February, 1944, in pursuance of the above provisions of the vesting order, the plaintiffs obtained from the Court an *ex parte* order as against the first defendant-respondent for delivery of possession of the temple and its properties to the trustees. Since the second defendant was himself a trustee, the order obviously was not and could not be issued against him ; but the first defendant was not a trustee and, while under the settlement he was to be allowed to continue as officiating priest during his lifetime, the order was thus properly issued against him.

Upon the Fiscal proceeding to execute the order, however, he met with resistance from the fifth and sixth respondents, who had not been parties to the action, but who claimed the right of officiating as priests and of managing the temple under a deed of 18th June, 1943, and to have been executed in their favour by their mother, the eighth respondent.

The plaintiffs accordingly filed a petition against the present respondents, including those three, under section 325 of the Civil Procedure Code, and in accordance with the provisions of section 327 their petition was duly registered as a plaint. Issues were framed, and among these were five issues, Nos. 9 to 13, in the nature of preliminary objections to the plaint. They were in the following terms :—

(9) Does the plaint disclose a cause of action ?

(10) On the footing of the allegations in the plaint do the plaintiffs have the status or right to maintain this action ?

(11) Is the plaintiffs' action bad for want of compliance with the provisions of section 101 and/or 102 of the Trusts Ordinance ?

(12) Is the plaintiffs' action bad for misjoinder of parties and causes of action ?

(13) Is the plaintiffs' action bad for non-joinder of parties, viz. of all trustees as plaintiffs ?

The learned District Judge proceeded to consider these five issues as preliminary objections to the plaint, and, finding against the plaintiffs on issues 9 and 10, he proceeded to dismiss the plaintiffs' claim forthwith, without going into the merits of the respondents' claim. It is against this that the present appeal is directed.

Now section 327 of the Civil Procedure Code requires the petitioner's (plaintiffs') petition of complaint to be " numbered and registered as a plaint in an action between the decree-holder as plaintiff and the claimant as respondent ", and it further requires the Court to " proceed to investigate the claim in the same manner and with the like power as if an action for the property had been instituted by the decree-holder against

the claimant". But these words, though no doubt they require the investigation to be treated as if it were a "fresh action" (and on that point I concur with what was said in *Fernando vs. Fernando* (24 N. L. R. at page 505) cannot, in my view, reasonably be construed as placing the plaintiff, the decree-holder, in the position of having to comply with all the technical requirements of the Civil Procedure Code, non-compliance with which might prove fatal to an actual fresh action brought by him. Nor is there any question of his having to show a "cause of action". It is sufficient that he is the holder of a decree for the possession of the immovable property. Section 327 merely says that the claim shall be investigated as if it were an action by the decree-holder against the claimant. But it is the claim (*i.e.* the case of the person offering resistance to the decree) which is required to be investigated, and not the decree-holder's own right. For he holds the decree, and the onus is on the claimant to support his claim as against that decree. Accordingly, I think the learned Judge of the District Court erred in dismissing the plaint on issues 9 and 10, *i.e.* on the ground that the plaintiffs had no cause of action or had no right to maintain their action. The very decree which they held gave them that right.

Mr. Chelvanayagam, for the respondents, has not seriously contested, in principle, the interpretation which I have placed on section 327. But his contention is that the plaintiffs had no right to avail themselves at all of the procedure laid down in sections 325 to 327, in that they were not the holders of a possessory decree. It was largely on this ground that the Court found against the plaintiffs on issues 9 and 10. Now it is true that the procedure prescribed in those sections is only available, in respect of immovable property, to the holder of a decree directing a person against whom it operates to yield up possession of the immovable property; the decree must fall within the category set out in paragraph (C) of section 217 of the Civil Procedure Code. But it seems to me that the decree in the present case did fall within that category. It authorizes the trustees to "take all necessary steps according to law to take charge and possession of the said temple and properties and temporalities.....and to eject parties therefrom". Of the two defendants to the action in which this decree was obtained, the "party" against whom it was directed was clearly the first defendant, for the reasons to which I have already alluded. It is said that this part of the decree was merely declaratory of the trustees' rights and was not an order for delivery of possession. But I think it must be read together with the order for ejectment of the first defendant which was issued consequent upon it—an order in the following terms:—"Order for delivery of possession issued against the first defendant, returnable 18-4-44". It was not merely declaratory but executory, and was completed by the order for ejectment. That a decree directing the delivery of trust property of a temple to new trustees is executable and not declaratory was held in the Indian case of *Varadaiah Chetty vs. Narasimhalu Chetty* (A. I. R. 1932 Madras 41). And I agree with the proposition of Mr. H. V. Perera, for the plaintiffs, that upon a suit instituted (as here) under section 102 of the Trusts Ordinance, all the reliefs claimed thereunder need not, and frequently cannot, be embodied in one decree, but that decree may be issued from time to time.

I accordingly hold that the procedure under sections 325 to 327 of the Civil Procedure Code was available to the plaintiffs, and that the learned District Judge erred in dismissing his claim on the preliminary points raised in issues 9 and 10, or in considering all issues 9 to 13 inclusive.

The appeal is allowed, the judgment below set aside, and the case remitted to the District Court for decision on its merits, that is to say, on the remaining issues. The plaintiffs to have their costs of the appeal, costs below to abide the result.

HOWARD, C.J.

I agree.

Appeal allowed.

Present : CANEKERATNE, J.

MOHAMED HUSSAIN & CO. vs. JAYARATNE, CONTROLLER OF TEXTILES

Application for a Writ of Certiorari on the Controller of Textiles (115)
Argued on : 26th September, 1947
Decided on : 8th October, 1947

Certiorari, *writ of—Order under rule* 62 *of Defence (Control of Textiles) Regulations cancelling licence of textile dealer—Notice of accusation and opportunity for explanation granted to dealer—When should Court review such order.*

Acting under rule 62 of the Defence (Control of Textiles) Regulations, the Textile Controller cancelled the licence granted to the petitioner to deal in textiles, on the ground that he was unfit to be allowed to continue as a dealer. Before this order was made, the Controller gave (*a*) notice to the petitioner of what he was accused of, and of the evidence on which the accusation was based (*b*) an opportunity to send his explanation.

An application for a Writ of Certiorari was made to quash the order cancelling the licence.

Held : (i) That inasmuch as the Controller gave notice of the allegations against the petitioner and an opportunity to tender his explanation thereon before making the order, mere insufficiency of evidence placed before the Controller is not a ground for setting aside the order.

Held : (ii) That the order cannot be challenged except on the ground that the Controller has acted in a way in which no person performing such functions, in the opinion of the Court, ought to act, or unless a rule laid down by the regulations under which he acts is violated, or failed to pay due regard to the dictates of natural justice.

Cases referred to : *Abdul Thassim vs. Rodrigo* (1947) 48 N. L. R. 121.*
In re *Application No.* 75 (decided on 19th September, 1947).†
Johnson & Co., Ltd. vs. Minister of Health (1947) 2 A. E. R. 395 p. 405.
Maclean vs. The Workers' Union (1929) 1 Ch. 602, pp. 624, 625.
Board of Education vs. Rice (1911) A. C. 182.
Arlidge vs. Local Government Board (1913) A. C. 120.
Johnson & Co., Ltd. vs. Minister of Health (1947) 2 A. E. R. 395 p. 400.

H. V. Perera, K.C., with *C. Suntheralingam* in support.
Walter Jayewardene, Crown Counsel, for the respondent.

CANEKERATNE, J.

This is an application by the petitioner for a mandate in the nature of a Writ of Certiorari quashing the order made by the respondent by his letter dated March 10, 1947.

The petitioner is a partner of the firm of S. Mohamed Hussain & Co. which carried on business as textile dealers in the Pettah, Colombo, the other partner being Mohamed Hussain.

The firm of S. Mohamed Hussain & Co.—and I will call them the firm—sent to the office of the Controller certain textile coupons on two occasions for the purpose of surrendering them to the Coupon Bank. According to the petitioner these coupons were taken by his employee one Alliyar, with a paying-in slip consisting of foil and counterfoil. It appears, according to the affidavit of the respondent, that the firm was supplied with a paying-in book containing slips and that coupons are brought to the office with the book. The slip and the coupons were handed to a receiving clerk by Alliyar on November 30, 1946 : this clerk counted the coupons and checked the number handed with that entered in the paying-in slip ; he then entered the number in a scroll book with various other particulars and obtained the signature of the depositor to the book. After this he passed on the paying-in slip together with the coupons to the Assistant Shroff. The latter checked the number of the coupons, passed the paying-in slip, foil and counterfoil to the Shroff. The Shroff entered in a register the number of points as they appear in the paying-in slip, signed foil and initialled counterfoil to both of which he affixed the serial number 7150 ; he passed them to the Chief Clerk. According to the affidavits of the receiving clerk, and the shroff the amount of coupons surrendered by the firm on this day was 669. On December 21, 1946, further coupons were surrendered by the firm amounting, according to the receiving clerk and shroff, to 992 ; the same procedure was followed by them as on the first occasion ; the foil contains the signature of the officiating shroff and of M. Aliyar, the initials of the Ledger Clerk and a staff assistant ; the counterfoil the signature of the receiving clerk, initials of shroff and of staff assistant. The serial number affixed to this was 7415. The signatures and the initials of the officers appear on the foil and counterfoil in 7150 too. The staff assistant is perhaps the Chief Clerk. The Chief Clerk

* 34 C. L. W. 82 † 48 N. L. R. 461

according to the affidavit of the Controller, countersigns the paying-in slip, detaches the foil of it which he passes to the Ledger Clerk and at the same time returns the book and counterfoil to the dealer; the Ledger Clerk enters in the dealer's ledger account as a credit the number of points appearing in the foil. The number of points that was entered in the firm's ledger account on the first occasion was 5669, on the second occasion 2992 and the foils and counterfoils now produced contain the amounts (in letters and figures) 5669 and 2992 coupons respectively.

The contentions advanced on behalf of the petitioner were that the Controller when he sent he notice dated February 22, 1946, took the view that he was an officer performing administrative duties, alternatively that he did not inform the firm the reasons on which he acted, or the grounds on which he proceeded to act and thus no opportunity was given to the firm to meet the case. The contentions on the other side were these: the person who was responsible for taking the *prima facie* view on February 22, was different from the one who made the order that was canvassed in the case of *Abdul Thassim vs. Rodrigo* (1947) 48 N. L. R. 121,* that officer had him elf stated in the course of that order that he was performing administrative functions; the Controller was not acting on suspicion, he had not failed to give an opportunity to the firm to meet the charge, it was for the petitioner to show that there were facts—if such there be—which were not disclosed to him, this the petitioner has failed to allege, the firm was given an opportunity of examining the books and meeting all the evidence upon which the Controller acted.

By a notice sent by the Controller dated February 20, 1947, but served, according to the note on the notice (marked A1) in the petitioner's affidavit at 12 a.m. on February 22, the firm was prohibited from purchasing or selling any regulated textiles from or to any person without the previous written authority of the Assistant Controller of Textiles, Colombo Town—the prohibition to be valid for two weeks.

On February 22, 1947, the Controller sent a notice (letter marked B) in the petitioner's affidavit to the firm, it was served on the firm according to the note, at 12 a.m. on Februray 22. The letter gives information to the firm (*a*) that the number of coupon points surrendered by the firm on November 30, 1946, was 669, on December 21, 1946, was 992; (*b*) that the office books kept by the receiving clerk, the Assistant Controller and the shroff show that these were the amounts received on the two dates; (*c*) that interpolations have been made in the slips (the foils and counterfoils) in figures as well as letters so as to show that in one case 5669 points were surrendered, in the other 2992 points; (*d*) that the interpolations and the original entries appear to be in the same handwriting; (*e*) that the amounts credited in the ledger account of the firm were 5669 and 2992 points respectively whereas the amounts that should have been entered ought to be 669 and 992 respectively. The letter proceeds thus:—

"I have reason to believe that you got these interpolations made with the object of obtaining in your ledger account credit for a larger amount than the amount you were entitled to on the coupons you actually surrendered.

"2. If you have any explanation to offer in respect of these matters, please send it in to me in writing on or before 4 p.m. on Tuesday, the 25th instant.

"3. If you desire to see the documents referred to above, you may do so at this office at any time during office hours on application to my Office Assistant."

It appears that the firm after receipt of the two letters sent counsel to interview the Controller. It also appears that at some time probably before February 22, S. Mohamed Hussain, Karkhud Ali, and Aliyar made statements to the Assistant Controller or to the Controller. The firm by its lawyer sent a reply (letter dated February 25, 1947, marked C); it stated that Nakkuda Ali, on the first-mentioned date surrendered 5669 points and entered up the paying-in slip in foil and counterfoil, on the second mentioned date he surrendered 2992 points and entered up the paying-in slip in foil and counterfoil. They were entered in the handwriting of "my client, the proprietor, Mr. Nakkuda Ali. Invariably when the paying-in slips are handed over to the Coupon Bank, the signature of my client's employee, namely M. O. Aliyar, is written in the slips. There were no interpolations when he wrote the paying-in slips and sent them to the Coupon Bank."

"Apparently what has happened is that some one else has destroyed these two paying-in slips and written out two fresh ones for lesser amounts namely 669 points on 30-11-46 and 992 points on 21-12-46 and subsequently interpolated the 5000 and 2000 respectively on the said dates."

"My client nor any office employee of his is responsible for the writing of these fresh paying-in slips which contained interpolations. They are not in the handwriting of my client nor any of his employees. It is noteworthy that the inter-

* 34 C. L. W. 82

polation slips do not contain the signature of my client's employee M. O. Aliyar."

"When the paying-in slips and the coupons are surrendered, the signature of my client's employee (M. O. Aliyar) is obtained in a book kept by the Bank clerk at the counter, sometimes the amount is entered and my client's man puts his signature without verifying the actual amount of coupons actually entered. Sometimes the amount is not entered immediately and the actual amount is entered by the clerk subsequently. In these two particular instances one or the other of these things may have happened."

Certain English authorities were referred to at the argument, also the decision of My Lord the Chief Justice in *In* re *Application No.* 75 (decided on 19th September, 1947).* It was not disputed that the facts of the last case and of the present were not similar and that there was a distinction. Mr. Perera contended that the decision applies to the present case; Mr. Jayewardene the contrary. The question is, how thin is the line dividing the realms of the two—is it so thin as to reach the vanishing point or is it so marked as to create a well defined distinction. The respondent in both cases was the same, in both cases a larger number of coupons than the amount recorded as having been surrendered according to the registers kept by the receiving clerks, the shroff and the Chief Clerk of the Coupon Bank was entered in the ledger account of the dealers. One of the mpeached transactions in both cases is alleged to have happened on the same date. There the similarity ends.

Perusal of the foils and counterfoils suggests that interpolations have been made. It appears on an examination of the counterfoil of 7150 that a line drawn across the blank space being "S. M. Hussain & Co." has been partly erased and the words "five thousand" have been written over it and that the slope and size of the letters in five thousand are different to those in "Six hundred and sixty-nine". On March 10, 1947, the Controller sent the notice (marked D) to the firm. It states that the respondent finds the firm a person unfit to hold a textile licence. "I therefore, order the revocation of your licence, under Regulation 62, with effect from 10-3-47,

"2. Please hand over to my officer your Licence, Identity Card, Coupon Issue Card, Coupon Account Register and any coupons you may have in your possession.

"3. You are also informed that you can keep any of your own stocks in your possession for 15 days after the date of revocation. Meanwhile, if you can make suitable arrangements to deliver the goods to another dealer, on such terms as you like, I shall sanction the transfer before that date on condition that:

(1) You surrender the remaining coupons in your hand and the coupons you obtain by the sales with my sanction.

(2) The transferee surrender the coupons for the goods transferred.

Possession of goods after 15 days will be regarded as unlicensed possession, and the goods will be regarded as unlicensed possession, and the goods will be seized and a prosecution entered."

Regulation 62 is 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 that dealers."

Information was given to the firm as to what the books at the office revealed in respect of the delivery of coupons on the two occasions, as to the condition of the paying in slips and as to the addition of 7000 coupons to their ledger account. The firm was informed what documents induced the Controller to form a *prima facie* view and that they were available for inspection and examination. One of the main questions the respondent had to decide was, did the firm surrender to the Coupon Bank 5669 coupons on November 30, 1946, and 2992 coupons on December 21, 1946. There was the entry in the scroll book kept by Sepala Rajapakse and in the register kept by K. A. D. Perera as regards the delivery on the former date, the entry in the scroll book kept by C. E. Rajapakse and in the register kept by Jayewardene as regards the later delivery: statements made by these persons corroborating the entries in the books would also be before the Controller. On the other hand were the statements made by the petitioner, Mohamed Hussain and Aliyar. The respondent had these two versions before him at the time of the making of the order. He had also the signatures of Alliyar to the scroll book on both occasions, the signature of Alliyar to the two foils (7150 and 7415) and the books in the office (the register kept by the Chief Clerk too). It is not surprising that the respondent did come to the conclusion that there was no delivery of 5669 coupons or 2992 coupons. He was entitled to believe one version in preference to the other. The other question the respondent had to decide was, did the firm get the interpolations made? He had the statements made by the petitioner, his co-partner and Alliyar, also the explanation give in letter C; on the other hand he had the

* 48 N. L. R. 461

documents already mentioned and the version given by the two Rajapakses, Perera and Jayewardene. There were also the following circumstances :—(1) There was no delivery by the firm of 5669 coupons or of 2992 cioupons ; (2) who would benefit by the inaccurate entries in the ledger account—the firm, the Chief Clerk, or someone else ? The scarcity of textiles and the readiness with which they can be disposed of at high prices makes dishonesty abnormally profitable. A coupon point, it was asserted at the argument, was a saleable article. On a sale of textiles a dealer must obtain the required number of coupons. If coupons were available at or near a dealer's shop, would-be purchasers of textiles would be considerably helped ; (3) the firm had been credited with an excess of 5000 coupons on the first occasion and 2000 on the second ; (4) when the paying-in book was returned the petitioner would see an increase in the number of coupons—for the firm did not send 5669 or 2992 coupons—he would further notice the interpolations in the counterfoil of 7150 and the writing on the other counterfoil. Could the respondent, on a consideration of these matters, and on the versions before him, not reasonably come to the conclusion that the firm got the interpolations made ?

One thing is clear that the decision of the Controller is not impeachable in the Courts on the grounds on which a judicial decision might be impeached. It would be impossible for a person like the petitioner to attempt to get the decision set aside on the ground that the evidence at the inquiry, or the evidence put before the Controller in his *quasi*-judicial capacity was insufficient to support his decision. It cannot be challenged in the Courts unless he has acted unfairly in the sense of having, while performing *quasi*-judicial functions, acted in a way which no person performing such functions, in the opinion of the Court, ought to act, *Johnson & Co., Ltd. vs Minister of Health* (1947) 2 A. E. R. 395, p. 400, unless he breaks a rule laid down by the regulations under which he acts or a rule laid down by the Courts for the behaviour of a *quasi*-judicial officer, that is, unless he has failed to pay due regard to "the dictates of natural justice." "Eminent Judges have at times used the phrase 'the principles of natural justice'. The phrase is, of course, used in a popular sense and must not be taken to mean that there is any justice natural among men. The truth is that justice is a very elaborate conception ; the growth of many centuries of civilization ; and even now the conception differs widely in countries usually described as civilised. The phrase can only mean in this connection the principles of fair play, that a provision for an inquiry necessarily imports that the 'person charged' should be given his chance of defence and explanation" *Maclean vs The Workers' Union* (1929) 1 Ch. 602, pp. 624, 625. There must be due inquiry. The person charged must have notice of what he is accused ; he must have an opportunity of being heard. With respect to the charge made, the charge of which the firm had notice—this was not disputed—it is a charge of non-delivery of coupons on two occasions and of getting interpolations made ; the particulars of the conduct alleged against it were brought to its atten ion and it was given an opportunity of sending an explanation and of seeing the documents referred to in letter B. If one sees that the requisite conditions have been fulfilled by the authority which instituted the inquiry, the functions of a Court are at an end. It appears to me that the Court has no power to review the evidence any more than the Court has a power to say whether the authority came to a right conclusion. Passages from the judgment in *Board of Education vs. Rice* (1911) A. C. 182 and *Arlidge vs. Local Government Board* (1913) A. C. 120 were read at the argument. It is not amiss to refer to what Lord Greene, M.R. said in a very recent case *Johnson & Co', Ltd. vs. Minister of Health* (1947) 2 A. E. R. 395, p. 405. "I ought, however to refer to one matter, because counsel for the respondent placed great reliance on it, viz., the well known observations of Lord Loreburn, L.C. in *Board of Education vs. Rice*, I shall not read the passage, but it is clear, to my mind, that Lord Loreburn was there dealing with a different type of matter from that which we have to deal here. He was dealing with something which was a list in a much truer sense, because, as he said : "The Board is in the nature of an arbitral tribunal". Apart from that his observations were not directed to the sort of statute we are dealing with, nor do I think the language which he used is in any way applicable to the consideration of the present case".

There has been no departure from the rules of "natural justice" in this case and the rule *nisi* must be discharged with costs.

Rule discharged.

Present : HOWARD, C.J.

KALANDAR LEVVE vs. PACKERTHAMBY AVVAUMMA

S. C. No. 136—*C. R. Kalmunai No.* 2514.
Argued on : 3rd October, 1947.
Decided on : 8th October, 1947.

Promissory note—Note given by married Muslim lady under 21 *years—Is the maker liable on the note.*

Held : That a Muslim minor, though married at the time of the making of a promissory note, is not liable on it.

Cases referred to : *Narayanen vs. Saree Umma* (21 N.L.R. 439).
Shorter & Co. vs. Mohomed (39 N.L.R. 113).

Cyril E. S. Perera with *M. A. M. Hussein*, for the plaintiff-appellant.
No appearance for the defendant-respondent.

HOWARD, C.J.

The plaintiff in this case appeals from a judgment of the Commissioner of Requests, Kalmunai, dismissing his action with costs. The action was brought on a promissory note dated the 3rd January, 1943, in which the defendant promised to pay a certain Meeracandu Athamhandu a sum of Rs. 120 with interest at the rate of 18% per annum. The promissory note in question was endorsed to A. Sulaiha Ummah who in turn endorsed it to the plaintiff. In her reply to the plaint, the defendant stated that at the time of the execution of the said promissory note she was a minor and therefore did not incur any liability. The learned Commissioner held that the note was executed by the defendant who was a Muslim without her father's consent and hence was not binding on her.

Mr. C. E. S. Perera has argued that, although the defendant was under age at the time of the execution of the promissory note, she was a major as she was married. The law with regard to capacity to contract in the case of the promissory note is the Roman-Dutch law. In *Narayanen vs. Saree Umma* (21 N.L.R. 439) it was held that a Mohammedan in Ceylon does not obtain majority by marriage and therefore a Mohammadan under 21 years of age cannot validly incur liability by contract. De Sampayo, J. in his judgment referred to section 1 of Ordinance No. 7 of 1865, now Chapter 53, which fixes the age of majority at twenty-one years and declares that except as in section 2 excepted, no person shall be deemed to have attained his majority at an earlier period, any law or custom to the contrary notwithstanding. The exception provided by section 2 of Ordinance is as follows :—

> "Nothing herein contained shall extend or be construed to prevent any person under the age of twenty-one years from attaining his majority at an earlier period by operation of law."

At p. 440 the learned Judge went on to say that under Roman-Dutch law emancipation of leaving the parental roof and openly carrying on any trade or business are well-known instances of attainment of majority by operation of law. But as the Roman-Dutch law does not apply to Mohammadans and as these modes of attaining majority are unknown to the Muhammadan law, there was no law by operation of which the second defendant could be said to have attained his majority by marriage, and the exception provided in the Ordinance is therefore inapplicable to him. De Sampayo, J. also stated that he could not assent to the proposition that the special laws governing Mohammadans in Ceylon are only concerned with such matters as inheritances and matrimonial affairs and that where there is a *casus omissus*, the Roman-Dutch law should be applied even to Mohammadans. He also said :—

> "By a long course of judicial practice, which cannot be questioned, the original sources of Mohammadan law and the recognised commentaries thereon have always been referred to as authorities on any points not provided for in the Mohammadan Code of 1806, which, though called a Code, is not, and does not profess to be, a complete embodiment of the laws applicable to Mohammedans. Even as regards inheritance, the principles of the Mohammedan law may be invoked in any case not specially dealt with in the Code. *Sarifa Umma vs. Mohamedo Lebbe* (1 S. C. C. 80); *Pereira vs. Khan* (2 Bal. 188). That being so, there is no *casus omissus* such as contended for. For the Mohammedan law does, in fact, provide for the attainment of majority so far as it intends to do so, and to apply the rule of the Roman-Dutch law as to the attainment of majority by marriage would, in effect, be, not to supply any onission in the Mohammedan law, but to add to it.

Mr. Perera concedes the authority of the judgment of De Sampayo, J. in *Narayanen vs. Saree Umma* but contends that it is no longer the law in view of the provisions of section 22

of the Bills of Exchange Ordinance which is worded as follows :—

"22 (1) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

(2) Where such capacity is to be determined by the law of Ceylon, it shall be determined by Roman-Dutch law as administered in Ceylon subject to the provisions of any Ordinance affecting that law.

(3) Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill, unless it is competent to it so to do under the law for the time being in force relating to the corporation.

(4) Where a bill is drawn or indorsed by a minor or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill and to enforce it against any other party thereto."

The ordinance was enacted on the 1st March, 1928, after the decision in the case I have cited. I have not had the benefit of an argument on behalf of the respondent. I cannot, however, accept Mr. Perera's contention that the words in sub-section (2) " shall be determined by Roman-Dutch law as administered in Ceylon " modifies the law previously in force in regard to the attainment by Mohammadans of majority. The question was raised but not decided in *Shorter & Co. vs. Mohamed* (39 N.L.R. 113) Roman-Dutch law as administered in Ceylon did not apply in regard to the attainment of majority by Muhammadens. In fact it was held in *Narayanen vs. Saree Umma* that Roman-Dutch law could not be invoked to fill a *casus omissus* in Muhammadan law on this question.

For the reasons I have given the appeal is dismissed.

Appeal dismissed.

Present : HOWARD, C.J.

PETER SILVA vs. WANIGASEKERA, SANITARY INSPECTOR

S. C. No. 754—*M. C. Gampola No.* 13267.
Argued on : 16th October, 1947.
Decided on : 27th October, 1947.

Housing and Town Improvement Ordinance (*Cap.* 199), *Sections* 2, 5, 13(1) (a) *and* (e)—*Does the word " building " in the Ordinance include a boundary " wall."*

Held : That the word " building " in section 5 of the Housing and Town Improvement Ordinance does not include a boundary " wall."

Cases referred to : *Bowes vs. Law* (1870) Law Reports & Equity Cases, 636.
Trim vs. Sturminister Rural District Council (1938) 2 K.B.D. 508.

E. F. N. Gratiaen, K.C. with *Ivor Misso*, for accused-appellant.

S. W. Jayasooriya with *C. Chellappah*, for complainant-respondent.

HOWARD, C.J.

The appellant in this case appeals against his conviction under section 13 (1) (*a*) and (*e*) of the Housing and Town Improvement Ordinance (Cap. 199), of the offence of erecting a building, to wit, a boundary wall in front of premises No. 16, Malabar Street, Gampola, of which he was the owner, without getting plans, drawings and specifications approved in writing by the Chairman of the Urban Council, in contravention of section 5 of the Ordinance. The Magistrate held that a boundary wall attached to the house by two arms is an appurtenance to the house and that section 5 is sufficiently wide to cover it. Section 5 of the Ordinance is worded as follows :—

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

The relevant parts of section 13 are worded as follows :—

" 13. (1) Any person who shall—

(*a*) commence, continue, or resume building operations in contravention of any provision of this Chapter ;

(*b*) (*c*) and (*d*).....

(*e*) fail to remove or pull down any building or

alteration to any building erected or made for a temporary purpose under a permit issued by the Chairman, within the time in such permit; or

(*f*) .....

or if such person cannot be found, the owner of the building in question, shall be liable on summary conviction to a fine not exceeding three hundred rupees, and to a daily fine of twenty-five rupees for every day on which the offence is continued after conviction."

"Building" is defined in section 2 as follows :—

"'building' includes the outhouses or other appurtenances of a building."

Mr. Gratiaen, on behalf of the appellant, has invited my attention to the fact that special provision is made for the control of the building of masonry boundary walls in section 2 of the District Councils Ordinance (Cap. 195). This definition states that "building" includes any house, hut, shed, or roofed enclosure, whether for the purpose of a human habitation or otherwise, and also any wall. Section 87 of the Urban Councils Ordinance (No. 61 of 1939) makes special provision for licences for boundary walls. Having regard to the wording of these provisions Mr. Gratiaen contends that the definition of "building" in section 5 does not include "a wall." Mr. Jayasooriya, on the other hand, maintains that the words "other appurtenances of a building" must be given a wide meaning and would include any wall erected within the premises. In this connection, he refers to the 2nd edition of Norton on Deeds at p. 274, where it is stated that in a conveyance of land the word "appurtenant" must be given a wide interpretation. But I do not think it follows that the same interpretation should be given to the word "appurtenances" when used in the penal provisions of a statute as is given to this word when it occurs in a conveyance. Mr. Jayasooriya also cited the case of *Bowes vs. Law* (1870) Law Reports & Equity Cases, 636, in which it was held that the building of a wall to the height of 11 feet was a breach of a covenant that "no buildings" except dwelling houses not to cost less than £200 each should be erected. This case was concerned with the construction of a covenant in a conveyance. Moreover I observe that James, V.C. at p. 641 stated that the word "buildings" is perhaps an ambiguous expression, and certainly in its ordinary way it does not signify a wall. Mr. Jayasooriya also cited the case of *Trim vs. Sturminister Rural District Council* (1938) 2 K.B.D. 508. This case raised a question with regard to the definition of "house" in section 188 of the Housing Act, 1875. At pages 515-516 Slesser, L.J. in the course of his judgment stated as follows :—

"The question for the decision of this Court is whether, in coming to that conclusion, the learned judge was correct in law. In my opinion, he was wrong in law in coming to any such conclusion. In the definition to which I have referred certain specific matters are mentioned, that is to say, any yard, garden and outhouses, and then follows the word "appurtenances." That word has had applied to it, through a long series of cases mostly dealing with the meaning of the word in demises, a certain limited meaning, and it is now beyond question that, broadly speaking, nothing will pass, under a demise, by the word "appurtenances" which would not equally pass under a conveyance of the principal subject-matter without the addition of that word, that is to say, as pointed out in the early case of *Bryan vs. Wetherhead* (Cro. Car. 17) that the word "appurtenances" will pass with the house, the orchard, yard, curtilage and gardens, but not the land. That view, as far as I understand the authorities, has never been departed from, except that in certain cases it has been held that the word "appurtenances" may also be competent to pass incorporeal hereditaments. Certainly no case has been cited to us in which the word "appurtenances" has ever been extended to include land, as meaning a corporeal hereditament, which does not fall within the curtilage of the yard of the house itself, that is, not within the parcel of the demise of the house."

Mr. Jayasooriya has contended that following the reasoning in this case, the house in question in the present case must include anything within its curtilage, and hence a boundary wall. Again I do not think that the facts of *Trim vs. Sturminister Rural District Council* can be applied to the facts of the present case which must be decided on the particular wording of the Housing and Town Improvement Ordinance. The phraseology employed in this Ordinance leaves it open to doubt whether the definition of "building" in section 2 includes a "wall." In these circumstances as section 5 and 13 impose penal provisions they must be strictly interpreted and must leave no room for doubt that "building" does include a "wall." The appeal is therefore allowed and the conviction set aside.

Conviction set aside.

Present : SOERTSZ, S.P.J. (President), JAYATILEKE, J. & CANEKERATNE, J.

REX vs. PUNCHIAPPUHAMY

Application No. 253 of 1947—S. C. No. 67/M. C. Dandagamuwa No. 21235
Argued on : 17th November, 1947
Decided on : 19th November, 1947

Court of Criminal Appeal—Penal Code, section 297—Verdict of culpable homicide not amounting to murder—Intention and knowledge—Jury's explanation of decision—Doubt—Sentence.

The Jury, in returning a verdict of culpable homicide not amounting to murder, stated that " they found the accused inflicted an injury which was likely to cause death without a murderous intention ". The trial Judge passed a sentence of twelve years' rigorous imprisonment.

Held : That where there was doubt whether the Jury appreciated the real distinction between intention that the act was likely to cause death and knowledge that the act was likely to cause death, the accused was entitled to the benefit of the doubt.

The Court reduced the sentence to ten years' rigorous imprisonment to bring it within the second part of section 297 of the Penal Code.

Applicant in person.

SOERTSZ, S.P.J.

The appellant before us for sentence today was the first accused in a case in which he was charged with the offence of murder. By a verdict of five to two the jury, at the end of the trial, found him guilty of culpable homicide not amounting to murder. Thereupon the learned trial Judge questioned the Jury in regard to what exactly they meant when they returned and the Foreman stated as follows :—" The Jury finds the first accused guilty of culpable homicide not amounting to murder in inflicting an injury which was likely to cause death without a murderous intention ". The learned Judge then sentenced the first accused to a term of 12 years' rigorous imprisonment.

The question that arose for us to consider was whether the sentence pa sed by the learned trial Judge was a legal sentence. In regard to that, section 297 of the Penal Code must give the answer. That section says : " Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment of either description for a term which may extend to twenty years, and shall also be liable to a fine, if the act by which the death is caused is done with the intention of causing death or of causing such bodily injury as is likely to cause death ; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death ". It will be seen from this section that for two different categories of offences of culpable homicide not amounting to murder sentence, up to a maximum of twenty years in the one case, and of ten years in the other case have been provided. The question is within which category we ought to place this case.

We are satisfied that it was open to the trial Judge to pass the sentence he did because the case, in view of the answer given by the Foreman of the Jury to the question put by the Judge, appears to fall clearly within the first part of section 297 which provides a maximum sentence of twenty years in cases in which death is caused by an act done with the intention of causing death or of causing such bodily injury as is likely to cause death. It is only in cases where the act causing death is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death that a maximum sentence of ten years is provided. So that it seems sufficiently clear that it was open to the trial Judge to pass the sentence he did. But we have another difficulty in the matter and that is to be able to say with some comfortable assurance that the Jury appreciated the nice distinction which may be clear to a lawyer looking at this section with some care and caution. Generally, these jurors draw a much broader distinction than the distinction really drawn in the Code when they return a verdict of culpable homicide not amounting to murder, not on the ground that one of the exceptions has been made out but where they discriminate between intention and knowledge. All they generally mean to say when they return a verdict of culpable homicide not amounting to murder is that they find that there was no murderous intention but that in their opinion there was or ought to have been knowledge that the act was likely to result in death. In view of this difficulty, we have decided to give the accused the benefit of the doubt in the matter and to reduce his sentence from one of 12 years' rigorous imprisonment to one of 10 years' rigorous imprisonment.

Sentence reduced.

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

PARTHASARTHY vs. FERNANDO & 2 OTHERS

S. C. No. 237—*D. C. Colombo* 6225/*M*
Argued on : 7th November, 1947
Decided on : 1st December, 1947

Civil Procedure Code, Sections 402 *and* 404—*Action instituted by administrator—Trial—Application for postponement on ground of plaintiff's illness—Recall of letters to plaintiff in testamentary case—Appointment of new administrator—Date given for substitution—Failure to substitute—No steps taken for over twelve months—Order of abatement—Validity of order.*

P, the administrator of the estate of a deceased person, instituted an action against the defendants to recover money due to the estate. The defendants filed answer and the case was fixed for trial. On the trial date the proctor for plaintiff asked for a postponement on the ground of plaintiff's illness and that it had become necessary to appoint a new administrator. This was granted and order was made removing the case from the trial roll and fixing a date for substituting the new administrator, who was not substituted as plaintiff, and no further steps were taken in the case for over twelve months. Thereupon, the Court entered order of abatement. Later the appellant, having obtained letters of administration in his favour and substitution, moved to have the order of abatement set aside. This was refused on the ground that there had been unreasonable delay.

Held : (1) That under section 404 of the Civil Procedure Code, the Court had no power to compel a person to get himself substituted.

(2) That the right of the original administrator to proceed with the action continued, because his successor was not substituted.

(3) That there had been no failure on the part of the original administrator to take a necessary step to prosecute the action inasmuch as the next step was to fix the case for trial, which duty rested with the Court under section 80 of the Civil Procedure Code.

(4) That in the circumstances, the order of abatement was invalid.

Cases referred to : *Rai Charan Mandal vs Biswanath Mandal* (1915) A. I. R. Calcutta 103.
Motilal vs. Karabdin (A. I. R. 1898-25 Cal. 179).
Ajaz Hossain Jaffri vs. Altaf Hussein (1923) A. I. R. Calcutta 651.
Lorenz Appuhamy vs. Pieris (11 N. L. R. 202.)
Kuda Banda vs. Hendrick (6 S. C. D. 42).
Seyado Ibrahim vs. Naina Marikar (6 S. C. D. 79).
Associated Newspapers of Ceylon vs. Kadingamar (36 N. L. R. 108).
Fernando vs Curera (1896 2 N. L. R. 29.)
Ponampalam vs. Canagasabay (2 N. L. R. 23).
Kumarihamy vs. Keerthiratne (12 Times 80).
Eastern Garage & Colombo Taxi Cab Co. vs. de Silva (2 Times 166).

H. V. Perera, K.C., with *P. Navaratnarajah*, for plaintiff-appellant.
N. E. Weerasooriya, K.C., with *K. Herat*, for 1st and 3rd defendant-respondents.
E. S. Amerasinghe, for 2nd defendant-respondent.

JAYETILEKE, J.

This is an appeal against an order made by the District Judge of Colombo refusing to set aside an order of abatement entered by him *ex mero motu* on July 13, 1940.

One Parathasarthy, the administrator of the estate of S. K. R. S. S. T. Sinnanani Chettiar, instituted this action against the defendants, on November 30, 1936, for the recovery of a sum of Rs. 272,062.50 alleged to be due to the estate of the deceased, on a writing "A" given by them to the deceased, undertaking to pay all sums advanced by the deceased to one W. D. Fernando, the 1st defendant's husband, if the latter failed to pay the same. He alleged further that W. D. Fernando was adjudged an insolvent in action No. 4474 of the District Court of Colombo, and was granted a certificate, and that no dividend was paid in that action to the creditors as there were no assets.

The 1st and 3rd defendants filed one answer alleging that they authorised the deceased to advance money to the Ceylon Auto-Carriers Co. and not to W. D. Fernando personally, and denying their liability to pay the amount claimed on the ground that the loan does not purport to be a loan to the Ceylon Auto-Carriers Co. They further pleaded certain legal defences to the action.

The 2nd defendant filed a separate answer pleading, in addition to the defences set forth in the answer of the 1st and 3rd defendants, that

W. D. Fernando transferred to the deceased an estate called Gamikande in full settlement of all the claims the deceased had against him.

The action was fixed for trial on December 9, 1937, but was postponed for March 9, 1938, owing to the illness of the plaintiff.

The medical certificate, which was produced in support of the application for a postponement, shows that the plaintiff was paralysed on the right side, and was unable to speak. The journal entries do not show what took place on March 9, 1938. The next journal entry is dated June 7, 1938. It reads :—

> " Mr. Muttusamy for plaintiff.
> Mr. de Silva for the defendant.
> Mr. Mack for the 1st and 3rd defendants.
>
> Mr. Muttusamy applies for postponement on the ground that the plaintiff is paralysed and unable to come for the case. He states that he is taking steps to get another administrator appointed and therefore move for a postponement.
>
> Mr. de Silva has no objection.
> The 1st and 3rd defendants also have no objection, of consent, the plaintiff will not be entitled to the costs of today in any event. Remove case from trial roll and call on August 5, to substitute the new administrator."

Action No. 7389 (Testamentary) of the District Court was the action in which the estate of the deceased was administered. The journal entries 1D1 show that on July 8, 1938, Mr. Muttusamy took steps to have the letters of administration issued to Parathasarthy recalled, and fresh letters of administration issued to one Arunasalam Servai under section 537 of the Civil Procedure Code (Cap. 86). On March 17, 1939, the Court allowed the application, and letters of administration were issued to Arunasalam Servai. The subsequent journal entries show that, beyond filing an account Arunasalam Servai took no steps to administer the estate, though he was repeatedly noticed by the Court to do so, and, eventually, on May 15, 1941, the Court was obliged to forfeit his bond and issue writ for the recovery of the money due on it. The writ was returned unexecuted to Court on the ground that he was in India and that he had no property in Ceylon.

On August 5, 1938, this case was called on the roll and the District Judge made the following minute :—

" Steps for substitution not taken for 9/9."

On September 9, 1938, the case was called again, and the District Judge made the following order :

On July 13, 1940, the District Judge entered an order of abatement *ex mero motu* under section 402 of the Civil Procedure Code on the ground that a period exceeding twelve months had elapsed since the date of the last order made in the case without the plaintiff taking steps to prosecute the action.

On November 20, 1944, the present appellant, who is the attorney of the heirs of the deceased, one of whom is a minor, filed a petition and affidavit in action No. 7389, and moved to have the letters of administration issued to Arunasalam Servai recalled and fresh letters of administration issued to him.

On February 27, 1945, his application was allowed and letters of administration were issued to him. A month later he filed a petition and affidavit in this action and moved to have himself substituted as plaintiff, and to have the order of abatement set aside. He stated in the papers filed by him that none of the heirs of the deceased ever came to Ceylon and that Arunasalam Servai was in Malaya and Burma till 1942 suffering from an incurable disease.

The learned District Judge disallowed the application on the ground that it was not made within a reasonable time, and that the long delay had deprived the defendants of material evidence.

Two points were urged in support of the appeal (1) that, at the time the order of abatement was entered, Parathasarthy had lost his status as administrator, and that the District Judge had no power to enter an order of abatement under section 402 before the person to whom the new grant of administration was made was substituted as plaintiff ; (2) that, even if Parathasarthy was entitled to continue the action after the letters of administration issued to him were recalled, the District Judge had no power to enter an order of abatement as there was no failure on Parathasarthy's part to take any step which he was required by law to take to prosecute the action.

I do not think that the first point is a good one. Chapter XXV of the Civil Procedure Code contain various provisions for the continuation of actions after alteration of a party's status. Sections 393, 394, 398, 399 and 400 deal with devolutions of interest by death, marriage and bankruptcy. Section 404 is a residuary section governing cases which are not provided for in those sections. The words " other cases " in section 404 mean cases other than those specifically provided for in the preceding sections. Section 404 provides that the person acquiring the interest may continue the action with the leave of Court. It does not provide that, if he does not obtain the leave of Court to continue the action, the action should stand dismissed. Under the corresponding sec-

tion of the Indian Act (Order 22 Rule 10) it has been held in *Rai Charan Mandal vs. Biswanath Mandal* (1915) A. I. R. Calcutta 103 that in the event of devolution of interest *pendente lite*, the successor in interest of the plaintiff may, if he chooses, come on the record with the leave of the Court under O 22, R 10, but if he does not, the plaintiff is entitled to continue the suit and his successor will be bound by the result of the litigation. The following passage appears in the judgment :—

> "Under R. 10-0-22, Civil Procedure Code, 1908, where there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against persons to or upon whom such interest has come or devolved. This entitled the person who has acquired an interest in the subject-matter of the litigation by an assignment or creation or devolution of interest *pendente lite* to apply to the Court for leave to continue the suit. But it does not follow that it is obligatory upon him to do so. If he does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record, and yet, as pointed out by Their Lordships of the Judicial Committee in *Motilal vs. Karab-din* (A. I. R. 1898-25 Cal. 179) he will be bound by the result of the litigation, even though he is not represented at the hearing. But the legislature has not further provided that in the event of devolution of interest during the pendency of suit, if the person who has acquired title does not obtain leave of the Court to carry on this suit, the suit should stand dismissed."

In the present case, the letters that were issued to Parathasarthy were recalled after he instituted the action and a new grant of letters was made to Arunasalam Servai. When the new grant was made, a devolution of interest took place within the meaning of section 404. It has been held in *Ajaz Hossain Jaffri vs. Altaf Hussain* (1928) A. I. R. Calcutta 651 that, when a trustee is removed from office and another is appointed in his place, the estate devolves on the new trustees within the meaning of Order 22, Rule 10.

Under section 404 Arunasalam Servai was entitled to ask the Court for leave to continue the action, but he did not do so. Parathasarthy was, therefore, entitled to continue the action.

With regard to the second point, the journal entries show that, after filing the plaint, Parathasarthy took out summonses on the defendants and brought them before the Court. There was no other step which he had to take under the Civil Procedure Code. After the defendants filed their answers the Court fixed the case for trial, and, on the trial date, the Court as an indulgence, gave Parathasarthy time to surrender his letters of administration and get someone else appointed to take his place as administrator. Arunasalam Servai was appointed administrator in place of Parathasarthy, but he failed to get himself substituted as plaintiff in this case. There is no provision in the Civil Procedure Code that, a person, who files an action in a representative capacity, is bound to take steps to have someone else substituted in his place if he is unable to prosecute the action owing to illness or for any other causes. The step which Parathasarthy undertook to take on June 7, 1938, was not a step that was "necessary" for him to take in order to prosecute the action as required by section 402 of the Civil Procedure Code.

In *Lorenz Appuhamy vs. Pieris* (11, N. L. R. 202, it was held that the word "necessary" means rendered necessary by some positive requirement of the law. "In the course of his judgment, Wood Renton, J. said :—

> "We ought not to interpret it as if the section ran without taking any steps to prosecute the action which a prudent man ought to take under the circumstances."

This judgment was followed in *Kuda Banda vs. Hendrik* (6, S.C.D. 42,) *Sayado Ibrahim vs. Naina Marikar* (6, S.C.D. 79,) and *Associated Newspapers of Ceylon vs. Kadirgamar* (36, N.L.R. 108). Parathasarthy could have proceeded with the action in spite of his illness, and when he failed to get some one substituted in his place, it was the duty of the Court to have fixed the case for trial. Under section 80 of the Civil Procedure Code the duty of fixing the date of trial rests on the Court. See *Fernando vs. Kurera* , *Ponampalam vs. Canagasabey* (2, N. L. R. 23).

In *Kuda Banda vs. Hendrick* (supra) before the case came up for hearing, the plaintiff's Proctor stated that his client was in jail, and moved that the case might be postponed to the bottom of the roll, but the District Judge ordered that it be struck off the roll. Subsequently, the District Judge ordered the action to abate *ex mero motu* on the ground that no steps had been taken for more than a year. It was held that the order that was made was *ultra vires*, and that it should be vacated inasmuch as there was no step which was necessary for the plaintiff to take which he had not taken. It was held further that the duty of fixing the case for trial rested on the Court. The order which the Court made on September 9, 1938, to wit :—

> "Steps not taken, no order"

was not an order which is contemplated by the Civil Procedure Code which specially requires that, when adjournments are made, the Court shall fix a day for the further hearing See *Kumarihamy vs. Keerthiratne*, (12 Times 80.)

Mr. Weerasooriya argued that, on the order made by the District Judge on June 7, 1938, the moment the Court recalled the letters that were issued to Parathasarthy and issued letters to Arunasalam Servai, the latter automatically became the plaintiff in the case. I am unable to read that order in the way in which Mr. Weerasooriya invited me to read it. The order was that the case should be called on August 5, to substitute the new administrator. Section 405 of the Civil Procedure Code has laid down the procedure to be followed for the substitution of a party. An application has to be made to the Court, by petition, to which the parties who may be affected by the order sought, must be made respondents. Such an application was not made by Arunasalam Servai, and the Court had no power under section 404 to compel him to get himself substituted as a plaintiff.

Even if Mr. Weerasooriya's contention is correct, I do not think that the order of abatement made by the District Judge can be supported.

For the reasons I have given, I am of opinion that the order of abatement that was entered by the District Judge is void and of no effect. In *Eastern Garage & Colombo Taxi Cab Co. vs. de Silva* (2 Times, 160), de Sampayo, J. held that an order of abatement which is improperly entered is void. A similar view was taken by Wood Renton, J. in *Kuda Banda vs. Hendrick* (supra), and by Garvin, J. in *Kumarihamy vs. Keerthiratne* (supra).

In view of my decision that the order made by the District Judge is void, it is unnecessary for me to consider whether the application to have the order set aside was made within a reasonable time. However, I think that the delay in making the application has been sufficiently explained in the appellant's affidavit. It states that Arunasalam Servai was in Malaya and in Burma up to 1942 and was unable to leave owing to illness. I do not think that the delay in making the application has caused any prejudice to the defendants because W. D. Fernando is alive and the books of the Ceylon Auto-Carriers Co. must be available to the defendants.

In all the circumstances of the case, I think the order made by the District Judge on July 13, 1940, must be vacated and the case remitted to the Court below for trial. The appellant will be entitled to the costs of appeal and of the inquiry.

Soertsz, S.P.J.
I agree.

Order vacated and case remitted.

Present : Soertsz, S.P.J., Canekeratne, J. & Nagalingam, J.

ANTHONY PERERA vs. JAYAWARDENA

Election Petition No. 18 *of* 1947, *Kelaniya.*
Argued on : 24th, 25th & 26th November, 1947
Decided on : 8th December, 1947.

Parliamentary Elections—Petition to declare election void—Number of Charges—Adequacy of Security—Preliminary objections—Parliamentary Elections Order in Council, 1946, *sections* 56, 58 (1) (*c*) *and* (*d*)—*Parliamentary Election Petition Rules* 12 (2) *and* (3)—*Meaning of the word "charges."*

A petition, praying for a declaratlon that an election be void, contained the following charges :—

(1) That before and during the election the responsent and his agents and other persons with his knowledge or consent did print, publish and distribute or cause to be printed, published and distributed handbills which did not bear upon the face thereof the name and address of the printers and publishers, etc.

(2) That before and during the election, the respondent and his agents and other persons with his knowledge or consent did make and publish false statements of facts in relation to the personal character and conduct of the other candidate.....for the purpose of effecting the return of that candidate, etc.

(3) That before and during the election the respondent and his agents and other persons with his knowledge or consent, did inflict, or thereafter threaten to inflict injury, damage, harm or loss upon a large number of electors in order to induce or compel them to refrain from voting, etc.

The petitioner gave security in a sum of Rs. 5,000 as required by Rule 12 (2) of the Third Schedule of the said Order in Council.

The respondent, by way of a preliminary objection, contended that the ground No. (1) contained a multiplicity of charges, in that printing, publishing, distribution, etc. constituted separate charges. Similarly he contended that the grounds (2) and (3) contained several separate charges, and that, therefore, the security given was insufficient. For this reason he moved for the dismissal of the petition as provided in Rule 12 (3) of the Parliamentary Election Petition Rules.

Held : (1) That printing, publishing, distributing, etc., as stated in ground No. (1), constituted only one charge.
(2) That similarly, grounds Nos. (2) and (3) each constituted one charge.
(3) That the security given was adequate.

Cases referred to : *Tillekawardene vs. Obeysekere* (33 N. L. R. 65).*
Hereford Case (10 M. & H. 194).
Norwich Case (10 M. & H. 91).
Assam Railways Ltd. vs. C. I. R. (1935—3 A. C. 445).
Rex vs. Tunbridge Overseers (1884, 13—Q. B. D. 242).
Campbell in re Cathcart (1870—5 Ch. at page 706).

H. V. Perera, K.C., with *D. S. Jayewickrema, C. S. Barr-Kumarakulasingham, H. W. Jayawardene*, and *G. T. Samarawickrema* in support of the application.

E. G. Wickremanayake with *B. H. Aluvihare, S. E. J. Fernando* and *A. B. Perera*, for petitioner-respondent.

SOERTSZ, S.P.J.

The matter now before us raises the question of the sufficiency of the security given by the petitioner under Rule 12 of the Parliamentary Election Petition Rules, 1946. It has been referred to us, a Divisional Bench of three Judges, at the direction of My Lord the Chief Justice. It had, in the first instance, gone before Basnayake, J., who referred it to a bench of five Judges,* but it was found difficult to assemble such a bench, and the matter was urgent.

The rule we have to interpret is in these terms :—

> 12. (1) "At the time of the presentation of the petition or within three days afterwards security for the payment of all costs, charges and expenses that may become payable by the petitioner shall be given on behalf of the petitioner.
>
> (2) The security shall be to an amount of not less than five thousand rupees. If the number of charges shall exceed three, additional security to an amount of two thousand rupees shall be given in respect of each charge in excess of the first three. The security required by this rule shall be given by a deposit of money.
>
> (3) If security as in this rule provided is not given.....no further proceedings shall be had on the petition and the respondent may apply to the Judge for an order directing the dismissal of the petition and for the payment of the respondent's costs, etc."

The question for consideration arises on an application made by the respondent to the petition for the dismissal of it on the ground that "security as in this rule provided" has not been given, the respondent's contention being that in the petition of the petitioner there are more than three charges disclosed and that, for that reason, the sum of Rs. 5,000 which is the sum admittedly deposited, is insufficient.

Does then the petitioner's petition disclose only three charges or does it disclose more than three charges? That depends on the meaning of the word "Charges". In paragraph three of the petition, the petitioner avers that the election of the respondent be "Void for the following reasons" :—

(1) That before and during the election the respondent and his agents and other persons with his knowledge or consent did print, publish and distribute or cause to be printed, published and distributed handbills which did not bear upon the face thereof the name and address of the printers and publishers, etc.

(2) That before and during the election the respondent and his agents and other persons with his knowledge or consent did make and publish false statements of facts in relation to the personal character and conduct of the other candidate.....for the purpose of affecting the return of that candidate, etc.

(3) That before and during the election the respondent and his agents and other persons with his knowledge or consent, did inflict, or thereafter threaten to inflict injury, damage, harm or loss upon a large number of electors in order to induce or compel them to refrain from voting, etc.

The respondent contends that in reason (1) or ground, on a proper interpretation of the averments therein contained, every act of printing was a distinct corrupt practice ; similarly, every act of publishing as well as every act of distributing ; so that reason or ground (1) contained in *posse* what might turn out to be hundreds or perhaps thousands of distinct corrupt practices and in that sense, hundreds or perhaps thousands of separate charges. Likewise in respect of reasons (2) and (3) there were, the respondent contended potentially, a very large number of different offences, each one of which, when presented to the election Court for consideration, should be treated as a separate charge.

A similar question arose before Drieberg, J. in the case of *Tillekawardene vs. Obeysekere* (33 N.L.R. 65)*, in which under allegations of bribery, treating and contracting for payment for the con-

* See pp. 108 and 109.

* 1 C. L. W. 12 Edd.)

veyance of voters the petitioner proposed to adduce seventeen cases of bribery and twenty-six cases of treating and fourteen cases of payment for the conveyance of voters, and the respondent moved for the dismissal of the petition on the ground that the security of Rs. 5,000 which had been given was inadequate as there were more than three charges. That learned Judge answered the question thus :—"In my opinion, by the word " Charges " in rule 12 (2) is meant the various forms of misconduct coming under the description of corrupt and illegal practices, for example, whatever may be the number of acts of bribery sought to be proved against a respondent, the charge to be laid against him in a petition is one of bribery. The fact that the security here has to depend on the number of matters submitted for inquiry in the petition does not compel us to adopt a different view of what, these matters are from what is accepted in practice in England, nor does it necessitate any departures from what an election petition should state. That matters on which the petition prays for inquiry are that the respondent committed the offence of bribery, treating and conveyance of voters and so far as the petition is concerned, each constitutes a charge against the respondent. It can be urged that the requirement in the form of the petition given in the rule that " The facts and the grounds on which the petitioners rely " should be stated, calls for an averment of each act of, *e.g.* bribery, and that an averment generally that the respondent has been guilty of the offence of bribery is not enough," but even on that assumption Drieberg, J. held that the word " Charges " is ambiguous and may be applied to the offence stated in the petition and also to each act constituting the offence though the latter are more often referred to as " Cases," or " Instances" of the offence and that for the purpose of ascertaining the adequacy of the security it is the offences and not the " cases " or " instances " that matter.

Mr. H. V. Perera submitted to us that the conclusion to which Drieberg, J. came is fallacious in that it is based on a false analogy, namely the analogy of the English practice which he argues was inapplicable inasmuch as in England the security was fixed and constant irrespective of the number of charges, whereas, here the security varies in proportion to the number of charges. Mr. Perera also contended that Drieberg, J. had not before him the report of the Royal Commissioners which showed that they were much concerned to prevent multifarious and vexatious charges.

In regard to this latter contention, although the report itself does not appear to have been referred to by citation in the course of the argument, Drieberg, J., nevertheless, deals with that aspect of the matter. He says " It was urged that it was the intention of the Legislature to require security to prevent a large number of unlawful acts being alleged on insufficient grounds and to prevent a protracted trial. The object of the provision is stated in the rule itself and this is to secure a successful respondent against the costs incurred by him..... The Legislature could not have acted in the belief that the costs of litigation is heavier here than in England," and he went on to point out that £1,000 security had to serve in England in the *Hereford Case* (10 M. & H. 194) 184 for cases of bribery alone and in the *Norwich Case* (10 M. & H. 91) for nearly 100 such instances. On the contention of the respondent before him, the security would have had to be Rs. 367,000 and Rs. 199,000. Perhaps the report of the Royal Commissioners was not cited to Drieberg, J. in the view that it was irrelevant in regard to a question of the interpretation of words and so, I believe, it would be. In *Assam Railways Ltd. vs. C. I. R.* (1935, 3 A. C. 445) Lord Wright made this statement : " It is clear that the language of a Minister of the Crown in proposing a measure in Parliament which eventually becomes law is inadmissable and the report of the Commissioners is even more removed from value as evidence of intention because it does not follow that their recommendations were accepted."

Mr. Perera sought to meet the point made by Drieberg, J. regarding the magnitude of the security involved by submitting that the remedy is in the hands of the petitioners themselves. They could choose a few of the best instances and cases and rely upon them. That may be so but it is a counsel of perfection. Elections bring candidates in contact with tens of thousands of voters and within the twenty-four days available to the petitioner for the giving of security it would hardly be possible to sift the cases sufficiently to make a final selection of them and to stand committed to them. Moreover, generally speaking, a few cases or instances of an illegal or corrupt practice could hardly create the kind of impression that an Election Tribunal would require or, at least desire, before it avoided an election with all the serious consequences that such an order would entail. That is why it would be reasonable to suppose, as Drieberg, J. points out, that both in England and here " It is not an unusual feature in election petitions to find numerous instances and cases of corrupt practices relied upon." One swallow, or for that matter several,

hardly ever makes a summer in the sphere of elections. It cannot, therefore, be fairly said that it is not relevant to calculate, as Drieberg, J. did, the figures that would result on an adoption of the manner of calculation suggested by the respondent. It is not only not irrelevant but a circumstance that may properly be taken into account when we are considering the meaning to be given to the ambiguous word "charges" in rule 12. An argument *ab inconvenienti*, it must be conceded, is more often than not a treacherous argument; but not, I think, in such a case as this, for as Brett, M. R. observed in the case of *Rex vs. Tunbridge Overseers* (1884, 13 Q. B. D. 242). "With regard to inconvenience, I think it is the most dangerous doctrines.....if an enactment is such that by reading it in its ordinary sense, you produce a palpable injustice, whereas by reading it in a sense *it can bear*, though not exactly in its ordinary sense, it will produce no injustice, then I admit one could assume that the Legislature intended that it should be so read as to produce no injustice." Drieberg's reading of rule 12 and his interpretation of the word "Charges" in it appears to afford a good illustration of that canon of interpretation. But, today there is much stronger reason for following his ruling because when Rule 12 was re-enacted in 1946, the word "Charges" re-appears in precisely the same way, and it is a well established principle that when a word has received a judicial interpretation and the same word is re-enacted, it must be deemed to have been re-enacted in the meaning given to it. As Sir W. M. James, L.J. remarked in *Ex parte Campbell in re Cathcart* (1870, 5 Ch. at page 706) "Where once certain words in an Act of Parliament received a judicial construction in one of the superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them."

Probably it was in a view of this difficulty that respondent's Counsel did not persist too strongly with his objection so far as reason or ground (3) in the petition was concerned for that matter falls clearly within the *ratio decidendi* in that case. He, however, maintained that in the reasons or grounds (1) and (2) of the petition there was a multiplicity of charges for the petitioner averred therein that (1) the respondent (2) his agents (3) others with his consent or knowledge of (*a*) printing (*b*) publishing (*c*) distributing (*d*) casuing to be printed (*e*) causing to be published (*f*) causing to be distributed handbills, (4) the respondent (5) his agents (6) other persons with his consent or knowledge, did (*g*) make (*h*) publish false statements of fact in regard to the personal conduct and character of the other candidate. Counsel was prepared to carry his contention to its logical conclusion and to say that each handbill (*a*) printed (*b*) published (*c*) distributed and each statement (*a*) made (*b*) published constituted a separate charge. I have put the matter with this particularity in order to make explicit all that is implied in this contention. If that contention is right, then the security involved would be in the region of a million-rupee mark. But Counsel submits that that is irrelevant and that there is no other logical method of dealing with section 58 (1) (*c*), (*d*) and (*e*) than the method of enumeration because unlike in the offences of bribery treating or undue influence there is not to be found in 58 (1) (*c*), (*d*) and (*e*), a genus to which "printing", "publishing", "distributing" and "making" can be related as sub-divisions. That appears to me to be too slender a reed to rely upon, for looked at in that way, the dissemination of annoymous printed handbills and the dissemination of false statements suggest itself readily as the genus the Legislature had in view.

For these reasons, I come clearly to the conclusion that we ought not to depart from the ruling given by Drieberg, J., but to affirm it as applicable to all the grounds or reasons that the petitioner relies on in his petition.

I would reject the objection with costs.

Objection rejected.

Proctors: *S. Gunasekere* for the petitioner.
Corbet Jayawardena for the respondent.

Present: BASNAYAKE, J.

In the Matter of the Inquiry into the Statement of Objections of Mr. J. R. Jayewardene, the Respondent in the above Election Petition.

Election Petition No. 18 of 1947, Kelaniya Electoral District.

E. G. Wickremanayake with *B. H. Aluvihare* and *S. E. J. Fernando* instructed by *Somawira Gunasekera*, for the petitioner.

H. V. Perera, K.C., with *E. F. N. Gratien, K.C., C. S. Barr Kumarakulasingham* and *G. T. Samarawickrema* instructed by *C. E. Jayewardene*, for objector-respondent.

Basnayake, J.

This is an interlocutory matter in connexion with the election petition presented on the 13th October, 1947, by one Kalugamage Anthony Perera of Kelaniya praying that the election of Junius Richard Jayewardene, member for Electoral District No. 10 Kelaniya be declared to be void.

The material paragraph of the petition is as follows :—

"3. Your petitioner submits that the election of the said Junius Richard Jayawardene the respondent abovenamed was void for the following reasons :—

(1) that before and during the election the said respondent and his agents and other persons with his knowledge or consent did print, publish and distribute or cause to be printed published and distributed handbills which did not bear upon the face thereof the names and addresses of their printers and publishers and that the said omission is a corrupt practice within the meaning of Section 58 (1) (*c*) of the Ceylon (Parliamentary Election) Order in Council 1946.

(2) that before and during the election the said respondent and his agents and other persons with his knowledge or consent did make and publish false statements of fact in relation to the personal character and conduct of the other candidate referred to in paragraph 2 above for the purpose of effecting the return of that candidate and that thereby a corrupt practice has been committed within the meaning of Section 58 (1) (*d*) of the said Order in Council.

(3) that before and during the election the said respondent and his agents and other persons with his knowledge or consent, did inflict or threaten to inflict injury, damage harm or loss upon a large number of electors in order to induce or compel them to refrain from voting at the said election and that thereby the corrupt practice of undue influence has been committed within the meaning of Section 56 of the said Order in Council.

Within the time prescribed by rule 12 of the Parliamentary Election Petition Rules, 1946 (hereinafter referred to as the Election Petition Rules) the petitioner gave security for the payment of all costs, charges and expenses that may become payable by him by the deposit of a sum of five thousand rupees with the Commissioner of Parliamentary Elections.

On the 29th October, 1947, the respondent Junius Richard Jayewardene through his proctor and agent lodged a statement of objections the material paragraphs of which are as follows :—

"5. It is submitted that the security alleged to have been given is of an amount less than that required by rule 12 (2) of the Third Schedule of the Ceylon (Parliamentary Elections) Order in Council 1946, as the number of the charges set out in the petition filed by the petitioner is more than three.

"6. As security has not been given by the petitioner as required by the aforesaid rule it is submitted that no further proceedings should be had on the said petition."

The Election Petition Rule referred to above reads :—

"12. (1) At the time of the presentation of the petition, or within three days afterwards, security for the payment of all costs, charges and expenses that may become payable by the petitioner shall be given on behalf of the petitioner.

(2) The security shall be to an amount of not less than five thousand rupees. If the number of charges in any petition shall exceed three, additional security to an amount of two thousand rupees shall be given in respect of each charge in excess of the first three. The security required by this rule shall be given by a deposit of money.

(3) If security as in this rule provided is not given by the petitioner, no further proceedings shall be had on the petition, and the respondent may apply to the Judge for an order directing the dismissal of the petition and for the payment of the respondent's costs. The costs of hearing and deciding such application shall be paid as ordered by the Judge, and in default of such order shall form part of the general costs of the petition."

On the 10th November, 1947, the matter of the objections of the respondent came up before me to be dealt with by way of an interlocutory matter under Section 78 78 (5) of the Ceylon (Parliamentary Elections) Order in Council, 1946.

I heard counsel for both the petitioner and the respondent and at the conclusion of the argument of the counsel for the respondent I informed counsel that I proposed to reserve the questions which arise for adjudication on the objections lodged by the respondent to a bench of two or more Judges as they appeared to me to be questions of difficulty.

As both parties will be heard once more it is unnecessary to make any reference here either to the submissions of counsel or to the authorities cited by them.

Briefly the respondent's main contention was that each of the paragraphs 3 (1) and 3 (2) contained more charges than one and that therefore the total number of charges in the petition being more than three the security of five thousand rupees was insufficient. He also contended that under paragraph 3 (3) of the petition the petitioner was not entitled to seek to prove more than one specific instance of the offence of undue influence.

The questions that arise for decision are :—

(*a*) Does paragraph 3 (1) of the petition contain more charges than one within the meaning of that expression in rule 12 of the Election Petition Rules ?

(*b*) Does paragraph 3 (2) of the petition contain more charges than one within the meaning of that expression in rule 12 of the Election Petition Rules ?

(*c*) Is the petitioner entitled to seek to prove more than one specific instance of the offence of undue influence under paragraph 3 (3) of the petition ?

(*d*) Has the security required by rule 12 of the Election Petition Rules been given on behalf of the petitioner ?

The questions arising for adjudication are apart from their difficulty questions of considerable importance, a fact which both counsel stressed.

I, therefore, reserve, under Section 48 of the Courts Ordinance, the above questions for decision by a Bench of five Judges of the Supreme Court.

Present : HOWARD, C.J. & WINDHAM, J.

SENEVIRATNE vs. SAMARANAYAKE

S. C. No. 49—*D. C.* (*Int.*) *Negombo No.* 3394
Argued on : 3rd September, 1947
Decided on : 11th September, 1947

Fidei-commissum—*Gift to children, their children and grandchildren, heirs, executors, administrators and assigns—Is it valid.*

Where a deed of gift stated as follows : " After the death of both of us our said two children, and their children, and grandchildren, heirs, executors, administrators and assigns are entitled to possess.....but they shall not sell, mortgage, or alienate in any manner the said lands....."

Held (1) That a valid *fidei-commissum* is created in favour of the donors' children, their children and grandchildren.

(2) That the *fidei commissum* ceased after the death of the great grandchildren of the donor as there is no clear indication of their successors in whose favour the prohibition against alienation is provided.

Cases referred to : *Silva vs. Silva* (18 N. L. R. at p. 174)
Wijetunge vs. Wijetunge (15 N. L. R. 493)
Mirando vs. Coudert (19 N. L. R. 90)
Coudert vs. Don Elias (17 N. L. R. 129)
Amaratunga vs. Alwis (40 N. L. R. 363)
Appuhamy vs. Mathes (45 N. L. R. 259)

H. W. Jayewardene with *Cyril E. S. Perera*, for the 1st respondent-appellant.
H. V. Perera, K.C., with *Kingsley Herat*, for the petitioner-respondent.

HOWARD, C.J.

This is an appeal by the 1st respondent-appellant against an order of the District Judge of Negombo granting the petitioner, as the sole heir of the deceased, Domingo Perera Wijesundera Seneviratne, his son, letters of administration to his estate. In coming to this decision the District Judge held that Deed 2335 of the 11th August, 1857, (P1), did not create a *fidei-commissum*. The only question that arises is whether this decision was correct in law. The relevant portion of P1 on which the appellant relies is worded as follows :

" It is directed that I and my wife Dona Francina Hamine are entitled to do whatever it pleased us with the said lands during our lifetime and in the event of the death of either of us, the survivor is entitled to possess a half share of the income of the said lands and also in the event of the death of either of us the survivor shall not alienate or deal with the same in any other manner and in the event of the death of either of us a half share of the income of the said lands shall be possessed by our said two children and that after the death of both of us our said two children and their children and grandchildren, heirs, executors, administrators and assigns are entitled to possess separately as mentioned herein below subject to Government regulations the lands not alienated or dealt with at our pleasure by us during our lifetime but they shall not sell, mortgage or alienate in any manner the said lands and when their descending heirs are extinct the said lands devolve on the Government and that if any dispute were to arise to the lands given to Dona Catherina Perera Wijesundera Seneviratne Hamine, Louis Perera Amarasinghe Appuhamy who is married to her is hereby empowered to settle such disputes through Government, but he (the said Appuhamy) shall not by virtue of his marriage be entitled to mortgage or alienate the said lands."

Mr. Jayewardene, on behalf of the appellant, has referred us to a number of authorities which he maintains support his case. Mr. H. V. Perera, on behalf of the respondent, has also referred us to other authorities. It is never easy to reconcile to one's complete satisfaction the various authorities on this subject. It has been in the past a prolific and unending source of litigation. Perusal of the case law on the subject indicates that a generation ago there was a tendency to find in favour of a *fidei-commissum* wherever possible, whereas the tendency in more recent years is in the other direction and Courts have attempted to give effect to the principle of Roman Dutch Law in favour of a presumption that a donor would not fetter a property bequeathed by will

or granted by deed. In this connection I would invite attention to the judgment of Lascelles, C.J. in *Silva vs. Silva* (18 N.L.R. at p. 174). Mr. Jayewardene has relied mainly on the following cases. In *Wijetunge vs. Wijetunge* (15 N. L. R. 493), B by deed gifted his property to A subject to the provision *inter alia* that A " shall not sell, lease out, mortgage, etc. the property, and that after A's death that A's heirs, executors or administrators shall hold and possess the property or deal with it as they please ". It was held that the deed created a *fidei commissum* ; the intention of the donor had not been defeated by the use of the words " executors or administrators ". The words had not been inserted except for the purpose of a *fidei commissum*. Mr. Perera contends that the present case is distinguishable from *Wijetunge vs Wijetunge* as the word " assigns' does not appear in the latter case. In *Silva vs. Siiva* (18 N. L. R. 174) a deed of gift contained the following clauses :—

> " After the demise of both of us all the aforesaid properties to be entitled to the said seven children in equal shares. .....and when one of us dies a half share of the said rights should devolve on our said seven children, and when both of us are dead all the aforesaid rights should be entitled to the aforesaid children and their heirs, executors, administrators and assigns, and they can only possess the same, but they cannot mortgage, sell, gift over, or lease over for a period of over five years, or alienate in any other manner, and our said children may get the rights partitioned."

It was held that the deed did not create a *fidei commissum*. In regard to this case Mr. Perera places particular reliance on the following words from the judgment of De Sampayo, J. at p. 178 :—

> " But where the instrument to be construed is such that there is no clear designation of the persons who are to take after the immediate donee, then I think that the use of such words as executors, administrators and assigns " as part of the same formula with the word ' heirs ' is of material importance. The present case is in that situation. For it is argued that the *fidei commissarii* are the ' heirs ' who are mentioned in that context. It appears to me impossible to disconnect the word ' heirs ' from the rest of the context, and so I think that this is a case in which there has been no designation of the persons in whose favour or for whose benefit the prohibition against alienation is provided."

Mr. Perera contends that there is in the present case no clear designation of the persons who are to take after the children and grand-children of the donee.

Mr. Jayewardene also cited *Mirando vs. Coudert* (19 N. L. R. 90). But in spite of the use of the word " assigns " the intention of the donor was clearly to benefit the descendants of one Isabel Mirando and to create a *fidei commissum* in their favour. In this case there was a clear designation of the person or persons ultimately to be benefitted. Again in *Coudert vs. Don Elias* (17 N. L. R. 129) there was no uncertainty in the secondary heirs. In that case it was held that the word " assigns " as used has no more force in repelling an intention to create a *fidei commissum* than either of the words " executors " and " administrators ". All these words are used as a means of vesting in the fiduciary the plena proprietas as a preliminary to burdening the property with a *fidei commissum*. The words " in perpetuity under the bond of *fidei commissum* " permit of no construction being placed on the deed other than one indicative of an intention to create a *fidei commissum*.

Mr. Perera also relies on the cases of *Amaratunge vs. Alwis* (40 N. L. R. 363) and *Appuhamy vs. Mathes* (45 N. L. R. 259). In both these cases it was held that the deeds in question did not create valid *fidei commissum*. In regard to these two cases Mr. Jayewardene has stressed the point that the words " assigned may deal with them as they please " appear in the deeds and negative an intention on the part of the donor to create a *fidei commissum*.

In my opinion we have in this case to apply the principle formulated by De Sampayo, A.J. in *Silva vs. Silva*. Can it be said that there has been a clear designation of the person to be benefitted ? The donors were Domingo Perera

Wijesundera Seneviratne and his wife, Dona Francina Hamine. There is a gift after their deaths to their two children and their children and grand-children, heirs, executors, administrators and assigns .....but they shall not sell, mortgage or alienate in any manner the said lands and when the descending heirs are extinct the said lands shall devolve on the Government. The donor died leaving two children John Simon and Catherine Perera. Under the deed they inherited separate properties. John Simon died leaving two children Martinus Perera and Reimus Perera. Reimus Perera married the petitioner and they had a son Domingo Perera, the deceased, who died unmarried. The 1st respondent is one of the three children of Martinus. The deed no doubt creates a *fidei commissum* in favour of the children of the donor and their children and grand-children. The deceased Domingo Perera is a great-grandson of the donor and I am of opinion that there is no valid *fidei commissum* created after his death as his successors are not clearly indicated nor is there any designation of those for whom the benefit against alienation is provided. Moreover there are not in the deed as in *Coudert vs. Don Elias* any words similar to " in perpetuity under the bond of *fidei commissum* ".

For the reasons I have given the appeal is dismissed with costs.

WINDHAM, J.
I agree.

Appeal dismissed.

Present : DIAS, J.

IN RE WITNESS

Application for Revision in M. C. Panadura No. 42659 (146)
Argued and decided on : 15th May, 1947

Criminal Procedure Code, Section 440—*Summary punishment for perjury in open Court—Proper exercise of this jurisdiction.*

The provisions of section 440 of the Criminal Procedure Code for summary punishment of a witness for giving false evidence should not be invoked except in a manifest case of attempting to mislead the Court by deliberately giving false evidence.

Titus Goonetilleke in support.

DIAS, J.

While I am extremely loth to restrictively interpret the wholesome provisions of section 440 of the Criminal Procedure Code, I nevertheless think that this is not a case in which the summary provisions of that section ought to have been invoked against this complainant.

It has been laid down that the provisions of section 440 should not be invoked except in a manifest case of attempting to mislead the Court by giving deliberately false evidence in support of the statement for which a witness is called. Applying that principle to the facts of this case, it is not at all manifest that the complainant in giving false evidence was attempting to commit a contempt of Court by giving false evidence. It was under cross-examination and he was probably being put a series of leading questions. He first stated " I do not know the accused but I have seen him before ". What the Sinhalese words used by the witness were, we do not know. But a person whom one has seen before can be said to be known to that person. So that his first statement was not necessarily a false statement when he said that he did not know the accused, although he had seen him before. Then later on, in the course of the same cross-examination, the complainant said " Now I say that I know the accused as the uncle of the girl Punchi Nona ". I do not think the two statements are necessarily contradictory. In fact the matter is too trivial and the learned Magistrate might have been well advised not to have taken any proceedings against the witness.

After all, if Magistrates act in this manner by summarily condemning witnesses for contempt of Court, nobody would be willing to come forward and testify in our Courts of Law.

I feel, therefore, that the conviction is bad. I set it aside and if the fine has been already paid, it will be forthwith refunded to the petitioner.

Conviction set aside.

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